In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 06-371V

(Filed: June 13, 2011)

TO BE PUBLISHED[1]

FRANCIA HIRMIZ and PETER HIRMIZ, as best friends of their daughter, JESSICA HIRMIZ,	*	
Petitioners,	*	Vaccine Act Interim Fees and Costs.
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

DECISION AWARDING INTERIM FEES AND COSTS

HASTINGS, ***Special Master.***

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), Francia and Peter Hirmiz ("Petitioners") seek, pursuant to 42 U.S.C. § 300aa-15(e),[2] an "interim" award for attorneys' fees and costs incurred in the course of Petitioners' attempt to obtain Program compensation. After careful consideration, I have determined to grant the request in part at this time, 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

Petitioners, Francia and Peter Hirmiz, filed this petition on May 8, 2006, alleging that several vaccinations injured their daughter Jessica. The Secretary of Health and Human Services ("Respondent") opposed the claim. The petition was assigned to Special Master Richard Abell, who conducted various proceedings, including an evidentiary hearing that was held on January 14, 2010. On March 26, 2010, Special Master Abell issued a document entitled "Findings of Fact," in which he resolved certain issues concerning what symptoms Jessica displayed, and when. The case was then reassigned to my docket on March 29, 2010, pursuant to the impending retirement of Special Master Abell.

Based upon the factual findings made by Special Master Abell, petitioners' counsel has attempted to obtain an expert report concerning the causation of Jessica's condition. However, after several months of seeking such an expert, petitioners asserted that they were unable to pay an expert. On December 13, 2010, they filed a document entitled "Interim Fees Application," seeking an award of "interim fees" for their attorney in the amount of $101,987, and "interim costs" in the amount of $12,366. (Hereinafter "Pet. App.") In their Application, Petitioners assert, *inter alia*, that such an interim award is necessary for them to retain an expert to prepare a report. The respondent filed an "Opposition" to Petitioners' application on January 19, 2011 (hereinafter "Opp."), and Petitioners filed a Reply on February 2, 2011 ("Reply").

II

LEGAL STANDARD FOR AWARDING ATTORNEYS' FEES IN GENERAL

Special masters have the authority to award "reasonable" attorney's fees 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 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). This court has employed the "lodestar" method to determine reasonable attorneys' fees. *Avera v. Sec'y of HHS*, 515 F.3d 1343, 1347 (Fed. Cir. 2008); *Saxton*, 3 F.3d at 1521; *Rupert v. Sec'y of HHS*, 52 Fed. Cl. 684, 686 (2002). The lodestar method, indeed, has been prescribed by the Supreme Court as the preferred method for the calculation of all attorneys' fees awarded by statute. *City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 429-37 (1983).[3]

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[3]The Supreme Court has declared that "[t]he standards set forth in [the *Hensley*] opinion are generally applicable in all cases in which Congress has authorized an award of fees." *Hensley*, 461 U.S. at 433 n.7. In *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989), that Court reaffirmed its view that such approach is "the centerpiece of attorney's fee awards."

Under the lodestar approach, the basic calculation starts with the number of hours reasonably expended by the attorney, and then multiplies that figure by a reasonable hourly rate.[4] The reasonable hourly rate is "the prevailing market rate" in the relevant community for similar services, by lawyers of "comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). The burden is on the fee applicant to demonstrate that the rate claimed is appropriate. (*Id.*) As the Supreme Court recognized in *Blum*, the determination of an appropriate market rate is "inherently difficult." (*Id.*) In light of this difficulty, the Court gave broad discretion to the trial judge to determine the prevailing market rate in the relevant community, given the individual circumstances of the case. (*Id.*)

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*, 461 U.S. at 437; *Rupert*, 52 Fed.Cl. at 686; *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). The petitioner is not given a "blank check to incur expenses." (*Id.*)

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

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[4]Once a total, sometimes called the "lodestar," is reached by multiplying the reasonable hourly rate by the number of hours expended, it may then be appropriate in a few cases to adjust the lodestar upward or downward based on the application of special factors in the case. *Hensley*, 461 U.S. at 434; *see also Martin v. United States*, 12 Cl. Ct. 223, 227 (1987), *remanded on other grounds*, 852 F.2d 1292 (Fed. Cir. 1988). However, such adjustments are to be made only in the exceptional case, on the basis of a specific and strong showing. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 898-902 (1984); *Hensley*, 461 U.S. at 434 n.9; *Copeland v. Marshall*, 641 F. 2d 880, 890-94 (D.C. Cir. 1980) (*en banc*). Here, neither party has requested any such adjustment of the "lodestar" figure.

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.

