IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 04-693V
Filed: August 11, 2010
To Be Published

* *		
MICHAEL L. SCHUEMAN and BILLIE L. SCHUEMAN, on behalf of their daughter, Cheyenne Schriver,	*	
Petitioners,	*	Attorney Fees and Costs; *Avera*; Forum Rate; Reasonable Number of Hours; Documentation of Costs
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

Paul S. Dannenberg, Esq., Huntington, VT, for petitioners.
Lynn E. Ricciardella, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION AWARDING FEES AND COSTS[1]

VOWELL, Special Master:

On April 20, 2004, petitioners Michael and Billie Schueman filed a petition in the National Vaccine Injury Compensation Program [the "Vaccine Act" or "Program"],[2] alleging that vaccines caused their daughter, Cheyenne Schriver ["Cheyenne"], to develop insulin dependent diabetes mellitus, also known as Type 1 diabetes ["T1D"]. Petition ¶¶ 3, 8. Cheyenne's case became part of a T1D omnibus proceeding in 2007. Order filed Apr. 13, 2007. After I found the evidence in the test case insufficient to demonstrate that vaccines could cause T1D (*Hennessey v. Sec'y, HHS*, No. 01-190V,

[1] In accordance with Vaccine Rule 18(b), petitioners have 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

[2] National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

2009 WL 1709053 (Fed. Cl. Spec. Mstr. May 29, 2009), *aff'd*, 91 Fed. Cl. 126 (2010)), petitioners requested a ruling on the record in Cheyenne's case. Petitioners' Motion filed Mar. 23, 2010. I denied compensation in a decision issued on March 26, 2010. The issue now before the court is the amount of fees and costs due petitioners and their attorney, Mr. Paul Dannenberg.

For the reasons indicated below, I award petitioners a total of $45,038.60 in attorney fees, attorney costs, and petitioners' own costs.

I. PROCEDURAL HISTORY.

This case was marked by numerous delays, largely at petitioners' own request.[3] After filing additional medical records on November 15, 2004 and medical literature on April 15 and June 16, 2005, petitioners requested a stay, pending the outcome of discovery in the Omnibus Autism Proceeding.[4] *See* Order filed June 20, 2005. The case was reassigned to me on February 21, 2006. Minimal activity ensued after I lifted the stay on May 24, 2006. Although petitioners filed an affidavit on July 24, 2006, most of the activity consisted of petitioners' requests for enlargements of time to file medical records and an expert report.

At an April 13, 2007 status conference, petitioners asked that further action be stayed until the resolution of the *Hennessey* test case. I granted their request. Order filed Apr. 13, 2007. That test case was litigated on January 22-23, 2008. Petitioners' counsel, Mr. Dannenberg, attended the first day of the hearing, but did not participate in the presentation of evidence.

After the decision in the *Hennessey* test case was issued on May 29, 2009, I ordered petitioners to file the report of a medical expert in Cheyenne's case. Order filed June 22, 2009. After several requests for delays, petitioners requested another stay until

[3] At least some of the delay involved efforts to distinguish other T1D cases from an unsuccessful attempt to demonstrate vaccine causation of T1D in a case resolved before this petition was filed. On September 26, 2003, a special master issued a decision in a T1D case, denying compensation. *See Baker v. Sec'y, HHS*, No. 99-653V, 2003 WL 22416622 (Fed. Cl. Spec. Mstr. Sept. 26, 2003). Show cause orders were issued in the other T1D cases, but the cases were not dismissed because the petitioners successfully argued that they were proceeding on a different theory of causation. This procedural history is discussed in some length in *Hennessey*, 2009 WL 1709053, at *3, and will thus not be repeated here.

[4] The Omnibus Autism Proceeding ["OAP"] had no direct relationship to the T1D cases, other than that one of the theories of vaccine causation of autism involved the mercury-based preservative, thimerosal, which was once contained in many children's vaccines. Subsequent to the *Baker* decision, petitioners in the T1D cases, including this one, asserted that thimerosal was the causal agent in T1D. The extensive discovery process in the OAP was expected to produce information that might be advantageous to the petitioners in the T1D cases, as well as many other informally created "injury groups." *See* Order filed July 13, 2005. Thus, orders suspending many cases unrelated to autism were issued by special masters after the creation of the OAP. *See Hennessey*, 2009 WL 1709053, at *4.

appellate review of the test case decision was completed. Initially I denied their request. Order filed Sept. 15, 2009. Petitioners subsequently indicated that if the appellate courts affirmed my decision in the test case, they did not intend to pursue their case, and I therefore granted their request for yet another stay. Order filed Oct. 28, 2009. The test case was affirmed by a judge of the Court of Federal Claims, and Mr. Hennessey did not appeal that decision. *See* Order filed Feb. 26, 2010. On March 26, 2010, after petitioners moved for a ruling on the record, I dismissed the petition filed on behalf of Cheyenne.

