GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL S. BOWSER
MAYOR

DEBORAH C. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-056 (R)

ANTHONY LAWSON,
Claimant–Respondent,

v.

M.C. DEAN, INC., and
ZURICH AMERICAN INSURANCE CO.,
Employer/Insurer-Petitioner.

On Remand from the District of Columbia Court of Appeals
No. 14-AA-1141, 146 A.3d 67 (D.C. 2016)

Appeal from a September 17, 2014 Compensation Review Board Decision and Order
Affirming an April 14, 2014 Compensation Order by
Administrative Law Judge David L. Boddie
AHD No. 06-431E, OWC No. 627344

(Decided January 11, 2017)

D. Stephenson Schwinn for Employer
Eric M. May for Claimant

Before JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

Introduction

This case is before the Compensation Review Board ("CRB") on the July 7, 2016 opinion of the District of Columbia Court of Appeals ("DCCA") remanding this matter for a determination as to whether the statutory term "arm" for the purposes of a schedule award is synonymous with the medical term "upper extremity", and for reconsideration by an Administrative Law Judge ("ALJ") of the claims without reference to social or personal effects of the injuries that have no

nexus to employment, i.e. wage-loss, and whether a compensation order must connect the specific impairments to a factor in the disability analysis instead of compensating occupational capacity in the abstract. *M.C. Dean, Inc. v. DOES and Anthony Lawson, Intervenor*, 146 A.3d 67 (D.C. 2016) ("*Lawson*").

FACTS OF RECORD AND PROCEDURAL HISTORY

The following Facts of Record and Procedural History are taken from the CRB's Decision and Order ("DO") which is the subject of this remand, *Lawson v. M. C. Dean*, CRB 14-056 (September 17, 2014):

> On April 1, 2006, Mr. Anthony Lawson injured his neck and shoulders while working for M.C. Dean. As a result of his injuries, Mr. Lawson experienced pain radiating into his arms.
>
> Eventually, Mr. Lawson was diagnosed with a torn left rotator cuff. He underwent surgical repair and received physical therapy but experienced little improvement in his neck and shoulder pain radiating into his arms.
>
> Mr. Lawson also was diagnosed with a torn right rotator cuff, and following multiple MRI's, Mr. Lawson was diagnosed with herniated disc at C5-C6 and bilateral carpal tunnel syndrome. In October 2009, he underwent an anterior discectomy and fusion of his cervical spine but continued to experience pain radiating into his arms. In December 2012, his right-sided carpal tunnel syndrome was surgically repaired.
>
> Although Mr. Lawson has reached maximum medical improvement, he continues to experience pain radiating into his arms. This pain affects his ability to function and decreases the strength in his right arm.
>
> As a result of his ongoing disability, Mr. Lawson asserted entitlement to an award for 50% permanent partial disability to his right arm and 30% permanent partial disability to his left arm. The parties proceeded to a formal hearing, and in a Compensation Order dated April 14, 2014, an administrative law judge ("ALJ") awarded Mr. Lawson 45% permanent partial disability for the right arm and 30% permanent partial disability for the left arm.
>
> On appeal, M.C. Dean takes exception to the fact that Mr. Lawson was awarded schedule member permanent partial disability benefits even though
>
> > Claimant sustained neck and shoulder injuries while lifting at work on April 1, 2006. Although he continues to work regular duty in his usual occupation, and has never experienced any permanent wage loss, the Claimant has been awarded more than $130,000 in benefits for a combined 75% permanent partial disability of his arms.

M.C. Dean argues Mr. Lawson's neck and shoulder injuries cannot support a permanent partial disability award because Mr. Lawson has not lost any wages and has not demonstrated a separate disability in his arms distinct from the disability in his neck and shoulders. Furthermore, even if there is a separate and distinct disability in Mr. Lawson's arms, M.C. Dean argues, "there is no factual basis for Judge Boddie's decision to allocate Claimant's entire disability to his arms [as opposed to his arms, neck, back, and shoulders]."

