

## Significant Decision

### ***Apportionment to a Pre-Existing Disability Under New Labor Code §§ 4663 and 4664 Requires Subtraction of Disability Percentages, Not Dollars.***

*Nabors v. Piedmont Lumber & Mill Company, State Comp. Ins. Fund.*

(Filed 6/9/2005)

WCAB En Banc; Case Nos. SRO 0122159, 0113249

2005 Cal. Wrk. Comp. LEXIS 148

Significance: This recent “en banc” decision by the Workers’ Compensation Appeals Board resolves yet another issue as to how the new apportionment rules under Senate Bill 899 are to be applied. Such “en banc” decisions are done to address important legal issues and insure uniform decisions among the judges staffing local WCAB offices. (Labor Code § 115.) The question is: when apportioning to a pre-existing disability, do we subtract disability from disability or dollar from dollar?

Background: Labor Code § 4658 governs computation of permanent disability. Prior to April 1, 1972, for each percentage point of permanent disability which was of industrial origin, an injured worker was entitled to four weeks of compensation. After April 1, 1972, the number of weekly benefits increased exponentially in proportion to the percentage of the disability. The salutary idea was to provide proportionately greater benefits for more serious injuries. For example, a single 50 percent disability has a greater monetary value than two 25 percent disabilities.

The problem comes when the injured worker’s current overall disability is attributable in part to a pre-existing disability that is subject to apportionment. How should we “subtract” the pre-existing disability from the current overall disability? Let’s take this case of Danny Nabors as our working example. Nabors sustained a 1996 injury to his low back and legs resulting in a stipulated award of 49% permanent disability, equivalent to \$42,476. He suffered a subsequent cumulative injury to the same body parts for the period ending August 19, 2002. Nabors’s current overall disability was rated at 80%, equivalent to \$118,795. Should we subtract disability from disability or dollars from dollars? Or, perhaps, some other middle way?

The Fuentes Case: This question was resolved by the California Supreme Court back in 1976 in the *Fuentes* case. (*Fuentes v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal. 3d 1.) Thus, some detailed discussion of *Fuentes* is here necessary. The Court considered three possible formulas, described for the sake of convenience as formulas A, B, and C.

Under formula A, the pre-existing permanent disability percentage is subtracted from the total current permanent disability percentage with the remainder being the amount attributable to the subsequent industrial injury. Thus, in Nabors’s case, formula A would read: 80% less 49% equals 31% which is equivalent to \$22,610.

Under formula B, we first determine the number of statutory weekly benefits authorized under §

4658 for the current total disability. This figure is then multiplied by the percentage of disability that the subsequent injury alone bears in relationship to the total. Thus, in Nabors's case, 80% results in 516.50 weeks of payments. The percentage of Nabors's disability directly caused by his subsequent injury compared to the total is 31/80ths. Multiplying this ratio by 516.50 yields 200.14 weeks of payments which is roughly equivalent to a rating of 40.75%, the value of which is \$34,212.50.

Under formula C, the total current permanent disability percentage is converted into its monetary equivalent. From this figure is subtracted the dollar value of the pre-existing permanent disability percentage. Thus, in Nabors's case, formula C would read: \$118,795 (the dollar value of 80%) less \$42,476 (the dollar value of 49%) yielding \$76,319. Obviously, this means a much greater recovery for Nabors than under formula A (a difference of \$53,709, to be exact.)

According to the *Fuentes* Court, the proper computation method is formula A. The Court based its decision on the language of former Labor Code § 4750 which provided that the employer is liable "only for that portion [of the total permanent disability] due to the later injury as though no prior disability or impairment had existed." As the *Fuentes* Court noted: "The frequently expressed policy behind this section is that it will encourage employers to hire the handicapped."

Holding and Rationale: Nabors argued that, since SB 899 repealed § 4750, the rationale underlying *Fuentes* is gone and, so, we should suddenly start apportioning dollars (that is, formula C). And dissenting Commissioner Ronnie Caplane agreed with Nabors. But a majority of the WCAB held that formula A is still the correct formula. After all, new Labor Code § 4663(c) requires apportionment of the "percentage of the permanent disability" caused by factors other than the industrial injury at issue. (Emphasis added.) Similarly, new Labor Code § 4664(a) provides that the employer shall only be liable for the "percentage of permanent disability" directly caused by the new industrial injury. (Emphasis added.) Moreover, the public policy behind apportionment—hiring and retaining disabled workers—remains the same.

Comment: Dissenting Commissioner Merle Rabine opted for the middle ground, formula B. His main point was that the word "percentage" used in § 4658 is not the same as the word "percentage" used in §§ 4663 and 4664. Commissioner Rabine's point has some merit, but only if we assume that the Legislature intended the word "percentage" in §§ 4663 and 4664 to mean "the ratio of the disability caused by industrial injury to the overall disability." But, of course, neither section actually says that. The simplest explanation is to read "percentage" as synonymous with "portion." That is, what *portion* of the overall disability is due to the industrial injury in question and what portion is not, leaving us with simple subtraction rather than multiplying by fractions.

Commissioner Rabine began his dissent with the snarky observation that there was no evidence formula A had furthered the public policy behind apportionment. Of course, there is no evidence that formula A *hasn't* had the desired effect either. So Commissioner Rabine's observation is fatally ambivalent and is nothing more than a rhetorical flourish anyway. Let's face it: formula B is a lot more clunky than simply subtracting percentages of disability under formula A. And there is no reason to prefer formula B other than it results in more money to the injured worker.