BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRITT A. JOHNSON, Claimant, vs. SEEDORFF MASONRY, Employer, OLD REPUBLIC INSURANCE CO., Insurance Carrier, Defendants.	File No. 22700099.01 ARBITRATION DECISION Head Note Nos.: 1402.30, 1403.30, 2401, 2402, 2802, 2907

STATEMENT OF THE CASE

Britt Johnson, claimant, filed a petition for arbitration against Seedorff Masonry, as the employer and Old Republic Insurance Company, as its insurance carrier. This case came before the undersigned for an arbitration hearing on February 13, 2023. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via Zoom videoconference.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 11, as well as Defendants' Exhibits A through J. Claimant testified on his own behalf. Defendants called Jim Burger and Tim Wright to testify. No other witnesses testified live at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

At the time of hearing, claimant made a motion pertaining to some late responses to requests for admissions. Ruling on that motion was reserved until this decision. After the hearing, defendants conceded that the responses could be accepted, rendering the dispute moot and a ruling unnecessary.

Although the evidentiary record closed, counsel for the parties requested an opportunity to file post-hearing briefs. Their request was granted, and both parties filed briefs simultaneously on March 20, 2023. The case was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the alleged injury of August 4, 2016 arose out of and in the course of claimant's employment with Seedorff Masonry.

2. Whether this claim is barred because claimant failed to give timely notice pursuant to Iowa Code section 85.23, including an assertion by claimant that defendants waived any notice defense.

3. Whether this claim is barred by the statute of limitations, including an assertion by claimant that the statute of limitations was tolled because defendants failed to timely file a commencement of benefits notice with this agency.

4. Whether the August 4, 2016 injury caused temporary disability and whether claimant is entitled to temporary total disability, or healing period, benefits from October 6, 2022 through October 23, 2022.

5. Whether the work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent partial disability benefits.

6. Whether claimant is entitled to payment or reimbursement for past medical expenses.

7. Whether claimant is entitled to alternate medical care into the future.

8. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Britt Johnson is a 52-year-old gentleman, who worked at Seedorff Masonry as a bricklayer and bricklayer superintendent from 2010 through 2017 and again four months later from 2017 through 2019. During his employment, Mr. Johnson performed heavy work, lifting, and moving stone weighing up to 150 pounds.

During his employment with Seedorff Masonry, Mr. Johnson sustained a low back injury in 2012. He made no formal workers' compensation claim for that injury. Instead, the injury was handled "informally" through an agreement with Seedorff Masonry. After the 2012 injury, Seedorff proposed and claimant agreed to submit his medical treatment through health insurance, and Seedorff agreed to reimburse claimant for any out-of-pocket medical expenses he incurred. Neither party objected to the arrangement, and claimant continued working for the employer.

Mr. Johnson asserts he sustained another low back injury as a result of his work duties at Seedorff Masonry on August 4, 2016. Specifically, he testified that he developed low back pain and symptoms in approximately July 2016. He experienced difficulties lifting during this time period and began using a piece of lumber to assist his walking when on the jobsite.

Claimant testified that the employer knew he was experiencing symptoms and difficulties. He further testified that Jim Burger, the employer's area superintendent, saw him on the jobsite walking with a piece of lumber. According to claimant, when Mr. Burger inquired, claimant told him that his low back hurt and that was the reason he used the lumber to assist with ambulation.

Mr. Johnson obtained medical treatment for symptoms in his low back and groin on August 2, 2016. However, he was released and returned to work. Then, on August 4, 2016, Mr. Johnson testified that he was walking down some stone stairs using his lumber as a cane. He missed the last two stairs and fell, landing on his lower back.

Mr. Johnson indicated that he had to sit on the ground for a few minutes after his fall before he was able to stand. He indicated that he proceeded to the general contractor's office to sit in a chair after the fall. When the superintendent for the general contractor asked him what was going on, he told the general contractor he had injured his low back. The superintendent from the general contractor instructed claimant to leave the job site and seek medical attention. Claimant did so, seeking care at an emergency room on August 4, 2016.

