

PENNSYLVANIA WORKERS' COMPENSATION

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For purposes of calculating the 90-day period for paying temporary compensation, the first date of disability, or the date a claimant stops working, is the date the 90-day period commences. If a claimant is paid full wages for the day on which the injury occurred, the day after shall be counted as the first day of disability.

Valley Stairs and Rail v. WCAB (Parsons); 1100 C.D. 2017; filed Jan. 24, 2019; Judge McCullough

The claimant sustained a low back strain at work, and he received his full pay from the employer on the date of injury. After the injury, the claimant did not return to work. The employer issued a notice of temporary compensation payable (NTCP), which stated the injury occurred on March 27, 2015, and that the 90-day period, under § 406.1 (d)(6) of the Act, started on March 30, 2015. On June 27th, the employer filed a notice of workers' compensation denial, and on June 28th, the employer filed a notice stopping temporary compensation. The next day, the Bureau of Workers' Compensation issued a notice of conversion. Later, the claimant filed a penalty petition, alleging the employer violated the Act by stopping payment of compensation benefits after the NTCP had converted to a notice of compensation payable (NCP).

The workers' compensation judge dismissed the claimant's petition, concluding that, because the claimant received his full pay for the date of injury (Friday, March 27, 2015), his disability commenced on Monday, March 30, 2015, thereby making the filing of notice

stopping temporary compensation timely and voiding the conversion notice issued by the Bureau.

In his appeal to the Workers' Compensation Appeal Board, the claimant argued that the NTCP properly converted because the date of disability was the March 27, 2015, injury date, as that was the date he was rendered unable to return to work. The Board agreed and reversed the judge's decision, concluding that March 27, 2015, was the date the claimant became eligible for benefits since he sustained a loss of earning power at that time.

The employer appealed to the Commonwealth Court. The court held that the trigger date for the 90 days of temporary compensation is the date the claimant stops working, or his first date of disability, and that the appropriate date in this case was March 27, 2015. Nonetheless, because the claimant received his full pay on his first day of disability, the court concluded that disability commenced on the day following the injury for which the claimant was paid his full wages for the day or shift. The court arrived at this decision by relying on § 121.15(a) of the Bureau Regulations, which says that in computing the time when disability becomes compensable, the day the injured employee is unable to continue at work by reason of the injury shall be counted as the first day of disability in the seven-day waiting period. However, the section also says that when an injured employee is paid in full for the day on which the injury occurred, the following day shall be counted as the first day of disability. The court said, because the claimant did not work on weekends, the following day, Monday, March 30, 2015, was the trigger date for temporary compensation. Because the employer filed its stoppage notices on June 28, 2015, one day before the end of the 90-day period, the court reversed the Board and concluded that the notice of conversion issued by the Bureau was null and void. ■■

Commonwealth Court holds that an aggravation of a pre-existing work-related allergic condition cannot be subjected to a full recovery when a claimant's return to work would result in a recurrence of the condition.

Kurpiewski v. WCAB (Caretta, Inc.), No 158 and 194 C.D. 2018; filed Jan. 18, 2019; Judge Cohn Jubilerer

The claimant worked for the employer as a bricklayer, and in the spring of 2012, his body broke out into a rash. He stopped working thereafter and did not return based on advice from his treating physician. He was diagnosed with allergic contact dermatitis arising from long-term exposure to chromium in bricks. The claimant filed claim and penalty petitions, alleging he suffered the injury and that the employer violated the Act by not timely accepting or denying the injury. The claimant also requested payment of attorney's fees, alleging the employer's contest became unreasonable following an Independent Medical Examination (IME), which found the claimant's condition was work-related and that he could not return to his position as a bricklayer.

Before the workers' compensation judge, the claimant testified that he had worked as a bricklayer since 1994. He first experienced a rash in 2007 while working for a different company. Testing at that time showed that he was allergic to multiple chemicals. After his job with that company ended, he started working for the employer in 2009 and remained an employee despite layoffs when work was not available. The claimant also testified that after seeing his physician, he informed the employer's foreman that he was being removed from work due to the rash. However, he did not remember if he told the foreman about its cause. The foreman also testified and was unable to recall whether the claimant informed him of the cause of the rash.

The workers' compensation judge granted the petition, concluding that the claimant showed causation between his employment and the aggravation of his pre-existing dermatitis, which resulted in his removal from work as a bricklayer with the employer. The judge also held that the nature of the contact dermatitis rendered the claimant incapable of returning to work as a bricklayer. Additionally, the judge found that timely notice of the work injury was given because the claim petition was filed within the 120-day notice period.

