

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

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PETER BROEKELSCHEN, M.D., \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH \*

AND HUMAN SERVICES, \*

Respondent. \*

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No. 07-137V  
Special Master Christian J. Moran

Filed: December 17, 2008

Attorneys' fees and costs, interim  
award, Dr. Steinman's hourly rate

*Lisa A. Roquemore, Broker & Assoc., P.C., Irvine CA, for petitioner,  
Melonie J. McCall, United States Dep't of Justice, Washington, D.C., for respondent.*

**PUBLISHED DECISION ON ATTORNEYS' FEES AND COSTS\***

Peter Broekelschen, a doctor, filed a petition seeking compensation under the National Vaccine Injury Compensation Program ("the Program"), 42 U.S.C. §§ 300aa-1 et seq. (2006). Dr. Broekelschen alleges that the influenza vaccination caused him to suffer transverse myelitis. Petition, filed Mar. 1, 2007, at 8.

Although the merit of this case has not been decided, Dr. Broekelschen has filed a motion for an interim award of attorneys' fees and costs. Respondent objects to the interim award. This

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\* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

objection lacks merit and Dr. Broekelschen is entitled to an interim award. Respondent also objects to specific items. After considering these objections, Dr. Broekelschen is awarded \$107,035.75 in attorneys' fees and \$27,335.26 in costs.

## **I. Facts**

Because facts about the course of Dr. Broekelschen's medical history are not significant to determining whether he is entitled to an award of attorneys' fees and costs, only a truncated version of the facts is provided in this decision. A more detailed recitation of the facts will be included in the decision regarding entitlement.

When Dr. Broekelschen was 65 years old, he received a dose of the flu vaccine. Exhibit 3 ¶ 9; exhibit 1 at 74 (letter written by Dr. John Storch dated May 1, 2006); exhibit 1 at 200 (memo by Dr. Storch dated January 2, 2007); transcript ("tr.") 16. Approximately six weeks later, Dr. Broekelschen experienced a severe crushing pain in his chest from the clavicle to his lower ribs. He also was having pain in both his arms, his fingers, his neck, and left scapula. Exhibit 1 at 124. An ambulance transported Dr. Broekelschen to Hoag Presbyterian Hospital Emergency Room. Exhibit 2 ¶ 10.

The illness that afflicted Dr. Broekelschen is a matter of significant dispute. He alleges transverse myelitis; respondent believes Dr. Broekelschen suffers from a different condition. Because of the parties' dispute, this decision does not name that illness. It is sufficient to note that Dr. Broekelschen's recovery has been lengthy, painful, and incomplete.

Dr. Broekelschen filed his petition seeking compensation on March 1, 2007. With this petition, Dr. Broekelschen included four volumes of medical records as exhibits. Exhibits 2 is the report of Dr. Lawrence Steinman, an expert retained by Dr. Broekelschen. The present decision reimburses Dr. Broekelschen for the costs of retaining Dr. Steinman.

Respondent filed his report, pursuant to Vaccine Rule 4(c), on August 13, 2007. Respondent denied that Dr. Broekelschen was entitled to compensation. Respondent also filed a report from Dr. Benjamin Greenberg. Respondent also filed a supplemental report from Dr. Greenberg on December 19, 2007. Exhibit C.

A hearing was scheduled to last two days in February 2008. Order, filed November 2, 2007. In the two weeks before the hearing, Dr. Broekelschen filed some additional medical records, which were not included in his initial filing. Respondent also filed additional medical literature.

The hearing took place on February 12-13, 2008. After the hearing, the parties submitted briefs addressing whether Dr. Broekelschen is entitled to compensation. As previously stated, no decision has yet been made on this issue.

After the hearing, Dr. Broekelschen filed a motion for an interim award of attorneys' fees and costs. Respondent filed an opposition and Dr. Broekelschen filed a reply.<sup>1</sup> Thus, the motion is ready for adjudication.<sup>2</sup>

## **II. Whether an Interim Award Is Appropriate**

The foundational issue is whether Dr. Broekelschen is entitled to an award on an interim basis. Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1352 (Fed. Cir. 2008), authorizes – but does not require – special masters to award petitioners in the Vaccine Program attorneys' fees and costs on an interim basis. Other courts recognize the discretion of trial courts to award attorneys' fees and costs before the entry of judgment. Dubuc v. Green Oak Tp., 312 F.3d 736, 744 (6th Cir. 2002); Sunrise Development, Inc. v. Town of Huntington, New York, 62 F.Supp.2d 762, 779 (E.D.N.Y.1999).

