WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

WILMA DIGGLE, ***Applicant,*** **vs.** **SIERRA SANDS UNIFIED SCHOOL DISTRICT, Permissibly Self-Insured; and SELF-INSURED SCHOOLS OF CALIFORNIA (Adjusting Agent),** ***Defendant(s).***	**Case No. BAK 0138299** **OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Wilma Diggle (applicant) seeks reconsideration of the "Joint Findings and Fact, Award & Order" issued by the workers' compensation administrative law judge (WCJ) on August 26, 2005.[1] In that decision, the WCJ found that, on October 4, 2000, applicant sustained an industrial injury to her spine – but not to her bilateral hands and wrists or to her right knee – while employed as a custodian by Sierra Sands Unified School District (defendant). In relevant part, it was further found that applicant's injury caused 58% permanent disability, after apportionment, resulting in a permanent disability indemnity award totaling $56,142.50.

In her petition, applicant contends, in substance: (1) that, because a petition for writ of review has been filed with respect to the Appeals Board's en banc decision in *Nabors v. Piedmont Lumber & Mill Co*. (2005) 70 Cal.Comp.Cases 856 ("*Nabors*"), the Appeals Board "has the authority and discretion to hear and reconsider its prior position in the *Nabors* case;" (2) that the Supreme Court's decision in *Fuentes v. Worker's Comp. Appeals Bd.* (1976) 16 Cal.3d 1 [41 Cal.Comp.Cases 42] ("*Fuentes*") no longer defines the method of apportioning pre-existing disability because *Fuentes* was based on an interpretation and application of former

[1] Although applicant's petition captions both Case Nos. BAK 0138298 and BAK 0138299, her petition only raises contentions regarding the latter case. That is, in Case No. BAK 0138298, the WCJ found that she did *not* sustain a cumulative injury to her spine, bilateral hands and wrists, or right knee from February 14, 1994 through November 19, 2000. Applicant does not challenge this finding of no cumulative injury.

Labor Code section 4750,[2] which was repealed by Senate Bill 899 (SB 899);[3] and (3) that, under new section 4664, the proper way to apportion is to convert her present overall percentage of permanent disability into its current monetary equivalent and then subtract the dollar value of her prior permanent disability award.

We will deny reconsideration because the en banc decision in *Nabors* resolved the issue raised by applicant. An en banc decision of the Appeals Board is binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, §10341.) As we shall explain, this principle remains true where a petition for writ of review has been filed or even where a writ of review has been granted, either in the actual case in which the en banc decision issued or in a different case in which the en banc decision is directly implicated, unless and until either (1) the appellate court issues an opinion that explicitly or implicitly overrules the en banc decision or (2) the appellate court stays or suspends the operation of the en banc decision prior to the Court's issuance of an opinion.

I. BACKGROUND

The facts are not in dispute.

On May 18, 1993, applicant sustained an industrial injury to her low back while employed by defendant. On August 21, 1997, a stipulated Award issued which determined, among other things, that this injury caused permanent disability of 12%. Applicant was awarded permanent disability indemnity in the total sum of $3,994.45 (payable at the rate of $104.43 per week for 38.25 weeks).

In the present case, applicant sustained an industrial injury to her spine on October 4, 2000. At trial, the parties stipulated that applicant's overall spinal permanent disability is now 70%, after adjustment for age and occupation, but before apportionment. The parties agreed that there must be "apportionment … due to her prior Award of 12-percent disability." The parties also stipulated: (1) that if the apportionment is accomplished by subtracting the prior percentage

[2] Unless otherwise noted, all further statutory references are to the Labor Code.

[3] Stats. 2004, ch. 34, §34.

disability from the current overall percentage disability, then applicant is 58% disabled and entitled to permanent partial disability indemnity of $56,142.51; (2) that if the apportionment is accomplished by subtracting the prior number of weeks of permanent disability indemnity from the number of weeks of permanent disability indemnity due for permanent disability of 70%, then applicant is entitled to partial disability indemnity totaling $66,002.50; and (3) that if the apportionment is accomplished by crediting the dollar amount of the prior permanent award against the dollar amount for permanent disability of 70%, then applicant is entitled to permanent partial disability indemnity totaling $94,100.55. The parties then submitted the issue of "the method of apportionment" for decision.

