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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

STAN BRODIE, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD, CONTRA COSTA COUNTY FIRE PROTECTION DISTRICT et al., Respondents.	A112003 (WCAB Nos. WCK 059913 WCK 068583 OAK 298772

INTRODUCTION

California's Workers' Compensation law was extensively amended in 2004 by urgency statute that took immediate effect and was intended to address a "crisis" in the availability and affordability of workers' compensation insurance. (Stats. 2004, ch. 34, § 49.) This case involves the application of certain parts of the new law that require apportionment where a claimant's permanent disability is due, in part, to a prior injury. The issue discussed here has been addressed in two published decisions of the Court of Appeal, *E & J Gallo Winery v. Workers' Comp. Appeals Bd.* (2005) 134 Cal.App.4th 1536 (*Dykes*) (review den. Mar. 1, 2006, S140645), and *Nabors v. Workers' Comp. Appeals Bd.* (2006) 140 Cal.App.4th 217 (review den. Aug. 23, 20006, S145097). While we agree with the apportionment formula applied in those cases, we apply it in a slightly different way.

In this case, Contra Costa County Firefighter Stan Brodie petitions for review of an order of the Workers' Compensation Appeals Board (Board) denying reconsideration of the permanent disability award of a Workers' Compensation Judge (WCJ). He seeks

the use of a different apportionment formula from that applied by the WCJ and the Board. We will annul the decision of the Board and remand the matter with directions to recompute Brodie's permanent disability award according to the formula described in our decision.

FACTS AND PROCEDURAL HISTORY

Brodie sustained an industrial injury to his back, spine and right knee on December 4, 2000, and injury to his back and spine cumulative to September 2002, that resulted in 74 percent permanent disability. Over the previous 30 years of his career as a firefighter, Brodie had sustained several industrial injuries to the same body parts for which he was awarded compensation based on a 44.5 percent permanent disability rating. So, in calculating the award in this case, the WCJ was required to apportion Brodie's disability between his prior injuries and the injuries that underlie his current claim, and in so doing applied new Labor Code sections 4663 and 4664 (Stats. 2004, ch. 34, §§ 34 & 35; see *post*, pp. 3-4).[1]

In her decision, the WCJ declared herself bound to follow the Board's en banc decision in *Nabors v. Piedmont Lumber & Mill Company* (2005) 70 Cal.Comp.Cases 856, 857-858 (*Nabors*), which was then pending in Division Two of this court on a petition for review. In *Nabors*, a 4-2 majority of the Board concluded that when apportioning permanent disability benefits, the amount of indemnity is calculated by determining the overall percentage of permanent disability and subtracting therefrom the percentage of disability caused by factors other than the current industrial injury. This formula ("formula A") was determined to be an appropriate method of apportionment under former section 4750[2] in *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d

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[1] All further statutory references are to the Labor Code.

[2] Former section 4750 provided in its entirety, "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury *when considered by itself* and not in conjunction with or in relation to the previous disability or impairment. [¶] The employer shall not be liable for compensation to such an employee for the combined disability, but

1, 5-6 (*Fuentes*). The WCJ thus subtracted 44.5 from 74 and awarded Brodie benefits totaling $20,867.50 based on a 29.5 percent permanent disability rating. But she did so reluctantly, and considered the dissenting view in *Nabors*—in repealing section 4750 and enacting section 4664, the Legislature contemplated a new apportionment formula—to be a more compelling argument. (See *Nabors, supra,* 70 Cal.Comp.Cases at pp. 864-865, dis. opn. of Comr. Caplane.)

In her report and recommendation on Brodie's petition for reconsideration, the WCJ again expressed her disagreement with the *Nabors* majority, and her belief that under section 4664, an employer is liable for that portion of a worker's overall disability that exceeds his prior level of disability. But she was bound by *Nabors*, and urged the Board to grant reconsideration and revisit its *Nabors* analysis. (By this time, Division Two of this court had granted review in *Nabors*.)[3] The Board denied reconsideration, and adopted and incorporated that part of the WCJ's report that acknowledged her duty to follow the Board's en banc decisions (Cal. Code Regs., tit. 8, § 10341), which also binds the Board until such decisions are stayed or overruled by an appellate court (*Diggle v. Sierra Sands Unified School District* (2005) 70 Cal.Comp.Cases 1480, 1481 ["significant" Board panel decision]).