A primary consideration for an award of attorneys' fees and costs is whether a petitioner has demonstrated a reasonable basis for the claim. The reasonable basis analysis is critical because a petitioner who is not awarded compensation in the entitlement phase remains eligible for an award of attorneys' fees and costs provided that there is a reasonable basis and good faith for the action. 42 U.S.C. § 300aa–15(e) (2006).

Here, respondent has not argued that Dr. Broekelschen's action lacked a reasonable basis or that it was not brought in good faith. Resp't Opp'n, passim. This implicit concession is warranted because Dr. Broekelschen presented a case, including the report and testimony of a well-qualified expert, that easily exceeds the standard for reasonable basis. (Whether Dr. Broekelschen, ultimately, meets his burden of establishing that he is entitled to compensation is entirely another question.)

Respondent argues that two factors support the denial of an award of attorneys' fees and costs at this time. The first point is that proceedings in Dr. Broekelschen's case have not been

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<sup>1</sup> It would be helpful if petitioner did not repeat letters (or numbers) when filing exhibits.

<sup>2</sup> The present decision is one of the first decisions by special masters addressing when an interim award of attorneys' fees and costs is appropriate. Although this decision is not binding in future cases, the decision may influence how other requests for an interim award of attorneys' fees and costs are resolved. Thus, the reasoning in the present decision is set forth in some detail.

Although the present decision is intended to resolve petitioner's claim for all attorneys' fees and costs incurred through the date of the motion, other results might be appropriate. For example, another reasonable alternative is to award some lower amount (especially if there is an amount to which respondent has not objected) and to reserve a decision on a higher (and disputed) amount for the final adjudication.

protracted. The second point is that Dr. Broekelschen has not suffered an “undue hardship.” Resp’t Opp’n at 4, quoting Avera, 515 F.3d at 1352. Neither argument is persuasive.

The length of anticipated delay should be considered in the context of the amount of money requested. If a long delay is anticipated, then an interim award is more appropriate. Similarly, the larger the amount of money reasonably requested, then an interim award becomes more appropriate. The way these two factors (delay and amount of money) relate cannot be described with a mathematical formula to create a bright-line test. Instead, special masters will consider them and the particular circumstances of each case.

Here, Dr. Broekelschen seeks approximately \$150,000 in attorneys’ fees and costs. This is not a trivial amount of money. Respondent’s argument that waiting for a sum of money of this magnitude is not an “undue hardship” seems hollow. Like anyone else, law firms prefer to receive money today, rather than money tomorrow. While there may be cases in which the amount of money at issue is so small that a delay in payment would not constitute a hardship, the present case is not one.

Respondent’s other argument is that the amount of time that has elapsed does not justify an award of attorneys’ fees and costs on an interim basis. This argument is more persuasive because the Federal Circuit in Avera actually affirmed the denial of an award of attorneys’ fees and costs because there was “only a short delay in the award pending the appeal.” Avera, 515 F.3d at 1352.

However, the procedural history in Avera distinguishes the cases. In Avera, petitioner filed a motion for attorneys’ fees and costs after a decision on entitlement was made. Thus, petitioner’s request for an interim award came much later in the case history. Practically, if the petitioner in Avera would have waited until the case concluded entirely, a relatively little amount of time would have passed after the petitioner actually had requested an interim award.

Here, there is much uncertainty about what will happen in Dr. Broekelschen’s case. If Dr. Broekelschen is found to be entitled to compensation, the case will enter the damages phase. Due to the severity of Dr. Broekelschen’s injury, the process of quantifying Dr. Broekelschen’s damages will probably take between one and two years. After damages are determined, a decision will be entered allowing either party to file a motion for review. See Vaccine Rule 23. Alternatively, Dr. Broekelschen may be found not to be entitled to compensation in which case a decision will be entered. Again, Dr. Broekelschen would be entitled to file a motion for review. Thus, a decision by the undersigned about entitlement would not necessarily end the case regardless of whether the decision was favorable or unfavorable to Dr. Broekelschen. For these reasons, there is a fair likelihood that the course of litigation may become protracted even if the litigation could not currently be described as prolonged.

