

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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4  
5 **CARYL ERICKSON,**

6 *Applicant,*

7 **vs.**

8 **SOUTHERN CALIFORNIA PERMANENTE**  
9 **MEDICAL GROUP/KAISER**  
10 **PERMANENTE, Permissibly Self-Insured,**

11 *Defendant(s).*

**Case Nos. POM 0246580**  
**POM 0246582**

**OPINION AND ORDER**  
**GRANTING PETITION FOR**  
**RECONSIDERATION**  
**AND DECISION AFTER**  
**RECONSIDERATION**

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13 Defendant, Southern California Permanente Medical Group/Kaiser Permanente, seeks  
14 reconsideration of the Amended Findings and Award issued by the workers' compensation  
15 administrative law judge (WCJ) on November 16, 2006.<sup>1</sup> In that decision, the WCJ found that  
16 applicant's two admitted industrial injuries to her neck and in the form of fibromyalgia, which she  
17 sustained while employed by defendant from 1994 through January 13, 2000 (Case No. POM  
18 0246580) and on October 26, 1999 (Case No. POM 0246582), caused overall permanent disability  
19 of 72%. Applying Labor Code section 4664,<sup>2</sup> however, the WCJ also determined that applicant's  
20 permanent disability indemnity award must be "reduced by \$14,171.00," which was the amount of  
21 the permanent disability indemnity payable under applicant's October 1, 1997 stipulated 25%  
22 permanent disability award for two earlier admitted low back injuries, which she sustained while  
23 employed by defendant from June 27, 1977 through May 14, 1994 (Case No. POM 0223242) and  
24 on May 19, 1994 (Case No. POM 0223243). Therefore, after apportionment under section 4664,

25 <sup>1</sup> Defendant's petition for reconsideration captions Case Nos. POM 0223242, POM 0223243, POM 0246580,  
26 and POM 0246582. Although the former two cases have bearing on the latter two, the former cases were not directly  
27 affected by the Amended Findings and Award at issue; therefore, defendant's petition will be deemed to have been  
filed only in the latter two cases.

<sup>2</sup> All further statutory references are to the Labor Code.

1 the WCJ found that applicant is entitled to 444.5 weeks of disability indemnity at the rate of  
2 \$230.00 per week, in the total sum of \$102,235.00, less \$14,171.00, and thereafter, a life pension  
3 of \$46.38 per week. The WCJ also allowed attorney's fees of \$15,335.25.

4 In its petition for reconsideration, defendant contends, in substance, that the proper method  
5 for calculating the amount of permanent disability indemnity due after apportionment is to subtract  
6 the percentage of permanent disability under the prior stipulated award from applicant's current  
7 overall percentage of permanent disability, and then convert the remaining percentage to its dollar  
8 value.

9 No answer has been filed.

10 For the reasons that follow, we grant reconsideration and amend the WCJ's decision to  
11 defer the issue of the *calculation of the amount of the permanent disability indemnity due* to  
12 applicant, pending issuance of the Supreme Court's decision(s) in *Brodie v. Workers' Comp.*  
13 *Appeals Bd.*, review granted November 15, 2006, S146979 (2006 Cal. LEXIS 13527), in *Welcher*  
14 *v. Workers' Comp. Appeals Bd.*, review granted November 15, 2006, S147030 (2006 Cal. LEXIS  
15 13523), or in any other case in which the Supreme Court issues an opinion that resolves this issue.  
16 We also defer the related issue of attorney's fees. Defendant should pay, or continue to pay,  
17 applicant any uncontested permanent disability indemnity, but it should withhold sufficient sums  
18 for attorney's fees, if possible. Upon request by applicant's counsel, an interim attorney's fee may  
19 be allowed by the WCJ – either from accrued sums, from sums withheld for fee purposes, or by  
20 way of commutation if deemed appropriate – after allowing a reasonable time for, and considering,  
21 any objections thereto.

