BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHRISTI TAKES,

Claimant,

vs.

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

Employer,
Defendant.

File No. 5053381

ARBITRATION

DECISION

Head Notes: 1803, 2500, 2910, 4000.2

STATEMENT OF THE CASE

Claimant, Christi Takes, filed a petition in arbitration seeking workers' compensation benefits from Prime Rut, Inc. d/b/a The Rut Bar and Grill, employer, and the Second Injury Fund of Iowa (Fund), both as defendants, as a result of an injury sustained on December 31, 2014. On November 8, 2017, the undersigned issued an entry of default against defendant-employer. Hearing on the default and the underlying arbitration petition were set for hearing on November 29, 2017 before Deputy Workers' Compensation Commissioner Erica J. Fitch. Prior to the scheduled hearing, claimant reached a settlement of her claim against the Fund, leaving only the default matter pending.

In lieu of hearing and oral testimony, claimant elected to submit written evidence and argument for consideration. Defendant-employer failed to enter an appearance or otherwise participate in the claim. Pursuant to claimant's waiver of hearing and defendant-employer's lack of participation, the record in this case consists of claimant's exhibits 1 through 4. Claimant also submitted a hearing brief for consideration, the matter being fully submitted on November 29, 2017.

ISSUES

The parties submitted the following issues for determination:

1. The extent of permanent disability to claimant's left lower extremity;
2. Whether defendant-employer is responsible for claimed medical expenses;
3. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much;

4. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39; and

5. Specific taxation of costs.

Given the entry of default against defendant-employer, the issues of whether there was an employer-employee relationship, whether claimant sustained an injury which arose out of and in the course of her employment, and whether there is a causal connection between the injury and the alleged disability, do not require determination.

FINDINGS OF FACT

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

The background facts of claimant's work history and injury of December 31, 2014 are set forth in an arbitration decision of May 3, 2016. Following a hearing on February 25, 2016, a distinct deputy commissioner issued an arbitration decision which found:

> 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)
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> 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)
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> 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)

(Ex. 2, p. 2)

> 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)
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> ...
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> 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.

(Ex. 2, p. 3)

At the time of the original arbitration hearing, claimant did not request an award of permanent disability benefits. She raised only the issues of entitlement to temporary disability benefits, proper rate of compensation, defendant-employer's responsibility for medical expenses, and a specific taxation of costs. (Ex. 2, p. 2) The presiding deputy awarded claimant temporary total disability benefits from January 4, 2015 through January 9, 2015 and January 17, 2015 through November 29, 2015, as well as temporary partial disability benefits from January 10, 2015 through January 16, 2015 in the amount of $228.97. The deputy determined claimant's proper rate of compensation as $255.94. Defendant-employer was also found responsible for claimed medical expenses. (Ex. 2, pp. 4-6) No appeals were taken from the deputy's decision.

On November 14, 2016, claimant filed a new original notice and petition in arbitration seeking workers' compensation benefits from defendant-employer and defendant-Fund.

At the arranging of claimant's counsel, on May 13, 2017, claimant presented to board certified orthopedist, Theron Jameson, D.O. for independent medical examination (IME). (Ex. 1, p. 11) Dr. Jameson performed a records review, physical examination, and interview of claimant. (Ex. 1, pp. 1-7) Thereafter, Dr. Jameson issued a diagnosis of an Achilles tendon rupture on December 31, 2014 with ongoing pain of the Achilles tendon, secondary to failed repair with postoperative infection. Dr. Jameson opined claimant achieved maximum medical improvement as of December 28, 2015 and did not issue any additional treatment recommendations. He opined claimant sustained permanent impairment of 7 percent left lower extremity based on loss of eversion and dysesthesia associated to the sural nerve. Dr. Jameson also recommended permanent restrictions of: no work at elevated heights; no ladder climbing; no work on uneven ground; no pushing, pulling, or lifting over 10 pounds; and limitation to seated work. (Ex. 1, p. 7)

Claimant submitted medical bills incurred on January 20, 2015, March 13, 2015, and April 15, 2015. (Ex. 3, pp. 1-10) I find these services were rendered in connection to the compensable December 31, 2014 injury and further, that the treatment was reasonable and necessary, and the charges incurred were fair and reasonable.

CONCLUSIONS OF LAW

The first issue for determination is the extent of permanent disability to claimant's left lower extremity.

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).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Claimant argues she sustained a permanent impairment of 7 percent left lower extremity as a result of the work injury of December 31, 2014. Claimant relies upon the opinion of Dr. Jameson in support of her argument. The opinion of Dr. Jameson is unrebutted and the undersigned finds no inherent flaw in Dr. Jameson's opinion or methodology.