On May 6, 2010, petitioners filed an application for attorney fees and costs ["Initial Fees App."] requesting a total of $68,569.63, representing 219.2 hours of attorney time at a requested rate of $300.00 per hour (resulting in attorney fees of $65,760), $2,379.63 in attorney costs, and $430.00 in petitioners' costs. The time sheets (Exhibit ["Ex."] 3 to the Initial Fees App.) supporting the number of attorney hours billed consisted of 25 unnumbered and handwritten pages, with many entries which were difficult to read. Additionally, the column for costs contained amounts that were unexplained or explained only by a code for which no key was provided. Respondent requested that I order petitioners to refile their supporting documentation in typewritten form. I granted their request, and on May 24, 2010, petitioners resubmitted the relevant information in typewritten form, along with a supplemental request ["Suppl. Fees App."] for an additional $2,049.34 in fees and costs.[5]

Had respondent not requested that I order petitioners to refile Ex. 3, I would have done so, *sua sponte*. Although petitioners assert that handwritten time sheets on behalf of Mr. Dannenberg's fees applications have been accepted in the past,[6] Mr. Dannenberg is now on notice that such submissions will no longer be accepted. It is clear from the many billing entries reflecting email contact with clients, respondent's counsel, and other Vaccine Act practitioners that Mr. Dannenberg has access to a computer. There is no reason to compel opposing counsel and the court to decipher his handwriting in order to determine the basis for the fees and costs claimed by petitioners on his behalf. Any costs incurred in converting his handwritten submissions to legible form will not be paid,

[5] This figure represents an additional 6.7 hours of attorney time, of which 3 hours represent reviewing corrections to the timesheets, resulting in an additional $2,010.00 in attorney fees. Respondent mistakenly characterized all 6.7 hours as pertaining to the creation of the typewritten version of Ex. 3. Respondent's Response to Petitioners' Petition for Fees and Costs, filed June 23, 2010 ["Res. Opp. to Fees and Costs"], at 10. The time sheet accompanying the typewritten version of Ex. 3 reflects a number of other actions pertaining to this case. Suppl. Fees App., refiled Ex. 3, at 28-29.

[6] There are very few cases involving Mr. Dannenberg's fees. In fact a search of publicly available cases found only one. That case did not reflect the nature of his billing records. In 1990, Mr. Dannenberg was awarded a rate of $90.00 per hour for work performed in 1989. *Doe v. Sec'y, HHS*, 19 Cl. Ct. 439, 444 (1990). Notwithstanding Mr. Dannenberg's assertion that his practice is limited to vaccine injuries, a report generated by the Clerk of Court's office from the court's electronic case management system reflects that Mr. Dannenberg is currently counsel of record in only 10 open or recently closed cases, not including this one.

as such costs would be for secretarial, not attorney or paralegal, services. *See Doe*, 19 Cl. Ct. at 443, 454 (adopting special master's recommendations regarding Mr. Dannenberg's fees, which included a determination by the special master that secretarial tasks are not compensable); *Plott v. Sec'y, HHS*, No. 92-633V, 1997 WL 842543, at *5 (Fed. Cl. Spec. Mstr. Apr. 23, 1997).

Subsequently, respondent objected to: (1) the hourly rate requested by petitioners on behalf of their attorney, Mr. Dannenberg; (2) the number of attorney hours claimed; (3) certain specific entries, such as time billed for researching state statutes of limitations; (4) costs for which no documentation was submitted (including petitioners' own costs); and (5) costs identified by an unexplained code.[7] Res. Opp. to Fees and Costs at 6, 9, 11.

In their reply to Res. Opp. to Fees and Costs, petitioners provided additional argument and evidence to support Mr. Dannenberg's hourly rate request and amended the rates requested by the year in which the services were performed. The hourly rates claimed in the Pet. Reply are $250.00 per hour for services performed by Mr. Dannenberg in 2004-2006, and $300.00 per hour thereafter. This reduced the total attorney fees claimed to $66,755.00.[8] Pet. Reply at 7. Petitioners also provided some explanation of the cost codes used and a breakdown of costs by category. Pet. Reply at 10-11. Petitioners also broke down their own costs, but did not include receipts for any of the costs claimed, other than the filing fee. Pet. Reply at 11 (petitioners' own costs), Ex. 9 (filing fee receipt). The filing of the Pet. Reply concluded the briefing process on the issue of attorney fees, and the issues are now ripe for resolution.

[7] Respondent also objected to the request for reimbursement of Mr. Dannenberg's travel to observe the test case hearing at the full hourly rate. This objection was mooted by petitioners' subsequent withdrawal of the request for the full hourly rate for travel. *See* Petitioners' Reply to Res. Opp. to Fees and Costs, filed July 6, 2010 ["Pet. Reply"], at 7. I note that Mr. Dannenberg did not claim work on specific tasks during his travel time.