This timely writ petition followed.

DISCUSSION

The issue here is: When making an award for permanent disability under the 2004 amendments to the workers' compensation law, how does a prior permanent disability affect the measure of indemnity due to a claimant? Two sections of the new law address the apportionment of employer responsibility for such injuries. Section 4663, subdivision (a) provides that "[a]pportionment of permanent disability shall be based on causation." Section 4664, subdivision (a) provides, "The employer shall only be liable for the

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only for that portion due to the later injury *as though no prior disability or impairment had existed*. (Italics added.)

[3] Hereafter, "*Nabors*" will refer to the appellate opinion in that case (see *ante*, p. 1).

percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." So, any award of permanent disability must take causation into account, and an employer is responsible for the percentage of disability caused by a work-related injury.

But fulfilling the legislative mandate to apportion employer responsibility on the basis of causation is not so easy, because "[i]n adopting Sen[ate] Bill 899, the Legislature did not outline any particular method for apportioning either a permanent disability award or a life pension." (*Dykes, supra,* 134 Cal.App.4th at p. 1552.) In choosing the appropriate formula, we will follow the statutory mandate that an "employer shall only be liable for the percentage of permanent disability directly cased by the injury" (§ 4664, subd. (a)) with several precepts of statutory construction in mind: The workers' compensation laws are to be liberally construed to extend benefits to people injured while working. (§ 3202.) To the extent the words of the statute can lead us to the result, we will follow them, giving words their ordinary and proper meaning. (*People v. Mel Mack Co.* (1975) 53 Cal.App.3d 621, 626.) But we are also aware of the historical background that led to the passage of Senate Bill No. 899, and to the extent the statutory language does not suffice, we will consider this historical context. (*Ibid.*)

In *Dykes* and *Nabors*, two different districts of the Court of Appeal considered the issue presented here. "We acknowledge we are not bound by an opinion of another District Court of Appeal, however persuasive it might be. [Citation.] We respect stare decisis, however, which serves the important goals of stability in the law and predictability of decision. Thus, we ordinarily follow the decisions of other districts without good reason to disagree. [Citation.]" (*Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 485.) So we largely follow the decisions in *Dykes* and *Nabors*.

The *Dykes* and *Nabors* courts discussed and applied an apportionment formula first articulated but rejected by our Supreme Court in *Fuentes, supra,* 16 Cal.3d 1. There, the court announced the appropriate method to determine an employer's liability for a permanent disability in cases where the overall disability is due in part to a preexisting

injury. (*Id.* at pp. 3-4.) The issue arose because 1971 amendments changed the schedule of permanent disability benefits (§ 4658) from a linear one that awarded four weeks of compensation for each one percent of permanent disability, to one in which the number of weekly benefits increases *exponentially* in proportion to increasing percentages of disability. (*Fuentes, supra*, at p. 4.) Thus, for example, the benefits for 44.5 percent permanent disability plus the benefits for 29.5 percent permanent disability add up to appreciably less than the benefits for 74 percent permanent disability.

The *Fuentes* court's analysis was informed by and turned upon the interplay between section 4658 and former section 4750 (see *ante*, fn. 2), which was repealed by the 2004 amendments to the workers' compensation law. (*Fuentes, supra*, 16 Cal.3d at p. 6; stats. 2004, ch. 34, § 37.) The court considered three possible formulas that could be used to apportion liability. Under "formula A" the percentage of non-industrial disability is subtracted from the claimant's overall disability to determine the compensable percentage. Under "formula B" the number of weeks of compensation allowable for a claimant's total disability is multiplied by the percentage of the injury that was industrially related to arrive at the compensable portion of disability. Under "formula C" the percentage of overall current disability is converted to its monetary equivalent, from which is subtracted the dollar value of the percentage of prior disability. (*Fuentes, supra,* at p. 5.)

The *Fuentes* court applied formula A because it was the method of apportionment that best gave effect to former section 4750 (*Fuentes, supra*, 16 Cal.3d at p. 8), but the *Dykes* court concluded the *Fuentes* decision is no longer controlling in light of the repeal of section 4750 (*Dykes, supra,* 134 Cal.App.4th at pp. 1548-1549). We agree. Amendment of a statute that has received judicial construction is an indication of legislative intent to change the law. (*O'Brien v. Dudenhoeffer* (1993) 16 Cal.App.4th 327, 335.)

