

DEPARTMENT OF INDUSTRIAL RELATIONS  
DIVISION OF WORKERS' COMPENSATION  
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October 11, 2006

Honorable Ronald M. George, Chief Justice and the Associate Justices  
California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102

Re: *Kenneth Dee Welcher v. WCAB* S147030  
*Jack Strong v. WCAB*  
*Aurora Lopez v. WCAB*  
*Henry L. Williams, Jr. v. WCAB*

Dear Chief Justice George and Associate Justices:

This letter in support of the Court's granting the petition for review in the above-named consolidated cases is submitted by the Division of Workers' Compensation pursuant to rule 28(g) of the California Rules of Court.

The Division of Workers' Compensation has an interest in these cases related to yet distinct from that of the Workers' Compensation Appeals Board. The Workers' Compensation Appeals Board (WCAB), consisting of seven Commissioners, is the respondent in each of these cases and exercises *judicial* power over workers' compensation litigation. The Division, through its Administrative Director and Court Administrator, *administers* the workers' compensation adjudication and benefit delivery system. The WCAB is charged by the California Constitution, Article XIV, section 4 with "accomplish[ing] substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character". The expeditious and unencumbered operation of the workers' compensation system is adversely affected by the lack of uniformity of decision in the cases interpreting the current law of apportionment of permanent disability.

I. The Applicant's Interest

The Division of Workers' Compensation, through the Administrative Director and Court Administrator, employs and supervises approximately 135 workers' compensation administrative law judges and 25 presiding workers' compensation administrative law judges who are employed at 24 district offices in California. These judges hear and decide all workers' compensation cases at the trial level. In 2005, workers' compensation administrative law judges held 349,045 hearings and issued 171,247 decisions.

Currently, there is conflict and uncertainty in the published case law regarding the proper method for calculating permanent disability indemnity where apportionment is involved under Labor Code sections 4663 or 4664(b). Because there is no uniformity of decision on the issue of apportionment of permanent disability, there is no guidance to the workers' compensation administrative law judges (and the workers' compensation community which participates in hearings before them) regarding how the issue should be handled.

II. There is No Uniformity of Decisions on the Application of the Revised Law of Apportionment of Permanent Disability:

In its December 20, 2005 opinion in *E & J Gallo Winery v. WCAB (Dykes)* (2005) 134 Cal.App.4th 1536 [70 Cal.Comp.Cases 1644], the Fifth Appellate District concluded that, now, the proper method for calculating permanent disability indemnity after apportionment is to subtract the *actual dollar amount* of the permanent disability indemnity award for the prior injury from the *current dollar value* of the overall permanent disability caused by both the current injury and the prior injury (i.e., subtract “old” dollars from “new” dollars). Thus, *Dykes* applied a variant of the “formula C” that the Supreme Court had considered (and rejected) in *Fuentes v. WCA* (1976) 16 Cal.3d 1 [41 Cal.Comp.Cases 42]. *Dykes*, however, said that “[w]e limit our analysis to the present facts where the injured employee received a prior disability award while working for the same self-insured employer” (134 Cal.App.4th at pp. 1550-1551, *see also*, pp. 1540, 1553) and that “we express no opinion whether formula C 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” (134 Cal.App.4th at p. 1553). On March 1, 2006, the Supreme Court denied the employer’s petition for review. (2006 Cal. LEXIS 2885.)

In its June 8, 2006 opinion in *Nabors v. WCAB* (2006) 140 Cal.App.4th 217 [71 Cal.Comp.Cases 704], the First Appellate District, Division Two, agreed with *Dykes* that formula C applies and that “old” dollars should be subtracted from “new” dollars. However, *Nabors* limits its holding to successive injuries with the same employer, when it either is self-insured or has two insurance carriers (*see* 140 Cal.App.4th at p. 228 [“we express no opinion about whether formula C should be applied in [other] cases, but like the *Dykes* court, exercise appropriate restraint by limiting our inquiry to the proper formula for calculating the benefits due under the facts of that case (having been asked to reject its reasoning) and this one”]). On August 23, 2006, the Supreme Court denied the employer’s petition for review. (2006 Cal. LEXIS 10100.)