## 22 **I. BACKGROUND**

23 The sole issue presented is how to calculate the amount of permanent disability indemnity  
24 due to applicant for her two current injuries, after apportionment for her two prior injuries.  
25 Defendant was permissibly self-insured for all four injuries.

26 As discussed above, an October 1, 1997 stipulated award determined that applicant's June  
27 27, 1977 through May 14, 1994 cumulative injury and her May 19, 1994 specific injury combined

1 to cause low back disability of 25%, resulting in a permanent disability indemnity award of  
2 \$14,171.00.<sup>3</sup> Defendant's verified petition alleges (and applicant has not disputed) that this  
3 stipulated 25% permanent disability rating was based on the February 19, 1997 report of George  
4 H. Lobley, M.D., whom the parties utilized as an agreed medical evaluator (AME) in orthopedics.  
5 Dr. Lobley found that applicant was prophylactically precluded from heavy lifting, repeated  
6 bending and stooping.

7       Thereafter, applicant sustained two admitted injuries to her neck and in the form of  
8 fibromyalgia, while employed by defendant from 1994 through January 13, 2000 and on October  
9 26, 1999. The parties again utilized Dr. Lobley as the AME in orthopedics, and also utilized  
10 Seymour Levine, M.D., as the AME in rheumatology. Dr. Lobley found that applicant's neck  
11 disability precluded her from substantial work, from heavy lifting, and from work above shoulder  
12 level. Dr. Levine found that applicant's fibromyalgia limited her to semi-sedentary work, that it  
13 precluded her from work above shoulder level, and that it required her to avoid stress greater than  
14 ordinary stress. The Disability Evaluation Unit issued a recommended permanent disability rating,  
15 finding that these factors of disability resulted in 72% permanent disability, after adjustment for  
16 age and occupation. This 72% permanent disability, *before* apportionment, would result in  
17 permanent disability indemnity in the total amount of \$102,235.00 (i.e., 444.5 weeks of indemnity  
18 at \$230.00 per week), plus a life pension thereafter of \$46.38 per week.

19       In his November 16, 2006 Opinion on Decision, the WCJ concluded in essence: (1) that if  
20 an employee has received a prior award of permanent disability indemnity, then, under section  
21 4664, the permanent disability underlying that award is conclusively presumed to still exist; and  
22 (2) that where an employee suffers an industrial injury or industrial injuries causing permanent  
23 disability, and where there is a prior award of permanent disability, section 4664 requires the  
24 apportionment of any overlapping permanent disabilities. (See *Kopping v. Workers' Comp.*  
25 *Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229]; see also, *Strong v. City &*

26 \_\_\_\_\_  
27 <sup>3</sup> Applicant filed a timely petition to reopen this award, but by a separate decision also issued on November 16,  
2006, the WCJ found that good cause had not been established to reopen for new and further disability.

1 County of San Francisco (2005) 70 Cal.Comp.Cases 1460 (Appeals Board en banc) [discussing  
2 overlap where the old and new injuries are to different regions of the body]; *Sanchez v. County of*  
3 *Los Angeles* (2005) 70 Cal.Comp.Cases 1440 (Appeals Board en banc) [discussing overlap where  
4 the old and new injuries are to the same region of the body].) Further, the WCJ concluded that  
5 applicant's conclusively existing low back disability overlaps (and is subsumed by) her current  
6 neck and fibromyalgia disability. However, based on *E & J Gallo Winery v. Workers' Comp.*  
7 *Appeals Bd. (Dykes)* (2005) 134 Cal.App.4th 1536 [70 Cal.Comp.Cases 1644], the WCJ also  
8 concluded that the correct method for determining the amount of permanent disability indemnity  
9 payable to applicant for her current injuries is to subtract the \$14,171.00 permanent disability  
10 indemnity award for her prior injuries from the \$102,235.00 pre-apportionment dollar value of the  
11 permanent disability caused by her current injuries. Accordingly, the WCJ found that applicant's  
12 current injuries caused 72% permanent disability, entitling her to 444.5 weeks of disability  
13 indemnity at the rate of \$230.00 per week (a total sum of \$102,235.00), and a weekly life pension  
14 of \$46.38 thereafter. However, apportioning under section 4664 and *Dykes*, the WCJ also found  
15 that applicant's permanent disability award is to be reduced by \$14,171.00 – the amount of her  
16 prior permanent disability indemnity award.<sup>4</sup>

