

Significant Decision

***Apportionment of permanent disability.
Court of Appeal disapproves Nabors.
Subtract dollars not percentages.***

*E & J Gallo Winery*¹ v. WCAB and David Dykes
Court of Appeal, 5th Appellate District (Fresno)
Civil No. F047246; WCAB No. STK 188538
Filed December 20, 2005
2005 Cal. App. LEXIS 1945

Significance: While SB 899 gave us greater certainty in *getting* apportionment, *Dykes* reduces the value of that apportionment. It bears stating early and often that the Court expressly limited its holding to the situation presented here:

We conclude that where an employee sustains multiple disabling injuries *while working for the same self-insured employer*, the employee is entitled to compensation for the total disability above any percentage previously awarded. *In this narrow context*, we see no reason to treat an employee who has been injured twice differently from a similarly situated employee who is injured once with the same level of disability. (Italics added.)

In reality, these two sentences explain this decision. At oral argument (attended by SCIF for *Nabors* purposes), the Justices' questioning revealed they were very uncomfortable with the proposition that two employees working for the same employer, both at 73% PD and the one with two injuries would get less than half the compensation that the co-worker with 73% from one injury would receive. The policy considerations set forth in the opinion are justifications for arriving at a result where two employees in these circumstance would receive the same benefits.

Procedural History: On June 9, 2005, the Appeals Board issued its en banc decision in *Nabors* holding that when apportionment is found, the *percentage* (rather than the money amount) of prior permanent disability is subtracted from the total disability to arrive at the percentage of current permanent disability.² Applicant sought a writ of review in the First District Court of Appeal (San Francisco). The writ of review was granted on October 7, 2005. The case is still in the briefing stages with no oral argument date set.

¹ Permissibly self-insured.

² *Nabors v. Piedmont Lumber & Mill Co. and SCIF*, (2005) 70 Cal.Comp.Cases 856 (WCAB en banc). For a full discussion of the Board's decision in *Nabors*, see our Significant Decision Summary #2005.10 on the Legal Department Worksite. (Shortcut: go to SCIF Intranet Worksite Homepage, type "Legal" in "Address" line (white box), hit enter, and click on "Significant Decisions.")

On January 5, 2005, six months before it issued its decision in *Nabors*, the Appeals Board summarily denied³ defendant Gallo's petition for reconsideration in *Dykes*. At the trial level, former Appeals Board Commissioner, now WCJ, Colleen Casey ruled that the *money amount* paid on Dykes' previous PD award should be subtracted from the benefit level corresponding to his current overall level of permanent disability.

Accordingly, on January 5, 2005, via summary denial by a three-commissioner Appeals Board panel, the Board approved subtracting the money amount of the prior award when carrying out apportionment. When this matter reached the Fifth District Court of Appeal on January 28, 2005 through Gallo's petition for writ of review, the decision of the Board (by the summary denial) was to subtract dollars. Thus, the Court's decision in *Dykes* affirmed the Board's holding in that case, even though the Court disapproved the Board's major decision on the matter when the Board squarely addressed the issue sitting as a whole in *Nabors*.

Facts: David Dykes sustained injury aoe/coe to his back in 1996 while working for Gallo. He returned to work with restrictions which were later lifted. The parties stipulated to 20½% PD worth \$11,680.

In 2002, he again injured his back while working for Gallo. After trial in November 2004, the WCJ awarded 73% PD valued at \$104,305 (before life pension). From the awarded dollar amount the WCJ subtracted the \$11,680 previously paid.

Under the formula urged by Gallo and prescribed by the Appeals Board in *Nabors*, Dykes' prior award of 20½ percent PD would be subtracted from his current overall PD level of 73% to yield an award of 52½% for the current injury, worth \$48,662.50.

Holding and Rationale: As noted above *Dykes* holds that "where an employee sustains multiple disabling injuries while working for the same self-insured employer, the employee is entitled to compensation for the total disability above any percentage of permanent disability previously awarded." That level of compensation is achieved by subtracting the dollar value, rather than the percentage of PD, of the previous award from the current overall level of permanent disability.