[8] This figure includes a 50% reduction of the hours Mr. Dannenberg spent traveling to and from the test case hearing. Based on the hours Mr. Dannenberg claimed for traveling on January 21 and 23, 2008, I compute that he spent approximately 23.7 hours traveling. By claiming reimbursement for only the 11.9 hours appearing in Pet. Reply at 7, Mr. Dannenberg halved the travel hours, achieving approximately the same effect as halving the hourly rate. *See* Initial Fees App., Ex. 3 (reflecting 1.6 hours of travel from the office to the railroad, plus 10.5 hours of rail travel, on January 21, 2008, and 10 hours of rail travel, plus 1.6 hours of travel from the railroad to the office, on January 23, 2008, for a total of 23.7 hours of travel). As indicated below, I will separately compensate the entire travel time of 23.7 hours at 50% of the hourly rate.

II. Law Pertaining to Awards of Fees and Costs in the Vaccine Program.

A. The Legal Framework for Fees and Costs Awards.

Unlike most other fee-shifting statutes, the Vaccine Act permits an unsuccessful litigant to receive fees and costs, provided that the petition was filed in good faith and upon a reasonable basis. *See* § 300aa-15(e)(1). Special masters have liberally interpreted the good faith and reasonable basis requirements. *See, e.g.*, *Savin v. Sec'y, HHS*, 85 Fed. Cl. 313, 317-19 (2008).

This court applies the lodestar method to any request for attorney fees and costs. *See Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) ("[T]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984))); *see also Avera v. Sec'y*, *HHS*, 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) ["*Avera II*"]; *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993). The standards set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), for calculating attorney fees "are generally applicable in all cases in which Congress has authorized an award of fees." *Hensley*, 461 U.S. at 433 n.7.

The reasonable hourly rate is "the prevailing market rate," which is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 896 n.11. Petitioners have the burden to demonstrate that the hourly rate requested is reasonable. *See Blum*, 465 U.S. at 895 n.11 ("[T]he burden is on the fee applicant to produce satisfactory evidence–in addition to the attorney's own affidavits–that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.").

The "prevailing market rate" is determined using the "forum rule." *Avera II*, 515 F.3d at 1349 ("to determine an award of attorneys' fees, a court in general should use the forum rate in the lodestar calculation"). Prior to the Federal Circuit's decision in *Avera II*, the Court of Federal Claims applied the "geographic rule" to determine the appropriate rate of compensation.[9] The geographic rule is based on the fees charged in the community in which the attorney performs the services, rather than the prevailing market rate in the forum community. *See Avera v. Sec'y, HHS*, 75 Fed. Cl. 400, 405 (2007) ["*Avera I*"]. In *Avera II*, the Federal Circuit also adopted the "*Davis* exception"[10] to

[9] Because *Avera II* changed the focus from the geographic rule previously used in the lodestar calculation to the forum rate, decisions issued prior to *Avera II* awarding specific hourly rates must be viewed with some caution, as they may be based on evidence of the geographic rate for the attorneys involved.

[10] The so-called "*Davis* exception" is based on *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA*, 169 F.3d 755 (D.C. Cir. 1999).

the forum rule. The court held that the *Davis* exception applies when the bulk of the work in a case is performed outside the forum (Washington, DC, in Vaccine Act cases), in a locale where the attorneys' rates are substantially lower. 515 F.3d at 1349.

In determining the number of hours reasonably expended, a court must exclude 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. Special masters may use their experience in Vaccine Act cases to determine whether the hourly rate and the hours expended are reasonable. *Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 483 (1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993) (noting special masters have broad discretion in calculating fees and costs awards).

III. Applying the Law to the Facts of this Application.

Based on the causation evidence adduced in the *Hennessey* test case and the hypotheses of causation advanced in the T1D diabetes omnibus proceeding, I find that the instant petition was filed and prosecuted in good faith and upon a reasonable basis.

A. Computing the Appropriate Hourly Rates.

After *Avera II*, determining the appropriate hourly rate in most cases involves a three-step process. First, the special master must determine the forum rate for similar services by lawyers of comparable skill and experience. As indicated below, I have made this determination in another case involving a lawyer of roughly comparable abilities and experience. Second, if it appears that the local rate in the geographic community in which the attorney practices may be substantially lower than the forum rate, and if the bulk of the work was performed in this locale, rather than in the forum, the special master must determine the local rate. Finally, the special master must compare the two rates to determine if the *Davis* exception to the forum rule applies. This involves a comparison of the two rates to determine if the local rate is substantially lower. Unless the local rate is substantially lower, the attorney is entitled to the forum rate.