17 Defendant then filed its petition for reconsideration.

## 18 **II. DISCUSSION**

19 We grant reconsideration to amend the WCJ's decision to defer the calculation of the  
20 amount of permanent disability indemnity due after apportionment for the reasons that follow.

21 On April 19, 2004, Senate Bill 899 (SB 899) repealed the former apportionment statutes  
22 and replaced them with new sections 4663 and 4664.

23 On December 20, 2005, the Fifth Appellate District issued *Dykes, supra*. *Dykes* concluded  
24 that, after SB 899, the proper method for calculating permanent disability indemnity after  
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26 <sup>4</sup> The WCJ did not specify how the \$14,171.00 reduction in applicant's current permanent disability indemnity  
27 award was to be applied (i.e., his decision did not state whether the \$14,171.00 was to be: deducted from the initial  
payments of permanent disability; commuted from the far end of the permanent disability award - but before the life  
pension; commuted over the duration of the permanent disability award; or adjusted by the parties).

1 appportionment is to subtract the *actual dollar amount* of the permanent disability indemnity award  
2 for the prior injury from the *current dollar value* of the overall permanent disability caused by  
3 both the current injury and the prior injury (i.e., subtracting “old” dollars from “new” dollars).  
4 Thus, *Dykes* applied a variant of the “formula C” that the California Supreme Court had  
5 considered (and rejected) in *Fuentes v. Worker’s Comp. Appeals Bd.* (1976) 16 Cal.3d 1 [41  
6 Cal.Comp.Cases 42]. *Dykes*, however, expressly limited its holding to cases involving successive  
7 injuries with the same self-insured employer. (134 Cal.App.4th at pp. 1550-1551, see also, pp.  
8 1540, 1553.) On March 1, 2006, the Supreme Court denied the employer’s petition for review.  
9 (2006 Cal. LEXIS 2885.)

10 On June 8, 2006, the First Appellate District, Division Two, issued *Nabors v. Workers’*  
11 *Comp. Appeals Bd.* (2006) 140 Cal.App.4th 217 [71 Cal.Comp.Cases 704]. *Nabors* agreed with  
12 *Dykes* that formula C applies and that “old” dollars should be subtracted from “new” dollars.  
13 *Nabors* applied its holding to successive injuries with the same employer, whether self-insured or  
14 having two insurance carriers. (140 Cal.App.4th at p. 228.) On August 23, 2006, the Supreme  
15 Court denied the employer’s petition for review. (2006 Cal. LEXIS 10100.)

16 On August 30, 2006, the First Appellate District, Division Three, issued *Brodie v.*  
17 *Workers’ Comp. Appeals Bd.* (2006) 142 Cal.App.4th 685 [71 Cal.Comp.Cases 1007], review  
18 granted November 15, 2006, S146979 – a case involving successive injuries with the same self-  
19 insured employer. *Brodie* agreed with *Dykes* and *Nabors* that formula C should be applied, but  
20 *Brodie* subtracted “new” dollars from “new” dollars (i.e., it subtracted the *current dollar value* of  
21 the percentage of permanent disability found under the prior award from the *current dollar value*  
22 of the overall permanent disability caused by both the current injury and prior injuries). On  
23 November 15, 2006, the Supreme Court granted review. (2006 Cal. LEXIS 13527.)

