

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD DHABOLT,

Claimant,

vs.

CITY OF DES MOINES,

Employer,
Self-Insured,
Defendant.

File Nos. 5068239, 20000505.01

ARBITRATION DECISION

Head Note Nos.: 1108, 1803

STATEMENT OF THE CASE

The claimant, Donald Dhabolt, filed two petitions for arbitration and seeks workers' compensation benefits from the City of Des Moines, a self-insured employer. The claimant was represented by Christopher Spaulding. The defendant was represented by Molly Tracy.

The matter came on for hearing on May 17, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of joint exhibits 1 through 9; claimant's exhibits 1 through 3; and defendant's exhibits A through B. The claimant testified under oath at hearing, as did his supervisor, J. Brian Johnson. Theresa Kenkel served as the court reporter. Both parties were well represented and the matter became fully submitted on June 14, 2021, after helpful briefing by counsel.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at relevant times.
2. Claimant sustained an injury which arose out of and in the course of employment on April 8, 2019, although the precise body parts injured in that incident are in dispute.
3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. The parties agree that the April 8, 2019, injury is a cause of some temporary permanent disability. The parties have stipulated that defendant has paid 10 weeks of permanency for this claim.
5. The parties stipulate to the elements which comprise the rate of compensation for both injury dates.
6. Affirmative defenses have been waived.

These stipulations are accepted by the agency and are hereby deemed enforceable and binding.

ISSUES

The parties submitted the following issues for determination:

- 1 The nature and extent of claimant's disability from his April 8, 2019, work injury.
- 2 Whether the claimant suffered an injury which arose out of and the course of his employment on January 4, 2020.
- 3 Whether the claimant sustained any temporary or permanent disability as a result of the alleged January 4, 2020 work injury, and if so, the nature and extent of such disability. Claimant amended the hearing report at hearing to seek temporary benefits from March 5, 2020, through April 5, 2020.
- 4 Whether the claimant is entitled to alternate medical care.
- 5 Whether the claimant is entitled to costs.

FINDINGS OF FACT

Claimant, Donald Dhabolt, was born in 1980 making him 41 years old as of the date of hearing. He testified live and under oath at the video hearing. I find his testimony to be highly credible. His testimony was consistent with other portions of the record including contemporaneous medical records. He was a good historian. There was nothing about his demeanor which was concerning.

Mr. Dhabolt is single and has three daughters. He attended high school in Pleasantville, Iowa but did not graduate. He attained his GED and has some college. He is bright and employable with a solid work history as a laborer and equipment operator. He began working for the City of Des Moines in 2017. Prior to starting with the City, he was generally healthy. He never had medical issues with his neck, back or either extremity.

Mr. Dhabolt is left handed. On April 8, 2019, he just started his job as a refuse

collector. On that date, he sustained an injury which arose out of and in the course of his employment. The injury actually occurred at a gas station. He testified that he reported the injury immediately. He was directed to treatment on the same date at Des Moines Occupational Medicine. The following history is recorded.

[T]he patient states at roughly 11:30 a.m. earlier today, 04/08/2019, he stopped at Casey's on 61st and Douglas by Merle Hay Mall for lunch. The patient states he went in to the restroom, however, slipped on a substance. As he fell, his feet went out in front of him and he went backwards. He landed directly on his buttocks. He tried to grab rail attached to the wall to stop him from falling, however, as he did this he felt a pop in his left arm. The patient states when he fell, he also hit the left medial elbow/forearm on the toilet tank. The patient states he now has 7/10 pain to his left arm and a soreness to his low back. He states he has not yet used ice, heat or any medications. . . .He states the pain is sharp and throbbing. . . .There is significant bruising to the forearm and upper arm along the elbow medially. The patient states he does have some tingling into his fingers. The patient denies any right-sided symptoms. The patient states low back is sore but denies any associated symptoms with that.