In addition, M.C. Dean asserts the ALJ erred by supplementing Mr. Lawson's medical impairment ratings with consideration of personal, social, and occupational impacts of the disability. Next, M.C. Dean argues that when determining the extent of Mr. Lawson's disability, the ALJ erred by considering the impact of Mr. Lawson's disability on his occupational capacity. Finally, M.C. Dean asserts it is entitled to a credit for temporary total disability benefits paid from December 7, 2012 until March 14, 2013 and should not have to pay "retroactive permanent benefits for the same time period in which temporary benefits have already been paid."

For these reasons, M.C. Dean urges the Compensation Review Board ("CRB") to reverse the April 14, 2014 Compensation Order and to

> take this opportunity to restore the original intent of the District of Columbia Council to limit awards for non-scheduled disabilities to cases where the claimant can demonstrate actual wage loss. At a minimum, the Board must use this case as a vehicle to inform ALJs of the limits of their discretion and the statutory elements to be considered when awarding benefits.

In opposition, Mr. Lawson

> argues that the ALJ correctly interpreted the law; did not err in granting a schedule award to the upper extremities; that the ALJ's conclusions were based on substantial evidence; that he acted within his permissible discretion in awarding additional benefits for the personal, social, and occupational impacts of the injury; and that the Act permits concurrent awards for the same injury.

Mr. Lawson asserts his lack of actual wage loss is irrelevant because his neck and shoulder injuries distinctly affect his arms, the situs of his disability. Mr. Lawson also asserts that the ALJ did not err in relying on (1.) Dr. Peter Moskovitz's impairment rating because Dr. Moskovitz appropriately assessed Mr. Lawson's arm disability in a way that conforms to statutory requirements in the District of Columbia or (2.) the effect of Mr. Lawson's disability on his personal, social, and

occupational capacities. Finally, Mr. Lawson advocates the CRB not to exceed its authority when applying existing law and to affirm the Compensation Order.

M.C. Dean filed a reply to Mr. Lawson's opposition. M.C. Dean emphasizes that in order to recover a schedule member award, Mr. Lawson must experience symptoms in and impairment to his arms, and "[t] here is no question that the focus of Claimant's treatment has been almost exclusively on the neck and shoulders." M.C. Dean, again, objects to Dr. Moskovitz's conversion of his whole body rating to an arm rating.

DO at 1-3. (footnotes omitted).

The DO identified these issues on appeal:

ISSUES ON APPEAL

1. Is it the situs of the injury or the situs of the disability that determines whether a schedule member permanent partial disability award is appropriate?

2. Has Mr. Lawson proven disability in his arms which forms the foundation for his schedule permanent partial disability claims?

3. Is the April 14, 2014 Compensation Order supported by substantial evidence and in accordance with the law?

Id. at 3-4.

The CRB concluded:

> The situs of a disability determines whether a schedule member permanent partial disability award is appropriate, and Mr. Lawson proved to the ALJ's satisfaction that the situs of his disability is his arms. The April 14, 2014 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

Id. at 7.

Employer appealed the DO to the DCCA, which found error on the parts of both the CRB and the ALJ, which will be more fully set forth below. Following the remand, the CRB issued a briefing order. Claimant and Employer filed their briefs on remand on August 29, 2016, ("Claimant's Brief on Remand" and "Employer's Brief on Remand").

ANALYSIS

The DCCA has directed the CRB to determine what is meant by the word "arm" in D.C. Code § 32-1508 (3) (U-i), that is, for the purpose of a schedule award, is "arm" synonymous with "upper extremity" and if not, what is the anatomical boundary of an "arm". *Lawson* at 73-75, 77-78.[1]

As the court noted, the term "arm" is used, but not specifically defined in the District of Columbia Workers' Compensation Act ("Act") while the term "upper extremity", while not in the Act, has frequently been used interchangeably by the Administrative Hearings Division, the CRB, and DCCA. However, the question of what constitutes the anatomic boundaries of scheduled members, particularly arms and legs, as the court in the case before us points out, has

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[1] Without a clear determination from the CRB as to where the arm begins for purposes of a schedule award, a particular doctor's or ALJ's understanding of the terms "arm" and "upper extremity" may result in the inconsistent determination of schedule awards or, as petitioners contend here, in the arbitrary expansion or reduction of a schedule "arm" award in a particular case.

