WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DANNY NABORS, ***Applicant,*** **vs.** **PIEDMONT LUMBER & MILL COMPANY; and STATE COMPENSATION INSURANCE FUND,** ***Defendants.***	**Case No. SRO 0122159** **SRO 0113249** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

The Appeals Board granted reconsideration of the December 24, 2004, Findings and Award issued by the workers' compensation administrative law judge ("WCJ") to further study the record and the applicable law. This is our Decision After Reconsideration.

In the December 24, 2004, decision, the WCJ found that Danny Nabors ("applicant") sustained an admitted industrial injury to his back and lower extremities during a period through August 19, 2002, while employed as a mill supervisor by Piedmont Lumber & Mill Company, the insured of State Compensation Insurance Fund. In relevant part, the WCJ also found that applicant's back and lower extremities injury caused 31% permanent disability after apportionment.

In his petition for reconsideration, applicant contends, in substance, that he should receive an award of 80% permanent disability for this injury, equivalent to $118,795, less the amount of $42,476 for a prior 49% permanent disability award.[1] In support of his contention, applicant argues that the Supreme Court's decision in *Fuentes v. Worker's Comp. Appeals Bd.* (1976) 16

[1] Applicant also listed Case NO. SRO 113249 in the caption of his Petition for Reconsideration. However, he does not raise any issues with regard to that case, except its effect on reducing his entitlement to permanent disability indemnity in Case No. SRO 122159, and does not dispute the finality of the stipulated Award of August 2, 2001. Therefore, we need not take any action with regard to Case No. SRO 113249.

Cal.3d 1 [41 Cal.Comp.Cases 42] ("*Fuentes*") is no longer controlling as it was based on the interpretation and application of former Labor Code section 4750,[2] which was repealed on April 19, 2004, in Senate Bill ("SB") 899. (Stats. 2004, ch. 34, §34.)

Because of the important legal issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, §115.)[3]

Based on our review of the relevant law, we hold that when the Workers' Compensation Appeals Board ("WCAB") awards permanent disability after apportionment, the amount of indemnity due applicant is calculated by determining the overall percentage of permanent disability and then subtracting the percentage of permanent disability caused by other factors under section 4663(c) or previously awarded under section 4664(b); the remainder is applicant's final percentage of permanent disability for which indemnity is calculated pursuant to sections 4453 and 4658.

BACKGROUND

The relevant facts do not appear to be in dispute.

On May 2, 1996, applicant sustained an admitted industrial injury to his low back "and radiating pain to both lower extremities," while employed by Piedmont Lumber & Mill Company as a "working foreman, lumber stacker, [and] forklift driver." On August 2, 2001, applicant received a stipulated Award of 49% permanent disability, equivalent to $42,476, based upon a preclusion from substantial work. (Case No. SRO 113249.) That Award is final.

During a period ending August 19, 2002, applicant sustained a cumulative industrial injury to his back and lower extremities, while employed by Piedmont Lumber & Mill Company as a mill supervisor. (Case No. SRO 122159.)

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

[3] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and workers' compensation administrative law judges. (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, 239, fn. 6]; see also Govt. Code, §11425.60(b).)

On April 19, 2004, SB 899 was enacted. In addition to other changes in the Labor Code, it repealed former sections 4750 and 4663 and replaced them with new sections 4663 and 4664.

On September 29, 2004, the issues of permanent disability and apportionment were tried. The WCJ took judicial notice of the stipulated Award in the earlier case, including the 49% permanent disability determination regarding applicant's low back and lower extremities.

The WCJ subsequently issued rating instructions to the Disability Evaluation Unit, as follows:

> "Work preclusions limiting the applicant to sedentary work and need for a cane.
>
> "Apportion 49% adjusted permanent disability per the August 2, 2001 Award in SRO 113249."

