



New Case Brief
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Danny Nabors v W.C.A.B., Piedmont Lumber (2006 Cal.App. LEXIS 852)

With the passage of SB 899 and the repeal of L.C. Section 4750, apportionment under Labor Code Section 4464 has been subject to ongoing interpretation. The new L.C. Section 4664 limits an employer's liability to "the percentage of permanent disability directly caused by the injury". The question has become then: how to calculate the liability for the increase in percentage disability after a second injury?

Nabors received injury to his back and lower extremities while employed by Piedmont Lumber, resulting in an award of 49% PD. A second injury at Piedmont, now insured by a second carrier, to the same body parts resulted in a current disability of 80%. The WCJ and *en banc* Panel, utilizing "Formula A" under *Fuentes*, held that the second claim, against the same employer, was to be calculated based on the percentage increase in disability, or 31% PD. This is equivalent to \$22,610. The First Appellate District overruled, allowing applicant the difference between the dollar value of applicant's current 80% permanent disability (including a life pension), and the prior award. In its decision the Court leaned heavily on the discussion in *D & J Gallo Winery v. Workers' Comp. Appeals Bd.* (2005) 134 Cal. App. 4th 1536 (*Dykes*), including the argument that a retained injured worker should not receive less for disability resulting from a second injury than a worker who suffers but one injury resulting in the same overall disability. *Dykes* involved successive injuries at a self-insured employer, rather than a single employer with successive coverage by two separate carriers.

Based on this decision, whenever an employee receives successive injuries at the same employer, "Formula C" under *Fuentes* will be applied. This allows applicant significantly higher PD benefits on the second injury, by calculating the increase in value taken from the exponentially increasing PD schedule. As in *Dykes*, the *Nabors* Court has abandoned use of the *Fuentes* "Formula A" method of calculating a second award (subtracting percentages and going to the bottom of the PD chart). This ignores the original rationale of promoting "hiring the handicapped". Looking ahead, remaining is the question of which "Formula" will be applied when applicant is injured at a *second employer*, or has a pre-existing non-industrial disability. Also in question is whether other appellate districts will follow *Dykes* and *Nabors*. Other cases in our offices are currently challenging application of the *Dykes/Nabors* decisions in other venues.