(Joint Exhibit 1, page 1)

Mr. Dhabolt was quickly referred to Ze-Hui Han, M.D., an orthopedist who performed a left distal biceps repair surgery on April 16, 2019. (Jt. Ex. 3, p. 35)

In June 2019, Mr. Dhabolt had sought medical care for a burning pain in his left shoulder and low back at Des Moines Occupational Medicine. The physician's assistant attributed his shoulder pain to the positioning during surgery and opined his low back pain was "back to baseline." (Jt. Ex. 1, p. 15) Dr. Han had recommended referral to a shoulder specialist and a back specialist. A left shoulder MRI was recommended. A "tiny intrasubstance tear at the anterior supraspinatus footprint" was noted. (Jt. Ex. 1, p. 17) He was eventually evaluated by shoulder specialist, Ian Lin, M.D., who diagnosed left shoulder impingement. In July 2019 he was given an injection which helped.

Mr. Dhabolt had a relatively normal recovery from the left arm surgery, including physical therapy and was placed at maximum medical improvement on August 12, 2019. (Jt. Ex. 2, p. 32) Dr. Han assigned a 4 percent impairment rating for the left upper extremity and opined there was no rating associated with the left shoulder. (Jt. Ex. 2, p. 34; Jt. Ex. 6, p. 53)

I have reviewed all of the contemporaneous medical documentation in the file related to claimant's left arm treatment. There is no indication of any right arm problems or deformity during any of these documented visits.

Mr. Dhabolt has repeatedly requested treatment for his left shoulder and low

back even after being released by Dr. Han. (Cl. Ex. 2, pp. 7-10)

In September 2019, Mr. Dhabolt was promoted to the position of truck driver.

On January 4, 2020, Mr. Dhabolt testified he sustained a second work injury. He was working his normal job as a truck driver. While filling up his truck with road salt during a storm, he suffered an injury to his right arm (bicep area). He immediately reported the injury. Mr. Johnson testified at hearing and is found to be highly credible. He testified that he took Mr. Dhabolt to the emergency room. (Tr., p. 45)

The emergency record documents the following:

The patient is a 39 y.o. male with history of left bicep tendon rupture repaired by Iowa orthopedics 7 months ago who presents to emergency department with chief complaint of right bicep injury and pain. He states that he was at work prior to arrival and using a crank to open a door. His hand slipped and his bicep struck a pole. He has tingling and pain since then mainly in the bicep area. He states that his bicep muscle is flat. He states that this is consistent with his prior bicep muscle tendon rupture on the left side. He rates the pain as moderate.

(Jt. Ex. 9, p. 101) Examination showed the bicep muscle was flat. (Jt. Ex. 9, p. 104) He was placed in a sling and released.

He was quickly referred to Jeffrey Rodgers, M.D., who diagnosed biceps tendon rupture. Dr. Rodgers performed reconstruction surgery of the right distal biceps tendon with semitendinosus allograft on January 28, 2020. (Jt. Ex. 8, p. 99) Dr. Rodgers opined that the injury occurred at the same time he sustained the left arm injury. (Jt. Ex. 8, p. 99) Dr. Rodgers repeated this opinion, changing it slightly in February 2020. He described it as "chronic" and opined it was at least three months old. "Within a reasonable degree of medical certainty it is my opinion that the right bicep injury did not occur on 1/4/2020." (Jt. Ex. 6, p. 59) He opined that while the January 4, 2020, injury may have "brought his attention to" the condition, neither of his work injuries caused the biceps tear.

Mr. Dhabolt returned to Dr. Rodgers for two follow up visits and was released on May 11, 2020. Mr. Dhabolt testified he was off work from March 5, 2020, through April 5, 2020. (Tr., p. 30) Apparently, after Dr. Rodgers opined the condition was not caused by the work injury, the City stopped allowing claimant to work light-duty. On May 11, 2020, Dr. Rodgers documented that it "is possible it happened at the time of his original injury (over 1 year prior)." (Jt. Ex. 6, p. 61)

Mr. Dhabolt had further workup of his neck complaints in January 2020, including an MRI and evaluation by a spine surgeon. No physician has assigned any permanent impairment to his neck or low back.