On November 29, 2004, the disability evaluator's recommended rating of 31% permanent disability, amounting to total indemnity of $22,610, was served on the parties. The recommended rating was derived from an overall rating of 80% permanent disability, based upon the work preclusions for applicant's low back limiting him to sedentary work and requiring his use of a cane, from which applicant's prior Award of 49% permanent disability was subtracted.[4]

On December 10, 2004, applicant's counsel wrote to the WCJ and, while not objecting to the overall rating of 80%, objected to apportionment by "subtracting percentages rather than subtracting money."

On December 24, 2004, the WCJ issued the decision finding 31% permanent disability after apportionment. In the Opinion in support of that decision, the WCJ explained that he followed the rationale of *Fuentes* and, therefore, determined that apportionment under section 4664 requires subtraction of the percentage of permanent disability previously awarded, rather than subtraction of the monetary value of the permanent disability indemnity previously awarded.

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[4] The parties did not raise, nor does this opinion consider, any issues regarding general principles of overlap or rating methodology when there is a prior award of permanent disability.

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DISCUSSION

Applicant argues that *Fuentes* is no longer controlling as it was based on the interpretation and application of former section 4750, which was repealed on April 19, 2004, in SB 899.

Former section 4750 provided:

> "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 only for that portion due to the later injury as though no prior disability or impairment had existed."

In *Fuentes*, the Supreme Court considered three methods for applying apportionment under former section 4750 and arriving at a percentage of permanent disability and its monetary value:

> "Under formula A, adopted by the Board in petitioner's case, there is subtracted from the total disability that portion which is nonindustrial, the remainder being the amount of compensable disability. Thus in the matter before us 24.25 percent, representing nonindustrial origin, is deducted from the 58 percent total disability with a net compensable disability of 33.75 percent. Under the schedule established by section 4658, subdivision (a), this entitled petitioner to 143.25 weekly benefits which may be converted in terms of dollars to an award of $10,027.50.
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> "Formula B contemplates, first determination of the number of statutory weekly benefits authorized under section 4658 for a 58 percent disability, namely, 297. This figure is then multiplied by the percentage of industrially related disability (58.33). The product is 173.25 weeks, which results in a total monetary award of $12,127.50.
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> "Petitioner urges adoption of formula C, under which the 58 percent permanent disability is converted into its monetary equivalent of $20,790. From this figure is subtracted the dollar value ($6,422.50) of the 24.25 percent of the noncompensable, nonindustrial disability. The result is an award of $14,367.50, or the equivalent of 205.25 weekly benefits." (*Fuentes v. Workers'*

> *Comp. Appeals Bd., supra*, 16 Cal.3d at pp. 5-6 [41 Cal.Comp.Cases at p. 44].)

The Supreme Court held that formula A was the correct formula required by the plain language of former section 4750, which precluded the employee from receiving "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" and limited the employer's liability for permanent disability to "that portion due to the later injury as though no prior disability or impairment had existed."

The Supreme Court observed that its interpretation of the plain language of former section 4750 was supported by the Legislature's intent in enacting former section 4750 to encourage employers to hire disabled workers. In this regard, the Court noted the Legislature's recognition that employers might refrain from hiring the disabled if, upon subsequent injury, an employer would become liable for compensating the employee for an aggregate disability that included a previous disability. (*Fuentes v. Workers' Comp. Appeals Bd., supra*, 16 Cal.3d at pp. 6-7 [41 Cal.Comp.Cases at p. 44] citing *Hegglin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 173 [36 Cal.Comp.Cases 93]; *State Comp. Ins. Fund v. Industrial Acc. Com. (Hutchinson*) (1963) 59 Cal.2d 45, 49 [28 Cal.Comp.Cases 20].)

Former section 4750 was repealed on April 19, 2004, along with former section 4663. They were replaced by new sections 4663 and 4664.

New section 4663 provides in relevant part:

> "(a) Apportionment of permanent disability shall be based on causation.
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> ***
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> "(c) In order for a physician's report to be considered complete on the issue of permanent disability, it must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by

> other factors both before and subsequent to the industrial injury, including prior industrial injuries."

