

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHRISTI TAKES,

Claimant,

vs.

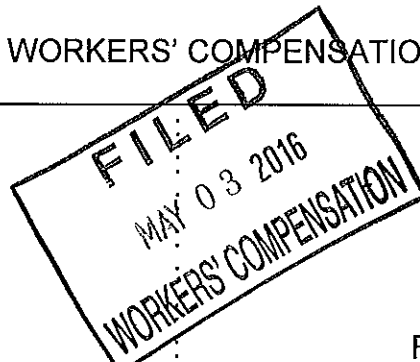
PRIME RUT INC., d/b/a THE RUT BAR
AND GRILL,

Employer,

and

SECOND INJURY FUND OF IOWA,

Defendants.



File No. 5053381

ARBITRATION

DECISION

Head Note Nos.: 1402, 1403,
1801, 1801.1, 2500

STATEMENT OF THE CASE

Christi Takes, claimant, filed a petition in arbitration seeking workers' compensation benefits from Prime Rut Inc., d/b/a The Rut Bar and Grill, an unknown workers' compensation insurance carrier, and The Second Injury Fund of Iowa. On December 11, 2015, an entry of default was entered by this agency against the Prime Rut Inc., d/b/a The Rut Bar and Grill, (hereinafter, "Prime Rut, Inc.") employer, and unknown workers' compensation carrier. The entry of default specifically states that the Second Injury Fund of Iowa shall not be bound by the default judgment entered against Prime Rut Inc.

A telephonic hearing was held on February 25, 2016. Neither Prime Rut, Inc. nor a workers' compensation carrier appeared at the hearing. There was no court reporter present; claimant waived her right to a court reporter and agreed to have the hearing recorded digitally. The Second Injury Fund of Iowa opted not to participate in the hearing. Presiding at the hearing was Deputy Workers' Compensation Commissioner Erin Q. Pals.

Claimant, Christi Takes, was the only witness who testified live at trial. The evidentiary record also includes claimant's Exhibits 1-11. Because an entry of default had been entered, the issues of whether there was an employer-employee relationship, whether claimant sustained an injury that arose out of and in the course of her employment, and whether there is a causal connection between the injury and the

alleged disability were not at issue. It should be noted that the issue of permanency was not ripe at the time of the telephonic hearing.

ISSUES

The parties submitted the following issues for resolution:

1. Claimant's entitlement to temporary benefits.
2. Appropriate weekly rate.
3. Claimant's entitlement to medical benefits.
4. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

At the time of hearing Ms. Takes was 45 years of age. She resided in Cedar Rapids with her four daughters. Ms. Takes sustained a work injury on December 31, 2014, while working for Rut, Inc. She was hired by defendant in August of 2012. She worked at the defendant's restaurant/bar as a bartender, cook, and trainer. She had the ability to hire and fire employees. She also did the book work. She testified that she did everything needed to run the establishment. She was typically the only employee working during her shifts. She worked approximately 32 hours per week, but it seemed they were always short-staffed so she filled in for others. Sometimes she worked overtime. She was paid \$7.35 per hour. However, when she did book work she was paid separately at the rate of \$30.00 per day. She estimates that the book work took her approximately one to one and a half hours. Ms. Takes was paid every Monday. (Testimony)

On December 31, 2014, she was waiting on a group of six men. She went to the deep freeze in the dining room to retrieve some fish for their meals. Unfortunately, her left heel became caught under the clearance of the freezer causing injury. She dropped to the floor and was not able to get up. She was taken via ambulance to the hospital. Her employer was at the restaurant at the time of her injury. (Testimony)

Ms. Takes was seen at UnityPoint Health in Cedar Rapids. She was diagnosed with a left Achilles rupture. (Ex. 1, pp. 1-6) She was referred to a specialist, Scott R. Ekroth, M.D. He recommended she undergo an operation. She had the first procedure on January 23, 2015. Dr. Ekroth performed a left Achilles repair and an excision of left calcaneal bone spurs. (Ex. 1, pp. 10-11)

Ms. Takes testified that she was able to return to work for the defendant only one time between the injury and the date of the first operation. She went in for

approximately four and one half hours on a Saturday while the owner ran some errands. She only went in because he was desperate for some help. She basically just sat there while he was gone. She did not do any cooking. She thinks she might have served a couple of drinks. (Testimony)

Ms. Takes testified that following surgery she had restrictions. The plan was for her to be no weight bearing for two weeks, in a cast for 8 weeks, and then in a boot for 12 weeks. However, her foot became infected and she had to undergo another operation on March 18, 2015. (Testimony)

The medical records reflect that after surgery she continued to follow up with Dr. Ekroth and his office, Physicians' Clinic of Iowa, P.C. In February of 2015, Ms. Takes was doing okay, had her pain under control, and placed in a boot. In March she noticed an open wound and received conservative wound treatment which was not successful. On March 1, 2015, Dr. Ekroth performed a second surgery to treat the non-healing wound and infection. (Ex. 1, pp. 12-16)

Ms. Takes testified that at the beginning of March 2015, she tried to talk with her boss about possibly returning to work with restrictions. However, she was told that if she sued them then she would no longer be an employee there. It was around this time that she reported to work a short four hour shift. However, the owner met her in the driveway of the restaurant/bar and said he would save her some steps because she was fired. He explained that he just got a phone call from an attorney about a workers' compensation claim involving her. Prime Rut, Inc. never contacted Ms. Takes again. (Testimony)

By July of 2015, Ms. Takes' wound continued to improve and there were no clear signs of infection. The doctor was not surprised that she was still quite sore because it was likely that the tendon was still trying to heal after the infection. (Ex. 1, p. 20) Dr. Ekroth saw Ms. Takes again on September 17, 2015, and noted that her wound was finally healed and there were no signs of infection. She did report some pain and weakness when weight bearing. The doctor recommended some formal physical therapy to try and gain strength and functionality out of the Achilles. She was to return for one final check in three months. (Ex. 1, p. 22)

Eventually, her wound healed and she was able to begin physical therapy in October of 2015. (Ex. 4) At this point, she was using a walker, wheelchair, and/or crutches. She attended therapy three times a week. Ms. Takes testified that the therapy was very painful. (Testimony) On November 30, 2015, Ms. Takes began a sit-down job. She worked 10 hours per day so she no longer had time to attend physical therapy.