Additionally, while a special master may choose to utilize a "line-by-line" analysis to analyze a fees and costs application, the special master is not *required* to do so. Depending on the circumstances of the case, the special master may find it appropriate to make a *percentage reduction* of hours, to use his or her experience to *estimate* a reasonable number of hours that it should have taken to accomplish a particular task, or to use some other method to determine a reasonable amount for a fees or costs item. *Saxton*, 3 F. 2d at 1521 (50% reduction of attorney hours approved by Federal Circuit); *Wasson v. Sec'y of HHS*, 24 Cl. Ct. 482 at 484-86 (Cl. Ct. 1991), *aff'd.* 988 F. 2d 131 (Fed. Cir. 1993); *Riggins*, 2009 WL 3319818 at *4; *Jeffries v. Sec'y of HHS*, No. 99-670, 2006 WL 3903710, at *8 (Fed. Cl. Spec. Mstr. Dec. 15, 2006); *Ray v. Sec'y of HHS*, No. 04-184V, 2006 WL 1006587, at *10 (Fed. Cl. Spec. Mstr. Mar. 30, 2006); *Broekelschen v. Sec'y of HHS*, No. 07-137, 2008 WL 5456319, at *6 (Fed. Cl. Spec. Mstr. Dec. 17, 2008); *Castillo v. Sec'y of HHS*, No. 95-652V, 1999 WL 1427754, at *3 (Fed. Cl. Spec. Mstr. Dec. 17, 1999).

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.*, *after* either an award of compensation resulting from the alleged vaccine injury has been made to the petitioners, or a judgment denying such compensation has been entered by the court. (Opp. at 5-8.)

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 fees awards, because under the Vaccine Act a petitioner may obtain a fees 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 fees 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 fees 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 fees 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 the respondent in this case.

In short, the *Shaw* opinion, as well as the *Avera* opinion, mandates that I reject the respondent's legal argument raised in this case.[5]

C. Interim fees 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 (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.*

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[5]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.

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 is 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); *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

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" on the petitioners. 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.[6]

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.

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

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[6] 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 also 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).

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 under *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 noted 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 of Jessica's condition to her vaccinations in question, combined with the lack of a clear causal relationship to any particular non-vaccine factor, 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 May of 2006. Petitioners' attorney claims the substantial amount

of over $101,000 in fees and over $12,000 in costs. It seems likely that it will be a long time before any final decision is rendered in this case. Finally, and the key factor, is that the petitioners still need to obtain a positive expert opinion in this case, and they represent that they cannot do so without an interim award of fees and costs. This need for funds to obtain an expert opinion constitutes a hardship to the petitioners that justifies an interim award here. That same factor has been stressed in another case approving an interim award. See, *e.g.*, *Dobrydneva*, 94 Fed. Cl. 134, 148.

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

V

AMOUNT OF AWARD

A. Attorney hourly rate

The parties are in agreement that a reasonable hourly rate for purposes of this *interim* award is $350. Whether petitioners' counsel should be awarded any *additional* amount for the hours in question is an issue that will be decided in the future.

B. Number of attorney hours

The respondent has not specifically challenged the number of attorney hours claimed by Mr. McHugh, in this case in which the prior special master, Special Master Abell, conducted an evidentiary hearing and required briefing. I find the hours claimed to be reasonable.

C. Costs

Respondent challenges the reasonableness of costs expended by petitioners' attorney in seeking expert opinions from Dr. Mark Geier and Dr. Marcel Kinsbourne. Moreover, I cannot effectively review the amounts claimed for Drs. Geier and Kinsbourne, since petitioners' counsel has failed to file any *documentation* regarding those amounts. (For expert costs, typically counsel file an *invoice* from the expert stating how many hours were expended, on what days, on what specific tasks, and at what hourly rate.) Accordingly, I will not grant *at this time*[7] the amounts claimed for Drs. Geier and Kinsbourne.

The additional claimed costs of $5,411.956 are uncontested, and seem appropriate.

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[7]The amounts for Drs. Geier and Kinsbourne may be claimed in the final fees application, *with appropriate documentation.*

VI

SUMMARY AND CONCLUSION

For the reasons set forth above, I conclude that it is appropriate to make an interim award of fees and costs to the petitioners at this time. The amount of the award is computed as follows:

A. Attorneys' fees

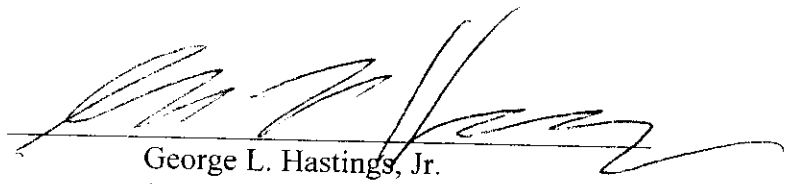
It is appropriate to award 233.25 hours of Mr. McHugh's time at $350 per hour, for a total of $81,637.50.

B. Costs

I award no funds to compensate Drs. Geier or Kinsbourne at this time. I will award the additional claimed costs of $5,411.95.

C. Total

Therefore, petitioners shall receive $81,637.50 plus $5,411.95, for a total award of $87,049.45, in the form of a check payable jointly to petitioners Francia Hirmiz and Peter Hirmiz, and petitioners' counsel, John McHugh.



George L. Hastings, Jr.
Special Master