24 On August 31, 2006, the Third Appellate District, issued *Welcher v. Workers’ Comp.*  
25 *Appeals Bd.* (2006) 142 Cal.App.4th 818 [71 Cal.Comp.Cases 1087], review granted November  
26 15, 2006, S147030 – a decision involving four consolidated cases with various factual scenarios,  
27 i.e., successive injuries with different employers with different carriers, successive injuries with

1 the same self-insured employer, and an industrial injury with pre-existing and subsequent non-  
2 industrial conditions. *Welcher* expressly disagreed with *Dykes* and *Nabors* and held that formula  
3 A of *Fuentes* still should be followed, i.e., subtracting the percentage of permanent disability under  
4 the prior award from the overall percentage of permanent disability caused by both the current  
5 industrial injury and the prior industrial injury (i.e., subtracting percentages from percentages). On  
6 November 15, 2006, the Supreme Court granted review. (2006 Cal. LEXIS 13523.)

7 The Supreme Court's grants of review in *Brodie* and *Welcher* automatically vacated those  
8 opinions, making them uncitable. (Cal. Rules of Court, rules 976(d)(1) [rule 8.1105(d)(1), eff.  
9 1/1/07] ("Unless otherwise ordered ..., an opinion is no longer considered published if the  
10 Supreme Court grants review") & 977(a) [rule 8.1115(a), eff. 1/1/07] (in general, "an opinion of a  
11 California Court of Appeal ... that is not certified for publication ... must not be cited or relied on  
12 by a court or a party in any other action"); see also, *Quintano v. Mercury Cas. Co.* (1995) 11  
13 Cal.4th 1049, 1067, fn. 6 (a grant of review "ha[s] the effect of depublishing [the Court of  
14 Appeal's] opinion"); *People v. Rogers* (1978) 21 Cal.3d 542, 547 ("the granting of a hearing  
15 automatically vacates the opinion of the Court of Appeal".) Accordingly, *Brodie* and *Welcher* no  
16 longer have any precedential effect.

17 On November 30, 2006, the Sixth Appellate District issued its opinion in the consolidated  
18 cases of *Davis v. Workers' Comp. Appeals Bd.* and *Torres v. v. Workers' Comp. Appeals Bd.*  
19 (2006) \_\_ Cal.App.4th \_\_ [71 Cal.Comp.Cases \_\_\_\_, 2006 Cal. App. LEXIS 1893, 51 Cal.Rptr.3d  
20 605], which both involved successive injuries with different employers having different insurers.  
21 *Davis/Torres* expressly disagreed with *Dykes* and *Nabors* and held that formula A of *Fuentes* still  
22 should be followed, i.e., subtracting percentages from percentages. *Davis/Torres* neither expressly  
23 limited its holding to the factual scenario before it nor expressly stated that its holding was  
24 intended to apply to all cases involving the calculation of permanent disability indemnity after  
25 apportionment. Although *Davis/Torres* will not be final until 30 days after its issuance (Cal. Rules  
26 of Court, rule 24(b)(1) [rule 8.264(b)(1), eff. 1/1/07]), it has immediate precedential effect because  
27 it was certified for publication upon its issuance. (Cal. Rules of Court, rule 977(d) [rule 8.1115(d),

1 eff. 1/1/07] (“A published California opinion may be cited or relied on as soon as it is certified for  
2 publication or ordered published”); see also, *Jonathon M. v. Superior Court* (2006) 141  
3 Cal.App.4th 1093, 1098.)

4 Therefore, given the decisional history above, there is now both a viable conflict and clear  
5 uncertainty in the appellate case law regarding the calculation of a permanent disability award  
6 after apportionment.