The *Dykes* Court found that the prior subtract-percentages rule ("formula A") from the *Fuentes*⁴ case no longer applies post-SB 899. In *Fuentes*, the California Supreme Court ruled that, then existing, Labor Code section 4750 required that compensation for a subsequent injury be computed as though no prior disability or impairment had existed.⁵ The *Dykes* Court placed great emphasis on statements by the Supreme Court in *Fuentes* that the holding in that case was required by section 4750. Since section 4750 was repealed by SB 899 and according to the Court because the new sections 4663 and 4664 were sufficiently different, *Fuentes* is no longer controlling after SB 899.

³ Summary denials contain brief boilerplate language, denying reconsideration and typically incorporating by reference the WCJ's report and recommendation on reconsideration.

⁴ *Fuentes v. WCAB* (1976) 16 Cal.3d 1.

⁵ *Id. at p. 6.*

The Court also stated that the policy of encouraging employers to hire persons with disabilities is not as great a concern as it was 30 years ago when *Fuentes* was decided in light of subsequent legislation protecting against disability discrimination. The Court added that the Legislature's repeal of section 4750 did indicate that it contemplated a variation in determining how apportionment is to be carried out.

Near the end of the opinion the Court reiterated the scope and central rationale of the decision:

Given the facts before us, we express no opinion whether formula C [subtract dollars] should also be applied where an employee received a prior disability award with another employer, where the employer was separately insured at the time of the injuries, or where the medical evidence reveals that a portion of the injured employee's disability is not compensable.

We adopt formula C here because we can ascertain no legislative intent to compensate an employee who has sustained two or more disabling injuries while employed by the same self-insured employer less than a similarly situated employee who has sustained a single injury resulting in the same level of permanent disability.

Comment and Practice Considerations: This decision will not be the last word on apportionment calculation. Our information is that Gallo will petition for review in the California Supreme Court. *Nabors* remains to be decided by the First District Court of Appeal. We are now answering a case in the Third District Court of Appeal (Sacramento) involving apportionment with injuries at different employers.

For now, what are attorneys and adjusters to do when confronted with demands to apply *Dykes* to all cases involving apportionment? Specifically, does *Dykes* or *Nabors* control? The situation now presented is the same as occurred recently with *Scheftner*.⁶ The Board's en banc decision in *Scheftner* was pending on a grant of writ of review in the Third District Court of Appeal when the Second District (Los Angeles) issued its decision in *Kleemann*,⁷ indirectly overruling *Scheftner*. The Appeals Board then in *Escobedo* acknowledged that a higher court had ruled on the same issue and that the Board was bound by *Kleemann*, even though *Scheftner* had not yet been directly overruled.⁸

Similarly, it appears that to the extent that *Dykes* indirectly overruled *Nabors*, *Dykes* controls. But, by the explicit language cited above, *Dykes* applies, and thus only overruled *Nabors*, "where an employee sustains multiple disabling injuries *while working for the same self-insured employer*."⁹ In all situations other than where the employee sustains multiple injuries with the same self-insured employer (as we sit here some 48 hours after the decision was filed), it would appear to be the better view that *Nabors* still applies. While the rationale of *Dykes* may be

⁶ *Scheftner v. Rio Linda School Dist.* (2004) 69 Cal.Comp.Cases 1281.

⁷ *Kleemann v. WCAB and State of Cal./Dept. of Justice, SCIF, adjusting agent*, (2005) 127 Cal.App.4th 274, 70 Cal.Comp.Cases 133.

⁸ *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, fn. 4.

⁹ State Contracts will be particularly affected.

extended eventually to all apportionment situations, the clear language of the opinion shows that it does not do so yet.

Moreover, policy considerations may prevent the extension of the *Dykes* rationale to cases involving injuries with different employers. The same-self-insured-employer situation involves the same entity paying benefits for the earlier injury(ies) and the current injury. Hence, the policy considerations set forth in the repealed section 4750 and *Fuentes* (of not burdening a subsequent employer with higher compensation payments for a subsequent injury by calculating PD for that injury as if there were no prior injury, thereby providing an incentive to hire persons with disabilities) do not apply to the same-payor situation. Accordingly, the policy of not burdening a subsequent employer with the higher costs of the *Dykes* formula and thus maintaining the incentive to hire persons with disabilities, *may* produce a different result where different employers are involved.

The official case citation is not yet available. The full opinion is available on Lexis as cited above and on the Court's website at:

<http://www.courtinfo.ca.gov/opinions/documents/F047246.PDF>