Because Dr. Broekelschen has shown that a reasonable basis supports his claim and because no factor points against an award of attorneys’ fees and costs on an interim basis, he is

entitled to such an award. The next questions are the amount of attorneys' fees to which Dr. Broekelschen is entitled and the amount of costs to which he is entitled.

### **III. Attorneys' Fees**

Petitioners in the Vaccine Program who receive compensation are entitled to an award for their attorneys' fees and costs. Like other litigation allowing an award of attorneys' fees and costs, awards for attorneys' fees and costs in the Vaccine Program must be "reasonable." 42 U.S.C. § 300aa-15(e)(1) (2006).

Reasonable attorneys' fees are determined using the lodestar method – "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Avera, 515 F.3d at 1347-48 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)).

When a party seeks an award of attorneys' fees, the fee-applicant bears the burden of showing the reasonableness of the request. "The burden is not for the court to justify each dollar or hour deducted from the total submitted by counsel. It remains counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero. In the process and especially in the end result, [trial] courts must continue to be accorded wide latitude." Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1210 (10th Cir. 1986).<sup>3</sup>

Dr. Broekelschen seeks \$111,337.75 in attorneys' fees. This amount is primarily for work performed by Ms. Roquemore, although a small portion represents work performed by a paralegal. Respondent's primary objections challenge the reasonableness of the number of hours charged by Ms. Roquemore. These objections are addressed in section III.B., below. Before discussing whether the number of hours charged is reasonable, the hourly rates for Ms. Roquemore and her paralegal are established.

#### **A. Hourly Rates**

Ms. Roquemore requests compensation at two different rates. For the beginning of the case until December 31, 2007, Ms. Roquemore states that her hourly rate is \$310 per hour. Beginning January 1, 2008, Ms. Roquemore's hourly rate increased to \$340 per hour. Ms. Roquemore has not sought an hourly rate based on the "forum rate" discussed in Avera.

Respondent has not objected to Ms. Roquemore's hourly rates. These rates are reasonable because Ms. Roquemore is among the best attorneys representing petitioners in this Program and because Ms. Roquemore works in a relatively high cost area.

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<sup>3</sup> Although Mares did not interpret the attorneys' fee provision of the Vaccine Act, fee-shifting statutes are interpreted similarly. Avera, 515 F.3d at 1348.

Dr. Broekelschen also requests compensation for the work performed by a paralegal who worked for Ms. Roquemore at a rate of \$125.00 per hour. Respondent did raise an objection to the rate for Ms. Roquemore's paralegal on the ground that Dr. Broekelschen did not submit evidence to justify this hourly rate. However, the reply brief contains persuasive evidence that \$125.00 per hour is a reasonable rate for a paralegal working in southern California.

## **B. Number of Hours**

After the reasonable hourly rate for Ms. Roquemore and her paralegal is established, the next task is determining the reasonable number of hours. Respondent makes several objections, arguing that Ms. Roquemore spent an unreasonable amount of time on a number of tasks. Because these objections are general, they are discussed before an analysis of the amount of work claimed during different periods of this litigation.

### **1. Respondent's Objections**

With regard to the number of hours, respondent raises two principal objections. First, respondent observes that Ms. Roquemore grouped many tasks into one block. Respondent, therefore, seems to argue that the amount of time should be reduced. Second, respondent contends that Ms. Roquemore performed tasks that are more appropriately suited for a paralegal and should be compensated at paralegal rates. These objections are taken up in sequence.

#### **a. Block Billing**

Respondent observes that Ms. Roquemore has grouped several activities into one entry. See, e.g., entries for Feb. 5 - 11, 2008.