Scott Neff, D.O., examined Mr. Dhabolt in October 2019 and again in April 2021. (Jt. Ex. 7; Cl. Ex. 1) Dr. Neff examined Mr. Dhabolt, took clinical history and reviewed

appropriate medical records. Based upon the history he took from Mr. Dhabolt he opined that all of his conditions were work-connected. He assigned a 5 percent rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition for his left shoulder condition. (Cl. Ex. 1, p. 4) He opined that the work injury was a cause of the shoulder impairment. (Jt. Ex. 7, p. 69) Dr. Neff assigned permanent restrictions and made other recommendations regarding Mr. Dhabolt's other conditions, however, did not specifically assign any impairment to any other condition. In May 2020, Dr. Neff opined that the neck condition is work-related and recommended neurosurgical examination. (Jt. Ex. 7, p. 97)

Mr. Dhabolt voluntarily quit his job with the City of Des Moines. Mr. Dhabolt testified that he felt betrayed and no longer felt comfortable working the City of Des Moines.

CONCLUSIONS OF LAW

File No. 5068239:

The first question is whether the admitted April 8, 2019, work injury caused any permanent partial disability, and if so, the nature and extent of such disability.

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).

The greater weight of evidence supports a finding that claimant sustained permanent impairment to his left shoulder and left arm as a result of the April 8, 2019, work injury. Dr. Han assigned a 4 percent left upper extremity rating for the biceps tear

and Dr. Neff assigned a 5 percent left upper extremity rating for the loss of range of motion in the left shoulder. The City argues that the claimant was inconsistent regarding his shoulder symptoms. (See City Brief, p. 5) I reject this argument. I find that Mr. Dhabolt's complaints of left shoulder symptoms are well documented in the record and I find no material inconsistencies. While Mr. Dhabolt did have some relief with the injection performed by Dr. Lin, it did not last. I do not view this as a credibility problem at all. On the contrary, I have found Mr. Dhabolt to be a highly credible witness.

I agree with the claimant as well, that Dr. Neff assigned permanent restrictions to claimant's neck and both arms. He did not, however, rate these conditions pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, which is required in order to award permanent disability benefits since the 2017 statutory changes.

x. In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2019).

I find that in this case, claimant has proven he sustained scheduled member disabilities to two separate body parts: a four (4) percent of the right arm under Section 85.34(2)(m) and five (5) percent of the right shoulder under Section 85.34(2)(n). Since Section 85.34(2) does not describe how to address or combine such injuries under any relevant subsection, I conclude that his disability must be assessed under Iowa Code Section 85.34(2)(v) as an unscheduled disability. Carmer v. Nordstrom, File No. 1656062.01 (App. Dec. 29, 2021).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation,

loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Having reviewed all of the appropriate factors of industrial disability, I find that claimant has sustained a 15 percent loss of earning capacity as a result of his April 8, 2019 work injury. This is based upon his manual labor work history and the nature of his condition. Mr. Dhabolt is quite bright and employable. I conclude that he is entitled to seventy-five weeks of compensation at the stipulated rate commencing on August 12, 2019.

Finally, claimant seeks alternate medical care.

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. Iowa Code Section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An employer's statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of

professional judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care January 31, 1994).

Claimant points to the treatment recommendations from Dr. Neff. The City has refused to authorize any treatment for Mr. Dhabolt's neck or shoulder. I find that the claimant has met his burden of proof that the neck condition is causally connected to the work injury and he is entitled to treatment for this condition. A complete denial of treatment for these conditions is unreasonable.

File No. 20000505.01:

The first issue is whether the claimant sustained an injury which arose out of and in the course of his employment on January 4, 2020.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

The greater weight of evidence supports the finding that the claimant suffered an injury to his right arm on or about January 4, 2020. This is based upon the claimant's credible testimony, the contemporaneous medical records as well as the testimony of Mr. Johnson.