Section 4664 provides in relevant part:

> "(a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.
>
> "(b) 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. This presumption is a presumption affecting the burden of proof."

In construing a statute, the Appeals Board's fundamental purpose is to determine and effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289]; *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 480]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657]; *Cal. Ins. Guar. Ass'n v. Workers' Comp. Appeals Bd. (Karaiskos)* (2004) 117 Cal.App.4th 350, 355 [69 Cal.Comp.Cases 183, 185].) Thus, the Appeals Board's first task is to look to the language of the statute itself. (*Ibid.*) The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois v. Workers' Comp. Appeals Bd., supra*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289]; *Gaytan v. Workers' Comp. Appeals Bd.* (2003) 109 Cal.App.4th 200, 214 [68 Cal.Comp.Cases 693, 702]; *Boehm & Associates v. Workers' Comp. Appeals Bd. (Lopez)* (1999) 76 Cal.App.4th 513, 516 [64 Cal.Comp.Cases 1350, 1351].) When the statutory language is clear and unambiguous, there is no room for interpretation and the Appeals Board must simply enforce the statute according to its plain terms. (*DuBois v. Workers' Comp. Appeals Bd., supra,* 5 Cal.4th at p. 387 [58 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (Arvizu)* (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508]; *Cal. Ins. Guar. Ass'n v. Workers' Comp. Appeals Bd. (Karaiskos), supra*, 117 Cal.App.4th at p. 355 [69 Cal.Comp.Cases at p. 185]; *Reeves v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 27 [65 Cal.Comp.Cases

359, 362]; *Boehm & Associates v. Workers' Comp. Appeals Bd. (Lopez)*, *supra*, 76 Cal.App.4th at p. 516 [64 Cal.Comp.Cases at p. 1351]; *Williams v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 1260, 1265 [64 Cal.Comp.Cases 995, 998].)

The plain terms of sections 4663(c) and 4664(a) mandate that the percentage of non-industrial or previously awarded permanent disability be subtracted from the overall percentage of permanent disability in the same manner as formula A adopted by the Supreme Court in *Fuentes*. That is, section 4663(c) requires apportionment of the "*percentage* of the permanent disability" caused by factors other than the industrial injury at issue. (Emphasis added.) Similarly, section 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, bearing in mind the public policy behind the enactment of new sections 4663 and 4664, we conclude that only formula A results in an award of permanent disability that complies with the provisions of those sections. Applicant has suffered a compensable permanent disability of 31%. Under formula B, however, he would receive an award that, under the rates provided for in section 4658, is equivalent to the amount of indemnity given for a disability of approximately 40.75%. Application of formula C results in a recovery that is approximately the same as that authorized by section 4658 for a rating in excess of 69.75%.

The fact that *Fuentes* was an analysis of apportionment under section 4750, which was repealed on April 19, 2004, does not change the Legislative intent underlying apportionment statutes of encouraging employers to hire disabled workers. We must assume that the Legislature was aware of the existing case law and intended to maintain a consistent body of rules when it enacted sections 4663 and 4664. (*Fuentes v. Workers' Comp. Appeals Bd., supra*, 16 Cal.3d at p. 7 [41 Cal.Comp.Cases at p. 45]; *Estate of Simpson* (1954) 43 Cal.2d 594, 600; *American Friends of Service Committee v. Procunier* (1973) 33 Cal.App.3d 252.) It should not be presumed that the Legislature meant to overthrow long-established principles in law unless such intention is made clear. (*Fuentes v. Workers' Comp. Appeals Bd., supra*, 16 Cal.3d at p. 7 [41 Cal.Comp.Cases at p. 45] citing *Theodor v. Superior Court* (1972) 8 Cal.3d 77.) Therefore, we conclude that part of the

legislative intent in enacting new sections 4663 and 4664 was, as in enacting former section 4750, to encourage employers to hire disabled workers.

