In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-39V

(Filed: August 4, 2011)

TO BE PUBLISHED[1]

AMY CRUTCHFIELD,	*	
	*	
	*	Vaccine Act Interim Costs.
Petitioner,	*	
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
	*	
	*	
Respondent.	*	
	*	

DECISION AWARDING INTERIM COSTS

HASTINGS, ***Special Master***.

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), Amy Crutchfield ("Petitioner") seeks, pursuant to 42 U.S.C. § 300aa-15(e),[2] an "interim" award for litigation costs incurred in the course of Petitioner's attempt to obtain Program compensation. After careful consideration, I have determined to grant the request in part, for the reasons set forth below.

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[1]Because I have designated this document to be published, this document will be made available to the public unless petitioner files, within fourteen days, an objection to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." See 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

[2]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2006). Hereinafter, for ease of citation, all § references will be to 42 U.S.C. (2006).

I

PROCEDURAL BACKGROUND

The Petitioner, Amy Crutchfield, filed this petition on January 16, 2009, alleging that a vaccination injured her. On May 8, 2009, the Secretary of Health and Human Services ("Respondent") filed a document opposing the petition for compensation.

On March 30, 2011, an evidentiary hearing concerning Petitioner's claim was held. In May through July of this year, additional post-hearing evidence was filed. The parties are now engaged in a post-hearing briefing process.

On May 17, 2011, Petitioner filed an application for "interim costs" seeking an award of $26,750. (Hereinafter "Pet. App.") Respondent filed an "Opposition" to Petitioner's application on June 7, 2011 (hereinafter "Opp."), and Petitioner filed a reply document on June 13, 2011 (hereinafter "Reply").

II

LEGAL STANDARD FOR AWARDING ATTORNEYS' FEES AND COSTS

A. In general

Special masters have the authority to award "reasonable" attorneys' fees and litigation costs in Vaccine Act cases. § 300aa-15(e)(1). This is true even when a petitioner is unsuccessful on the merits of the case, if the petition was filed in good faith and with a reasonable basis. (*Id*.) "The determination of the amount of reasonable attorneys' fees and costs is within the special master's discretion." *Saxton v. Sec'y of HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993); see also *Shaw v. Sec'y of HHS*, 609 F.3d 1372, 1377 (Fed. Cir. 2010).

Further, as to all aspects of a claim for attorneys' fees and costs, the burden is on the *petitioner* to demonstrate that the attorneys' fees claimed are "reasonable." *Sabella v. Sec'y of HHS*, 86 Fed. Cl. 201, at 215 (Fed. Cl. 2009); *Hensley v. Eckerhart*, 461 U.S. 424, at 437 (1983); *Rupert v. Sec'y of HHS*, 52 Fed.Cl. 684, at 686 (2002); *Wilcox v. Sec'y of HHS*, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). The petitioner's burden of proof to demonstrate "reasonableness" applies equally to *costs* as well as attorneys' fees. *Perreira v. Sec'y of HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd* 33 F.3d 1375 (Fed. Cir. 1994).

One test of the "reasonableness" of a fee or cost item is whether a hypothetical petitioner, who had to use his own resources to pay his attorney for Vaccine Act representation, would be willing to pay for such expenditure. *Riggins v. Sec'y of HHS*, No. 99-382V, 2009 WL 3319818, at *3 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009), *affirmed*, 40 Fed. Appx. 479 (Fed. Cir. 2011); *Sabella v. Sec'y of HHS*, No. 02-1627V, 2008 WL

4426040, at *28 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff'd in part and rev'd in part*, 86 Fed. Cl. 201 (2009). In this regard, the United States Court of Appeals for the Federal Circuit has noted that--

> [i]n the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.

Saxton, 3 F.3d at 1521 (emphasis in original), quoting *Hensley*, 461 U.S. at 433-34. Therefore, in assessing the number of hours reasonably expended by an attorney, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434; see also *Riggins*, 2009 WL 3319818, at *4.

