

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JANUARY 2019 AT A GLANCE
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JURISDICTION

- The fact that Pennsylvania and New Jersey jointly own the Ben Franklin including its approaches did not automatically confer Pa. jurisdiction where claimant, though he came out of a Pa. union hall, completed tax forms in Camden NJ, reported each day to Camden NJ and suffered his injury working on the ground underneath the PATCO rail line on the New Jersey side of the bridge.

This is because jurisdiction would not be conferred pursuant to 305.2 where the Compact between Pennsylvania and New Jersey, that provides both Pennsylvania and New Jersey are recognized as joint owners of the bridge, did not make any reference to jurisdiction for purposes of workers' compensation claims, let alone confer jurisdiction to Pennsylvania authorities under the Act for injuries occurring in New Jersey and there was no dispute that Claimant was not injured on the bridge itself or on a highway or road leading to the bridge. Rather, Claimant was injured while working underneath the bridge and standing on the ground in New Jersey.

- Section 305.2 of the Act only applies to injuries sustained in very limited circumstances, including where:
 - (1) His employment is principally localized in this State, or
 - (2) He is working under a contract of hire made in this State in employment not principally localized in any state, or
 - (3) He is working under a contract of hire made in this State in employment principally localized in another state whose workmen's compensation law is not applicable to his employer, or
 - (4) He is working under a contract of hire made in this State for employment outside the United States and Canada.

The General Assembly intended section 305.2 to operate as an exception to the general rule that the Act only applies to injuries occurring within this Commonwealth and to apply only in limited circumstances, i.e., if a claimant meets one of the four prerequisites noted above, which Claimant in this case did not.

In this matter, applying 305.2(1), the contract of hire was New Jersey and the claimant's injury occurred in New Jersey while standing on the ground. There was no evidence his employment was principally localized Pennsylvania.

Kreschollek v. WCAB (Commodore Maintenance Corp.), No. 297 C.D. 2018 (Decision by Judge McCullough, January 7, 2019) 1/19

**AVERAGE WEEKLY WAGE/ OCCUPATIONAL DISEASE/
AGGRAVATION/PENALTY**

- It is true the Supreme Court decision of Bethlehem Steel Corporation v. WCAB (Baxter), 708 A.2d 801 (Pa. 1998) stands for the proposition that a claimant has fully recovered from the work-related aggravation of his preexisting, non-work-related condition and his condition returned to its baseline, the claimant is ineligible for benefits because his disability was no longer related to the conditions of his workplace.

Baxter would not apply to the fact pattern in this case where the pre-existing condition was not non-occupational but had developed while working as a bricklayer for prior employer's and claimant's severe allergy to chromium was caused by his long-term exposure to chromium working as a bricklayer.

Therefore, where the claimant's work-related injury, though initially manifested with a prior employer, became asymptomatic when the claimant was not working, ongoing benefits were awarded because his injuries would recur upon the claimant's return to work.

Since Claimant's current restriction from working as a bricklayer was a result of his continued exposure to chromium, which occurred while working for Employer, the claimant was entitled to receive ongoing benefits.

It was further noted that Claimant's baseline condition materially differed between when he started working for Employer and when, due to his ongoing exposure to chromium, his work-related condition became so severe that he could no longer be exposed to that material without endangering his health. It was Claimant's exposure to chromium while working for Employer, and the resulting aggravation of his work-related chromium sensitivity, that have rendered him incapable of performing his work duties. Claimant, therefore, satisfied his burden of proving that, notwithstanding his current lack of symptoms or need for treatment; he was disabled from performing his job as a bricklayer for Employer, or anyone else, and is eligible for ongoing benefits.

- The overall legislative purpose of Section 309 is to provide for an accurate measurement of the claimant's average weekly wage.

Section 309(d), which requires the calculation of the average weekly wage by averaging the highest of 3 of the past 4 quarter, applied to the calculation of the average weekly wage where the claimant had periods of layoff with the employer, during which time he received Unemployment Compensation and had periods of employment with other employers and where Employer was aware that he worked for a different employer while he was laid off, but Employer still recalled him to work.

The fact claimant was laid off from his work with Employer during these periods and worked for another employer does not mean the employment relationship was not maintained.

This is because the term ‘employ’ or ‘employed’ as used in Section 309(d) is not limited to actual days an employee performs work, but encompasses the period of time that an employment relationship is maintained between the parties.

Section 309(d) thus applied, and Claimant’s earning capacity was appropriately measured by using the highest 3 of the last 4 consecutive periods of 13 calendar weeks in the year immediately preceding Claimant’s work injury, which represented his actual history of earnings.

This holding might not have applied to this factual scenario if the employer’s policy provided that the employment relationship ended at layoff and required the employee to reapply for work. In this matter claimant was called back to work and did not have to reapply.

- The claimant was not entitled to wages calculated based upon concurrent employment where he worked for other employers during periods of layoff but not on the date of injury. This is because for a claimant’s employment with a second employer to qualify as concurrent employment, the claimant had to have been working for both employers “at the time of the work injury
- An employer violates Section 406.1 of the Act if it fails to issue an NCP, an NCD, or a Notice of Temporary Compensation Payable within 21 days of receiving notice of a work-related injury” and can be liable for penalties for not doing so.

This is true even if the employer is actively contesting the claimant’s claim, since contesting a claim and filing of the answer denying the claim’s allegations does not relieve an employer of its duty under Section 406.1 of the Act.

The violation of the Act does not automatically trigger the assessment of a penalty because it is within the discretion of the WCJ to impose penalties, though this discretion is not unfettered.

Kurpiewski v. WCAB (Caretti, Inc.), No. 158 C.D. 2018 (Decision by Judge Cohn Jubelirer, January 18, 2019) 1/19

NOTICE OF TEMPORARY COMPENSATION PAYABLE

- Disability, for purposes of computation of the 90-day period for purposes of stopping a Notice Of Temporary Compensation Payable commences on the day following the injury when a claimant is paid his full wages for the day, shift, or turn on which the injury occurred.

This is consistent with Regulation 121.15(a) that states:

*In computing the time when the 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 7 day waiting period. If the injured employee is paid full wages for the day, shift or turn on which the injury occurred, **the following day** shall be counted as the first day of disability. ...*

In this matter since claimant's injury occurred on Friday, March 27, 2015 and he was paid that day. Accordingly, since the claimant did not work weekends "**the following day**" under section 121.15(a) was Monday, March 30, 2015, and it is that date from which the 90 days on the TNCP began to run.

Thus, the 90-day period began on Monday, March 30, 2015, and ended on June 29, 2015. In this matter because the Employer filed its Notice Stopping Temporary Compensation Payable and Denial on June 28, 2015, both were timely issued and the Notice of Conversion issued by the Bureau was void.

Valley Stairs and Rails v. WCAB (Parsons), No. 1100 C.D. 2017 (Decision by Judge McCullough, January 24, 2019) 1/19