Therefore, we conclude that formula A, as adopted by *Fuentes*, is still the correct formula. When the WCAB awards permanent disability after apportionment, the amount of indemnity due applicant is calculated by determining the overall percentage of permanent disability and then subtracting the percentage of permanent disability caused by other factors under section 4663(c) or previously awarded under section 4664(b); the remainder is applicant's final percentage of permanent disability for which indemnity is calculated pursuant to sections 4453 and 4658.

DISPOSITION

As our Decision After Reconsideration, we will affirm the WCJ's Findings and Award of December 24, 2004.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation

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Compensation Appeals Board (En Banc), that the Findings and Award issued by the workers' compensation administrative law judge on December 24, 2004, be, and hereby is, **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

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WILLIAM K. O'BRIEN, Commissioner

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JAMES C. CUNEO, Commissioner

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JANICE J. MURRAY, Commissioner

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FRANK M. BRASS, Commissioner

I DISSENT
(See attached Dissenting Opinion)

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MERLE C. RABINE, Chairman

I DISSENT
(See attached Dissenting Opinion)

_____
RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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JSG/tab

DISSENTING OPINION OF CHAIRMAN RABINE

I dissent. I believe that the express language of section 4663 as amended by SB 899 requires that application of formula B discussed in *Fuentes v. Worker's Comp. Appeals Bd.* (1976) 16 Cal.3d 1 [41 Cal.Comp.Cases 42] ("*Fuentes*").

The Supreme Court in *Fuentes* based its adoption of formula A on two grounds: (1) the "beneficent public policy" which prompted the Legislature to adopt former section 4750 (16 Cal.3d at p. 6 [41 Cal.Comp.Cases at p. 45]); that is, encouraging employers to hire physically handicapped persons (16 Cal.3d at pp. 5, 6-7 [41 Cal.Comp.Cases at pp. 44]); and (2) the "express and unequivocal language of [former] section 4750" (16 Cal.3d at p. 6 [41 Cal.Comp.Cases at p. 44]). As the majority correctly notes, section 4750 has been repealed.

While I do not question the Legislature's continuing beneficence, I am unaware of any empirical evidence in the almost 30 years since *Fuentes* issued that demonstrates that the adoption of formula A instead of formulas B or C has resulted in any employers hiring physically (or mentally) handicapped persons who would have not been hired but for the adoption of formula A. There is certainly nothing in this record that could allow the Appeals Board to determine that application of formula A to apportionment under SB 899 will encourage employers to hire handicapped persons (cf., *Kleemann v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 274, 288 [70 Cal.Comp.Cases 133, 144]).

However, irrespective of the Legislature's beneficence, I believe that the express language of sections 4663 and 4664 requires the adoption of formula B for calculation of indemnity to which injured workers are entitled when they sustain permanent disabilities that are subject to apportionment.

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, the Appeals Board held en banc that section 4663 requires that the applicant must prove by a preponderance of the evidence both the overall level of permanent disability and the "approximate percentage" of the permanent disability and that the defendant has the burden of establishing the "approximate percentage" of

permanent disability cause by factors other than the industrial injury (70 Cal.Comp.Cases at pp. 607, 612-613). This implies that there will be a determination of overall permanent disability, the percentage directly caused by the industrial injury, and the percentage caused by other factors.

In this case, applicant's overall permanent disability is 80%. However, he had a prior award of 49%. Thus, the percentage of his disability that was directly caused by his present injury is 31/80ths and the percentage caused by other factors (here, his prior injury) is 49/80ths. "Percentage" in section 4663 is the ratio of the disability caused by industrial injury to the overall disability. This same use of percentage as ratio is evident in section 4664(a), which requires that the employer only be liable for the "percentage of permanent disability" directly caused by the industrial injury.