Both parties appealed to the Appeal Board, which remanded the case for a finding as to whether the claimant gave notice within 21 days after the injury. The Board also agreed with the employer that the claimant had fully recovered from his work-related aggravation of pre-existing dermatitis and, therefore, terminated benefits based on the claimant's expert's testimony that the claimant had essentially recovered from the rash and had returned to his pre-injury baseline condition.

On remand, the workers' compensation judge found that notice of the injury was not given until the date the claim petition was filed and, therefore, concluded that benefits were not payable until that date through the date of full recovery found by the Appeal Board. The case was appealed to the Appeal Board again. This time, the Board affirmed the workers' compensation judge in all respects, except for the judge's dismissal of the penalty petition. The Board ordered a 10 percent penalty since the employer did not issue Bureau documents.

Both the claimant and the employer appealed to the Commonwealth Court. The court agreed with the claimant that his benefits should not be terminated since there was medical evidence establishing that his underlying chromium allergy resulted from prolonged exposure to that substance throughout his bricklaying career and that the allergy prevented him from ever working as a bricklayer again. According to the court, the fact that the claimant was asymptomatic when not exposed to chromium did not preclude the receipt of ongoing benefits because his condition will recur and become more dangerous when he is exposed once more. The court noted that the claimant's situation was not like the aggravation of a pre-existing, non-work-related condition in the case of *Baxter v. WCAB*, where the Supreme Court held eligibility for ongoing benefits was not established by an employee because he had fully recovered from a work-related aggravation of pre-existing, non-work-related asthma. In this case, however, the claimant had developed a work-related condition from long-term exposure to chromium as a bricklayer. The court reversed the Board's termination of the claimant's benefits, concluding that, notwithstanding his current lack of symptoms or need for treatment, the claimant showed he is disabled from performing his job as a bricklayer for the employer, or anyone else. **II**

NEWS FROM MARSHALL DENNEHEY

Anthony Natale and **Ashley Talley** (Philadelphia, PA) are presenting "The Interplay Between Traumatic Brain Injuries and Fraud in Workers' Compensation" at the upcoming Pennsylvania Insurance Fraud Conference, being held in Hershey, PA between April 23 and April 24, 2019. In the workers' compensation field, one of the biggest red flags for fraud is the nature of injury, and, more recently, injuries involving concussion, post-concussion or similar traumatic head injuries. Attendees will gain insight into how to identify, manage and fight claims for traumatic head injuries that are diagnosed based upon subjective complaints alone. For more information, [click here](#).

Kacey Wiedt (Harrisburg, PA), assistant director of the firm's Workers' Compensation Department, is speaking at the *Tough Problems in Workers' Compensation* seminar hosted by the Pennsylvania Bar Institute on April 18, 2019. The program is designed to explore some of the toughest issues in a lively point/counterpoint style. In addition to focusing on specific problems, the faculty will provide a review of recent decisions from the Commonwealth and Supreme Courts and how they affect workers' compensation practitioners and their clients. For more information, [click here](#).

NEWS FROM MARSHALL DENNEHEY (CONT.)

On April 9, 2019, **Niki Ingram** (Philadelphia, PA), director of the Workers' Compensation Department, and **Tony Natale** (Philadelphia, PA) will be presenting "Influence of Pharmaceuticals and Changing Landscape in Workers' Comp Medical Costs" at this year's Philly I-Day conference. A two-part presentation, this engaging session will explore disruptors (those rapid and most likely permanent changes that impact our industry and are caused by forces beyond our control) in workers' compensation, how they evolved, what is happening now and what is expected as we move into the future. For more information or to register for this event, [click here](#).

Michele Punturi (Philadelphia, PA) is speaking at the 2019 CLM Annual Conference in Orlando, Florida, which is being held between March 13 and March 15, 2019. In "Driven to Distraction—Mitigating Distracted Driving Claims," Michele joins other industry professionals to discuss the importance of developing a roadmap to minimize the impact and effect of distracted driving by limiting exposures, reducing costs, and mitigating workers' compensation claims. By identifying potential sources of distracted driving, employers can take the necessary steps to help curb behaviors and control risks and exposures. The CLM Annual Conference is the premier annual event for professionals in the claims and litigation management industries. For more information, [click here](#). **II**