The evidence produced by Mr. Dannenberg focused solely on the hourly rates charged in his local community (the "geographic rate"), not on the forum rate.[11] The

[11] Petitioners filed Mr. Dannenberg's affidavit, which stated that his "current practice is limited to vaccine injury litigation" and that he has "handled numerous vaccine cases since 1987." Initial Fees App. at Ex. 1. He asserted that his "local hourly rate for vaccine injury litigation is presently $300.00 per hour." *Id*. Petitioners also filed an affidavit of James Spink, an attorney practicing general tort law in Burlington, VT, who has been licensed for approximately 30 years (compared to Mr. Dannenberg's 24 years of practice in Huntington, VT). This attorney's affidavit asserted that his hourly rate was between $185.00 and $250.00 per hour. Initial Fees App., Ex. 2, at 1. I note that this affidavit was dated in 2007. *Id*. An affidavit from a second attorney, Roger Kohn, dated in 2010, asserted that his hourly rates ranged from $195.00-$225.00 per hour, with the majority of his cases billing at the higher hourly rate. Mr. Kohn practices in Burlington, VT and Middlebury, VT. The Kohn affidavit indicated that Mr. Kohn had "substantial litigation experience, particularly on behalf of plaintiffs," and had been practicing law for approximately 38 years. Initial Fees

forum rule dictates that the reasonable hourly rate be based on the rates paid to similarly qualified attorneys where the court sits, which in Vaccine Act litigation is Washington, DC. *Avera II*, 515 F.3d at 1348; *see also Hall v. Sec'y, HHS*, No. 02-1052V, 2010 WL 1840837, at *6, 8 (Fed. Cl. May 5, 2010). Petitioners assert that the forum rate was that authorized by the so-called "*Laffey* Matrix."[12] Initial Fees App. at 2. Respondent took no position on an appropriate forum rate, instead arguing that Mr. Dannenberg's rate should be determined under the *Davis* exception.[13] Res. Opp. to Fees and Costs at 6-8. Petitioners conceded that, under the *Davis* exception to the forum rule, Mr. Dannenberg would only be entitled to the local rate, as it was substantially lower than that authorized by the *Laffey* Matrix.

In *Avera II*, the Federal Circuit acknowledged the *Laffey* Matrix argument raised in that case, but did not hold that the *Laffey* Matrix constituted the forum rate. With one exception (*Walmsley v. Sec'y, HHS*, No. 06-270V, 2009 WL 4064105 (Fed. Cl. Spec. Mstr. Nov. 6, 2009)), every special master and judge of the Court of Federal Claims presented with the issue of whether the *Laffey* Matrix rate constitutes the forum rate in Vaccine Act cases has held that it does not.[14] As petitioners did not assert Mr.

App., Ex. 2, at 2. In the Pet. Reply, petitioners filed an additional affidavit, that of Gordon Troy. Mr. Troy has been in practice for approximately 24 years, and currently bills and receives $325.00 per hour in trademark, copyright, and general intellectual property litigation. Mr. Troy practices in Charlotte, Chittenden County, VT. Pet. Reply at Ex. 7.

[12] The *Laffey* Matrix is based on the hourly rates allowed by the U.S. District Court for the District of Columbia in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984) (rejecting use of the matrix rates in that particular case). The Court of Appeals for the District of Columbia Circuit later approved of applying *Laffey* Matrix rates (*see, e.g.*, *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995)), and now the matrix is maintained by the U.S. Attorney's Office for the District of Columbia. It includes a chart of hourly rates for attorneys, based on the number of years in practice. Yearly updates to the original hourly rates allowed by the district court are based on annual increases in the Consumer Price Index. The *Laffey* Matrix may be viewed at http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html (last visited Aug. 9, 2010).

[13] Respondent asserts that petitioners failed to substantiate the applicable market rate (the local rate in VT), but she did not submit evidence undercutting the affidavits supporting petitioners' application. *See* Res. Opp. to Fees and Costs at 6-8. Instead, respondent argued that because the ranges set forth in those affidavits include hourly rates less than $300, they do not support a $300 per hour rate. *Id.* This argument is unpersuasive. I expect that in most markets, hourly rates vary, even for the same attorney, due to a variety of factors. A survey of cases from northwestern Vermont involving awards of attorney fees might provide additional information supporting or impeaching Mr. Dannenberg's evidence regarding the prevailing local rate for "similar services by lawyers of reasonably comparable skill, experience and reputation" (*Blum*, 465 U.S. at 895 n.11), but neither party to this litigation saw fit to do that research. The evidence in the record supports the award of rates between $195.00 and $325.00 per hour as the local market rate.