This use of "percentage" is not the same as the use of the term in section 4658. In that section, weeks of payment of indemnity are assigned to each "percentage of permanent disability incurred." Here, "a permanent disability rating is a numeric representation, expressed as a whole number percent, of the degree to which the permanent effects of the injury have diminished the capacity of the employee to compete for and maintain employment in an open labor market" (Schedule for Rating Permanent Disabilities, April 1997, pp. 1-2). However, "the percentage level of permanent disability represents only a point on a relative scale" (1 Hanna, *Cal. Law of Employee Injuries and Workers' Compensation* (Revised Second Edition, December 2004), §8.02[2], p. 8-6). This "relative" "numeric representation" is quite different from the precise calculation required by section 4663.

Thus, on its face section 4663 requires the application of formula B. The majority simply asserts, without analysis, that sections 4663 and 4664 require that "the percentage of non-industrial or previously awarded permanent disability be *subtracted* from the overall percentage of permanent disability" (p. 7, *supra*, emphasis added), despite the fact that the term *subtract* is nowhere to be found in the statutes, although it was clearly implied in former section 4750 (the employer shall be liable "only for that portion due to the later injury as though no prior disability or impairment had existed").

Finally, the fact that this employee would be entitled under my analysis to 31/80ths of the number of weeks of indemnity specified for 80% by section 4658 is not an undue burden to employers. As was noted in *Escobedo*, in SB 899 "the Legislature intended to expand rather than narrow the scope of legally permissible apportionment" (70 Cal.Comp.Cases at p. 616). The language of section 4663 "appears to reflect a legislative intent to enlarge the range of factors that may be considered in determining the cause of permanent disability" (70 Cal.Comp.Cases at p. 617). In this context it cannot be said that the fact that the express language of section 4663 also requires the application of formula B will fail "to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time" (SB 899 [Stats. 2004, ch. 34, §49).

I believe that the repeal of former section 4750 removes the underpinnings of the Supreme Court's holding in *Fuentes*. I believe that the express language of section 4663 requires the application of formula B. Therefore, I dissent.

MERLE C. RABINE, Chairman

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DISSENTING OPINION OF COMMISSIONER CAPLANE

I dissent. I believe that the express language of sections 4663 and 4664 as amended by SB 899 requires application of formula C discussed in *Fuentes v. Worker's Comp. Appeals Bd.* (1976) 16 Cal.3d 1 [41 Cal.Comp.Cases 42] ("*Fuentes*").

Comparing the former and current apportionment statutes, sections 4750 and 4664 respectively, it is clear that a new formula was intended by the legislature. Former section 4750 says that in cases of combined disability, an employer is only liable, "for that portion due to the later injury as though *no prior disability or impairment had existed*." (Emphasis added.) On the other hand, section 4664 states that in cases of combined disability, an employer is only "liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment."

Under old law, we are asked to ignore any prior disability when calculating the percentage of permanent disability caused by an industrial event. New law has no such limitation; therefore, it is reasonable to conclude that with the repeal of the prior apportionment statute, the legislature intended to effect a change. Thus, to apply *Fuentes* as it has for the past 29 years, disregards any intended change.

The new law recognizes that simply subtracting an injured worker's prior disability from his or her overall current disability does not adequately compensate the worker for the *permanent disability directly caused by the injury*. It also furthers the intent of our permanent disability schedule, which geometrically increases benefits as disability increases, acknowledging that a worker who has suffered two independent injuries of 20% each is considerably less disabled, more employable and therefore entitled to lower benefits than a worker who has an overall disability of 40%.

Therefore I conclude that under section 4664, an employer is liable for that portion of a worker's overall disability, which exceeds his or her prior level of disability.

In the present case, Mr. Nabors was previously 49% disabled. He had a new industrial

injury and now is 80% disabled. The *permanent disability directly caused by the new injury* is that which took Mr. Nabors from 49% to 80%. To compensate him for a 49% and a 31% permanent disability when he is, in reality 80% disabled and will compete in the open labor market at that level of disability, is manifestly unfair. Although the workers' compensation system is not designed to make injured workers whole, it should compensate workers fairly and equitably within its strictures. Therefore, I dissent.

RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 9, 2005

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