



New Case Brief
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Nabors v. Piedmont Lumber & Mill Company
(2005) 70 CCC 856 [WCAB En Banc]

The majority of Commissioners sitting *en banc* held that when the WCAB awards permanent disability after **apportionment**, the amount of indemnity due applicant is calculated by determining the overall percentage of permanent disability and then **subtracting the percentage** of permanent disability caused by other factors under section 4663(c) or previously awarded under section 4664(b); the remainder is applicant's final percentage of permanent disability for which indemnity is calculated pursuant to sections 4453 and 4658.

The applicant argued that section 4750 was repealed with the new apportionment sections enacted with SB 899, and therefore the Supreme Court's holding in *Fuentes v. WCAB* (1976) 16 Cal.3d 1; 41 Cal Comp. Cases, 42, no longer controlled the formula for determining permanent disability after apportionment.

The decision by the WCJ followed the rationale of *Fuentes* and, therefore determined that apportionment under section 4664 requires **subtraction of the percentage of permanent disability awarded, rather than subtraction of the monetary value**. The Commissioners reviewed the Court's holding in *Fuentes*, (argued by our own Mullen & Filippi attorney, Alex McKenzie) and agreed with the WCJ's decision in *Nabors*. The Commissioners reviewed the same three formulas considered by the Court in *Fuentes*, and like the Court in *Fuentes*, the Commissioners in *Nabors* believed that the first formula used which subtracts the percentage rather than subtracting the value, is what the legislature intended in both former section 4750, and new section 4663 and 4664. The majority concluded that part of the legislative intent in enacting the new sections was, as in enacting former 4750, to encourage employers to hire disabled workers. Therefore, the formula adopted by *Fuentes*, is still the correct formula.

There are two Dissenting Opinions in *Nabors*. Commissioner Rabine (Chairman) believes that the express language of the new sections requires the use of the second formula considered in *Fuentes*. Relying on the more recent Opinion of the Commissioners *en banc* in *Escobedo*, Commissioner Rabine opines that the language of "approximate percentage" of permanent

disability implies a determination of overall permanent disability allowing for the formula to obtain "the ratio of the disability caused by the industrial injury to the overall disability." The use of "percentage" as a ratio is evident in section 4664(a), which is not the same as the use of the term in section 4658. In that section, weeks of payment of indemnity are assigned to each percentage of permanent disability incurred. The rating can now be considered a 'relative' "numeric representation," expressed as a whole number and divided by percentages. The term "subtract" is nowhere to be found in the new statutes, although it was clearly implied in former section 4750 (the employer shall be liable "only for that portion due to the later injury as though no prior disability or impairment had existed"). The repeal of former section 4750 removes the basis for the method held to apply in *Fuentes*.

The Dissenting Opinion by Commissioner Caplane is based on the third formula discussed in *Fuentes*, often argued, that the permanent disability after apportionment should be calculated by subtracting the monetary value between the present percentage from the value of the prior Award.

Practice Pointer: This reviewer believes that the strong Dissenting Opinion by Chairman Rabine, will result in the Opinion and Decision in Nabors being appealed to the Court of Appeal, including amicus curiae from the California Applicant Attorneys' Association.