

Significant Decision

The decision on apportionment in Welcher, Strong, Lopez and Williams from the Court of Appeal in Sacramento conflicts with the decisions in Gallo/Dykes from the Court of Appeal in Fresno, and in Brodie and Nabors from the Court of Appeal in San Francisco.

*Stan Brodie v. Workers' Comp. Appeals Bd., and
Contra Costa County Fire Protection District et al.,*

Filed 8/30/06

First Appellate District, Civil No. A112003

Welcher v. Workers' Compensation Appeals Board (C051263)

Strong v. Workers' Compensation Appeals Board (C051409)

Lopez v. Workers' Compensation Appeals Board (C051790)

Williams v. Workers' Compensation Appeals Board (C051894)

Filed 8/31/06

Third Appellate District

Significance: It is almost certain the Supreme Court will grant review to secure uniformity of decision on the issue of how to apportion permanent disability under SB 899's changes to the provisions on apportionment. If it does grant review, win or lose, we will have certainty.

Facts In *Nabors*, while working for the same privately insured employer, Nabors sustained two injuries to his low back and lower extremities. The first injury was in 1996, which resulted in an awarded of 49% permanent disability. A second work injury six years later increased Nabors' overall permanent disability to 80%. At the time of the second injury, State Compensation Insurance Fund ("State Fund") was the employer's workers' compensation insurance carrier.

In *Gallo/Dykes*, while working for the same self injured employer, Dykes sustained two injuries to his back. The first injury was in 1996 and was stipulated to have caused 20.5% permanent disability. A second work injury in 2002 increased Dykes' overall permanent disability to 73%.

In *Brodie*, while employed as a firefighter for Contra Costa County Fire Protection District, Brodie sustained several industrial injuries to his back, spine and right knee for which he had been awarded 44.5% permanent disability. Thereafter, Brodie sustained two more injuries; a specific injury to his back, spine and right knee sustained in 2000, and a cumulative injury to his back and spine

sustained during the period ending September 2002. Brodie's overall percentage of permanent disability after these subsequent injuries was 74%.

In *Welcher*, while working in 1990 for the North State Asphalt, insured by Cal. Comp. Ins., Welcher sustained injury to right arm and leg, which resulted in permanent disability of 62.5%. Thereafter, while employed by Hat Creek Construction, insured by State Fund, Welcher sustained a work injury through March 2001, which increased Welcher's overall permanent disability to 71%.

In *Strong*, while employed by the City and County of San Francisco in 1995, Strong sustained an industrial injury to left knee resulting in an award of 34.5% permanent disability. Thereafter, in 1999, Strong sustained a work injury to his left shoulder, left knee and ankle, and right wrist resulting in 42% permanent disability after apportionment of the prior injury. In 2002, Strong sustained a work injury to his back resulting in overall permanent disability of 70%.

In *Lopez*, while working for the State Department of Social Services, petitioner sustained a work injury in 1998 to her back and lower extremities. The parties stipulated her overall permanent disability was 100%: 79% industrial and 21% caused by other factors. State Fund was, and continues to be, the Department of Social Services' workers' compensation adjusting agent.

In *Williams*, while working for the same self insured employer, Williams sustained two injuries to his back. The first injury caused 28% permanent disability. The second work injury sustained through August 2003 increased Williams's overall permanent disability to 43%.

In all of these cases, the issue was which formula should be used to calculate apportionment of the preexisting percentage of permanent disability. The competing formulas are formula A and formula C. Under formula A, the percentage of permanent disability of the preexisting award or condition is subtracted from the overall percentage of permanent disability to determine the percentage of permanent disability directly caused by the current work injury. Under formula C, the dollar value of the percentage of preexisting permanent disability is subtracted from the dollar value of the overall percentage of permanent disability.

In all of these cases except *Gallo/Dykes*, the Board determined formula A was the correct formula to calculate apportionment.¹ In *Nabors*, *Gallo/Dykes*, and

¹ As explained by the Court in *Nabors v Workers' Comp. Appeals Bd.* (2006) 140 Cal.App.4th 217, 223 in fn 5: (continued on next page)

Brodie the Court of Appeal ruled formula C was correct. However, in a decision in the consolidated cases of *Welcher, Strong, Lopez* and *Williams*, the Third District Court of Appeal (“DCA”) ruled formula A is correct to calculate apportionment.

In *Welcher, Strong, Lopez* and *Williams*, the court acknowledged SB 899 and Labor Code §4663 & §4664 took effect immediately as urgency legislation. Further, the court observed that formula A—established under *Fuentes v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal.3d 1—has been the method of calculating apportionment of permanent disability for almost 30 years. That said, the court began with the question of whether, by repealing the former law including Labor Code § 4750 and enacting new sections 4663 & 4664, did the Legislature clearly express or necessarily imply an intent to abandon formula A and adopt formula C? The short answer is no. Nothing in the provisions of Labor Code § 4663 & §4664 persuaded the court that the Legislature intended to abandon formula A. Rather, the court found the new provisions compelled continued application of formula A. And with regard to the perceived unfairness of formula A noted by the court in *Gallo/Dykes*, the *Welcher* court stressed formula A had not been disturbed by the Legislature for nearly 30 years. And in that regard said, “It is not for us to question the wisdom or fairness of that decision.”

In a concurring opinion, Justice Sims added another reason why he believed *Gallo/Dykes* was wrongly decided. What followed was the first citation—in any of the Court of Appeal decisions cited above—to the Legislature’s stated purpose of enacting SB 899 to relieve the state’s employers from the workers’ compensation crisis at the earliest possible time. In consideration of the Legislature’s stated purpose, Justice Sims said:

In order to understand the analysis in *Dykes* and its relationship to this case, it is helpful to keep in mind the intertwined procedural histories of the two cases. Dykes obtained his original award in November 2004 (*Dykes, supra*, 134 Cal. App. 3d at p. 1541); Nabors obtained his the following month. In January 2005, a Board panel denied Gallo's petition for reconsideration in *Dykes (ibid.)*, and Gallo petitioned for writ of review. While that petition was pending in the Fifth District Court of Appeal, the Board granted Nabors's petition for reconsideration (March 2005) and issued its en banc decision after reconsideration (June 2005). Nabors petitioned this court for writ of review in July 2005, which we granted in October. In December, while this petition was pending, the Fifth District filed its opinion in *Dykes*.

It is inconceivable to me that the Legislature intended to fix this “crisis” in workers’ compensation costs by abandoning the long-established formula of apportionment of permanent disability announced in *Fuentes v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal.3d 1, and by adopting a new formula that would dramatically increase awards to employees and therefore *increase* employers’ costs.

Discussion The Fifth (*Gallo/Dykes*) and First (*Nabors & Brodie*) DCA saw SB 899’s changes to the provisions on apportionment as an opportunity to change law that has been a burr under applicants’ saddle since *Fuentes* was decided nearly 30 years ago. Now that the Third DCA has interpreted SB 899’s changes to these provisions as preserving formula A, the stage is set for the Supreme Court to grant review to secure uniformity of decision. While the Supreme Court could order depublishation of *Welcher et al.*, it’s not likely this will happen given the solid nature of the opinion. In the meantime, it remains to be seen how the Board will react to the uncertainty arising from this split of authority.

Note: The courts’ opinions become final 30 days after their filing dates.

The full opinion in *Brodie* can be found at the Court’s website at:
<http://www.courtinfo.ca.gov/opinions/documents/A112003.DOC>

The full opinion in *Welcher et al.* can be found at the Court’s website at:
<http://www.courtinfo.ca.gov/opinions/documents/C051263.DOC>