The real question in this case is whether the injury is a cause of any temporary or permanent disability in claimant's right arm. The relevant legal standards of medical causation are set forth above.

I find that a greater weight of evidence supports a finding that claimant tore his right biceps tendon in the accident on or about January 4, 2020. This is based upon claimant's credible testimony as well as the contemporaneous medical notes. I reject the opinion of Dr. Rodgers. Dr. Rodgers opined that the condition was "chronic" and that the injury itself merely "drew attention" to the condition. I find it improbable that Mr. Dhabolt worked with this condition in his right biceps for an extended period of time without noticing it. In other words, he would have to be flat out lying for this theory to be possible. Following the work injury there was a deformity in the biceps and it was flat. I do not find this to be the most likely scenario. Of course, it is certainly possible that he had degenerative problems in this area prior to the work injury that was unnoticed by Mr. Dhabolt and it then became symptomatic and disabling following the work injury. Mr. Dhabolt, however, had been actively receiving treatment on his left arm condition from April through August 2019, including physical therapy. There is no reference in any of those contemporaneous records to any issues, symptoms, or deformities in his right arm or biceps area. It is highly unlikely that he could have concealed a right torn biceps tendon from his providers during this timeframe. I find the opinion of Dr. Neff to be more convincing in this regard.

Claimant seeks temporary total disability benefits for this injury.

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. Iowa Code section 85.33(1) (2019).

Having found that the right biceps tear is work-connected, the claimant is entitled to healing period benefits from March 5, 2020, through April 5, 2020. Mr. Dhabolt was under temporary restrictions during this timeframe from an authorized physician. The employer did not offer claimant work during this time period and benefits are owed.

Claimant also seeks permanent partial disability for a disability to his right arm. The legal standard for payment of permanency is set forth above.

The claimant has failed to present evidence of a permanent impairment rating from his right arm condition. He asks the agency utilize the rating provided by Dr. Han

for the left arm be utilized to assign an impairment/disability rating for the right arm. I find this is not proper in this case in the absence of supporting expert medical evidence. As such, claimant is not entitled to any PPD benefits for this condition. Mr. Dhabolt may very well have some permanent functional impairment in his right arm, however, it is not proven under the circumstances and current legal standards.

Regarding Both Files:

The next issue is claimant's entitlement to an independent medical examination under 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).

Dr. Neff examined the claimant twice and had to perform additional testing. I find his costs are reasonable. Claimant is entitled to reimbursement of IME costs in the amount of \$6,300.00. This is undoubtedly a significant expense, however, Dr. Neff did examine at least four body parts – left arm, right arm, left shoulder and neck. While the expenses are significant, I cannot find they are unreasonable in light of the number of body parts examined.

ORDER

THEREFORE IT IS ORDERED:

File No. 5068239

The defendant shall pay seventy-five (75) weeks of compensation at the rate of seven hundred twenty-nine and 86/100 dollars (\$729.86) commencing on August 12, 2019.

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.

The defendant shall authorize treatment for claimant's shoulder and neck as recommended by Dr. Neff.

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

File No. 20000505.01

Defendant shall pay temporary total disability benefits at the rate of six hundred eighty-four and 41/100 dollars (\$684.41), commencing on March 5, 2020 and ending April 5, 2020.

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

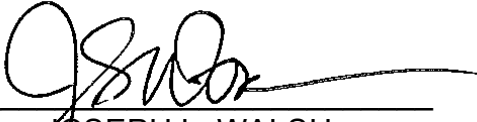
Defendant employer shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

For both files:

Defendant shall pay IME expenses in the amount of six thousand three hundred dollars (\$6,300.00).

Costs are taxed to defendant in the amount of six hundred dollars (\$600.00).

Signed and filed this 26th of January, 2022.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Christopher Spaulding (via WCES)

Molly Tracy (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.