7 Where a conflict exists between published opinions of different Courts of Appeal, the  
8 WCAB is free to choose between the conflicting lines of authority until either the Supreme Court  
9 resolves the conflict or the Legislature clears up the uncertainty by legislation. (*Auto Equity Sales*  
10 *v. Superior Court* (1962) 57 Cal.2d 450, 456; *People v. Hunter* (2005) 133 Cal.App.4th 371, 382;  
11 *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4; *Maples v. Aetna Cas. & Surety*  
12 *Co.* (1978) 83 Cal.App.3d 641, 650, fn. 5.) The Supreme Court’s grants of review in *Brodie* and  
13 *Welcher* are not “decisions” and, therefore, do not resolve the conflicts between *Dykes/Nabors* and  
14 *Davis/Torres*. (See Cal. Const., art. VI, § 14 (“Decisions of the Supreme Court ... shall be in  
15 writing with reasons stated.”); *cf. Ritter v. Thigpen* (11th Cir. 1987) 828 F.2d 662, 665-666 (“A  
16 grant of certiorari [by the U.S. Supreme Court] does not constitute new law.”).)

17 Nevertheless, under the peculiar circumstances present here – where there is uncertainty  
18 and conflict in the current published appellate authority (i.e., *Dykes/Nabors* versus *Davis/Torres*),  
19 and where there have been grants of review by the Supreme Court (*Brodie/Welcher*) – we elect not  
20 to choose which of the conflicting lines of authority we will follow. Instead, we conclude that the  
21 strong public policies favoring judicial economy, uniformity in the application of the law, and the  
22 prevention of inconsistent judgments that undermine the integrity of the judicial system (e.g.,  
23 *Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 Cal.4th 917, 933; *Mooney v. Caspari* (2006)  
24 138 Cal.App.4th 704, 717) provide compelling reasons for *deferring* the issue of how to calculate  
25 permanent disability indemnity after apportionment.

26 First, given the Supreme Court’s grants in *Brodie* and *Welcher*, and given the very wide  
27 discrepancies in the potential outcomes in individual cases depending on which “formula” the

1 Supreme Court ultimately adopts,<sup>5</sup> we expect relatively few settlements; therefore, an unusually  
2 high number of cases will be litigated.

3 Second, if we were to consistently decide these litigated cases in accordance with  
4 *Dykes/Nabors*, in accordance with *Davis/Torres*, or in accordance with both lines of authority (i.e.,  
5 applying *Dykes/Nabors* where there have been successive industrial injuries with the *same*  
6 employer and applying *Davis/Torres* where there have been successive industrial injuries with  
7 *different* employers), then the WCAB and the appellate courts likely would be flooded,  
8 respectively, with petitions for reconsideration and petitions for writ of review – if for no other  
9 reason than to enable the parties to preserve their rights pending the Supreme Court’s decision(s)  
10 in *Brodie* and *Welcher*.

11 Third, even if some cases became final because the parties did not seek reconsideration or  
12 appellate review, the Supreme Court’s decision(s) in *Brodie* and *Welcher* might be inconsistent  
13 with *Dykes/Nabors* or *Davis/Torres* or both. If the Supreme Court’s decision(s) are not applied  
14 prospectively only – then, with respect to cases that are still within five years of the applicant’s  
15 date of injury (Lab. Code, § 5804), many parties might file petitions alleging “good cause” to  
16 reopen based on a change in the law. (Lab. Code, § 5803.)<sup>6</sup> This could create “a landslide of  
17 reopenings of previously adjudicated cases” (*Atlantic Richfield Co. v. Workers’ Comp. Appeals*  
18 *Bd. (Arvizu)* (1982) 31 Cal.3d 715, 728 [47 Cal.Comp.Cases 500]) that could strain the workers’  
19 compensation adjudication system and cause additional delays in the final resolution of these  
20 cases.