B. "Interim" fees and costs

In *Avera v. Sec'y of HHS*, 515 F. 3d 1343, 1352 (2008), the U.S. Court of Appeals for the Federal Circuit indicated that an award of "interim" fees and costs--that is, an award *prior* to the entry of a final judgment on the initial question of whether the petitioner is entitled to compensation for the alleged vaccine injury--can be appropriate in Vaccine Act cases. The *Avera* court did not specify in what *particular* circumstances such an award might appropriately be issued, but the court made it clear that such "interim" awards *can* be appropriate. The Federal Circuit gave the same indication again in *Shaw v. Sec'y of HHS*, 609 F. 3d 1372, 1373-74 (2010).

III

RESPONDENT'S *LEGAL ARGUMENT* CONCERNING WHEN AN AWARD IS APPROPRIATE FOR INTERIM FEES AND COSTS

In *Avera v. Sec'y of HHS*, 515 F. 3d 1343, 1352 (2008), the U.S. Court of Appeals for the Federal Circuit indicated that an award of "interim fees"--that is, an award of fees *prior* to the entry of a final judgment on account of the alleged vaccine injury--can be appropriate in Vaccine Act cases. However, the *Avera* court did not specify in what *particular* circumstances such an award might appropriately be issued. In this case, Respondent first raises a *legal argument* that an "interim" award is appropriate only in a very narrow set of circumstances--*i.e.*, either after an award of compensation resulting from the alleged vaccine injury has been made to the petitioners, or after a judgment denying such compensation has been entered by the court. (Opp. at 2-6.)

After consideration, I must reject Respondent's legal argument.

A. The Avera decision does not support Respondent's argument

Respondent's legal argument is based on the procedural history of the *Avera* case itself. In *Avera*, the special master determined that the petitioners were not entitled to compensation for the injury to their son, and the petitioners did not seek review of that special master's decision, so that

judgment was entered denying compensation. (515 F. 3d at 1345.) The petitioners then sought an award of attorneys' fees, but the parties disagreed concerning the proper *amount* of such fees. The petitioners asked the special master to grant an "interim" award for the undisputed portion, while litigation could continue concerning the contested portion. The special master declined, concluding that the statute did not permit awards of "interim" fees, but authorized only a single award at the conclusion of the case. (*Id*. at 1346.)

On appeal, the Federal Circuit concluded that the special master "erred in holding that an interim fee award is not permissible. The statute permits such awards." (*Id*. at 1352.) Nevertheless, the court determined that in the particular circumstance of that case, an award of interim fees was not justified. (*Id*.)

Thus, it is true that, as respondent notes here, in *Avera* a judgment denying compensation for the injury had already been entered at the time when the application for "interim" fees was made. However, a review of the Federal Circuit's *Avera* opinion does not support the respondent's argument that an award of interim fees must be confined to the unusual procedural circumstances of *Avera*. To the contrary, the language of the *Avera* court was broad and unequivocal. The court stated that the special master "erred in holding that an interim fee award is not permissible. The statute permits such awards." (515 F. 3d at 1352.) Moreover, the court, in explaining its reasoning, noted that among various fee-shifting federal statutes, proceedings under the Vaccine Act were *particularly* appropriate for interim fee awards, because under the Vaccine Act a petitioner may obtain a fee award whether or not he obtains compensation on the merits, if the petition was at least brought in good faith and with a reasonable basis. (*Id*.) The court noted that a "special master can often determine at an early stage of the proceedings whether a claim was brought in good faith and with a reasonable basis." (*Id*.) This last sentence strongly implies that the Federal Circuit envisioned situations in which an award of interim fees could be made "at an early stage of the proceedings"--*i.e.*, certainly prior to the entry of judgment "on the merits."

Further, the *Avera* court also provided some brief comments concerning the *circumstances* under which interim award might be appropriate, stating that interim fees "are particularly appropriate in cases where proceedings are protracted and costly experts must be retained." (*Id.*) Those comments do not imply in any way that interim fees are appropriate only after judgment "on the merits" has occurred.