Lawson at 73.

* * *

> Because the extent of the "arm" differentiates schedule awards and non-schedule awards, a definition of that boundary is essential.

* * *

> [footnote 7] The fact that Mr. Lawson's injury occurred to the neck and shoulders, even if eligible only for non-schedule benefits, does not preclude a schedule award for resulting impairment of the arms. *See id.* at 227-28. It may, however, require separation of the impairments.

Lawson at 74.

* * *

> We therefore remand to the CRB to clarify the definitions of "arm" and "upper extremity" so that the legal scope of schedule awards does not vary from case to case.

Lawson at 75.

> [From the conclusion]: [W]e ... remand to the CRB for resolution [by the CRB] of th[e] legal question of where the "arm" ends for purposes of a schedule award ... or whether the statutory term "arm" is actually synonymous with the medical term "upper extremity".

Lawson at 77-78.

yet to be addressed. This lack of clarity is particularly a problem when there is schedule award claim for an injury to a claimant's arm that includes injury to the shoulder.[2]

In answering the court's question, our starting point is the schedule award section of the Act that reads in pertinent part:

> **§ 32-1508. Compensation for disability.**
>
> **(3)** In case of disability partial in character but permanent in quality, the compensation shall be 662/3% of the employee's average weekly wages which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with paragraph (2) or (4) of this subsection respectively, and shall be paid to the employee, as follows:
>
> **(A)** Arm lost, 312 weeks' compensation;
>
> **(B)** Leg lost, 288 weeks' compensation;
>
> **(C)** Hand lost, 244 weeks' compensation;
>
> **(D)** Foot lost, 205 weeks' compensation;
>
> **(E)** Eye lost, 160 weeks' compensation;
>
> **(F)** Thumb lost, 75 weeks' compensation;
>
> **(G)** First finger lost, 46 weeks' compensation;
>
> **(H)** Great toe lost, 38 weeks' compensation;
>
> **(I)** Second finger lost, 30 weeks' compensation;
>
> **(J)** Third finger lost, 25 weeks' compensation;
>
> **(K)** Toe other than great toe lost, 16 weeks' compensation;
>
> **(L)** Fourth finger lost, 15 weeks' compensation;
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> **(M)** Compensation for loss of hearing of 1 ear, 52 weeks. Compensation for loss of hearing of both ears, 200 weeks, provided that the Mayor may establish a waiting period, not to exceed 6 months, during which an employee may not file a claim for loss of hearing resulting from nontraumatic causes in his occupational environment until the employee has been away from such environment for such period, and provided further, that nothing in this subparagraph shall limit an

[2] Since the shoulder is not listed as a schedule member under the Act, if a shoulder impairment does not independently impair the arm, a shoulder impairment is not suitable for a schedule award. *See Morrison v. DOES,* 736 A.2d. 223 (D.C. 1999). The court noted that *Morrison* presented the inverse of the present case. In *Morrison,* the claimant suffered an injury to his arm and shoulder and was awarded schedule benefits for his "upper extremity." The court held that the term "upper extremity" must have meant the arm without the shoulder and the case was remanded since any shoulder disability resulting in a wage loss could be compensable as a non-schedule disability.

employee's right to file a claim for temporary partial disability pursuant to paragraph (5) of this section;

(N) Compensation for loss of more than 1 phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the 1st phalange shall be one half of the compensation for loss of the entire digit;

(O) Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot;

(P) Compensation for loss of binocular vision or for 80% or more of the vision of an eye shall be the same as for loss of the eye;

(Q) Compensation for loss of 2 or more digits, or 1 or more phalanges of 2 or more digits, of a hand or foot, may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot;

(R) Compensation for permanent total loss of use of a member shall be the same as for loss of the member;

(S) Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member. Benefits for partial loss of vision in 1 or both eyes, or partial loss of hearing in 1 or both ears shall be for a period proportionate to the period benefits are payable for total bilateral loss of vision or total binaural loss of hearing as such partial loss bears to total loss [.]

* * *

(U-i) In determining disability pursuant to subparagraphs (A) through (S) of this subsection, the most recent edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* may be utilized, along with the following 5 factors:

(i) Pain;

(ii) Weakness;

(iii) Atrophy;

(iv) Loss of endurance;

and

(v) Loss of function.