Ms. Takes testified that Dr. Ekroth would like to see her again, but she currently does not have an appointment scheduled. She has not been told that she has reached maximum medical improvement. She has not been given any type of permanent impairment rating, but her primary care physician has told her that she will have

permanent damage. Ms. Takes testified that she has a permanent handicapped sticker. (Testimony)

Ms. Takes testified that as a result of her heel injury she also has knee problems. She describes her current ability to walk as very labored. She has a definite limp and is always in pain. Stairs are especially hard for her because her tendon is weak and that it gives out on her. When she shops she uses handicapped carts. Her home contains a lot of stairs which she tries to avoid. For example, if she has to go upstairs she will just stay upstairs, if possible. She estimates that she can only stand for approximately ten minutes at a time. She requires frequent breaks. She currently takes Meloxicam and Tylenol. (Testimony)

Dr. Dvorak restricted her to sit down work. Her physical therapist told her that she is not physically able to go back to work at Prime Rut, Inc. Although one of her therapy goals was to be able to return to that job, she never met that goal. (Testimony)

Ms. Takes testified that she has never been paid for her medical treatment or the mileage she incurred obtaining the treatment. She submitted an affidavit which contains medical expenses that were incurred as a result of the work injury. (Ex. 6) There is no evidence to suggest that these bills are not related to the work injury. I find that these medical bills and expenses were necessitated by the December 31, 2014, work injury at the defendant's.

Ms. Takes submitted an affidavit of medical mileage which she incurred as a result of the work injury. I find that Ms. Takes incurred medical mileage as set forth in Exhibit 7 as a result of the work injury.

Claimant contends that she was paid on an hourly basis and that she has an average weekly wage of \$376.09. She further contends that at the time of the work injury she was single and entitled to two exemptions; thus, resulting in a weekly workers' compensation rate of \$255.94. I find that claimant has shown by a preponderance of the evidence that her average weekly wage at the time of the injury was \$376.09 and that she was single and entitled to two exemptions. Thus, claimant's weekly workers' compensation rate is \$255.94. (Ex. 9 & 10)

Additionally, Ms. Takes has never been paid for the time she was off work due to the work injury. The only payment she has received was for the approximately four hours she worked on the one day when the owner ran errands. Otherwise, Ms. Takes has not received any wages or temporary workers' compensation benefits. At some point, she did receive some unemployment benefits until she gained employment on November 30, 2015. Claimant asserts she is entitled to temporary total disability benefits from January 4, 2015 to January 9, 2015, and from January 17, 2015 until November 29, 2015. (Ex. 11) I find claimant has shown entitlement to these benefits by a preponderance of the evidence.

Claimant further asserts that she is entitled to temporary partial disability benefits from January 10, 2015 to January 16, 2015 in the amount of \$228.97. (Ex. 11) I find claimant has shown entitlement to these benefits by a preponderance of the evidence.

Claimant is seeking an assessment of costs as set forth in Exhibit 8. Specifically, claimant is seeking reimbursement of the filing fee in the amount of \$100.00 and service of the petition in the amount of \$6.48. I find that these are appropriate costs under 876 IAC (3) & (7). Claimant is also seeking a recovery for medical reports from three medical providers. These costs appear to be for reimbursement for the costs of obtaining medical records. I find that these are not appropriate costs under 876 IAC 4.33. Thus, defendant is assessed costs in the amount of \$106.48.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Based on the above findings of fact I conclude that defendant is responsible for the medical expenses and medical mileage set forth in Exhibits 5, 6, and 7.

We now turn to the issues of weekly workers' compensation benefits. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6). Based on the above findings of fact I conclude that claimant's weekly workers' compensation benefits shall be paid at the rate of two hundred fifty-five and 94/100 dollars (\$255.94).

In the present case, claimant is seeking an award of temporary total disability benefits. When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33.

Ms. Takes is also seeking an award of temporary partial disability benefits. An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

As noted above, I concluded that Ms. Takes has shown entitlement to the temporary total disability benefits from January 4, 2015 to January 9, 2015 and from January 17, 2015 to November 29, 2015. I further concluded defendant is responsible to pay temporary partial disability benefits from January 10, 2015 to January 16, 2015 in the amount of \$228.97.

Defendant is responsible to pay weekly benefits at the appropriate rate, plus interest pursuant to Iowa Code section 85.30.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was generally successful in her claim I find it is appropriate to assess costs against the defendant as set forth above. Thus, defendant shall reimburse claimant costs as set forth above.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of two hundred fifty-five and 94/100 dollars (\$255.94).

Defendant shall pay temporary total disability benefits from January 4, 2015 to January 9, 2015 and from January 17, 2015 to November 29, 2015.

Defendant shall pay temporary partial disability benefits from January 10, 2015 to January 16, 2015 in the amount of two hundred twenty-eight and 97/100 dollars (\$228.97).


All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendant is responsible for the medical expenses and medical mileage as set forth above.

Defendant shall reimburse claimant's costs in the amount of one hundred six and 48/100 dollars (\$106.48).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 3rd day of May, 2016.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.