B. The Shaw decision

The Federal Circuit again addressed the topic of "interim" fees in *Shaw v. Sec'y of HHS*, 609 F. 3d 1372 (2010). In that case, the special master had not yet ruled upon the issue of whether the petitioner was entitled to compensation for his injury, when the petitioner sought an interim fee award. (*Id*. at 1373.) The special master granted an award, but in a lesser amount than the petitioner had sought, and the petitioner sought review by a judge of this court. (*Id*. at 1373-74.) The judge ruled that she lacked jurisdiction to review an interim fee award. (*Id*. at 1374.) The petitioner appealed to the Federal Circuit, and that court determined that the Court of Federal Claims judge *did* have jurisdiction to review the special master's ruling concerning the request for interim fees.

In so ruling, the *Shaw* opinion stated unequivocally that the *Avera* court had rejected "the government's argument that a fee award *is only permissible after judgment* under §300aa-15." (*Id*. at 1374, emphasis added.) Thus, the *Shaw* court *explicitly interpreted* the *Avera* court to have rejected the very argument that Respondent raises here, that a fee award "is only permissible after judgment." (*Id*.)

Moreover, the entire *Shaw* opinion strongly implies that an interim award, prior to a decision or judgment on the merits of the petition, *is not* forbidden by the statute. For example, the *Shaw* court quoted the *Avera* court's reasoning as to why interim fee awards were even more logical in Vaccine Act cases than under other federal fee-shifting statutes. (*Id*. at 1374-75.) And this reasoning, endorsed by the Federal Circuit in both *Avera* and *Shaw*, would be *thwarted* were I to adopt the legal argument raised by Respondent in this case.

In short, the *Shaw* opinion, as well as the *Avera* opinion, mandates that I reject the legal argument raised by Respondent in this case.[3]

C. Interim fee rulings since Avera

In the period since the Federal Circuit's issuance of *Avera* in February of 2008, many decisions of *special masters* have granted interim fees in cases where judgment concerning the merits had not yet been entered. *See*, *e.g.*, *Bowman v. Sec'y of HHS*, No. 06-394V, 2008 WL 2397494 (Fed.Cl.Spec.Mstr. May 22, 2008); *Broekelschen v. Sec'y of HHS*, No. 07-137V, 2008 WL 5456319 (Fed.Cl.Spec.Mstr. Dec. 17, 2008); *Butland v. Sec'y of HHS*, No. 07-111V, 2009 WL 2981981 (Fed.Cl.Spec.Mstr. Aug. 28, 2009); *Cedillo v. Sec'y of HHS*, No. 98-916V, 2009 WL 811449 (Fed.Cl.Spec.Mstr. Mar. 11, 2009); *Davis v. Sec'y of HHS*, No. 07-451V, 2010 WL 1252737 (Fed.Cl.Spec.Mstr. Mar. 10, 2010); *Delmonte v. Sec'y of HHS*, No. 01-14V, 2010 WL 3430815 (Fed.Cl.Spec.Mstr. July 27, 2010); *Franklin v. Sec'y of HHS*, No. 99-855V, 2009 WL 2524492 (Fed.Cl.Spec.Mstr. July 28, 2009); *Hager v. Sec'y of HHS*, No. 01-307V, 2009 WL 4030940 (Fed.Cl.Spec.Mstr. Nov. 3, 2009); *Hall v. Sec'y of HHS*, No. 02-1052V, 2009 WL 3094881 (Fed.Cl.Spec.Mstr. July 28, 2009); *Kirk v. Sec'y of HHS*, No. 08-241V, 2009 WL 973158 (Fed.Cl.Spec.Mstr. Mar. 17, 2009); *MacNeir v. Sec'y of HHS*, No. 03-1914V, 2010 WL 891145 (Fed.Cl.Spec.Mstr. Feb. 12, 2010); *Masias v. Sec'y of HHS*, No. 99-697V, 2009 WL 899703 (Fed.Cl.Spec.Mstr. Mar. 12, 2009); *Mojabi v. Sec'y of HHS*, No. 06-227V, 2009 WL 4884473 (Fed.Cl.Spec.Mstr. Nov. 23, 2009); *Mueller v. Sec'y of HHS*, No. 06-775V, 2009 WL 1631615 (Fed.Cl.Spec.Mstr. May 14, 2009); *Nance v. Sec'y of HHS*, No. 06-730V, 2010 WL 2541727 (Fed.Cl.Spec.Mstr. May 26, 2010); *Parsons v. Sec'y of HHS*, No. 08-447V, 2010 WL 3069334 (Fed.Cl.Spec.Mstr. July 13, 2010); *Porter v. Sec'y of HHS*, No. 99-639V, 2009 WL 4034795 (Fed.Cl.Spec.Mstr. Nov. 3, 2009); *Rotoli v. Sec'y of HHS*, No. 99-644V, 2009 WL 4034800