D.C. Code § 32-1508 (3)(A) – (S); (U-i).

Prior to April 16, 1999, (the effective date of amendments to the Act passed in 1998), the Act did not contain sub-subsection (U-i). Then, as now, the schedule listed body parts by reference to "arms" and "legs". Sub-subsection (O), by referring to "amputation" with regard to the relationship of an amputation to whether it was above or below the elbow or knee, respectively, ascribing a below-the-knee amputation as "the loss of the foot" and a beyond the elbow amputation as "the loss of the hand", (as well as similar references to the phalanges of the "digits" of the hand and foot) is suggestive (but not clearly dispositive) that the arm and leg were considered to be co-extensive with the upper and lower large bones, to the point of their terminus at what can be referred to as the shoulder and hip joints.

Further, sub-subsection (S), which also pre-dates the amendments, recognizes a literal distinction between "loss" of the member (presumably by accidental or therapeutic amputation) and "loss of use" of the member, and deems the literal distinction immaterial to the legal existence of a schedule "disability".

With respect to Subsection U-1, the bill that was introduced stated the use of the *American Medical Association Guides the Evaluation of Permanent Impairment* (the "Guides") was mandatory and conclusive.[3] However, the legislation that was enacted said use of the Guides as well as the 5 factors was permissive. The introductory language of the enacted bill stated:

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[3] Bill 12-192 provided in pertinent part:

> (e) Section 8 (D.C. Code § 36-307) is amended as follows: (1) Section (a-l) (D.C. Code § 36-307(a-1)) is repealed. (2) Section (b)(1) is amended to read as follows: "(b)(1) Physicians providing services under this act after the effective date of these amendments *shall evaluate and report medical impairment in accordance with the most recent edition of the American Medical Association's Guides to the Evaluation Of Permanent Impairment ("Guides").* An employer shall have the right to require, at its own expense, that the employee obtain an impairment evaluation by a physician designated or approved by the employer in the event that the employer does not accept the evaluation of the employee's treating physician. When there is disparity or disagreement between the reports of two physicians, or between a report and findings reported in medical treatment records, the employee may be referred for further evaluation, at the expense of " the employer, in accordance with the Guides, by a board-certified medical specialist, mutually agreeable to both employee and employer, for a resolution of the disparity or disagreement. The decision of the specialist shall be binding on all parties."
>
> * * *
>
> (B) Subsection 9(c)(21) (D.C. Code § 36-308(c)(U)) is amended by adding the following sentence after the semicolon: "; *the degree of impairment for the loss of, or loss of the use of, any member as set forth in subparagraphs (A) through (S) of this subsection shall be determined in accordance with the evaluation of a physician pursuant to Section 8(b)(3) (D.C. Code §36- 307(b)(3)) utilizing the most recent edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment.*"
>
> * * *
>
> (5) Add new subsection (k) to read as follows: "(A) Notwithstanding the provisions set forth in the preceding subsections, in the case of a disability partial in character but permanent in quality occurring on or after the effective date of this act that is compensated according to subsection (3)(V) above, *compensation shall be exclusively based on an impairment rating using the most recent edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment.*

> To amend the District of Columbia Workers' Compensation Act of 1979 ... to place a 500 week cap on the payment of disability benefits where 1 injury causes temporary or permanent partial disability, *to permit American Medical Association Guidelines along with 5 other factors to evaluate permanent injuries*, ... to reduce the length of scheduled permanent partial disability compensation periods by 25% ....

D.C. Act 12-571, D.C. Register 46-891, December 23, 1998.[4]

Employer has attached to its Brief a portion of the current edition of the Guides. We take administrative notice of their provisions as contained at pages 19 – 20 and 391.[5]

The most significant portion of the Guides for the purposes of this remand is found in the introduction to Chapter 15, The Upper Extremities:

> This chapter provides the criteria for evaluating permanent impairment due to impairments of the upper extremities (upper limbs). For evaluation purposes, as illustrated in Figure 15-1, the upper extremity is divided into 4 regions:
>
> •Digits/Hands: including carpometacarpal (CMC), metacarpophalangeal (MCP), and interphalangeal (IP) joints.
>
> • Wrist: including distal radioulnar, radiocarpal, and ulnocarpal, joints.
>
> • Elbow: including humeroulnar and proximal radioulnar joints.