Mr. Johnson concedes that he did not notify Seedorff Masonry about his August 4, 2016 fall or injury at that time. In fact, he is unable to provide a specific date when he did notify the employer of his work-related fall and injury. Instead, Mr. Johnson testified he was concerned for his job and chose not to immediately notify the employer of his work injury.

The emergency room record documents claimant's evaluation on August 4, 2016. However, that medical record documents that claimant did not report any work-related incident as the cause for his low back injury and symptoms. Instead, the emergency room record documents complaints of testicular pain with an onset four weeks prior. Claimant contends that he did not report the work injury to the emergency room provider because he was concerned about his job.

Claimant followed-up with his personal physician, who ordered an MRI of his low back and referred him to an orthopaedic surgeon for evaluation. Steven Aviles, M.D. initially evaluated claimant for a hip injury. Dr. Aviles conclude that claimant did not have a hip injury and referred him to Trevor Schmitz, M.D., an orthopaedic back surgeon, for evaluation. Dr. Schmitz evaluated Mr. Johnson on September 12, 2016. His initial record documents a history of lower back pain that radiated to the right calf, which was aggravated by bending and walking. Again, claimant reported a four-month history of back pain when evaluated by Dr. Schmitz and did not report a work injury in August 2016.

Dr. Schmitz ultimately referred claimant for evaluation by a pain specialist, Thomas G. Klein, D.O. Dr. Klein performed several different injections and prescribed various medications for claimant's injury and resulting symptoms. Dr. Klein also recommended and performed radiofrequency ablations four times on claimant's low back with diminishing benefit with each procedure. Ultimately, Dr. Klein recommended a follow-up surgical evaluation with Dr. Schmitz, which occurred on August 31, 2022. Dr. Schmitz and his physician assistant documented at that visit that claimant's low back pain onset was July 1, 2016.

Dr. Schmitz recommended surgical intervention this time and performed surgery on claimant's low back on October 6, 2022. Claimant testified that surgery improved his symptoms but did not entirely resolve his issues. Dr. Schmitz declared maximum medical improvement on February 3, 2023. He imposed a 30-pound occasional lifting restriction on claimant. Mr. Johnson continues to take Lyrica as well as meloxicam for his low back injury and resulting symptoms.

The initial factual dispute between the parties is whether claimant sustained an injury that arose out of and in the course of his employment on August 4, 2016. Defendants make a compelling challenge in this instance. Claimant failed to report the injury to the employer. He failed to report the injury to the emergency room provider. Claimant failed to report the injury at work to his personal physician. The initial records of the emergency room and Dr. Schmitz suggest the injury and symptoms developed months before August 4, 2016. Dr. Schmitz ultimately opined that claimant's back condition is not the result of a work-related accident or activities. He similarly opined that claimant did not sustain a permanent aggravation of his back condition due to a work-related accident or work activities. (Def. Ex. A)

In support of his claim, Mr. Johnson presented the opinions of his pain specialist, Dr. Klein. Dr. Klein opined that "the treatment he has received from Iowa Ortho, and most notably, the treatment that I have given him, is relevant to the condition and incident that precipitated his first evaluation with Dr. Schmitz on September 12, 2016." (Jt. Ex. 4, p. 133) Dr. Klein did not specifically outline the August 4, 2016 fall as the direct cause or material aggravation. Yet, his opinion supports that the ongoing treatment is related to whatever precipitating cause required evaluation by Dr. Schmitz.

Claimant also offered the opinion of his independent medical evaluator, John D. Kuhnlein, D.O., in support of his claim. Dr. Kuhnlein performed a thorough record review, interview, and evaluation. Dr. Kuhnlein rejected the notion of a cumulative injury. Instead, he reported that claimant gave a history of a traumatic injury. However, Dr. Kuhnlein also described the mechanism of injury walking down the stairs and falling onto his tailbone. (Cl. Ex. 1, p. 15)

After noting some potential inconsistencies between claimant's version of events and the medical records, Dr. Kuhnlein offered a causation opinion. Specifically, Dr. Kuhnlein opines:

> If Mr. Johnson's statements about his reasons for not reporting his work-related injury are accurate, and if his statements regarding the fall down the stairs at work are accurate, then the condition initially treated by Dr. Schmitz on September 12, 2016, would be the work-related injury that aggravated the pre-existing condition.