[3]Respondent's brief seems to suggest that *Avera* was contrary to the statute and thus was wrongly decided. But the rulings of the Federal Circuit concerning legal issues are *binding* on this Court. Any argument that the *Avera* and *Shaw* courts misinterpreted the statute must be made to the Federal Circuit, not this court.

(Fed.Cl.Spec.Mstr. Nov. 3, 2009); *Stone v. Sec'y of HHS*, No. 90-1041V, 2010 WL 3790297 (Fed.Cl.Spec.Mstr. Sept. 9, 2010).

Further, a number of *judges* of this court have written opinions indicating that interim awards, prior to the entry of judgment, are permissible pursuant to *Avera*. See *Avila v. Sec'y of HHS*, 90 Fed.Cl. 590, 597-99 (2009) (acknowledging that interim fees are authorized under *Avera*, but denying fees in this case); *Doe/11 v. Sec'y of HHS*, 89 Fed.Cl. 661, 666-67 (2009); *Dobrydneva v. Sec'y of HHS*, 94 Fed.Cl. 134, 148 (2010); *Friedman v. Sec'y of HHS*, 94 Fed.Cl. 323, 334 (2010) (acknowledging that the award of interim fees is authorized, but discretionary, and affirming special master's denial of such fees in this case); *Warfle v. Sec'y of HHS*, 92 Fed.Cl. 361, 363 (2010).

It is notable that in all of the opinions cited in the previous paragraph, issued during 2008, 2009, and 2010, there was no indication that Respondent ever raised the legal issue raised in this case. As far as I can tell, only in the latter part of 2010 did Respondent begin to raise this argument in Vaccine Act cases. Respondent has not explained why Respondent apparently took a more liberal interpretation of *Avera* for some 2 ½ years, before adopting Respondent's current very narrow interpretation.

In any event, when Respondent has raised this legal argument in recent months, the argument has been *uniformly rejected* by those special masters who have addressed the argument while considering motions for interim fees. Respondent's argument has been addressed and rejected in the following opinions: *Burgess v. Sec'y of HHS*, No. 07-258V, 2011 WL 159760, at *1 (Fed.Cl.Spec.Mstr. Jan. 3, 2011); *Dudash v. Sec'y of HHS*, No. 09-646V, 2011 WL 1598836, at *1-2 (Fed.Cl.Spec.Mstr. Apr. 7, 2011); *Hammitt v. Sec'y of HHS*, No. 07-170V, 2011 WL 1827221, at *4 (Fed.Cl.Spec.Mstr. Apr. 7, 2011); *Hibbard v. Sec'y of HHS*, No. 07-446V, 2011 WL 1135894, at *1-3 (Fed.Cl.Spec.Mstr. Mar. 7, 2011); *Hirmiz v. Sec'y of HHS*, No. 06-371V, 2011 WL 2680721 (Fed. Cl. Spec. Mstr. June 13, 2011); *Holmes v. Sec'y of HHS*, No. 08-185V, 2011 WL 1043473, at *2-3 (Fed.Cl.Spec.Mstr. Feb. 28, 2011); *Paluck v. Sec'y of HHS*, No. 07-889V, 2011 WL 1515698, at *1-3 (Fed.Cl.Spec.Mstr. Mar. 30, 2011); *Whitener v. Sec'y of HHS*, No. 06-477V, 2011 WL 1467919, at *2-4 (Fed.Cl.Spec.Mstr. Mar. 25, 2011).

