



Law Review Article
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THE CURRENT UNCERTAINTY OF APPORTIONMENT LAW

INTRODUCTION

Little did we suspect that with the Legislative overhaul of the workers compensation laws in 2004, such confusion and conflict would arise. This urgency statute was intended to address a “crisis” in the availability and affordability of workers’ compensation insurance. Instead, this statute created a “crisis” that still exists today. In adopting Senate Bill 899, the Legislature did not make it clear as to the appropriate method for apportioning a permanent disability award. Significant legal debate over the meaning of the Legislative changes resulted in a series of conflicting results in cases dealing with the issue of prior permanent disability. This has thrown the workers’ compensation community into further chaos.

This confusion could be traced back to 1971, when the Legislature amended Labor Code § 4658. Here, under this new statute, the number of weekly benefits increased exponentially in proportion to the percentage of the disability. Conflicts arose over the proper method of apportioning permanent disability and eventually this issue reached the Supreme Court in *Fuentes v. WCAB* (1976) 16 CA 3d 1, 41 CCC 42.

The parties in that case suggested that three possible methods, known as Formulas A, B and C may be utilized. Under the old LC § 4658, the compensation was the same, regardless of which formula was used.

Under **Formula A**, the percentage of the non-industrial permanent disability is subtracted from the percentage of the employee’s overall level of total disability to determine the compensable level of permanent disability.

Under **Formula B**, the industrially related percentage is multiplied by the number of weeks of compensation.

While with **Formula C**, the monetary value of the prior disability is subtracted from the percentage of overall permanent disability converted to its monetary value. The remainder is the award.

The Supreme Court adopted Formula A as the appropriate method, and rejected formulas B and C, as “required by the express and unequivocal language of [Labor Code] § 4750.”

According to the Supreme Court, the policy of LC § 4750 was to encourage employers to hire physically handicapped persons and hence economically reduce the results of the subsequent awards of permanent disability.

For many years the Supreme Court Formula A remained the appropriate method of calculating apportionment to Prior Awards.

POST SB 899 CASES

Governor Arnold Schwarzenegger signed into law, Senate Bill No. 899 on April 19, 2004. This bill included reforms to the workers' compensation laws, including the apportionment of permanent disability. Two new statutes, Labor Codes § 4663 and § 4664 governed apportionment, while the former LC § 4750 was repealed.

Labor Code § 4663 provided that apportionment of permanent disability shall be based on causation. On the other hand, § 4664 provided that (a) the employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment (b) if the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. Interestingly, the statute added that "this presumption is a presumption affecting the burden of proof."

However, the confusion and chaos began, since the "key" question now existed as to the "proper" method of calculation regarding apportionment. The use of different methods resulted in a varied range of different outcomes, because the monetary value of permanent disability increased exponentially. Thus depending on whether parties used monetary values or percentages affected the result.

This issue of apportionment was addressed when the WCAB considered, en banc, the method for apportioning permanent disability in *Nabors v. Piedmont Lumber & Mill Company* (2005) 70 CCC 856 (Nabors). The Board concluded that "Formula A" as adopted by Fuentes, was still the correct formula. Here, the Board by a four-to-two majority ruled that in apportioning permanent disability, "the amount of indemnity is calculated by determining the overall percentage of permanent disability and subtracting the percentage of disability caused by other non-industrial factors." The remainder is the applicant's final percentage of permanent disability. The Court's decision was based on the "plain terms of section 4663 (c) and 4664 (a)."

However, the Court of Appeal in December 2005, in *E & J Gallo Winery v. WCAB* (Dykes), 134 CA 4th 1536, 70 CCC 1644 (2005), ruled that the proper method for calculations of prior permanent disability awards was based on a variation of "Formula C" as outlined in the Fuentes Case.

Here, the Dykes court ruled that the "the Legislature contemplated a variation in determining apportionment by repealing § 4750 and replacing it with different language in § 4664 for apportioning liability among multiple injuries." (Dykes, supra, p.1550)

Basically, the Court held that amendment of a statute indicates intent to change the law. The Dykes court further stated that “while the new law can be interpreted to permit several different approaches to apportionment that would yield disparate results, the plain language of § 4664, subdivision (a) means that “ [a]n employer is liable for the direct consequences of a work-related injury, nothing more and nothing less.” (Dykes, supra, at P.1551)

Overall, the Court of Appeal in Dykes decided that the proper method, is that the employee is entitled to compensation for the total disability above any percentage of permanent disability awarded, i.e. “old dollars from new dollars.”

We must point out that Dykes court limited its holding to cases where the employer is self insured and the injured worker sustained both injuries with the same employer.

Significantly, thereafter, a writ of review was granted by the Court of Appeal regarding the WCAB en banc decision in Nabors. The California 1st District Court of Appeal overruled the WCAB decision in Nabors. The Appeal Court agreed with the Dykes court that the appropriate formula for apportioning an award under Labor Code § 4664 was formula C. The Nabors Court now also expanded the Dykes method to an employer who is insured with different carriers.

In regards to Dykes, we note that an employer’s Petition for Writ of Review was filed January 23, 2006 and subsequently denied before the Supreme Court on March 1, 2006, S140645. On the other hand, in the Nabors case, review was denied on August 23, 2006, S145097.

Hence, for a moment, it appeared that the Dykes/Nabors method became the new “apportionment law” of the State.

However, this Dykes/Nabors method was short lived, as on August 30, 2006 the 1st Appellate District court “refined” formula C as held in those two cases. In delivering its decision in *Brodie v. WCAB*, Court of Appeal, 1st App. Dist., Div. 3, 142 Cal. App. 4th 685; 47 Cal. Rptr. 3d 825; 2006 Cal. App. LEXIS 1322, August 30, 2006, the Court held that Formula C had to be re-modified to be the appropriate method when apportioning responsibility between a current and prior disabling injury.