(Emphasis added).

[4] While at least two provisions of the legislation passed in 1998 were clearly intended to limit the size of schedule awards (limiting benefits to 500 weeks and reducing the number of weeks for which a schedule award is payable by 25%), it is not clear whether that was the intent with respect to the AMA Guides and the 5 factors.

[5] On December 22, 2016, the CRB issued an Order to Show Cause Re: Taking of Administrative Notice of Employer's submissions ("OSC"). The OSC directed the parties to show cause why the CRB should not take administrative notice of the submissions, and invited submission by them of "such items that are suitable for the taking of Administrative Notice that are relevant to" Employer's submissions and which the party believed should also be considered in connection with the Administrative Notice taken.

Claimant filed Claimant's Response to Order to Show Cause in which Claimant consented to notice being taken of the anatomy text, but objecting to taking notice of the submitted portions of the AMA Guides. The bases of the objections were (1) Employer had submitted different provisions of the Guides to the court during this appeal to which Claimant had objected but upon such objection the court did not rule, and (2) Claimant does not now have the opportunity to further examine his medical expert(s) for comment or explanation. Claimant did not ask the CRB to take administrative notice of any submissions.

Neither of Claimant's objections is germane to the question of whether the submissions are matters of which the CRB may take Administrative Notice. Rather they reflect Claimant's wish that the CRB ignore matters to which it could have taken notice without Employer's having submitted them. Accordingly Claimant's objections are rejected.

> •Shoulder: including scapulothoracic, scapuloclavicular, sternoclavicular, and glenohumral joints.
>
> In prior editions of the *Guides*, the upper limb was referred to as the upper extremity, and this usage has become standardized. However, proper use of terminology would require that the structure from the shoulder to the hand be called the upper limb. In the Sixth Edition both terms are used synonymously.

Guides at 383-384.

The diagram included in Chapter 15 as Figure 15-1 depicts all the bony structures from the fingertips, through the elbow joint, and through the shoulder joint and beyond, and does not include any portion of the spinal column.

The Guides also include the following discussion:

> 15.2e Shoulder
>
> The shoulder is defined as the region from the mid-humerus bone [6] to the scapulothoracic region. [7]

Guides at 390.

The Court on remand noted that our DO in this case could be viewed as inconsistent with our decision in *Morrison* and invited the CRB to further explain this apparent inconsistency:

> Although prior administrative decisions held that actual neck and shoulder impairments can only contribute to non-schedule disability awards, *see Morrison, supra*, 736 A.2d at 225 n.1, the CRB affirmed the compensation order in this case in which the ALJ fully credited Dr. Moskovitz's upper extremity impairment assessment without grappling with the inclusion of neck and shoulder impairments in that assessment. The CRB is entitled to deference in its interpretation of the Act which does not explicitly define either the "arm" or the "upper extremity." The CRB has expertise in the area of workers' compensation and could potentially conclude — though we take no position — that sound policy and legislative intent support a change in the scope of arm awards since *Morrison* was decided in 1999.

Lawson at 74.

As stated, the CRB asked the parties to address this point. Employer argued in its Brief on Remand that:

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[6] The mid-humerus bone is the long bone in the upper arm between the shoulder joint and the elbow joint. *Dorland's Illustrated Medical Dictionary, 29th Ed.* ("*Dorland's*") at 836.

[7] Scapular referring to the shoulder blade and thoracic referring to the thorax or chest, being the part of between the neck and the diaphragm, encased by ribs. *Dorland's, supra* at 1604.