[14] *See, e.g.*, *Rivard v. Sec'y, HHS*, No. 08-371V, slip op. at 16 n.10, 17-18 (Fed. Cl. Spec. Mstr. June 22, 2010); *Friedman v. Sec'y, HHS*, No. 02-1467V, 2009 WL 4975267, at *3 (Fed. Cl. Spec. Mstr. Dec. 4, 2009), *aff'd*, slip op. at 8 (Fed. Cl. June 18, 2010); *Hall v. Sec'y, HHS*, No. 02-1052V, 2009 WL 3423036, at *19 (Fed. Cl. Spec. Mstr. Oct. 6, 2009), *aff'd*, 2010 WL 1840837, at *3 n.7 (Fed. Cl. May 5, 2010) (noting that petitioner did not challenge the determination that *Laffey* rates were inapplicable), *appeal docketed*,

Dannenberg's entitlement to *Laffey* matrix rates, I need not address their applicability to Vaccine Act litigation in the instant application.

Unfortunately, there is a dearth of evidence regarding what the forum rate actually is, as few Washington, DC, attorneys representing Vaccine Act petitioners have been awarded fees. In a recent case, I analyzed the evidence available to determine that the forum rate for an attorney with substantial experience in Vaccine Act or similar litigation is between $275.00 and $360.00 per hour for work performed in 2006 and beyond.[15] *Rodriguez*, 2009 WL 2568468, at *15. Another special master independently computed similar rates. *Masia*s, 2009 WL 1838979, at *25.

Based on Mr. Dannenberg's years of practice, his requested hourly rates ($250.00 per hour for services performed in 2004-2006 and $300.00 per hour for services performed in 2007 and beyond) appear compatible with the forum rates I computed. Despite the fact that the bulk of Mr. Dannenberg's work was done outside the forum, there is not a "very significant difference in compensation favoring D.C.," and I need not apply the *Davis* exception. *See Avera II*, 515 F. 3d at 1349; *see also Hall v. Sec'y, HHS*, No. 02-1052V, 2010 WL 1840837, at *10 (Fed. Cl. May 5, 2010) (finding in that case that a difference of 59% was "very significant"). I thus accept Mr. Dannenberg's requested hourly rates as commensurate with the forum rate for the years in question.

B. The Hours Claimed.

Not only must the hourly rate be reasonable, the hours expended must also be reasonable. The determining factor is not whether the hours were actually expended, it is whether they were reasonably expended. *Sabella v. Sec'y, HHS*, 86 Fed. Cl. 201,

---

No. 10-5126 (Fed. Cir. June 3, 2010); *Rodriguez v. Sec'y, HHS*, No. 06-559V, 2009 WL 2568468, at *11-12 (Fed. Cl. Spec. Mstr. July 27, 2009), *aff'd*, 91 Fed. Cl. 453, 468-74 (2010), *appeal docketed*, No. 10-5093 (Fed. Cir. Mar. 19, 2010); *Masias v. Sec'y, HHS*, No. 99-697V, 2009 WL 1838979, at *23 (Fed. Cl. Spec. Mstr. June 12, 2009), *aff'd*, slip op. at 10-11 (Fed. Cl. Dec. 10, 2009), *appeal docketed*, No. 10-5077 (Fed. Cir. Feb. 17, 2010).

[15] Although another special master has asserted that I did not provide sufficient basis for that finding (*see Walmsley*, 2009 WL 4064105, at *6), I respectfully disagree. In determining the forum rate, I looked at the sparse evidence available including: (1) the rate negotiated by a DC law professor for his billable hours on behalf of Vaccine Act petitioners in a student clinical program; (2) a fees application by a Washington, DC, attorney with considerable experience in tort litigation who requested and received a rate within the stated range; (3) rates negotiated on behalf of a Boston firm specializing in Vaccine Act litigation, noting that the Boston and Washington, DC communities have a similar cost of living, based on a cost of living index; and (4) rates negotiated on behalf of a Vienna, VA, firm specializing in Vaccine Act litigation. *Rodriguez*, 2009 WL 2568468, at *13-15. Because the latter two rates were virtually identical, in spite of the fact that one firm is located in a city with a high cost of living, and the other in a suburban area with concomitant lower overhead costs, I concluded that the latter two negotiated rates represent forum, rather than geographic, rates. *Id.* at 14. I note that the forum rate I determined is challenged in the *Rodriguez* appeal currently pending before the United States Court of Appeals for the Federal Circuit, with the issue presented being the applicability of the *Laffey* Matrix to the award of attorney fees in Vaccine Act cases.

205-06 (2009). Experienced attorneys command a premium fee in large part because they are expected to accomplish tasks more efficiently than attorneys of lesser experience do. *See Plott*, 1997 WL 842543, at *2. A trial court has discretion in determining the hours to be reimbursed because the trial court is in the best position to assess whether the hours claimed are reasonable. *See Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993); *see also Case v. Unified Sch. Dist. No. 233, Johnson County, Kan.*, 157 F.3d 1243, 1256 (10th Cir. 1998).

Petitioners initially requested compensation for 219.2 hours of work by Mr. Dannenberg for a case in which no hearing was held, no expert report was ever filed, and for which no extensive briefing was ever required. *See* Initial Fees App. at 2. Additionally, the case was stayed for substantial periods of time. Most of Mr. Dannenberg's actions appearing on the docket were requests for enlargements of time and for extended periods, the case was inactive. Subsequent filings on the issues raised in the initial fees application have raised the total hours claimed to 251.7 hours.[16] *See* Pet. Reply at 11.