The Court examined the position of where a prior permanent disability could be several years old. The Brodie Court held that by only “crediting the amount of the prior award against the benefits due for current overall disability seems to be to an employer’s disadvantage.” The Court further held that it “fails to take into consideration of the monetary value of the prior award over a period of time and other relevant economic factors.”

Instead, the Brodie court favored the “literal application of Formula C as articulated in Fuentes: with the [current] dollar value of the percentage of prior disability being subtracted from the overall current disability converted into its monetary equivalent.”

Thus the Court held that this refined method ensured that irrespective of the time passed since the prior award was made, an employer would be responsible only for the additional portion of disability resulting from the current compensable injury “nothing more and nothing less.” The Court applied this method of calculation to the Brodie case to demonstrate their point.

The facts are that Stan Brodie received a permanent disability rating of 74% following injuries in 2000 (back, spine and right knee) and injury to his back and spine cumulative to September 2002. This 74% rating entitled him to an award of \$106,375. Brodie had a pre-existing disability rating of 44.5% to the same body parts for which he received awards of \$27,167.50.

Using the Dykes methodology, Brodie’s total award for his recent disability of 29.5% (74% – 44.5%) resulted in a total of \$79,207.50. However this amount exceeded the current scheduled value of a disability rating of 29.5%.

Instead, the Court believed that the “better” approach was the current dollar value of the percentage of pre-existing disability (44.5%, valued at \$38,675) subtracted from the amount of benefits currently valued for a 74% permanent disability rating. Hence this resulted in a permanent disability award of \$67,700 (\$106,375 - \$38,675).

As a result, the order denying reconsideration was annulled and the matter was returned to the WCAB with directions to grant reconsideration, reverse the WCJ’s order and recalculate Brodie’s amount of permanent disability benefits.

On August 31, 2006, one day later after the Brodie decision, the 3^d Appellate Court handed down a decision that created another way of calculating permanent disability where there existed a prior award. In doing so, the Court disagreed with the use of the methods used in Dykes/Nabors (Formula C) and by implication, the newly-given decision in Brodie.

The Court of Appeal made this ruling in four consolidated cases that came its way. The four consolidated cases are *Welcher v. WCAB*, No. C051263; *Lopez v. WCAB*, No. C051790; *Williams v. WCAB*, No. C051894; and *Strong v. WCAB*, No. C051409 Court of Appeal 3rd App. Dist. 142 Cal. App. 4th 818; 47 Cal. Rptr. 3d 888; 2006 Cal. App. LEXIS 1344; 2006 Daily Journal DAR 11883, August 31, 2006. The WCAB in deciding all these four cases used Formula A. The Court of Appeal subsequently affirmed all these orders.

The Welcher court first held that “the fundamental rule of statutory construction is to ascertain and effectuate the intent of the Legislature in enacting the statute. We construe the workers’ compensation scheme as a whole and consider the words used in their usual, commonsense meaning.” As a result, the Court held that Labor Codes § 4663 and § 4664 “did not clearly imply a legislative intent to abandon formula A as held in Fuentes.” According to the Court, these two sections “compelled” the continued application of this

formula, “with the percentage of permanent disability meaning the percentage of permanent disability to total disability, as used in Labor code § 4658.”

Secondly, the Welcher Court further held that “(1) under § 4663, permanent disability must be apportioned based on causation by determining the percentage of the permanent disability to total disability that was directly caused by the current industrial injury, as distinguished from other factors and (2) under § 4664, subdivision (a), the employer is liable only for the percentage of the permanent disability to total disability that was directly caused by the current industrial injury.”

Thus, the Court of Appeal held that the approach to apportionment as adopted by the majority decision in Nabors was correct.

This Court did not agree with the Dykes court’s conclusion that “the Legislature contemplated a variation in determining apportionment by repealing § 4750 and replacing it with different language in § 4664.” (Dykes, supra, 134 Cal. App. 4th at P.1550)

Instead, the Court held that they “perceived no intended change in meaning between these two provisions, since they covered the same subject.” The Court concluded by stating, “It is inconceivable that Legislature intended to fix this “crisis” in workers compensation costs by abandoning the long-established formula of apportionment of permanent disability announced in Fuentes and by adopting a new formula that would dramatically increase awards to employees and therefore increase employers’ costs.”

Then as if enough confusion had not yet been generated, on September 27, 2006, the head of the Appeals Board issued a memo advising “shelving” all such apportionment claims. Chairman Joseph Miller, citing “conflict and uncertainty” advised workers compensation judges to wait for guidance from the Legislature or the Supreme Court before adjudicating any more apportionment cases.

According to Miller, “deferring on this issue will avoid multiple [workers’ compensation] proceedings, and it will prevent the appellate courts from being unnecessarily flooded with cases presenting the same issues.” Regarding Miller’s recommendation, “limited feedback” was received. However various opinions surfaced, indicating it may take up to two years before a resolution is arrived at.

CONCLUSION

The “conflict and uncertainty” of the present different methods for the calculation of benefits in apportionment claims have certainly thrown the workers’ compensation community in disarray. The concept of permanent disability changed dramatically with the adoption of Senate Bill 899. The question now remains whether the new apportionment statutes, § 4663 and § 4664 represent a reversal of the policy under former § 4750.

As of now, there is little that can be done to address this contentious issue. Further appellate decisions may result in new “fourth or fifth” methods of calculations. We await either the intervention of the Legislature or the Supreme Court in this matter.