> Sound public policy supports departure from *Morrison*. In the years since *Morrison*, the Board [CRB] has focused more and more on the place of functional disability, rather than the situs of injury, to assign disability under the Act. This has coincided with a national trend to include the shoulder and rotator cuff as part of the arm for the purpose of assigning a permanency rating. *See Adomakov. Northern VA Training Center,* 2014 WL 1154388 (Virginia Workers' Compensation Commission); *Johnson v. Pasminco Zinc Inc.*, 2007 WL 789522(Tenn.); *Hagan v. Labor and Industry Review Com'n*, 210 Wis. 2d 12, 563 N.W. 2d 454, (1997); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).
>
> * * *
>
> Another very good reason to conform the meaning of the "arm" under the Act to the AMA Guides definition of the term "upper extremity" is to avoid making disability awards turn on medical lexicon. The current rule engenders needless litigation over the precise amount of impairment and commensurate disability attributable to the shoulder as opposed to the rest of the arm, and deprives the parties of predictability in this recurring issue. In this case, the Claimant was determined to have a combined 75% disability of his arms, even though he had no wage loss and his treating physician initially opined that virtually all of the impairment stemmed from injuries to his neck and shoulders. The evaluating physician was asked to simply convert the neck and shoulder impairments and express them as equivalent impairments of the arms, thereby permitting a schedule award under the Act. Allowing this sort of "conversion" effectively means that the determination of whether there is a schedule award or a wage loss award will vary from case to case at the sole discretion of the Claimant and his evaluating physician. Thus, this case perfectly demonstrates how any disability determination could turn entirely on a matter of semantics; because an impairment of any scheduled body member can be converted to an equivalent impairment of the body as a whole.

Employer's Brief on Remand at 8-9.

Claimant argued to the contrary:

> There is no sound policy or legislative intent that would support departure from the holding in *Morrison*. However, this Court should delineate between the holding in *Morrison* and the 6th Edition of the AMA [Guides]. The 6th Edition of the AMA [Guides] describes the upper extremity as the shoulders, hands, wrists and elbows. … It is apparent that the 6th Edition of the AMA [Guides] and the holding in *Morrison* are thus at odds in defining the upper extremity. … To remedy the conflict between *Morrison* and the 6th Edition of the AMA [Guides], it must be made clear that ratings for a schedule benefit be made to an individual's arms as opposed to the upper extremities. In *Morrison*, the doctor had to clarify that his use of the word[s] upper extremity was coexistent with the word arm, thereby illustrating the confusion. If the Compensation Review Board defines the

> upper extremity as the arm, and it is made clear that the rotator cuff is not included in the definition, there will be guidance in evaluating permanent partial impairment in the future.

Claimant's Brief on Remand at 6.

From these two arguments one thing is apparent: Claimant and Employer agree that *Morrison* is inconsistent with the Guides.

Further, the court in *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012) moved quite clearly in the direction of using medical impairment as a baseline for assessing disability under the schedule, in order to reduce the possibility of arbitrary awards under the schedule. The CRB has followed this baseline approach in numerous cases since *Jones*. *See Ulloa v. Hotel Harrington*, CRB No. 12-006 (August 7, 2012); *Green v. DOES*, CRB No. 12-156 (November 15, 2012); *Nickens v. Fort Myer Construction*, CRB No. 13-057 (August 6, 2013)(*Nickens I*); *Prescott v. Friendship Public Charter School*, CRB No. 13-072 (August 22, 2013); *Hawkins v. Washington Hospital Center*, CRB No. 13-063 (August 27, 2013); *Nickens v. Fort Myer Construction*, CRB No. 14-045 (August 19, 2014)(*Nickens II*); and *Allen v. Corrections Corporation of America*, CRB No. 15-090 (October 5, 2015).

Although the language in the Act regarding use of the Guides and the 5 ~~five~~ factors is permissive, it is reasonable to infer that by making the Guides an appropriate benchmark for assessing objective medical impairment, Council intended that the anatomical description of the relevant body parts referenced in the Guides would correspond to the anatomical body parts listed in the schedule. Any other conclusion would result in like injuries being treated differently depending upon whether an ALJ chose to employ the Guides or not, the result of which would be to arbitrarily treat the arm as not including the rotator cuff and shoulder in some cases, but to treat it as including them as part of the arm in others.

We conclude that given the acceptance by the D.C. Council of the Guides as being germane to assessing medical impairment for the purpose of permanent partial disability awards under the schedule, and in light of the great importance that has been assigned to the degree of medical impairment in schedule award cases since *Jones,* the *Morrison* rule that the shoulder and rotator cuff are not a part of the arm for purposes of schedule awards under the Act should be jettisoned.