It is therefore determined that claimant has proven by a preponderance of the evidence that the work injury of December 31, 2014 resulted in permanent impairment of 7 percent of the left lower extremity. This award entitles claimant to 15.4 weeks of permanent partial disability benefits (7 percent x 220 weeks = 15.4 weeks). Such benefits shall be paid at the weekly rate of $255.94 and shall commence on November 30, 2015, the day following termination of claimant's healing period, as set forth in the May 3, 2016 arbitration decision.

The next issue for determination is whether defendant-employer is responsible for claimed medical expenses.

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).

As set forth *supra*, claimant incurred medical expenses in treatment of the work related injury of December 31, 2014. There is no evidence these charges were unnecessarily incurred or that the charges were not fair and reasonable. Accordingly, defendant-employer is responsible for the claimed medical expenses incurred on January 20, 2015, March 13, 2015, and April 15, 2015.

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Iowa Code 86.13, as amended effective July 1, 2009, states:

> 4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall

award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Claimant seeks an award of penalty benefits based upon defendant-employer's failure to pay the temporary disability benefits awarded in the May 3, 2016 arbitration decision, as well as a failure to pay any permanent partial disability benefits. Defendant-employer has failed to participate in litigation before this agency with respect to either the July 8, 2015 or November 14, 2016 original notice and petitions. There is no evidence defendant-employer paid any benefits to claimant with respect to the compensable injury of December 31, 2014; accordingly, claimant has demonstrated a denial of benefits as required by section 86.13. As defendant-employer failed to participate in hearing, defendant-employer has failed to show reasonable cause or excuse for this denial.

Accordingly, an award of the maximum penalty allowable is warranted. The arbitration decision of May 3, 2016 awarded claimant $228.97 in temporary partial

disability benefits and $11,809.84 in temporary total disability benefits (46.143 weeks x $255.94 = $11,809.84). Penalty benefits in the amount of $6,019.41 is awarded on unpaid temporary disability benefits (50 percent x $12,038.81 = $6,019.41). By this decision, the undersigned awarded claimant 15.4 weeks of permanent partial disability benefits, with a lump sum accrued value of $3,941.48. Penalty benefits in the amount of $1,970.74 is awarded on unpaid permanent disability benefits (50 percent x $3,941.48 = $1,970.74). Defendant-employer shall pay unto claimant a total penalty of $7,990.15 ($6,019.41 + $1,970.74 = $7,990.15).

The next issue for determination is whether claimant is entitled to reimbursement for an independent medical evaluation (IME) pursuant to Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

At the time claimant obtained the opinion of Dr. Jameson, no employer-retained physician had previously evaluated claimant's permanent disability. As a result, claimant's right to a reimbursable section 85.39 IME was not triggered. Accordingly, claimant is not entitled to reimbursement for Dr. Jameson's IME.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: $100.00 filing fee; $6.72 service fee; and $1,500.00 report of Dr. Jameson. (Ex. 4, p. 1) The costs of filing fee and service fee are allowable costs and are assessed to defendant-employer.

Claimant is not permitted to receive reimbursement for the full cost of Dr. Jameson's IME as a practitioner's report under rule 4.33. Rather, the Iowa Supreme Court has ruled only the portion of the IME expense incurred in preparation of the written report can be taxed. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). Claimant failed to submit any evidence to substantiate the claimed IME expense of $1,500.00. Absent proof of the cost incurred, no portion of Dr. Jameson's IME fee may be taxed to defendant-employer.

Accordingly, defendant-employer is taxed with costs in the amount of $106.72.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendant-employer shall pay unto claimant fifteen point four (15.4) weeks of permanent partial disability benefits commencing November 30, 2015 at the weekly rate of two hundred fifty-five and 94/100 dollars ($255.94).

Defendant-employer shall pay prior medical expenses submitted by claimant at the hearing as set forth in the decision.

Defendant-employer shall pay penalty benefits in the amount of seven thousand nine hundred ninety and 15/100 dollars ($7,990.15).

Defendant-employer shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap On Tools, 757 N.W.2d 330, 339 (Iowa 2008).

Defendant-employer shall pay accrued weekly benefits in a lump sum.

Defendant-employer shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant-employer shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendant-employer pursuant to 876 IAC 4.33 in the amount of one hundred six and 72/100 dollars ($106.72), as set forth in the decision.

Signed and filed this 5th day of January, 2018.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.