

March 25, 2021

State of Vermont**Department of Labor**

Workers' Compensation and Safety Division

5 Green Mountain Drive

P.O. Box 488

Montpelier, VT 05601-0488

www.labor.vermont.gov

[phone] 802-828-2286
[fax] 802-828-2195 or
802-828-0408
[tty] 800-650-4152

March 25, 2021

Mark Kolter, Esq.
Darby Kolter & Nordle, LLP
996 South Main Street, Suite 1A
Stowe, VT 05672

Keith Kasper, Esq.
McCormick, Fitzpatrick, Kasper & Burchard, P.C.
40 George Street
P.O. Box 638
Burlington, VT 05402

Re: Jori Fairbanks v. Town of Bristol
State File No. MM-57901

Dear Counselors:

I have reviewed Claimant's two motions for costs and attorney fees in this matter, Defendant's response in opposition to the second of Claimant's motions, and Claimant's response in support thereof. More than thirty days have passed since the most recent filing; thus, Claimant's request is ripe for determination under Workers' Compensation Rule 20.1700.

This case arises out of an experience that Claimant endured while serving as a police officer for Defendant on December 4, 2019. Late that night, she responded to a call to assist two state troopers in a domestic violence call. The alleged perpetrator stepped out of his truck, and the state troopers initially attempted to deescalate the situation, but the man picked up a rifle and began yelling. Both state troopers fired their weapons at the alleged perpetrator and struck him five times. Claimant took cover in a ditch during the shooting and then rendered first aid to the severely-injured perpetrator while awaiting an ambulance.

Claimant filed a workers' compensation claim for benefits relating to posttraumatic stress disorder (PTSD) stemming from that incident. Defendant denied her claim, contending that the 2017 amendment to Vermont's workers' compensation statute creating a presumption of compensability for certain first responders diagnosed with PTSD was



unconstitutionally vague and unenforceable. Claimant subsequently hired attorney Mark Kolter, who filed an entry of appearance on her behalf in March 2020.

After two informal conferences, the Department found that it lacked jurisdiction over Defendant's constitutional argument and that Claimant had met her burden under the statutory presumption of compensability. On September 11, 2020, the Department issued an interim order of benefits covering medical benefits and retroactive temporary disability benefits beginning January 29, 2020, as well as "any other benefits" to which Claimant may have been entitled. Defendant appealed that order, and this case was referred to the formal hearing docket.

Claimant originally moved for attorneys' fees and costs on October 6, 2020. In that motion, she sought \$14,375.00 in fees and \$6.70 in costs. Defendant did not file any response in opposition to that request and voluntarily paid all the fees and costs that Claimant sought. On December 7, 2020, the parties filed a Stipulation of Dismissal of this case from the formal hearing docket. That Stipulation provided in relevant part that the parties "agreed to accept the compensability of the claim and have agreed on a compromise average weekly wage and compensation rate calculation thereon. No other claims or defenses have been waived by this stipulation and all other rights and obligation[s] vested in the parties in this matter remain."

Two days later, on December 9, 2020, Claimant filed a second motion for attorneys' fees and costs for time spent on this case after Defendant's payment of the fees sought in Claimant's first petition. Defendant opposes this request, arguing that Claimant's most recent request is based on the same interim order as her original request, and that Defendant has continued to pay medical and indemnity benefits since that time. Defendant contends that Claimant has advanced "no new basis for an award of attorney fees other than that for which she has already been compensated with her October 6 Attorney Fee Petition" and that awarding attorney fees would amount to an "Administrative Law equivalent of Double Jeopardy, continually attempting to punish Defendant for conduct for which Claimant has already received compensation." In response, Claimant argues in part that the Stipulation of Dismissal constituted a new basis for an award because Defendant accepted what had been a denied claim and Claimant's compensation rate increased from \$576.29 to \$705.11.

The Commissioner has discretion to award costs and fees in claims that are resolved short of formal hearing pursuant to 21 V.S.A. § 678. Subsection (d) of that statute provides as follows:

In cases for which a formal hearing is requested and the case is resolved prior to formal hearing, the commissioner may award reasonable attorney fees if the claimant retained an attorney in response to an actual or effective

denial of a claim and thereafter payments were made to the claimant as a result of the attorney's efforts.

Recovery of costs and fees at the informal dispute resolution level is the exception rather than the rule. See Workers' Compensation Rule 20.1500. In such cases, the Department considers whether awarding fees will further the goals of (a) maintaining appropriate standards of employer and adjuster conduct; (b) discouraging excessive and unnecessary attorney involvement; and/or (c) encouraging the parties to make effective use of the informal dispute resolution process. *Id.*; *Herring v. State of Vermont Department of Liquor Control*, Opinion No. 06-15WC (March 24, 2015).

Although no formal hearing occurred in this case, Claimant ultimately obtained the relief that she would have obtained had she prevailed at the formal hearing, in that Defendant accepted the compensability of her claim. That is a more final result than the interim order. The parties' Stipulation also resulted in an increase in Claimant's indemnity benefits because it resulted in a higher compensation rate. These results stemmed from her attorney's efforts after the date of that interim order. As such, Claimant has substantially prevailed on her claim thanks to her attorney's efforts, and Vermont law would authorize an award of attorneys' fees and costs.

However, I do not find that the factors enumerated above warrant such an award in this case. With respect to the first factor, there is no evidence of adjuster or employer misconduct after the issuance of the interim order. Indeed, Defendant voluntarily paid all the fees Claimant originally requested and worked with Claimant's counsel to negotiate an acceptable compensation rate. These actions benefitted rather than harmed Claimant. With respect to the second factor, unnecessary attorney involvement, Defendant had the right to assert its constitutional argument, and it pursued the appropriate avenues to advance that position. Claimant would be better served in a case involving such an argument by having an attorney than not. Indeed, purely legal disputes are precisely the kinds of cases in which attorney involvement is often the most helpful and necessary. With respect to the third factor, the encouragement of effective use of the informal dispute resolution process, substantially all the time invoiced in Claimant's most recent petition relates to activity after the issuance of the interim order at the informal level. As such, this factor does not bear in any significant way on the analysis of Claimant's present petition. As such, I do not find that these discretionary factors justify an award of attorneys' fees and costs.

For all these reasons, Claimant's motion for attorneys' fees and costs is **DENIED**.

Mark Kolter, Esq.
Keith Kasper, Esq.
March 25, 2021
Page 4

Yours sincerely,

A handwritten signature in dark ink, appearing to read "Stephen W. Brown". The signature is fluid and cursive, with the first name "Stephen" being more prominent and the last name "Brown" following in a similar style.

Stephen W. Brown
Administrative Law Judge