This method of recording time, which is often called "block billing," is not preferred. "Each task should have its own line entry indicating the amount of time spent on that task. Several tasks lumped together with one time entry frustrates the court's ability to assess the reasonableness of the request." Office of Special Masters, Guidelines for Practice under the National Vaccine Injury Compensation Program (Rev. Ed. 2004) § XIV.A.3. Cases from within the Vaccine Program have criticized this method. Jeffries v. Sec'y of Health & Human Servs., No. 99-670V, 2006 WL 3903710 \*8 (Fed. Cl. Spec. Mstr. Dec. 15, 2006); Plott v. Sec'y of Health & Human Servs., No. 92-633V, 1997 WL 842543 \* 5 (Fed. Cl. Spec. Mstr. April 23, 1997). These cases are consistent with cases decided by federal courts in California, the location of Ms. Roquemore's practice. See Welch v. Metropolitan Life Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007) (stating "block billing makes it more difficult to determine how much time was spent on particular activities."); In re Hoffman, 352 B.R. 879, 883-84 (Bkrp. N.D. Ca. 2006).

Ms. Roquemore represents that respondent has not challenged her method of recording her activities previously and also suggests that special masters have also not objected. Reply at 5-7. However, the better practice is to specify the amount of time for each individual activity.

All time recorded in blocks will not be eliminated. However, to the extent that Ms. Roquemore's records do not permit an examination of the reasonableness of the activity being performed, the lack of more specific information will be considered in evaluating the time requested.

**b. Paralegal Functions**

Respondent also argues that some of the work performed by Ms. Roquemore should have been performed by a paralegal. Respondent identifies four examples. Resp't Opp'n at 5.

Respondent is correct in that attorneys should not charge attorney rates for work that can be performed by support staff who charge a lower rate. Attorneys are expected to delegate some tasks to their paralegals.

Ms. Roquemore notes that the paralegal works "only part time." Ms. Roquemore appears to argue that because a paralegal may not be available to perform some duties, Ms. Roquemore must do what needs to be done. Reply at 6.

However, the staffing at Ms. Roquemore's firm is not the issue. Ms. Roquemore's firm may choose to employ paralegals or may choose not to employ paralegals.

A review of the time sheets shows that the vast majority of tasks performed by Ms. Roquemore were tasks appropriately billed at an attorney's rate. (However, as discussed below, some of the time spent on these tasks was unreasonable.) Nevertheless, a few tasks are more economically performed by a paralegal at a lower cost.

**2. Analysis of Different Periods of Time**

Respondent has challenged the number of hours worked by Ms. Roquemore. Respondent "objects to [the] number of hours charged for professional services. . . . [The number of hours requested] is excessive." Resp't Opp'n at 4-5.

The second factor in the lodestar formula is the reasonable number of hours. Quoting a decision by the United States Supreme Court, the Federal Circuit has explained some of the limits of the number of hours for which compensation may be sought.

The [trial forum] also should exclude from this initial fee calculation hours that were not "reasonably expended." . . . Counsel for the prevailing party should make a good-faith effort to exclude from a fee request 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. "In 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 v. Sec’y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (emphasis in original) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)). One reason a trial court possesses discretion to reduce the number of hours is that a trial court “is somewhat of an expert in the time that is required to conduct litigation.” Case v. Unified School Dist. No. 233, Johnson County, Kansas, 157 F.3d 1243, 1256 (10th Cir. 1998).

A decision by a special master to reduce the number of hours is entitled to deference because special masters are also familiar with the litigation. Saxton, 3 F.3d at 1521 (reversing decision of judge of the Court of Federal Claims ruling that the special master acted arbitrarily in reducing number of hours); Guy v. Sec’y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997).

Special masters are permitted to reduce the claimed number of hours to a reasonable number of hours by means of a bulk reduction. Special masters are not required to assess fee petitions on a line-by-line basis. Saxton, 3 F.3d at 1521 (approving special master’s elimination of 50 percent of the hours claimed); see also Guy v. Sec’y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997) (affirming special master’s reduction in the number of hours from 515.3 hours to 240 hours); Edgar v. Sec’y of Health & Human Servs., 32 Fed. Cl. 505 (1994) (affirming special master’s awarding only 58 percent of the numbers of hours for which compensation was sought). When the trial court uses a percentage reduction, the trial court should provide a “concise but clear’ explanation of its fee reduction.” Internat’l Rectifier Corp. v. Samsung Electronics, Co., 424 F.3d 1235, 1239 (Fed. Cir. 2005) (quoting Gates v. Deukmejian, 987 F.2d 1392, 1400 (9th Cir. 1993) and following Ninth Circuit law). In reducing the number of hours allowed, a trial court is not required to explain how many hours are appropriate for any given task. Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1259 (10th Cir. 2005); Mares, 801 F.2d at 1202-03 (10th Cir. 1986) (affirming district court’s reduction in the number of hours claimed for pre-trial preparation by 77 percent).