"[T]he Legislature contemplated a variation in determining apportionment by repealing section 4750 and replacing it with different language in section 4664 for apportioning liability among multiple injuries." (*Dykes, supra*, 134 Cal.App.4th at

p. 1550; *Nabors, supra,* 140 Cal.App.4th at p. 223-224.) While the new law can be interpreted to permit several different approaches to apportionment that would yield disparate results, the plain language of section 4664, subdivision (a) means that "[a]n employer is liable for the direct consequences of a work-related injury, nothing more and nothing less." (*Dykes, supra,* at p. 1551.) Like the *Dykes* and *Nabors* courts, we find "formula C" to be the method that best effectuates the directive of section 4664, subdivision (a) when apportioning responsibility between a current and prior disabling injury.[4]

Although Senate Bill No. 899 repealed section 4750, the exponentially progressive permanent disability tables embodied in section 4658, which most clearly justify the use of formula C, survive. The other formulas considered in *Fuentes* treat the employee as though no prior permanent disability existed, and in light of the exponentially progressive permanent disability tables, create a windfall to the employer at the employee's expense. They do not seem to fix responsibility for an award in a way that takes both causation and the progressive nature of disability into account. Before Senate Bill No. 899, a claimant could defeat apportionment by showing that he or she was completely rehabilitated from the prior injury; this is no longer possible (§ 4664, subd. (b)).[5] Section 4664, subdivision (a) requires that an award take into account the prior disability by ensuring that benefits are awarded only for the "percentage of permanent disability directly caused by" the recent injury. Formula C compensates for the additional percentage of disability caused by the most recent compensable injury. Finally, by taking prior disability into account and fixing employer responsibility for only that portion of a disability caused by the current injury, section 4664 fulfills the purpose of former section 4750 "to encourage

[4] The *Dykes* court limited its holding to the situation in which an employee received the prior disability award while working for the same self-insured employer. (*Dykes, supra,* 134 Cal.App.4th at p. 1540.) The *Nabors* court did not consider that limitation to be an obstacle to applying the *Dykes* rationale in a broader context (*Nabors, supra,* 140 Cal.App.4th at pp. 225-226), and neither do we.

[5] This subdivision provides in pertinent part, "If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury."

employers to hire physically handicapped persons" (*Fuentes, supra*, 16 Cal.3d at p. 6; see also *Dykes, supra*, 134 Cal.App.4th at p. 1550). Application of formula C does not undermine that objective. All these reasons lead us to conclude that formula C is the proper means to apportion employer responsibility between prior and current permanently disabling injuries.

But in applying formula C, we respectfully elaborate upon and clarify the approach taken in *Dykes*. To arrive at the amount of compensation due the claimant, the *Dykes* court applied a dollar credit equal to the amount of a previous disability award against the scheduled benefits for the current overall disability level. (*Dykes, supra*, 134 Cal.App.4th at p. 1555.) This is one way to interpret the statement in the very same paragraph that Dykes was "entitled to the difference between a 20.5 percent disability and a 73 percent disability on the permanent disability table applicable for the subsequent injury." (*Dykes, supra*, at p. 1554.)[6] Interpreting that language somewhat differently, we calculate the dollar value of a prior award in such a way that the measure of compensation reflects "the direct consequences of a work-related injury, nothing more and nothing less" (*id.* at p. 1551).

In cases like these, a prior permanent disability award might be many years old. Thus, simply crediting the *amount* of the prior award against the benefits due for current overall disability seems to work a disadvantage to the employer. It fails to take into account the relative worth of the prior award over time, as well as possible changes in benefit schedules or an employee's average weekly earnings, which are factors in the permanent disability computation (§ 4658). A simple dollar-for-dollar credit is also unworkable when the prior disability was caused by a non-industrial injury, in which case there would be no prior award at all.

Instead, we favor the literal application of formula C as articulated in *Fuentes*: the overall current disability "is converted into its monetary equivalent" and "[f]rom this

[6] The *Nabors* court ended its summary of the *Dykes* opinion with this language (*Nabors, supra*, 140 Cal.App.4th at p. 225), but held only that formula C was the correct method of calculating Nabors's permanent disability benefits (id. at p. 228), without, as it were, doing the math.

figure is subtracted the [current] dollar value . . . of the . . . percent of [prior] disability." (*Fuentes, supra,* 16 Cal.3d at p. 5.) This formulation does not apply a credit for or subtract the amount of a previous *award*. Instead, the *Fuentes* court calculated the value of the noncompensable portion of the award (attributable in that case to a prior *non*industrial injury) and subtracted that value from the value of the current overall disability. (*Ibid*.) This application of formula C ensures that irrespective of the passage of time since a prior award, its size, or whether the prior injury was even compensable, an employer will be responsible only for the additional portion of disability caused by the current compensable injury, "nothing more and nothing less."

