



New Case Brief
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E & J Gallo Winery v. WCAB (Dykes)
F047246 2005 Cal. App. LEXIS 1945; 2005 Daily
Journal DAR 4674. Court of Appeal of California,
Fifth District.

The Fifth District Court of Appeals overruled the Fuentes (*Fuentes v. Workers' Compensation Appeals Bd.* (1076) 16 Cal.3d 1,3*) decision and established the formula to be used when applying **apportionment** under Labor Codes §§ 4663 & 4664. However, the decision only applies under very specific circumstances.

Dykes applies only to cases where an employee sustains multiple industrial injuries while working for the same self-insured employer. The Court specifically expressed no opinion in cases where an employee received a prior disability award with another employer, where the employer was separately insured at the time of the injuries, or where the medical evidence reveals that a portion of the injured employee's disability is not compensable.

Applicant David Dykes injured his back in 1996. The case resulted in a Stipulation for 20.5% (\$11,680) permanent disability and an Award of future medical care. In 2002, Applicant, still working for the same self-insured employer, suffered another back injury. This one resulted in a finding of 73% disability after adjustment for age and occupation.

The WCJ in his Findings and Award disregarded the *Fuentes* decision (which called for the subtraction of percentages) and awarded the Applicant 73% (\$104,305) less the previously paid \$11,680 and less 12% attorney's fee. The WCJ reasoned that newly enacted Labor Codes §§ 4663 & 4664 superceded the reasoning in the *Fuentes* decision and that this formula allowed for the fairest outcome under the new apportionment statutes.

Defendant Gallo filed a Petition for Reconsideration, which was denied. A Writ was filed with the 5th District Court of Appeals who agreed to hear the case. The Appellate Court Decision upholds the WCJ's Findings & Award. The Appeals Court reasoned that the plain language of section 4664 contemplates accumulating multiple disability awards rather than subtracting percentage levels of disability.

Dykes is distinguishable from the WCAB En Banc Decision *Nabors v. Piedmont Lumber & Mill Company* (2005) 70 Cal.Comp.Cases 856 , currently on appeal before the First District Court of Appeals because of it's narrow application. The WCAB found in *Nabors* that the subtraction of percentages (Formula "A") is the correct method to determine apportionment.

**Fuentes* contemplated three formulas to determine apportionment to prior injuries. Adopting what the Court called Formula "A". This case specifically changes the law to adopt Formula "C" as defined in under *Fuentes*.