(Cl. Ex. 1, p. 16)

Ultimately, I accept claimant's testimony as credible and accurate that he fell on August 4, 2016 at work. Mr. Johnson offered some concessions during his testimony that are not beneficial to his case. He came across as candid and forthright during most of his testimony. Having accepted Mr. Johnson's testimony about how he injured his back, I also accept the causation opinions of Dr. Klein and Dr. Kuhnlein. Therefore, I ultimately find that claimant did fall at work on August 4, 2016 and that he has proven that he sustained an injury to his low back as a result of that fall at work.

Claimant testified that he notified the employer about his work injury in late 2017 or early 2018. (Tr., p. 67) Claimant testified that he delayed reporting the work injury from August 4, 2016 until late 2017 or early 2018 because he was concerned about his job. He explained that he reported the injury to the employer once he became concerned that he might not be able to continue working as a bricklayer.

Mr. Johnson indicated that Tim Wright, the employer's risk manager, proposed to handle the medical expenses similar to the way in which the parties handled claimant's 2012 medical expenses. In other words, claimant could continue submitting his medical expenses through his health insurance, paying his co-pays and deductible, and the employer would reimburse claimant for any out-of-pocket medical expenses. Payroll records document that the employer did reimburse claimant for out-of-pocket medical expenses beginning in December 2018. (Cl. Ex. 4, p. 27).

Tim Wright and Jim Burger both testified on behalf of the employer. Mr. Wright is the employer' risk manager. Consistent with claimant's version of events, Mr. Wright testified that claimant did not report a work injury to him in 2016. (Tr., p. 128) However, he acknowledges that claimant came to him at some point in time and requested assistance with his medical bills. Mr. Wright acknowledges that he agreed the company would assist with claimant's medical expenses under similar terms described by claimant regarding reimbursement of claimant's out-of-pocket expenses. Mr. Wright recalls that the conversation he had with claimant occurred shortly before the company began reimbursements for miscellaneous expenses, which was in late 2018. (Tr., pp. 129-131)

Mr. Wright did not understand that claimant's request for reimbursement of medical expenses in 2018 was the result of a new work injury in 2016. Instead, he understood claimant was seeking assistance for the 2012 incident with ongoing symptoms. (Tr., p. 133)

I find Mr. Wright's testimony credible in some respects and difficult to accept in other respects. I accept that he did not receive notice of the alleged work injury in

August 2016 until late 2018, close in time to the commencement of reimbursement for claimant's out-of-pocket medical expenses. I find it difficult to believe that Mr. Wright began payment, or reimbursement, without some understanding or knowledge that the medical expenses were likely related to a work incident. Regardless, I find that claimant did not report the work injury to the employer until sometime in 2018, likely close in time to the commencement of the miscellaneous reimbursements in December 2018.

Mr. Burger was the employer's area superintendent on August 4, 2016. He supervised claimant on the date of injury. Mr. Burger denied that claimant ever reported a work injury to him or that claimant requested any type of accommodations to continue working for the employer. He also denied ever seeing claimant hobbling or using a cane to ambulate on the job site. (Tr., pp. 116-118) Ultimately, I accept Mr. Burger's testimony and find that he was not provided notice of the August 4, 2016 injury within 90 days of its occurrence. I similarly accept claimant's concession and find that he did not report this injury to any employer representative within 90 days of the traumatic injury and that he actually did not report the injury until late 2018.

Claimant used sick leave and paid-time off leave to seek medical treatment (ablation procedures) on August 20, 2018 and August 30, 2018. (Tr., p. 77) I find that these payments were made pursuant to the employer's benefit program and not paid specifically to claimant as compensation in lieu of weekly worker's compensation benefits. In fact, I find these wages were paid specifically for claimant's lost time to seek and obtain medical care. There is no evidence that any other lost time occurred or was paid by the employer, or that the employer intended these benefit payments to be wages in lieu of worker's compensation weekly benefits. For clarity, I find that this sick leave and paid time off was actually used by claimant and paid by the employer before claimant reported the work injury to the employer.