Those rulings, thus, offer support for the legal conclusion that I have reached in this case.

IV

THE CIRCUMSTANCES OF THIS CASE JUSTIFY AN INTERIM AWARD OF COSTS

The *Avera* court did not provide a detailed set of guidelines concerning *in what situations* an award of interim fees is warranted in a Vaccine Act case. The court did afford some guidance, noting that "[i]nterim fees are particularly appropriate in cases where proceedings are protracted and costly experts must be retained," and indicating that interim fees would be appropriate in order to avoid "undue hardship." 515 F. 3d at 1352. But it appears to me that the *Avera* court's quoted statements were designed merely to give *examples* and *general guidance* concerning when interim

fees and costs might be awarded, leaving the special masters broad *discretion* to consider many factors in considering whether an interim award is appropriate in a particular case.

A. Prior cases

Since *Avera*, there has been a considerable amount of case law concerning the topic of when an interim fees award is appropriate. In *Avila v. Sec'y of HHS*, 90 Fed. Cl. 590, 598 (2009), a judge of this court opined that an interim fees award should be denied when--

> a petitioner fails to demonstrate that he has suffered undue hardship; the amount of fees sought is not substantial; no experts were employed; and only a short delay in the award [would transpire in the absence of an interim award].

The judge added that the amount of $9,882, involved in that case, "is not substantial." *Id*. at 599.

In *Doe/11 v. Sec'y of HHS*, 89 Fed. Cl. 661, 667 (Fed. Cl. 2009), the judge indicated that an interim award should be granted in a case in which (1) proceedings before the special master had been "protracted" (a period of nearly 10 years), (2) the petitioners had presented expert testimony at a trial, and (3) a "final" fees award would not likely take place for some time, due to an appeal.[4]

In *Dobrydneva v. Sec'y of HHS*, 94 Fed. Cl. 134, 148 (2010), the judge found that where the petitioners asserted that they needed funds from an interim award in order to obtain testimony from an expert witness, such an award was justified.

In *Franklin v. Sec'y of HHS*, No. 99-0855V, 2009 WL 2524492, at *4 (Fed. Cl. Spec. Mstr. July 28, 2009), the special master found it appropriate to award interim fees, again in a situation where (1) the petition had been pending for a long time, (2) petitioner's counsel had paid significant amounts to experts, and (3) final resolution of the case would likely take some time. He found that the above-described factors, taken together, constituted an "undue hardship" on petitioner's counsel. (*Id*.)

In *Hall v. Sec'y of HHS*, No. 02-1052V, 2009 WL 3094881, at **1-2 (Fed. Cl. Spec. Mstr. July 28, 2009), the special master found an interim award to be merited where (1) the amount due to counsel (over $64,000) was substantial, (2) the case had been pending about seven years, and (3) due to an appeal the attorney would likely have to wait a considerable additional time for that amount if an interim award was not issued.

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[4]In *Doe/11*, the judge reversed the special master as to the *appropriate amount* of the interim award, but the special master below had actually concluded, like the judge, that an interim award *was* appropriate, due to the prior protracted proceedings and the fact that a pending appeal would likely delay the final fees award. See *Doe/11 v. Sec'y of HHS*, 2009 WL 1803457, at *4 (Fed. Cl. Spec. Mstr. June 9, 2009).

In *Broekelschen v. Sec'y of HHS*, No. 07-137V, 2008 WL 5456319, at **2-3 (Fed. Cl. Spec. Mstr. Dec. 17, 2008), the special master again made an award for interim fees and costs. The special master found that the petitioner's attorney had incurred the substantial amount of $150,000 in fees and costs, and that there was a significant possibility of a lengthy delay until final resolution of the case.

