

COURT OF APPEALS CLARIFIES THE METHOD TO ASSIGN PERMANENT PARTIAL DISABILITY AWARDS UNDER THE D C WORKERS' COMPENSATION ACT

Like many other workers' compensation statutes, the D.C. Workers' Compensation Act [Act] provides a schedule setting forth the amount of benefits that may be awarded for the permanent disability of certain body members. D.C. Code § 32-1508(3). For example, the Act dictates that the loss of an arm results in an award of 234 weeks of compensation benefits. Partial loss of use of the arm is compensable in a proportionate amount, i.e., a 10% permanent disability of the arm equates to 23.4 weeks of compensation benefits. Thus, the schedule of disabilities may be seen as a legislative determination of the presumed occupational impact of these permanent disabilities, without requiring proof of actual lost wages in every case. In contrast, permanent partial disability benefits for non-scheduled members are based upon actual wage loss. Thus, compensation for injuries to the neck or back is payable at a rate of two-thirds the wage loss for up to 633 weeks.

Over time, this simple statutory scheme was interpreted in ways that made it difficult to determine whether or not the claimant sustained a scheduled disability, and the extent of the disability sustained. For example, neck injuries frequently cause radiculopathy, i.e., nerve pain radiating down the arm. The courts held that the place of the impairment, not the place of injury, controls for purposes of determining disability. From there, it was argued that some injuries cause impairments in more than one place. In 1999, the Court of Appeals affirmed a decision awarding scheduled benefits for a disability of the arm, plus additional benefits for any wage loss that could be attributed to any "separate and distinct" disability of the shoulder resulting from the same shoulder injury. *Morrison v. D.C. DOES*, 736 A.2d 223 (D.C. 1991). This generated still more litigation over whether these separate awards should be paid consecutively, or together at the same time.

The case of *M.C. Dean, Inc. v. D.C. Dep't of Emp't Servs.*, 146 A.3d 67 (D.C. 2016) [*Dean*] provided a vehicle for the Court of Appeals to clarify how Administrative Law Judges should make permanent partial disability awards. In *Dean*, the treating physician assigned a 27% whole body impairment as a result of the claimant's neck and shoulder injuries. The claimant's attorney wrote to the physician, explaining that an impairment of the neck and shoulders would not be compensable under the Act because the claimant sustained no wage loss, and asked him to express the impairment as the equivalent impairment of the claimant's arms. The physician obliged, assigning a 31% impairment of the left upper extremity and a 16% impairment of the right upper extremity. The physician addressed the impairments of the neck, shoulders, arms, and hands all together, explaining that in his view, "the upper extremity begins at the base of the skull."

The case proceeded to a formal hearing, and the ALJ ultimately assigned a 45% permanent partial disability to the right upper extremity, and a 30% permanent partial disability to the left upper extremity. The medical impairment ratings were increased by the ALJ to account for the claimant's testimony about his pain, weakness, and loss of endurance, as well as the impact the injuries had on his ability to engage in personal, social, and occupational activities like playing ball and shopping for groceries. The award amounted to over \$130,000 in permanent partial disability benefits, even though the claimant had never sustained any actual wage loss on account of his neck and shoulder injuries.

The Court of Appeals identified two problems with this approach. First, the impairment ratings of Claimant's arms were assigned based on injuries to his neck and shoulders. The Court recognized that without a clear line of demarcation, a claimant could choose to collect a scheduled loss award where there is no wage loss, and *vice versa*. The Court decided that a neck injury could not support an award for an impairment of the arm.

Noting that earlier decisions had held that the shoulder was not part of the arm, the Court remanded the case to the agency to consider whether or not this interpretation of the statute should be reconsidered and allow the arm to be equated with the upper extremity, and include the shoulder.

The Court also held it was improper to award benefits based on the effect of the injury on the claimant's ability to engage in personal or social activities. These awards went beyond the scope of the Act, which is intended to compensate for lost earnings. The Court held that a disability rating should focus on loss of occupational capacity. The economic disability rating may be different from the medical impairment rating, but any variance should be specifically explained by an analysis of how the impairment affects the ability to work, and not in the abstract.

On remand from the Court of Appeals, the Compensation Review Board adopted the suggestion to make the shoulder part of the arm for purposes of permanent disability ratings and "jettisoned" the approach taken earlier in *Morrison*. *Lawson v M.C. Dean*, CRB 14-056 (2017). Following the most recent edition of the AMA Guide, the Board held that entire upper extremity -from the shoulder to the hand- is the arm for purposes of assigning permanent partial disability benefits under the schedule.

The Board also rejected the recently emerging trend of ALJs awarding increased disability ratings to account for "personal, social and occupational factors" associated with the injury. Henceforth, any variation from the medical impairment rating must be based on the statutory allowance for pain, weakness, atrophy, loss of endurance and loss of function, and then only to the extent it can be shown to have an identifiable nexus with the claimant's wage earning capacity.

Applying these new standards, Administrative Law Judge Roberson rejected the opinion supplied by Dr. Moskovitz and reduced the permanent partial disability to 12% of the left arm and 3% of the right arm due to the work injury. This reduction, from a combined disability of 75%, resulted in giving Dean a credit of \$148,141 to offset against any future indemnity awarded. *Lawson v M.C. Dean*, AHD 06-431E (Feb. 27, 2017).

Dean should have a very favorable impact on future claims. Under this binding precedent, cervical radiculopathy should no longer support a claim for disability of the arm. By the same reasoning, back injuries should not result in a disability of the leg. Non-scheduled injuries will be compensated only on the basis of actual, demonstrated wage loss again. Shoulder injuries are now considered part of the arm, subject to the 234 week limitation on permanent partial disability benefits. And hip injuries should be compensated as part of the leg.

Perhaps most importantly, ALJ's will no longer be allowed to increase the disability over the medical impairment ratings to account for the alleged personal or social impact of the injury. Any increase in disability on account of occupational impairment based on the statutorily recognized factors of pain, weakness, atrophy, loss of endurance or function must be directly related to the claimant's ability to work. This will reduce uncertainty and litigation, making workers' compensation awards predictable again.

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