There are two independent reasons for reducing the number of attorney hours compensated in this case, one generally based on my experience in Vaccine Act fees and costs determinations, and one based on the attorney hours approved in the other T1D omnibus cases. The hours initially claimed in this case far exceed those claimed in any similarly postured case[17] in my four and one-half years as a special master. Although a few of the hours claimed are for tasks that are not appropriate for compensation by the Vaccine Program,[18] subtracting those hours still leaves the total hours claimed inordinately high, particularly for an attorney with over 20 years experience in the Vaccine Program and whose practice is limited to Vaccine Act cases.

[16] Petitioners added 6.7 hours for refiling Ex. 3 in typewritten form and for other matters occurring after the Initial Fees App. was filed. Supp. Fees App. at 1. Petitioners also added an additional 25.8 hours for work on the Pet. Reply and other matters subsequent to the refiling of Ex. 3. Pet. Reply at 11.

[17] A similarly postured case would be one in which no expert report was filed, no hearing was held, no substantial briefing was required, and one which was stayed for significant periods of time, pending action in some other case. It would also include cases in which the hypothesis of causation was vaguely stated in the initial petition, and which altered as the case progressed. *See, e.g.*, *Savin v. Sec'y, HHS*, No. 99-537V, 2008 WL 2066611, at *1 n.3, 5 (Fed. Cl. Spec. Mstr. Apr. 22, 2008) (awarding $30,691.48 in attorney fees and costs in a case pending for 7 years, and in which no medical records or evidence linking petitioner's vaccinations to his injuries were ever filed).

[18] Respondent objected to the hours claimed for researching various state statutes of limitations. Her objection is well taken. It is inappropriate to bill to the Vaccine Program legal research focused on determining if petitioners may have a timely cause of action in state court after rejecting a Vaccine Act judgment. *See* § 300aa-15(e)(1) (fees and costs are compensable when they are incurred in a proceeding on a Vaccine Act petition); *cf. Summar v. Sec'y, HHS*, No. 90-415V, 1992 WL 158582, at *1 (Cl. Ct. Spec. Mstr. June 18, 1992) (finding that under § 300aa-15(e)(1), an unsuccessful petitioner may not be compensated for fees and costs incurred in a prior civil proceeding).

The hours claimed in other cases in the T1D omnibus proceeding illustrate the excessive nature of the hours claimed on behalf of Mr. Dannenberg. These cases fall into two categories. The first category includes the *Hennessey* case, No. 01-190V, which was resolved after a causation hearing and a motion for review filed with the Court of Federal Claims. It also includes the case originally identified as the "lead case," *Alsheimer*, No. 03-1708V, into which many of the prehearing submissions regarding omnibus matters were filed. The second category includes all of the other T1D omnibus cases.

The petitioner in the *Hennessey* test case filed an interim fees application shortly before I issued my decision in the test case. Initially, he claimed approximately 460 hours on behalf of the four attorneys who worked on his case. Petitioner's Application for Interim Fees and Costs, at Tab A, No. 01-190V, filed Feb. 19, 2009. In negotiations with respondent's counsel, he settled the interim fees application (which included the causation hearing, plus all the post-hearing briefing), receiving compensation for approximately 380 hours of attorney time.[19] *See* Decision on Interim Attorney Fees and Costs, *Hennessey v. Sec'y, HHS*, No. 01-190V, filed Apr. 30, 2009. The attorney hours requested in the original "lead case" totaled 212 hours. Petitioner's Application for Attorneys' Fees and Costs, at Tab A, *Alsheimer v. Sec'y, HHS*, No. 03-1708, filed June 4, 2010.

Cases in the second category were primarily handled by the same firm that prepared and presented the test case and the original lead case. In those cases in which attorney fees have been requested and awarded, the attorney hours claimed have ranged from 10 to 40 hours of attorney time in cases filed between 1999 and 2009. *See, e.g.*, Petitioner's Unopposed Application for Attorneys' Fees and Costs, *Joubert v. Sec'y, HHS*, No. 04-1371V, filed July 23, 2010; Petitioners' Unopposed Application for Attorneys' Fees and Costs, *Jones v. Sec'y, HHS*, No. 09-197V, filed July 21, 2010; Petitioner's Unopposed Application for Attorneys' Fees and Costs, *El-Kadi v. Sec'y, HHS*, No. 99-619V, filed July 15, 2010.