On August 30, 2006, the First Appellate District, Division Three, issued its opinion in *Brodie v. WCAB* (2006) \_\_\_ Cal.App.4th \_\_\_ [71 Cal.Comp.Cases 1007], another case (like *Dykes*) involving successive injuries with the same self-insured employer and a prior award of permanent disability. *Brodie* agreed with *Dykes* and *Nabors* that formula C should be applied, however, *Brodie* subtracted “new” dollars from “new” dollars (i.e., it subtracted the *current dollar value* of the percentage of permanent disability found under the prior award from the *current dollar value* of the overall permanent disability caused by both the current injury and prior injuries) It is not entirely clear whether *Brodie* is limiting its holding to successive injuries with the same employer (whether self-insured or not) or whether it intends its holding to apply more broadly to all cases of successive industrial injuries (see 71 Cal.Comp.Cases at p. 1011, fn. 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. ... The *Nabors* court did not consider that limitation to be an obstacle to applying the *Dykes* rationale in a broader context ... and neither do we.”]).

On August 31, 2006, the Third Appellate District, in *Welcher v. WCAB* (2006) \_\_\_ Cal.App.4th \_\_\_ [71 Cal.Comp.Cases 1087], expressly disagreed with *Dykes* and *Nabors* and held that formula A of *Fuentes* still should be followed, i.e., subtracting the percentage permanent disability rating under the award for the prior industrial injury from the overall percentage of permanent disability caused by both the current industrial injury and the prior industrial injury. *Welcher* presented four consolidated cases involving, variously, successive injuries with different employers with different carriers (*Welcher*), successive injuries with the same self-insured employer (*Strong* and *Williams*), and an industrial injury with pre-existing and subsequent non-

industrial conditions (diabetes and a stroke) (*Lopez*). Moreover, *Welcher* applied its holding to all cases (71 Cal.Comp.Cases at p. 1105 [“we note that [*Dykes*] attempted to limit the reach of its decision by restricting that decision to situations where ‘an employee sustains multiple industrial injuries working for the same self-insured employer.’ ... [W]e find no basis in the law ... for construing the operative statutes one way when multiple employers and/or insurers are involved, and another way when only a single, self-insured employer is involved. Absent any such basis, the law must be consistently applied ... ”]).

### III. Conclusion

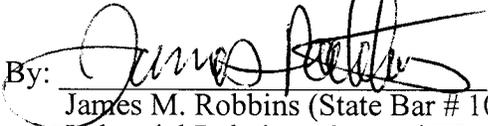
Therefore, at present, there is both irreconcilable conflict and uncertainty in the appellate case law. The conflict exists because, in cases involving successive industrial injuries with the same employer and a prior award of permanent disability, there are two courts applying the “subtract old dollars from new dollars” variant of formula C (i.e., *Dykes* and *Nabors*), there is one court applying the “subtract new dollars from new dollars” variant of formula C (i.e., *Brodie*), and there is one court applying the “subtract percentages from percentages” approach of formula A (i.e., *Welcher*). The uncertainty exists because, in cases not involving successive industrial injuries with the same employer (i.e., cases involving successive industrial injuries with different employers or involving an industrial injury with a prior or subsequent non-industrial injury or condition), it is not clear whether only formula A applies (i.e., *Welcher*) or whether the “subtract new dollars from new dollars” variant of formula C (i.e., *Brodie*) might also apply.

Applicant respectfully requests that the petition for review in this case be granted in order to provide clear guidance on these important issues of statutory interpretation for the Division’s WCALJs, the parties who appear before them and all members of the workers’ compensation community.

Very truly yours,

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