On August 26, 2005, the WCJ issued the decision in question here. He reached the 58% permanent disability finding, after apportionment, by subtracting the percentage of permanent disability under her prior award (12%) from her current overall percentage of permanent disability (70%). In reaching this finding, the WCJ observed: (1) that the Appeals Board's en banc decision in *Nabors* "resolved the question of the proper method of apportionment, selecting the subtraction method;" (2) that "en banc decisions of the Appeals Board are binding precedent on all ... individual [WCJs]; and (3) that, therefore, "[a]n individual [WCJ] has no discretion to apportion by a different method."

Applicant then filed her petition for reconsideration, raising the contentions summarized above. No answer to the petition for reconsideration has been received. In his Report and Recommendation on Petition for Reconsideration (Report), however, the WCJ recommends that reconsideration be denied. In his Report, the WCJ states:

> "The constitutional mandate of California's workers' compensation system is to 'accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character' Cal. Const. Art. XIV §4. The constitutional mandate for expeditious and unencumbered proceedings cannot be carried out if the rules of law remain 'unsettled' until the last possible appeal of a precedent-setting case has been decided by the last possible court.

> "Under the legal theory urged by Petitioner, the situation in the present case will remain unsettled until [the] First District Court of Appeals reaches its decision on the Petition for Writ of Review in *Nabors*, supra, which will thereafter be subject to further potential appeal[] to the California Supreme Court ... . Under the legal theory urged by Petitioner, this case and nearly every other post-SB 899 California workers' compensation case raising *bona fide* issues of apportionment must sit unresolved until this process (potentially spanning many years) is completed.
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> "Such is not the law. The better view is that the *en banc* decisions of the Appeals Board are binding precedent on all panels and individual [WCJs]. WCAB Rule 10341 (8 CCR § 10341); *City of Long Beach v. WCAB* (*Garcia*) (2005) 126 Cal.App.4th 298, 313 fn 5, 70 CCC 109; *Gee v. WCAB* (2002) 96 Cal.App.4th 1418, 1425 fn 6; 67 CCC 236, 239 fn 6. When, but only when, the WCAB's decision is overturned by a higher tribunal does it cease to be a binding precedent ... . Thus, unless and until overturned, the WCAB's decision in *Nabors*, supra, is a correct statement of the applicable rule of law. ...
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> "To do otherwise is to defeat the constitutional mandate of expeditious and unencumbered proceedings every time a party to a precedent-setting decision exercises its legal right to judicial review."

II. DISCUSSION

The en banc decision in *Nabors* expressly rejected applicant's contention that the repeal of former section 4750 invalidated the method of apportioning pre-existing disability set forth by the Supreme Court in *Fuentes*. That is, *Nabors* held that, under SB 899, where two or more injuries cause successive permanent disabilities that can be separated, the percentage of the previously awarded permanent disability is to be subtracted from the overall percentage of permanent disability using the same method ("Formula A") adopted by the Supreme Court in *Fuentes*.

Nabors is an en banc decision of the Appeals Board. En banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, §10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425,

fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, §11425.60(b).) We cannot and will not revisit *Nabors* here.

We recognize that, in *Nabors*, a petition for writ of review has been filed with the First Appellate District, Division Two (*Nabors v. Workers' Comp. Appeals Bd*., 1st Civ. No. A110792 (WCAB Case No. SRO 0122159)). That Court, however, has not yet acted on the petition.

Moreover, a writ of review has been granted by the Fifth Appellate District in a case that directly presents a *Nabors* issue (*E&J Gallo Winery v. Workers' Comp. Appeals Bd*. (*Dykes*), 5th Civ. No. F047246 (WCAB Case No. STK 0188538)).[4] Yet, that Court has not issued an opinion or suspended the effect of *Nabors*.

Neither the filing of a petition for writ or review in *Nabors* nor the granting of a writ of review in *Dykes*, standing alone, changes the legal effect of the *Nabors* en banc decision, i.e., *Nabors* remains binding precedent on all Appeals Board panels and WCJs.

Labor Code section 5956 states:

> "*The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, decision, or award of the appeals board*, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, decision, or award of the appeals board subject to review, upon the terms and conditions which it by order directs, except as provided in Article 3 of this chapter [relating to undertakings]." (Emphasis added.)

Thus, section 5956 specifically provides that "[*t*]*he filing of a petition for … a writ of review* shall not of itself stay or suspend the operation of any … decision of the appeals board." (Emphasis added.) Consequently, the mere fact that a petition for writ of review was filed in *Nabors*, standing alone, does not affect the "operation" of the *Nabors* en banc decision, i.e., *Nabors* remains binding precedent on all Appeals Board panels and WCJs.[5]

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[4] For further information, see summary at 33 Cal. Workers' Comp. Rptr. 213-214 (September 2005).