The nature of the work performed by the attorneys in other T1D cases does not directly equate to the type of work performed in the case at bar. Because he is a solo practitioner with a single T1D case, Mr. Dannenberg's work cannot be divided among many cases advancing the same medical hypothesis. The firm handling the test case also represented all but two of the participants in the omnibus program, and the basic research, legal and medical, required in such cases was performed and billed in the test case, creating economies of scale.[20] Before becoming part of the omnibus proceeding,

[19] This figure was derived by applying the percentage of fees claimed to fees paid (83.3%) against the hours claimed. Additional fees were requested and paid after the conclusion of appellate review, but those hours are not relevant to the issues raised in the Schuemans' fees application.

[20] I note that Mr. Dannenberg and his clients benefited directly from the efforts of this firm on behalf of the T1D omnibus participants. Mr. Dannenberg's billing records reflect frequent contact with the attorney who tried the test case. The expert Mr. Dannenberg consulted as part of his representation of petitioners, Dr.

Mr. Dannenberg was obliged to conduct his own research. To some extent, because omnibus participants are not bound by the results in the test case, that obligation continued throughout his representation as well. Thus, Mr. Dannenberg may reasonably have spent somewhat more time on this case than did the attorneys for the other T1D petitioners who, like the Schuemans, were not test case litigants.

Mr. Dannenberg's efforts are not the precise equivalent of the work performed in either the test case or the original lead case, either. Mr. Dannenberg claims about half the number of hours on Cheyenne's case as did the four attorneys who prepared and presented the omnibus test case, and about two-thirds the number of hours for which they were compensated at the conclusion of the proceedings before the special master. However, far more work was performed in the test case than in the Schuemans' case. The lead trial attorney in the test case had to prepare the direct and cross-examination of four experts in diverse fields of medicine, as well as review over 200 medical and scientific journal articles and book chapters cited by the experts and filed into the record. Post hearing, significant problems with the transcripts required additional work by the attorneys to review and suggest transcript corrections. Additionally, this firm was responsible for submitting other information that I required before permitting the cases to go forward as an omnibus proceeding. Mr. Dannenberg had none of these responsibilities. Substantial briefing was also required in the original lead case, making it dissimilar to the work Mr. Dannenberg was required to perform in Cheyenne's case.

The tasks required of Mr. Dannenberg in Cheyenne's case fall somewhere in between the 460 hours in the test case, the 212 hours in the original lead case, and the upper end (40 attorney hours) of the other T1D omnibus cases which, like the Schuemans' case, were not litigated. Within this range, the 251.7 hours claimed by Mr. Dannenberg are excessive.

It is difficult to pinpoint just what tasks resulted in the excessive number of hours claimed. Some of the excess hours certainly come from Mr. Dannenberg's performance of tasks that would otherwise be performed by a secretary, or possibly a paralegal, such as preparing letters to medical treatment facilities seeking medical records and updating his calendar. Other hours were generated, as respondent notes, by entries that do not appear to relate to this case, such as conversations with respondent's counsel who were not involved in this case (Res. Opp. to Fees and Costs at 10), and a law clerk (identified as "Michael") who did not work for the special master then assigned to this case. *See* Initial Fees App. at Ex. 3 (entries for Oct. 30, 2006; Apr. 5, 2008; July 1, 2009). Others appear to have been caused by repetitive performance of the same task. *See, e.g.*, *id.* (entries between Mar. 2004 and Dec. 2007 billing for preparation and review of a client affidavit, some of which were improperly "lumped" with other tasks performed on the

---

Shoenfeld, was the same expert who appeared on behalf of the test case petitioner. Additionally, many of the medical journal articles Mr. Dannenberg referenced in his billing records were exhibits in the test case and/or authored by Dr. Shoenfeld. *See* Initial Fees App. at Ex. 3.

same date). Additionally, Mr. Dannenberg conducted a considerable amount of medical research, some of which had little or no bearing on the issues in this case, such as research on autism and research on the connection between diabetes and the "BCG" vaccine, a vaccine never administered to Cheyenne. *Id.* (entries for Sept. 12, 2004; Nov. 1, 2005; Sept. 2, 2009).

However, I need not determine precisely what entries caused the excessive number of hours. Mr. Dannenberg was simply not as efficient in performing the tasks required as most attorneys of his level of experience. Based on my experience in Vaccine Act cases in general, as well as what was required in other T1D cases in particular, the hours billed are excessive. *Wasson*, 24 Cl. Ct. at 483 (noting that a special master need not conduct a line by line analysis of an attorney bill). Based on that experience, I conclude that a reasonably efficient attorney with Mr. Dannenberg's tenure in the legal profession and experience in the Vaccine Program should not have expended beyond 140 hours of effort in a case of this complexity and procedural posture.

In making this determination, I am mindful that Mr. Dannenberg was not likely knowledgeable about mercury, autoimmunity, or diabetes at the time he began representing these petitioners, and, at that point, he had no reason to know that his clients' case would eventually be resolved by a test case presented by another law firm. Thus, I am compensating him for substantially more hours in the instant case than were authorized in any of the other individual T1D cases (other than the test and lead cases) to date.