21 Finally, if the Supreme Court’s decision(s) in *Brodie* and *Welcher* reach a result  
22 inconsistent with *Dykes/Nabors*, then in any cases in which *Dykes/Nabors* had been applied – but  
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24 <sup>5</sup> For example, in *Davis*, the employee had a prior 35% permanent disability award, and then suffered a new  
25 injury that left her with overall permanent total disability (100%). Using formula A (i.e., subtracting percentages from  
26 percentages), the WCAB gave her a permanent disability award of \$65,662.50 – based on 65% permanent disability  
after apportionment – with no life pension. Had the formula C of *Dykes* and *Nabors* been followed (i.e., subtracting  
“old” dollars from “new” dollars), the employee would have received \$420,649.21, based on her life expectancy,  
including a life pension.

27 <sup>6</sup> We do not now express or imply any opinion on this question.



1 the defendants either timely sought appellate review or successfully petitioned to reopen – there  
2 could be issues of restitution or credit that, again, could cause delays in the final resolution of  
3 these cases and – if allowed – could significantly disrupt the applicants’ benefits or have other  
4 serious adverse consequences for them.

5 Accordingly, deferring any finding regarding the calculation of the permanent disability  
6 indemnity appears to be both fair and in the best interests of applicants, defendants, and the  
7 workers’ compensation adjudication system.<sup>7</sup> Indeed, it appears that the Supreme Court has  
8 adopted a policy of deferring the issue of the calculation of permanent disability after  
9 apportionment pending its decision in *Welcher/Brodie*. (See *Browning-Ferris Industries v.*  
10 *Workers’ Comp. Appeals Bd. (Salter)*, review granted December 20, 2006, S147883 [Supreme  
11 Court defers further action and “holds” case pending its decision in *Welcher/Brodie*].)

12 In light of the Supreme Court’s grants in *Brodie* and *Welcher*, we recognize it is reasonably  
13 likely that petitions for review will be filed in *Davis* and *Torres* and that the Supreme Court will  
14 grant review. Nevertheless, the mere filing of a petition for review has no effect on a Court of  
15 Appeal decision. Moreover, given the timelines established by the California Rules of Court, there  
16 could be a several month delay before the Supreme Court acts on any petitions for review filed in  
17 *Davis/Torres*. Accordingly, *Davis/Torres* may continue to have precedential effect for some time.

18 If the Supreme Court does grant review in *Davis/Torres*, however, then this would render  
19 *Davis/Torres* uncitable. (Cal. Rules of Court, rules 976(d)(1) [rule 8.1105(d)(1), eff. 1/1/07],  
20 977(a) [rule 8.1115(a), eff. 1/1/07]; *Quintano, supra*, 11 Cal.4th at p. 1067, fn. 6; *Rogers, supra*,  
21 21 Cal.3d at p. 547.) This would leave *Dykes* and *Nabors* as the only published appellate authority  
22 addressing the issue of how to calculate permanent disability after apportionment in light of SB  
23 899. Moreover, because *Dykes* and *Nabors* are consistent with each other, there no longer would  
24 be any “conflict” in the published case law.

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25 <sup>7</sup> The Appeals Board may defer the issue of the calculation of permanent disability indemnity due after  
26 apportionment, and then subsequently determine that issue, even though the statutory five-year period for filing a  
27 petition to reopen has elapsed. (E.g., *General Foundry Service v. Workers’ Comp. Appeals Bd. (Jackson)* (1986) 42  
Cal.3d 331, 337 [51 Cal.Comp.Cases 375]; *Douglas Aircraft Co. v. Industrial Acc. Com. (Chaffee)* (1948) 31 Cal.2d  
853, 855-856 [13 Cal.Comp.Cases 116].)