In other contexts, judges at the Court of Federal Claims have reduced the number of hours in requests for attorneys’ fees by percentages. See, e.g., Town of Grantwood Village v. United States, 55 Fed. Cl. 481, 489 (2003) (reduction of 30% for supplemental fee petition); Presault v. United States, 52 Fed. Cl. 667, 681 (2002) (reduction of 20% of the total requested fee).

Dividing this case into three different periods of time aids an analysis in determining whether the total number of hours was reasonable. The three periods of time are, first, from when Dr. Broekelschen initially consulted Ms. Roquemore to when the petition was filed on March 1, 2007; second, from March 2, 2007, through and including the conclusion of the hearing on February 13, 2008; and third, from February 14, 2008 through June 27, 2008, the date the motion for interim fees was filed.



The following chart summarizes the number of hours worked during each period of time.

<b>Summary of Attorneys' Fees Requested</b>					
Period	Atty Hrs	Atty Rate	Paralegal Hrs	Paralegal Rate	Total
1	40.0	\$300	0	\$125	\$12,000.00
2	46.1	\$300	17.45	\$125	\$16,011.25
2	125.8	\$345	----	-----	\$43,401.00
3	150.4	\$345	.3	\$125	\$51,925.50
TOTAL	362.3		17.75		\$123,337.75

**a. First Period**

In the first period, Ms. Roquemore prepared to file and actually did file the petition. The petition included not only almost all of the relevant medical records from Dr. Broekelschen, but also an expert report from Dr. Steinman. It is a rare – but welcome – event when petitioners file so much information with the petition.

In this period, Ms. Roquemore spent 40 hours. There was no time charged by a paralegal. Ms. Roquemore did not charge any time for gathering medical records. It appears that Dr. Broekelschen's wife gathered medical records primarily.

Almost all of Ms. Roquemore's activities during this period were reasonable. The only exception is that Ms. Roquemore spent some amount of time reviewing the medical records and creating a summary of the medical records. Exhibit B at 8. Although attorneys are required to spend some time reviewing medical records, a paralegal can summarize the medical records. Due to Ms. Roquemore's method of grouping tasks into blocks, exactly how much time Ms. Roquemore spent summarizing medical records is not known. However, a reasonable estimate can be made.

Preparing a medical summary probably took Ms. Roquemore two hours. However, it would have been less costly for a paralegal to accomplish the same task in three hours. Therefore, two hours of work at Ms. Roquemore's rate will be deducted and three hours at paralegal rates will be added.

**b. Second Period**

The second period of time spans from the filing of the petition to the completion of the entitlement hearing on February 13, 2008. During this period, Ms. Roquemore seeks compensation for working 171.9 hours plus an additional 17.45 hours for a paralegal. As

reflected in the chart above, Ms. Roquemore's hourly rate increased from \$300 to \$345 on January 1, 2008.

The primary activities performed during this period were obtaining a few medical records, reviewing respondent's report, obtaining a supplemental report from Dr. Steinman, analyzing the report of the respondent's expert, scheduling the hearing, and preparing for the hearing. The total number of hours spent on these tasks was unreasonable, at least for an attorney with Ms. Roquemore's experience.<sup>4</sup>

As discussed in the cases cited above, a trial court is not required to identify exactly which hours are unreasonable. Instead of setting forth the maximum number of hours, special masters may rely upon their experience in supervising the litigation and their experience in adjudicating other fee petitions.

Experience indicates that the number of hours spent was unreasonable. For example, for trial preparation, Ms. Roquemore appears to have spent more than 32 hours preparing the examinations of Dr. Broekelschen, Dr. Steinman, and Dr. Greenberg. During this same period of time, Ms. Roquemore spent additional time reviewing medical records, reviewing medical articles, and preparing her opening statement. The hearing itself lasted about 12 hours.