I also find that claimant knew or should have known the severity of his injuries when he was referred to two orthopaedic surgeons and a pain specialist. I find that Mr. Johnson knew of his work injury and knew its potential compensable nature when the injury occurred. He specifically and intentionally did not report the injury to the employer or his medical providers. Instead, he attempted to withhold his reporting out of a fear of losing his job.

While this may be a subjectively reasonable thing to do, claimant nevertheless knew his injury was compensable and knew it was serious long before he reported the injury to the employer. This knowledge is demonstrated because claimant left his employment at Seedorff and sought alternate employment at Hansen in 2017. Mr. Johnson specifically testified he left Seedorff and sought the employment at Hansen because of the physical demands of his job at Seedorff and presumably his concerns about whether he could continue to perform those job duties after his August 4, 2016 injury. (Tr., pp. 34-35) I find that Mr. Johnson proved a traumatic injury on August 4, 2016 that arose out of and in the course of his employment with Seedorff. I find that he intentionally withheld reporting that injury to the employer until late 2018 and that he knew or should have known the compensability and seriousness of the injury by the

time he quit his employment at Seedorff and accepted a less physically demanding position at Hansen in 2017.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In this case, I ultimately accepted claimant's testimony about how he was injured and found that he sustained a fall at work on August 4, 2016. Having accepted that testimony, I also accepted the medical causation opinions of Dr. Klein and Dr. Kuhnlein. Having accepted those causation opinions, I conclude claimant proved he sustained an injury to his low back arising out of and in the course of his employment with Seedorff on August 4, 2016.

The employer asserts two affirmative defenses, which must be considered. The first defense asserted is a notice defense. The second affirmative defense asserted is a statute of limitations claim.

The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

In this case, the employer denies receiving notice of the work injury within 90 days of its occurrence. Claimant conceded that he did not report the injury within the 90-day statutory time. I found that claimant did not report the injury to the employer until late 2018, more than two years after the injury occurred. Although claimant asserted that his area superintendent observed him walking on the job site before August 4, 2016 using a piece of lumber as a crutch or cane, there is no evidence that the employer had actual knowledge of the August 4, 2016 fall or injury. The employer established by a preponderance of the evidence that it did not have actual knowledge of the injury and that claimant did not report the injury within 90 days of its occurrence.

Nevertheless, claimant contends that the employer waived the notice defense. Claimant asserts that defendants paid him wages in lieu of worker's compensation weekly benefits when they paid claimant sick leave and paid-time-off benefits when he missed work to obtain radiofrequency ablation procedures on August 20, 2018 and August 30, 2018. Claimant contends, pursuant to Hawkins v. TMC Transportation, 674 N.W.2d 683 (Iowa Ct. App. 2003), that payment of weekly benefits to the claimant waives any notice defense under Iowa Code section 85.23.

The facts of Hawkins are clearly distinguishable. In Hawkins, the employer intentionally commenced weekly worker's compensation benefits once an injury was reported by the injured worker, even though the injury was reported more than 90 days after the injury date. While the Court of Appeals found that payment of weekly benefits waived the notice defense, such a payment of weekly benefits was not made in this case. In fact, the payment of sick leave and paid-time-off was made for claimant to seek medical treatment. Even if construed as a payment of worker's compensation benefits, payments made to attend medical treatment are paid pursuant to Iowa Code section 85.27 and not considered weekly benefits.

Moreover, in this case, I found that claimant did not report his injury to the employer until after the August 20, 2018 and August 30, 2018 ablation procedures. Therefore, the employer was not aware of the alleged work injury and could not have been paying sick leave or time off for medical treatment as wages in lieu of weekly benefits. It was not yet aware that a claim was even being made. I decline to extend the holding in Hawkins to conclude that an employer can unintentionally waive its notice defense by paying employment benefits (sick leave and paid time off benefits) it is

otherwise obligated to provide when it is not even on notice of the alleged injury at the time the payments are made.

In Hawkins, the employer made an intentional payment of weekly benefits to the injured worker after being notified of the injury. In this instance, the employer paid sick leave and paid time off to claimant to seek medical care without even being notified that a work injury was being claimed. Claimant's assertion of a waiver of the notice defense is rejected. I conclude the employer has established its notice defense pursuant to Iowa Code section 85.23. I further conclude that this claim is barred pursuant to that section for untimely notice.