1           Of course, under the principle of stare decisis, the WCAB is bound to follow any non-  
2 conflicting published decisions of the Courts of Appeal (*Auto Equity Sales, supra*, 57 Cal.2d at p.  
3 455; see also *Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377, 384, fn. 5 [61  
4 Cal.Comp.Cases 554]; *Ryerson Concrete Co. v. Workmen's Comp. Appeals Bd. (Pena)* (1973) 34  
5 Cal.App.3d 685, 688 [38 Cal.Comp.Cases 649].) As discussed above, the Supreme Court's grants  
6 of review in *Brodie* and *Welcher* are not "decisions" (see Cal. Const., art. VI, § 14) and, therefore,  
7 they do not affect the obligation of the WCAB to follow non-conflicting precedential Court of  
8 Appeal decisions. (See *People v. Hammond* (1994) 22 Cal.App.4th 1611, 1626, fn. 12 (when the  
9 United States Supreme Court had granted certiorari on an issue of federal law, on which it is the  
10 ultimate arbiter, the doctrine of stare decisis still required the Court of Appeal to follow California  
11 Supreme Court decisions on that same issue despite the grant of certiorari); see also, e.g., *U.S. v.*  
12 *Bruno* (3rd Cir. 1990) 897 F.2d 691, 693, fn. 2 (federal Circuit Court of Appeals was bound by its  
13 prior decision, notwithstanding the United States Supreme Court's grant of certiorari in another  
14 Circuit's case in which a contrary conclusion was reached); *Ritter, supra*, 828 F.2d at pp. 665-666  
15 ("A grant of certiorari does not constitute new law.") Thus, if the Supreme Court grants review  
16 in *Davis/Torres*, then, at least for a time, the WCAB would be bound by *Dykes* and *Nabors*,  
17 notwithstanding the Supreme Court's grants of review in *Brodie* and *Welcher* on the same issue.

18           Nevertheless, even if the Supreme Court does grant review in *Davis/Torres* (or, indeed, if it  
19 grants review in any subsequent published case presenting the issue of how to calculate permanent  
20 disability indemnity after apportionment), this would not change our approach. That is, given the  
21 peculiar circumstances now present, including the fact that *Brodie* and *Welcher* are presently  
22 pending before the Supreme Court on grants of review – and given the public policies discussed  
23 above favoring judicial economy, uniformity in the application of the law, and the prevention of  
24 inconsistent judgments which undermine the integrity of the judicial system – we would still  
25 conclude that it is appropriate to *defer* the issue of how to calculate permanent disability indemnity  
26 after apportionment. Moreover, the principle of stare decisis would not be violated by *deferring*  
27

1 this issue, because we would not be actually *deciding* it in a manner inconsistent with  
2 *Dykes/Nabors*.

3 We emphasize, however, that we are deferring a finding *solely* on the issue of *the*  
4 *calculation of the permanent disability indemnity* (and the related issue of attorney's fees). Any  
5 findings regarding the overall level of permanent disability or the percentage of permanent  
6 disability to be apportioned under section 4664 (or, for any section 4663 apportionment, the  
7 approximate percentages of industrial and non-industrial causation) are *not* being deferred. The  
8 parties should treat these findings as "final" for purposes of reconsideration, appellate review, and  
9 reopening.

10 For the foregoing reasons,

11 **IT IS ORDERED** that the defendant's petition for reconsideration, filed December 8,  
12 2006, is **GRANTED**.

13 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Appeals  
14 Board that the Amended Findings and Award issued by the workers' compensation administrative  
15 law judge on October 16, 2006 is **RESCINDED** and that the following Findings and Order is  
16 **SUBSTITUTED** therefore:

17 **FINDINGS OF FACT**

18 1. Applicant's two admitted industrial injuries to her neck and in the  
19 form of fibromyalgia, which she sustained while employed as an x-ray  
20 technician by defendant from 1994 through January 13, 2000 (Case No.  
21 POM 0246580) and on October 26, 1999 (Case No. POM 0246582),  
22 caused overall permanent disability of 72%, before apportionment.

23 2. Applicant's stipulated award of 25% permanent disability for her June  
24 27, 1977 through May 14, 1994 cumulative injury and her May 19, 1994  
25 specific injury to her low back shall be apportioned in accordance with  
26 Labor Code section 4664.