Time records from other cases indicate that other attorneys spend considerably less time preparing for hearings and still accomplish a reasonably-good result. It is certainly true that Ms. Roquemore's performance during trial was excellent – perhaps, better than the performance of most attorneys. Yet, even after recognizing that Ms. Roquemore advocated on behalf of Dr. Broekelschen very well, it is difficult to understand how so much time could have been spent to prepare for this hearing.

Consequently, a reduction in the number of hours to a reasonable level is warranted. The appropriate reduction is ten percent.

**c. Third Period**

The third period of time comprises activities from the completion of the hearing until June 27, 2008, the date on which the motion for interim attorneys' fees and costs was filed. Ms. Roquemore's primary activities during this time were (1) attempting to resolve this case through an agreement, (2) preparing a post-hearing brief, and (3) preparing the request for attorneys' fees

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<sup>4</sup> An experienced attorney warrants a higher hourly rate because the attorney is expected to accomplish the same work in a shorter amount of time than a less experienced attorney. If the attorney spends the same amount of time to accomplish the same result, then a premium (higher hourly rate) is not warranted. Ms. Roquemore's hourly rate is among the highest hourly rate for attorneys practicing in the Vaccine Program. Therefore, she is expected to work efficiently.

and costs. Ms. Roquemore spent 150.4 hours during this time. A paralegal spent almost no time – only 0.3 hours.

The total number of hours, again, is unreasonable. A few items demonstrate inefficiency. Ms. Roquemore has claimed more than 35 hours for reviewing the transcript of the hearing. Exhibit B at 48. The transcript is 410 pages. The undersigned’s experience indicates that reading one page per minute is reasonable for an experienced attorney. By this benchmark, a 410-page transcript can be read in about seven hours. Ms. Roquemore requests compensation for five times what would seem to be a reasonable rule-of-thumb. Indexing a transcript is another task that could be delegated to a paralegal.

Another activity that took an unreasonable amount of time is the amount of time spent preparing the post hearing brief. In addition to spending more than 35 hours for reading the transcript, Ms. Roquemore spent approximately 50 hours for briefing. Exhibit B at 50. Ms. Roquemore separately charged time for reading cases. Exhibit B at 8, 11, 47. Altogether, Ms. Roquemore spent much more time on preparing a post hearing brief than other attorneys in the Vaccine Program.

To adjust the number of hours to a reasonable amount, 20 percent will be reduced for activities during this period.

**C. Results**

The following chart incorporates the modifications as described in the previous sections. The total amount awarded for attorneys’ fees is \$107,035.75. The total amount of reduction in attorneys’ fees is \$16,302.00.

<b>Summary of Attorneys’ Fees Awarded</b>					
Period	Adjusted Atty Hrs	Atty Rate	Paralegal Hrs	Paralegal Rate	Total
1	38.0	\$300	3.0	\$125	\$11,775.00
2	41.5	\$300	17.45	\$125	\$14,631.25
2	113.2	\$345	----	\$125	\$39,054.00
3	120.4	\$345	.3	\$125	\$41,575.50
<b>TOTAL</b>	<b>313.1</b>		<b>20.75</b>		<b>\$107,035.75</b>

Even after reducing the attorneys’ fees award, the actual amount of the award is the highest amount of attorneys’ fees awarded by the undersigned. Because this award is an award

of interim attorneys' fees, Ms. Roquemore may submit, at the conclusion of this case, another request for attorneys' fees for activities performed between June 27, 2008 to the end of the case.

#### **IV. Costs**

In addition to an interim award for his attorneys' fees, Dr. Broekelschen is entitled to an interim award for his costs. 42 U.S.C. § 300aa-15(e); Avera, 515 F.3d at 1352. Dr. Broekelschen's request includes two different categories of costs — costs not related to an expert and costs related to obtaining Dr. Steinman's opinion.

The total amount of costs requested is \$29,910.26. Dr. Broekelschen is awarded \$27,335.26 in costs.