Defendants also assert that the claim was filed untimely and barred by the statute of limitations. Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

That the employee failed to bring a proceeding within the required time period is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

Claimant appears to concede that he filed his petition more than two years after the injury date. However, he asserts that the two-year statute of limitations outlined in Iowa Code section 85.26(1) is not applicable in this situation. Instead, claimant again contends that the payment of the sick leave benefits and the paid time off benefits during claimant's ablation procedures in August 2018 resulted in payment of weekly compensation benefits or wages in lieu of benefits. See 876 IAC 8.4.

Claimant contends that payment of the wages to attend the ablation procedures in August 2018 required defendants to file a notice of commencement of weekly compensation benefits with this agency. See Iowa Code section 86.13(1)-(2). Indeed, if an employer pays weekly benefits to an injured worker, it is obligated to file the notice of commencement and failure to do so tolls the statute of limitations. Moreover, if weekly benefits are paid, claimant's statute of limitations is three years after the last benefit payment (if the appropriate notice of commencement is filed with the agency). Iowa Code section 85.26(1).

Therefore, the question is whether the payment of sick leave benefits and paid time off benefits to attend the Augusts 20, 2018 and August 30, 2018 ablation procedures represent payment of weekly benefits or wages in lieu of benefits. I conclude that those payments of sick leave and paid time off do not constitute payment of weekly benefits. I reach this conclusion for two reasons. First, Iowa Code section 85.27(7) provides for the payment of wages when an injured worker seeks medical care. In this instance, the only payments claimant can identify as wages in lieu of

benefits are personnel benefits to attend medical care. Such payments, if deemed to be worker's compensation benefits, would be categorized as Iowa Code section 85.27(7) wages and benefits, not weekly worker's compensation benefits. Nothing in Iowa Code section 85.26 or Iowa Code section 86.13 tolls the statute of limitations for payment of medical benefits such as wages paid to attend medical care in Iowa Code section 85.27(7).

Second, I conclude that the payment of sick leave benefits and paid time off benefits in August 2018 are not properly categorized as weekly worker's compensation benefits or wages in lieu of benefits because the employer was not yet on notice of an injury when those benefits were paid. I found that the claimant reported his injury in late 2018 and after August 2018. At the time the employer paid sick leave and paid time off benefits to claimant, it was not yet aware Mr. Johnson was making a worker's compensation claim. It would be absurd to conclude that the employer was paying wages in lieu of weekly benefits when it was not yet aware the claimant was even making a worker's compensation claim.

Claimant's argument would result in scenarios where injured workers could withhold notice of injuries and result in unintentional waivers of rights and defenses by the employer. This does not appear to be the purpose or intent of either Iowa Code section 85.23 or Iowa Code section 85.26. I reject claimant's argument that defendants waived the notice defense or that its failure to file a notice of commencement of benefits for payments it never intended to be worker's compensation benefits resulted in a tolling of the statute of limitations.

Ultimately, I conclude that the employer also established its statute of limitations defense. I conclude that claimant failed to timely file a petition and pursue his claims. Therefore, I conclude this claim is barred by the statute of limitations. Iowa Code section 85.26(1).

The conclusions pertaining to the notice defense and statute of limitations render the other substantive disputes moot with the exception of the claim for costs. In this instance, Mr. Johnson has submitted a claim for reimbursement of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Having concluded that this claim is barred by the statute of limitations and Iowa Code section 85.23, I exercise the agency's discretion and conclude that neither party's costs should be assessed in this case. Rather, all parties should bear their own costs.

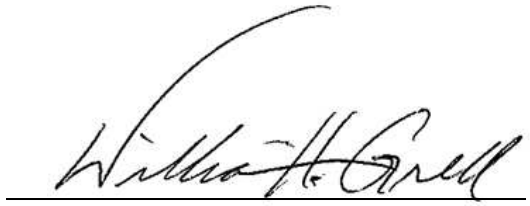
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing.

All parties shall pay their own costs.

Signed and filed this __21st___ day of August, 2023.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Ballard (via WCES)

Caroline Westerhold (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.