In *Masias v. Sec'y of HHS*, No. 99-697V, 2009 WL 899703, at **1-3 (Fed. Cl. Spec. Mstr. Mar. 12, 2009), a special master once more awarded interim fees and costs. The case had been pending for about 10 years, the amount awarded was significant (about $48,000), and the special master found that a key factor justifying an interim award was, once again, the fact that without an interim award the petitioner's attorney would likely have to wait a substantial additional amount of time to receive that compensation.

In one case, Special Master Golkiewicz issued two different opinions, the first setting forth his *general* views as to the appropriate circumstances for an interim award, and the second actually awarding interim fees and costs in that case. *Kirk v. Sec'y of HHS*, No. 08-241V, 2009 WL 775396 (Fed. Cl. Spec. Mstr. Mar. 13, 2009), and 2009 WL 973158 (Fed. Cl. Spec. Mstr. Mar. 17, 2009). The special master disagreed with the respondent's argument that interim fees awards "should be the rare exception, not the rule." (2009 WL 775396 at *1.) Instead, he concluded that *Avera* provided special masters with "broad discretion" to determine whether interim fees were appropriate in a case, for the general purpose of "ensuring that petitioners are not punished financially while pursuing their vaccine claim." (*Id*.) The special master acknowledged that the *Avera* court stated that interim fees are "particularly appropriate" where the proceedings are protracted or costly experts had been obtained, but rejected the view that the *Avera* court meant those factors to strictly limit the circumstances for interim awards. (*Id*.) Rather, the special master indicated that pursuant to *Avera*, a special master should consider whether, under the overall circumstances, "petitioners *or their counsel* will suffer an undue hardship" in the absence of an interim award. (*Id*. at *2, emphasis added.) In that case, the amount involved was about $15,000 in attorneys' fees plus a small amount of costs (*id*. at *1), and it appeared that the final resolution of the case might not take place for a considerable time period (*id*. at *2). The special master found that it would be an undue hardship for the "small" law firm involved in the case to go without those funds for "years." (*Id*.) The special master, accordingly, did make an award of interim fees and costs. (2009 WL 973158, at *1.)

In *MacNeir v. Sec'y of HHS*, No. 03-1914V, 2010 WL 891145, at *1-4 (Fed. Cl. Spec. Mstr. Feb. 12, 2010), the special master granted an interim award of fees and costs in the amount of $12,062, in a case in which the petitioners' counsel had expended most of the fees and costs in obtaining and filing medical records, and the case had been pending about seven years.

I also note that several of the decisions have specifically commented that under *Avera*, the special master's determination whether or not to make an award of interim fees and costs is a matter of *discretion* based upon all the circumstances of the case. *Broekelschen*, 2008 WL 5456319 at *2; *Hall*, 2009 WL 3423036 at *1-2; *Masias*, 2009 WL 899703 at *3; *Kirk*, 2009 WL 775396, at *1.

B. This case

The overall circumstances of this case, in my view, are appropriate for an interim award at this time. First, in light of the evidence of a possible temporal relationship between Petitioner's condition and the vaccination in question, combined with the lack of a clear causal relationship to any particular non-vaccine factor, as well as the fact that Petitioner's claim is supported by the well-credentialed Dr. Yehuda Shoenfeld, I conclude that this case was brought in good faith and with a reasonable basis in fact.

Second, the overall circumstances of this case fit within the very broad guidelines suggested in the *Avera* opinion concerning the topic of when an interim award is appropriate. In this case, the petition has been pending since January 2009. Petitioner claims the substantial amount of over $25,000 in costs. And it seems likely that it will be a long time before a final decision is rendered in this case. That is, the current post-hearing briefing process, concerning the issue of whether Petitioner has a vaccine-caused injury, will take several months. Then, if Petitioner obtains an award, the resolution of the "damages" issue would probably take many more months.