[5] Section 5956's reference to "any" decision of the Appeals Board establishes that not even an en banc decision is affected by the filing of an appellate petition. (See *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 ("the word 'any' means without limit and no matter what kind").)

Section 5956 also specifically provides that "[*t*]*he pendency of … a writ of review* shall not of itself stay or suspend the operation of any … decision of the appeals board." (Emphasis added.) Consequently, the mere fact that a writ of review was granted and is now "pend[ing]" in *Dykes*, standing alone, does not affect the "operation" of the *Nabors* en banc decision, i.e., *Nabors* remains binding precedent on all Appeals Board panels and WCJs.

We recognize that, in discussing the now-overruled en banc decision in *Scheftner v. Rio Linda School Dist.* [see 69 Cal.Comp.Cases 1281 (2005)], one Court of Appeal stated in dictum: "*Scheftner* was appealed and review was granted by the Third Appellate District … , *rendering it uncitable as authority*." (*Green v. Workers' Comp. Appeals Bd.*, *supra*, 127 Cal.App.4th 1426, 1442, fn. 40 [70 Cal.Comp.Cases 294] (emphasis added).) Nevertheless, dictum is not binding. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §945, pp. 986-987.) Moreover, although dictum may be persuasive authority if made by a court after careful consideration or in the course of an elaborate review of the authorities (*id*., §947, pp. 989-991), it is axiomatic that cases are not authority for propositions they did not consider or address. (*Gomez v. Superior Court* (2005) 35 Cal. 4th 1125, 1153; *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd*. (*Steele*) (1999) 19 Cal.4th 1182, 1195 [64 Cal.Comp.Cases 1].) The *Green* dictum did *not* consider or address the express mandates of section 5956. Therefore, it does not change our conclusion that a grant of a writ of review does not alter the binding effect of an en banc decision on all Appeals Board panels and WCJs.

Subsequently, in *Marsh v. Workers' Comp. Appeals Bd.*, *supra*, 130 Cal.App.4th 906 [70 Cal.Comp.Cases 787], another Court of Appeal discussed the Appeals Board's en banc decision in *Scheftner*, and said: "The persuasive weight of the WCAB's opinion is further diminished because the Third Appellate District has since granted [a] writ [of] review in *Scheftner* … . (Cf. Cal. Rules of Court, rule 976(d)(1) [appellate decision loses precedential value upon rehearing or Supreme Court review].)" (130 Cal.App.4th at p. 913.) Again, however, this statement is dictum that did not consider or address section 5956. Moreover, the statement seems to recognize that no Rule of Court renders an Appeals Board decision *inoperative* merely upon the grant of a writ

of review. Rather, it suggests only that, to the extent that an Appeals Board decision can be *persuasive* authority to a Court of Appeal (and, of course, Appeals Board decisions are not *binding* on a Court of Appeal), the persuasiveness of an Appeals Board decision to a Court of Appeal may be lessened when a writ has been granted with respect to that decision. Accordingly, the dictum in *Marsh* also does not change our conclusion that a grant of a writ of review does not alter the binding effect of an en banc decision on all Appeals Board panels and WCJs.

Of course, if an appellate court "*stay*[*s*] *or suspend*[*s*] the operation" of an en banc decision under section 5956 (see also, Lab. Code, 6000),[6] then the binding effect of the en banc decision on Appeals Board panels and WCJs is also stayed or suspended – at least until the suspension or stay order is lifted.

Also, if an appellate court issues an opinion that explicitly or implicitly overrules an en banc decision of the Appeals Board, then, under the principle of stare decisis, the Court's decision is controlling and the en banc decision no longer can be followed by the Appeals Board or any WCJ. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 609, fn. 4 (Appeals Board en banc).) There may be some exceptions to this standard principle (e.g., when an en banc decision is only partially overruled, or where it is indirectly overruled in a non-published appellate opinion), however, we need not and will not address any such scenarios here.

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For the foregoing reasons,

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[6] Section 6000 states:

> "The operation of any order, decision, or award of the appeals board under the provisions of this division or any judgment entered thereon, shall not at any time be stayed by the court to which petition is made for a writ of review, unless an undertaking is executed on the part of the petitioner."

IT IS ORDERED that applicant's Petition for Reconsideration, filed September 14, 2005, be, and it is hereby, **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ William K. O'Brien

I CONCUR,

/s/ Merle C. Rabine

/s/ James C. Cuneo

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 7, 2005

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

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