##### **A. Costs Not Related to an Expert**

Ms. Roquemore states that her firm has incurred \$6,051.26 in costs excluding costs associated with Dr. Steinman. Pet'r Mot., filed June 27, 2008, and exhibit E thereto.<sup>5</sup>

While this motion was pending, Ms. Roquemore submitted documentation to support the costs claimed. The costs are awarded in full. However, one adjustment is required. The Clerk's Office, erroneously, informed Ms. Roquemore that the Court did not receive the filing fee when Ms. Roquemore filed Dr. Broekelschen's petition. Ms. Roquemore sent another check for the filing fee. The Clerk's Office has refunded the amount erroneously received a second time (\$250). Thus, Ms. Roquemore is awarded \$5,801.26.

##### **B. Expert Costs**

Dr. Broekelschen also requests an award to reimburse him for the cost of retaining Dr. Steinman. The total amount requested is \$23,859.00. This chart summarizes the amount requested by him.

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<sup>5</sup> Actually, Ms. Roquemore requested \$1,000 more. However, the entry for May 21, 2008 indicates that \$1,000 is associated with Dr. Steinman.

<b>Components of Dr. Steinman's Requested Compensation</b>				
Activity	Number of Hours	Hourly Rate	Subtotal	
Work in 2007	17	\$400.00	\$6,800.00	
Work in 2008	31	\$500.00	\$15,500.00	
Fee for time				\$22,300.00
Expenses				\$1,559.00
<b>TOTAL</b>				<b>\$23,859.00</b>

Declaration of Dr. Steinman, filed Jun. 27, 2008, Exhibit B.

Respondent maintains an objection to Dr. Steinman's hourly rate for 2008, which is \$500 per hour. Respondent is correct that Dr. Broekelschen has not submitted sufficient evidence to establish that \$500 per hour is reasonable in 2008. Therefore, Dr. Steinman's hourly rate is reduced to \$425.00 per hour.

Respondent did not object to a proposed hourly rate of \$400 per hour for Dr. Steinman in 2007. See Resp't Opp'n, filed Aug. 29, 2008, at 8. This implicit concession is appropriate because \$400 per hour appears reasonable for a neurologist with Dr. Steinman's experience. Dr. Steinman has been practicing medicine for more than 30 years and has been board-certified in neurology since 1984. He also has an expertise in immunology and has received at least five patents.

While \$400 per hour in 2007 is reasonable, there is a fair question as to whether \$500 per hour in 2008 is also reasonable. The increase of \$100 per hour is an increase of 25 percent, which appears not to be justified solely as a general change with inflation. Dr. Steinman explains that his increase to \$500 per hour is to align his rates with the general market rates. Steinman Declaration ¶ 3.

The information submitted by Dr. Steinman about the market for other neurologists does not support an increase to \$500 per hour. Dr. Steinman compares himself to four other doctors, Dr. Paul Utz, Dr. Norman Latov, Dr. Jonathan Schleimer and Dr. Marcel Kinsbourne. However, these comparisons do not support a rate of \$500 per hour.

For Dr. Utz, Dr. Steinman states that "the United States Government approved his hourly fees in the range of \$500 to \$550 per hour" and cites two cases in support. An analysis shows that someone (either Dr. Utz or Dr. Steinman) is mistaken.

Dr. Steinman's reference to the "United States Government" is ambiguous. It could refer to the Office of Special Masters, the entity that actually determines the hourly rate for experts. If so, Dr. Steinman's information is certainly wrong because the special masters in the two cases cited in Dr. Steinman's declaration have not yet determined the hourly rate for Dr. Utz.

"United States Government" could also refer to the United States Department of Justice. However, the likelihood that the United States Department of Justice has agreed that Dr. Utz is entitled to \$500 (or more) per hour is extremely remote. The present case with Dr. Steinman illustrates the general (if not universal) practice of the Department of Justice to object to hourly rates equaling \$500 per hour. Thus, the information about Dr. Utz does not constitute persuasive evidence that Dr. Steinman is entitled to \$500 per hour.

For Dr. Latov, Dr. Steinman states that Ms. Roquemore has informed him that Dr. Latov charges \$500 per hour. Setting aside the problem of hearsay, there is no verifiable information that Dr. Latov has actually received \$500 per hour. For example, a search on Westlaw reveals no case (since 2000) setting Dr. Latov's hourly rates.