Applying formula C in this way to Brodie's case illustrates the point. Brodie injured his back, spine and right knee in 2000, and had an injury to his back and spine cumulative to September 2002. Following these injuries, he received a permanent disability rating of 74 percent, which would entitle him to an award of $106,375.[7] Prior injuries to these same body parts had left Brodie with a preexisting permanent disability rating of 44.5 percent, for which he had received awards totaling $27,167.50.

The *Dykes* decision would permit us to subtract from the total benefits payable for a 74 percent disability the amount of Brodie's prior award. Therefore, Brodie's total award for the most recent 29.5 percent of his disability would be $79,207.50. But this amount of benefits exceeds the currently scheduled amount for that portion of a 74 percent disability that occurs after a rating of 44.5 percent. Moreover, it does not reflect a reduction for the relative value today of the $27,167.50 that Brodie was awarded in 1987 and 1999.[8] Nor does subtraction of the prior award reflect any possible changes in

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[7] In calculating Brodie's benefits, we note that it appears uncontested that his salary entitled him to maximum weekly benefits. Based on his dates of injury, we apply the values for disability found in 2 O'Brien, California Workers' Compensation Claims and Benefits (11th ed. 2004) Appendix 7—Permanent Disability Indemnity Chart.

[8] Under various methods of computing the relative value of money, Brodie's 1987 award of $2,835 and his 1999 award of $24,332.50 can range from $32,234.94 to $40,251.95 in 2006 dollars. The range of relative value results from the growth index that is used to make a comparative value calculation. Application of changes in gross domestic product, the consumer price index or unskilled wage rates all yield different

benefit schedules or Brodie's employment status that might affect the calculation of a current award.

We think the better approach is to subtract from the amount of benefits currently scheduled for a 74 percent permanent disability rating, the current dollar value of the percentage of preexisting disability.[9] Brodie's prior 44.5 percent disability is now valued at $38,675. When this is subtracted from the $106,375 scheduled for a 74 percent disability, Brodie's permanent disability award is $67,700 for the last 29.5 percent of his disability. This amount reflects the scheduled amount due Brodie for the final percentage of his disability caused by the most recent compensable injuries, nothing more and nothing less.

Finally, just as in *Dykes* and *Nabors*, since Brodie's total disability exceeds 70 percent due to his most recent injuries, a life pension was imposed as a matter of law under section 4659, subdivision (a). (*Dykes, supra*, 134 Cal.App.4th at p. 1555; *Nabors, supra*, 140 Cal.App.4th at p. 228.)

DISPOSITION

The Board's order denying reconsideration is annulled, and the matter is returned to the Board with directions to grant reconsideration, reverse the WCJ's order, and recalculate the amount of permanent disability benefits due Brodie in accordance with the method described in this opinion.

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results. (See generally Williamson, *What Is the Relative Value?* (Economic History Services, June 2006) <http://eh.net/hmit/compare/> [as of August 30, 2006].)

[9] At oral argument, counsel for Brodie acknowledged the conceptual preferability of this approach. This approach would have no practical effect in *Dykes*, where it appears the claimant was entitled to maximum benefits and the same benefit schedule applied to his preexisting and current injuries. (See *Dykes, supra*, 134 Cal.App.4th at p. 1541, and *ante*, fn. 7.) In *Nabors*, though the claimant appears to be entitled to maximum benefits, the method we describe yields a different result than would a credit for the dollar amount of the previous award, because of an intervening change in the benefits schedule. (See *Nabors, supra*, 140 Cal.App.4th at p. 220, and *ante*, fn. 7.)

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Siggins, J.

We concur:

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Parrilli, Acting P.J.

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Pollak, J.

Brodie v. WCAB et al., A112003

Trial Court:	Workers Compensation Appeals Board
Trial Judge:	Rosa M. Moran, Workers' Compensation Administrative Law Judge
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