C. Computation of Attorney Fees Authorized.

In the Initial Fees App., approximately 50% of the hours claimed were for tasks performed in 2004-06. Because I have elected to reduce the hours for which compensation is authorized on an overall basis, rather than on a line-by-line or percentage basis, I will apportion the hours authorized similarly.[21] Mr. Dannenberg's fees are therefore based on 70 hours at a rate of $250.00 per hour ($17,500.00) and 70 hours at a rate of $300.00 per hour ($21,000.00). Additionally, Mr. Dannenberg is authorized 23.7 hours of travel time for attendance at the *Hennessey* hearing at 50% of his hourly rate of $300.00 per hour, for a total of $3555.00. Petitioners are thus entitled to a total attorney fees award of $42,055.00 on Mr. Dannenberg's behalf.

D. Costs.

Respondent's challenges to the costs focused on the lack of receipts for many of

[21] Another reason for apportioning the fees in this manner is that the case remained pending for six years, with three years of fees billed at the $250.00 per hour rate, and about three years billed at the $300.00 per hour rate.

the requests and the lack of specificity for many of the entries on the billing sheets. Petitioners' subsequent filings explained most of the billing sheet entries, although some remain a mystery, particularly those for copies made on a date when the events otherwise described do not seem to require copies. *See, e.g.*, Initial Fees App. at Ex. 3 (entries dated May 11, 2004 for reviewing a letter from petitioners, and a court assignment, accompanied by costs of 90 cents and $1.50, respectively). Nevertheless, when copying costs are claimed on specific dates, those costs are authorized.

I accept the list of costs contained in the Pet. Reply at 10-11, with certain exceptions. The filing fee of $150.00 was claimed twice, once as part of the attorney costs (the first entry on page 10) and once as part of the costs borne by petitioners (the first entry on page 11). Because it is claimed as part of petitioners' costs, I authorize payment of it to petitioners alone.

With the exception of the filing fee entry, the other entries claimed as attorney costs on Pet. Reply at 10 are authorized. The bill for Dr. Shoenfeld's fees (Initial Fees App. at Ex. 5), does not comport with the Guidelines for Practice[22] in that it does not specify an hourly rate, the number of hours billed, or the dates on which the services were performed. Any future bills submitted by petitioners' counsel on behalf of medical consultants must contain this information or compensation will be reduced or denied. However, in this case, Mr. Dannenberg's time records reflect numerous conversations and email contact with Dr. Shoenfeld, and I am satisfied that Dr. Shoenfeld's time and efforts warrant the fee claimed. Petitioners are awarded $2,808.60 in attorney costs.

With regard to petitioners' own costs, I reluctantly agree with respondent that the amount claimed for copies, faxes, and long distance calls is undocumented in any way and thus should not be compensated.[23] While it is likely that certain long distance calls and fax transmissions occurred, the amount claimed appears to be a "ballpark estimate," rather than the result of any record keeping. Petitioner's General Order 9 statement is similarly vague, stating only that $430.00 in costs were incurred, without otherwise identifying them. *See* Initial Fees App. at Ex. 6. I also note that many long distance service plans do not charge individually for long distance calls. Absent some indication that long distance calls were a specific, individual expense (such as in Mr. Dannenberg's time sheets), I am unwilling to speculate as to the actual costs involved.

The specific claim for obtaining Texas Tech health records on June 16, 2004 is authorized, as Mr. Dannenberg's time sheets reflect a letter to the same hospital, presumably seeking medical records, on the date claimed.[24] Initial Fees App. at Ex. 3.

---

[22] The Guidelines for Practice under the National Vaccine Injury Compensation Program are available at http://www.uscfc.uscourts.gov/sites/default/files/OSM.Guidelines.pdf.

[23] Mr. Dannenberg appears to have been meticulous in accounting for his own costs and should have communicated that requirement to his clients.

[24] I note that petitioners did not submit a receipt or other documentation for this cost. If it were not

Petitioners are therefore authorized $175.00 in their own costs.

IV. Conclusion.

Accordingly, I hereby award the total **$45,038.60**[25] as follows:

- **A lump sum of $44,863.60 in the form of a check payable jointly to petitioners, Michael Schueman and Billie Schueman, and petitioners' counsel, Paul Dannenberg, for petitioners' attorney fees and costs; and**

- **A lump sum of $175.00 in the form of a check payable to petitioners, Michael Schueman and Billie Schueman, for their litigation costs.**

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.[26]

IT IS SO ORDERED.

Denise K. Vowell
Special Master

---

corroborated by their attorney's billing record I would not award it.

[25] This amount is intended to cover all legal expenses incurred in this matter. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. *See generally Beck v. Sec'y, HHS*, 924 F.2d 1029 (Fed. Cir.1991).

[26] Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. *See* Vaccine Rule 11(a).