Therefore, in response to the first issue on remand, the CRB finds that the term "arm" in D.C. § 32-1508 includes the shoulder and rotator cuff.

The second issue on remand concerned the ALJ's legal analysis, specifically his increasing the disability loss by factors for which he did not identify a nexus between those factors and the effect they had on Claimant's wage-earning capacity.

The court held:

> [Employer] contend[s] the ALJ erred by first performing the standard five-factor analysis of § 32-1508 (3)(U-i) to arrive at a thirty percent (30%) disability for the right upper extremity and fifteen percent (15%) disability to the left upper extremity, *then increasing each upper extremity schedule disability award by*

fifteen percent (15%) based on additional factors not set forth in the statute. For the right upper extremity increase, the compensation order has only one sentence: "Based upon these finding [sic] I assign 5% disability to each of these factors, for a total 45 percent disability of the right upper extremity." The other "finding[s]" or "factors" are never identified. For the left arm, the compensation order includes two paragraphs explaining the personal, social, and occupational limitations. For the left arm the compensation order includes two paragraphs explaining the personal, social, and occupational limitations resulting from the disability before assigning an additional "5 per cent permanent partial disability for the impact the work injury has caused impacting upon [Mr. Lawson's] activities in these areas for a total 30 per cent permanent partial disability of the left upper extremity."

The ALJ's omission of the additional findings regarding the right upper extremity award prevents meaningful review of the decision.

* * *

[Employer] argue[s] that the ALJ relied on the same three factors laid out in the left upper extremity analysis – five percent increases for personal, social, and occupational activities—when increasing the right upper extremity award. Mr. Lawson counters that the ALJ increased the award by the same three statutory factors used previously – pain, weakness, and loss of endurance – though he cannot explain why the ALJ would reiterate the same factors instead of awarding fifteen percent disability for each factor in the first instance. The debate between counsel at oral argument about the additional factors reflects the lack of clarity in the ALJ's additional award for the right upper extremity. Because the ALJ "fail[ed] to 'explain its reasoning in arriving at a disability award'" for the right upper extremity "we must remand the case back to the CRB." *Bowles v. District of Columbia Dept. of Emp't Servs., 121 A.3d 1264, 1269 (D.C. 2015)*(quoting *Jones*[*v. District of Columbia Dep't of Emp't Servs., 41 A.3d 1219, 1224 (D.C. 2012)*] *at 1225.*

The ALJ relied on the general definition of non-medical disability in the AMA *Guides* as authority to award disability benefits for the impact of Mr. Lawson's impairment on his personal and social activities, not just his wage-earning capacity[8]. … The compensation order did not tie personal and social functions to the multi-factor framework of § 32-1508 (3)(U-i) … . the ALJ instead provided a five-percent increase for limited "sleep through the night and grocery shopping" (personal) and a five-percent increase for limited "ability to participate in recreational activities" (social) without demonstrating a nexus between those limitations and Mr. Lawson's ability to perform job duties.

We conclude that the ALJ erred in failing to demonstrate a nexus between Mr. Lawson's personal and social activities and his wage earning capacity, and therefore the award should not have been increased by the non-occupational consequences of an injury. A schedule award should not increase based on functional impairment of personal and social activities because those are beyond

the economic scope of the Act. ... **Contrary to our concurring colleague, we conclude that consideration of personal and social activities is only consistent with the legislative history and structure of the Act if there is a nexus to wage-earning capacity, so a remand on this issue is unnecessary.**

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[8] ... This brief background in the AMA *Guides* ['disability,' which is *assessed by nonmedical means*, means an alteration of an individual's capacity to meet personal, social, or occupational demands] was not intended, either by its authors or the D.C. Council, to be a source of legal factors, and it does not change the economic focus of the Act, or to meet statutory or regulatory requirements.

Lawson, supra, at 75– 77 (italics and bold emphasis added).

