



New Case Brief
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September 5, 2006

Stan Brodie v. WCAB and Contra Costa Fire Protection District et al.

Court of Appeal, 1st District

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(8/30/06)

Certified for Publication

This is a Court of Appeal decision (1st Appellate District) that modifies the calculation of Labor Code § 4664 apportionment. This is the Appellate District that had been governed by the decision in *Nabors v. WCAB (2006) 140 Cal.App.4th 217*. The Court acknowledged *Nabors* and also commented on the methodology of the application of Labor Code § 4664 apportionment in the 5th Appellate District, *E & J Gallo Winery v. WCAB (2005) 134 Cal.App.4th 1536 (Dykes)*. The decision was this Courts way of applying apportionment to the applicant's 74% award due to prior awards totaling 44.5%.

The Court looked back at *Fuentes v. WCAB (1976) 16 Cal.3d 1*, for guidance. *Fuentes* was an apportionment decision based, in large part, on Labor Code § 4750, which was repealed as part of the reforms passed as SB 899 enacted on 4/19/2004. There was an extensive discussion of three formulas that could be used to apportion liability. This Court found that the *Fuentes* "Formula C" to still be the appropriate formula for calculating apportionment under Labor Code § 4664.

However, this Court treats the implementation of *Fuentes* Formula C differently than *Dykes* and more completely than *Nabors*. They issue is that just using the exact dollar value of the prior award may result in the employer in getting credit for a lower relative worth of the prior award because of the passage of time and other economic factors.

The Court indicated that it was guided by Labor Code §4664 subdivision (a) which provides, "The employer shall only be liable for the percentage of permanent disability directly caused by the injury and arising out of and occurring in the course of employment." The Court adopted "the literal interpretation of formula C as articulated in *Fuentes*: the overall current disability 'is converted into its monetary equivalent' and '[f]rom this figure is subtracted the [current] dollar value. . .of the. . .percent of [prior] disability.' (*Fuentes, supra*, 16 Cal.3d 1 at page 5)." This application of formula C ensures that the employer will only be responsibility for the additional portion of disability caused by the current compensable injury, "nothing more and nothing less."

The Court returned the matter to the WCAB to grant reconsideration, reverse the WCJ's order and recalculate the amount of permanent disability in accordance with this decision.

This decision gives guidance but leaves open many questions. The decision is not clear if this was the same employer for the subsequent injuries. This decision speaks about apportionment under Labor Code § 4663 but that was not before the Court or part of this decision.