Moreover, Petitioner's explanation of the need for an interim award at this time is persuasive. In his written filings and during an unrecorded telephonic status conference held on July 19, 2011, Petitioner's counsel, John McHugh, explained that Petitioner has been able to pay Dr. Shoenfeld for his written expert reports, but not for his hearing preparation and testimony, for which he has charged $25,250. Mr. McHugh explained that it would constitute a substantial hardship for either the Petitioner or himself to pay Dr. Shoenfeld at this time, absent an interim award of costs.

In sum, I conclude that the overall circumstances of this case justify the issuance of an interim award of costs at this time.

V

AMOUNT OF THE AWARD

Petitioner's application ("Pet. App." filed on May 17, 2011), along with the attached letter from Dr. Shoenfeld (Ex. 81), demonstrate that Petitioner seeks $26,750 to pay Dr. Shoenfeld. ($1,500 of that amount has already been paid to Dr. Shoenfeld.) Respondent argues that both Dr. Shoenfeld's hourly rate ($500) and the number of hours he charged are excessive.

A. Hourly Rate

I agree with respondent that petitioner has not established that it is reasonable to pay the very high hourly rate of $500 for the services of Dr. Shoenfeld. Respondent notes (Opp. at 9-10) that in two other Vaccine Act cases, special masters have awarded $350 per hour for Dr. Shoenfeld's services. I will grant that $350 hourly rate *at this time*. In Petitioner's *final* fees and costs application, Petitioner may attempt to show that a higher hourly rate is appropriate, and if she is able

to make such a showing, I will award an *additional* amount for the same hours that I compensate in this case.

B. Number of hours

Dr. Shoenfeld charged 44 hours for which he seeks his full hourly rate. (Ex. 81, p. 1.) Respondent first objects to the 19 hours of hearing preparation billed by Dr. Shoenfeld before he left his home in Israel. (Opp. at 10.) But I find that claim for 19 hours is reasonable under all the circumstances, and I will compensate those hours at the $350 hourly rate.

Respondent also objects to Dr. Shoenfeld's request for compensation at his full hourly rate for 13 travel hours for his trip from Israel to Washington for the evidentiary hearing in this case. (Opp. at 10-11.) Dr. Shoenfeld represents that those 13 hours "includ[ed]" an unspecified number of hours of "continued preparation" for the hearing during his flight. (Ex. 81, p. 1.) However, he does not say *how many* of those travel hours he spent on hearing preparation. Accordingly, *at this time*, I will compensate those hours at ½ of the $350 hourly rate. Again, if Dr. Shoenfeld reasonably explains in a *final* fees/costs application how many of those 13 hours constituted actual hearing preparation, I will afford additional compensation for those hours as well.

Respondent does *not* contest 12 other hours billed by Dr. Shoenfeld at his full hourly rate, and those hours seem reasonable to me.

In sum, at this time I will compensate Dr. Shoenfeld for 31 hours at the hourly rate of $350, and for 26 hours at ½ of that rate, or $175 per hour.[5]

C. Preparation of initial report and supplemental opinion

Dr. Shoenfeld also charged Petitioner a total of $1,500 for his original written expert report (filed on March 31, 2009) and his supplemental written report (filed on July 6, 2009). (Ex. 81, p. 1.) Respondent challenged that $1,500 charge. (Opp. at 10.) As respondent points out, Ex. 81 did not explain the hourly rate involved. Accordingly, at this point, I will assume that the rate was $500 per hour for 3 hours of work, and therefore I will award three hours at $350 per hour. (If my assumption is not correct, Petitioner can present additional evidence in the final fees and costs application.)

D. Summary

31 hours times $350 =	$10,850
26 hours times $175 =	$ 4,550
3 hours times $350 =	$ 1,050
Total	$16,450

[5]Dr. Shoenfeld sought only ½ of his hourly rate for the 13 hours of his *return trip* to Israel. (Ex. 81, p. 2.)

Accordingly, for the reasons set forth above, I hereby award petitioner the amount of $16,450 in costs for the services of Dr. Shoenfeld. The award shall be made in the form of a check payable jointly to Petitioner and Petitioner's counsel, John McHugh.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master