Our interpretation of the court's phraseology, especially the bolded part of this passage, is that it has determined that a remand to the CRB to consider whether non-occupational factors may be considered in disability analysis is unneeded, since the court has made that determination. We assume it is the court's intent that the matter be remanded to the ALJ for reconsideration of the claims without reference to social or personal effects that have effect on Claimant's wage-earning capacity.

Accordingly, the matter must be remanded for reconsideration, and on remand the ALJ may not consider the effects of the injury upon Claimant's "personal and social activities" unless there is a nexus found between such effects and Claimant's wage-earning capacity..

The third and final instruction from the court is contained within the following:

> The ALJ also found that Mr. Lawson's arm injuries imposed "physical limitations regarding overhead work" causing an inability to perform some work assignments. These functional impairments both narrowed Mr. Lawson's work assignments and his ability to seek second jobs as an independent contractor. As a result, the ALJ awarded five percent permanent partial disability for occupational limitations. The CRB affirmed, reasoning that "consideration of a disability's effect on occupational capacity is precisely what an ALJ is tasked to do." [Employer] argue[s] that the occupational limitations were *de minimis* and warranted no further award beyond the factor analysis....
>
> We agree that determining "occupational capacity is precisely what an ALJ is tasked to do," but it is not clear that occupational capacity should be an independent factor evaluated in a vacuum. Limitations of occupational activities are assessed under the statutory structure (with the Maryland factors of pain, weakness, atrophy, loss of endurance, and loss of function), and our recent decisions have emphasized that variance from the physical impairment rating to the economic disability rating should be specifically explained. ... *On remand, the CRB should consider whether a compensation order must connect the specific impairments to a factor in the disability analysis instead of compensating occupational capacity in the abstract.* If so, the ALJ's findings in this case

> regarding limited range of motion affecting job duties would still be relevant, and they might support an award increase for "loss of function" under § 32-1508 (3)(U-i)(v).
>
> The ALJ did not clearly explain its award for the right upper extremity. The ALJ also erred by considering personal and social activities as independent factors in the left upper extremity analysis without demonstrating an economic nexus to wage-earning capacity. We therefore remand for new disability analysis by the ALJ and clarification of the role of "occupational capacity" in the disability analysis by the CRB [footnote omitted].

Lawson at 76-77.

Our understanding of this mandate is that the court wishes for the CRB to state whether the five factors are to be considered in the absence of a specific finding that the existence of such a factor (i.e., the presence of detectable atrophy, reported or diagnosed weakness, complaints of pain, the loss of functional capacity, and/or the reported or measured loss of endurance) has some specific occupational consequence. That is, we take this mandate to be to determine whether, like "personal and social activities", there must be some nexus between one or more of the five factors and a claimant's earning capacity, in order for such factor or factors to enhance a schedule award. As we understand it, the court deems a finding of the existence of one or more of the five factors to be "occupational incapacity in the abstract", unless the factor is shown to have some specific effect on a claimant's ability to perform his or her job.

As just discussed, the court has deemed it improper to consider personal and social effects of an injury on a claimant in the absence of a specific nexus between those limitations and a claimant's wage-earning capacity. The court has also made clear in this and other cases that "deviations from medical impairment" in arriving at a disability figure must be fully explained.

In light of these principles, the answer to the court's question is this: use of one or more of the 5 factors to deviate from the medical impairment found requires an identifiable nexus between the factor or factors and a claimant's wage-earning capacity. Stated another way, when determining a schedule award, it is improper to consider any of the five factors in the abstract but that any of the five factors may be relevant to the award if such factor is shown to affect a claimant's earning capacity or other economic impairment.

CONCLUSION AND ORDER

Based upon the aforegoing we conclude that (1) the term "upper extremity" as used in the *American Medical Association Guides to the Evaluation of Permanent Impairment* and the term "arm" as used in the schedule awards provisions of the Act are co-extensive and synonymous for consideration of permanent partial disability awards under the schedule, and (2) use of one or more of the five factors to deviate from the medical impairment found requires an identifiable nexus between the factor or factors and a claimant's wage-earning capacity.

The matter is remanded for further consideration of the claims for schedule awards to the left and right arms in a manner consistent with the remand order of the District of Columbia Court of Appeals and this Decision and Remand Order.

So ordered.