For Dr. Schleimer, Dr. Steinman has presented a rate sheet showing that Dr. Schleimer charges different amounts for different tasks, ranging up to \$500 per hour for testifying. There are two problems with comparing Dr. Steinman to Dr. Schleimer. Again, there is a problem that no evidence indicates that a court has accepted the reasonableness of Dr. Schleimer's proposed rates. A search of Westlaw revealed no cases. Second, even if the different rates were approved by a court, Dr. Schleimer charges different amounts for different tasks. Specifically, Dr. Schleimer charges \$300 per hour for reviewing records. Dr. Steinman charges more for this task. Although Dr. Steinman compares his proposed hourly rate for testifying to Dr. Schleimer's listed hourly rate for testifying, Dr. Steinman overlooks Dr. Schleimer's lower rate for reviewing records.

Finally, Dr. Steinman notes that Dr. Kinsbourne has been awarded \$500 per hour. This statement is accurate. This determination was based, in part, on Dr. Kinsbourne's long history (more than 15 years) of testifying in the Vaccine Program. Dr. Kinsbourne's relatively high hourly rate reflects a premium for increased efficiency. Simon v. Sec'y of Health & Human Servs., No. 05-941V, 2008 WL 623833 \*7 (Fed. Cl. Spec. Mstr. Feb. 21, 2008). Dr. Steinman, although very well credentialed in other respects, does not have this long history of testifying in this Program.

This case demonstrates some of the challenges in producing probative evidence. See Exhibit B at 41 (Ms. Roquemore's entry on 2/26/08, requesting more information from Dr. Steinman on hourly rates). Some experts may be reluctant to disseminate information about their hourly rate for several reasons. Experts who communicate information about hourly rates probably have a natural inclination to give only information about the highest price they receive. These experts may not note special circumstances warranting the rate. Experts, like everyone

else, have an incentive to maximize their income. This inclination suggests that statements about experts' rates should be analyzed with care.

Here, the evidence submitted to support Dr. Steinman's proposed hourly rate of \$500 per hour does not preponderate in favor of an award of that rate. If \$400 per hour is a reasonable rate for 2007, the \$425 per hour is reasonable rate for 2008. An increase of \$25 per hour is an increase of 6.25 percent. This rate of increase is more aligned with general rates of inflation. See Simpson Elec. Co. v. NLRB, 654 F.2d 15, 16 (7th Cir. 1981) (taking judicial notice of inflation); Kunz Const. Co. v. United States, 16 Cl. Ct. 431, 438 (1989) (permitting judicial notice of inflation when determining hourly rates pursuant to the Equal Access to Justice Act). Consequently, for the 31 hours worked in 2008, Dr. Steinman will be compensated at a rate of \$425 per hour.

Besides a request for an award for Dr. Steinman's time, Dr. Broekelschen includes a request for an award for Dr. Steinman's expenses. During the briefing process, Dr. Steinman submitted documentation to justify his claimed expenses. Thus, Dr. Broekelschen is awarded \$1,559 for Dr. Steinman's costs.

<b>Components of Dr. Steinman's Awarded Compensation</b>				
Activity	Number of Hours	Hourly Rate	Subtotal	
Work in 2007	17	\$400.00	\$6,800.00	
Work in 2008	31	\$425.00	\$13,175.00	
Fee for time				\$19,975.00
Expenses				\$1,559.00
<b>TOTAL</b>				<b>\$21,534.00</b>

V. Summary

Dr. Broekelschen is awarded the following items:

Summary of Attorneys' Fees and Costs

Attorneys' Fees	\$107,035.75
Attorneys' Costs (other than expert)	\$5,801.26
Expert Fees	\$19,975.00
Expert Costs	\$1,559.00
TOTAL	\$134,371.01

Petitioner is entitled to an award of interim attorneys' fees and attorneys' costs. The special master determines that there is no just reason to delay the entry of judgment on interim attorneys' fees and attorneys' costs. Therefore, in the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment in petitioner's favor for **\$134,371.01** in interim attorneys' fees and attorneys' costs. Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

IT IS SO ORDERED.

s/Christian J. Moran

Christian J. Moran  
Special Master