

## Significant Decision

### “Back to *Fuentes*”

*Brodie v. WCAB, and Contra Costa County Fire Protection District et al.*  
Supreme Court No. S146979

*Welcher v. WCAB, Hat Creek Construction, Inc., and State Fund.*

*Strong v. WCAB and City and County of San Francisco.*

*Lopez v. WCAB, Calif. Dept. of Soc. Svs., and State Fund, adjusting agent*

*Williams v. WCAB and United Airlines.*

Supreme Court No. S147030

Filed May 3, 2007

07 C.D.O.S. 4856

**Significance:** The Supreme Court ruled the Legislature did not intend to overrule *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1 (*Fuentes*), when it repealed former Labor Code § 4750. Thus, as it has been for the last 31 years, formula A remains the law on how to calculate apportionment.

**Facts** In *Brodie*, while employed as a firefighter for Contra Costa County Fire Protection District, Brodie sustained several industrial injuries to his back, spine and right knee for which he had been awarded 44.5% permanent disability. Thereafter, Brodie sustained two more injuries: a specific injury to his back, spine and right knee sustained in 2000, and a cumulative injury to his back and spine sustained during the period ending September 2002. Brodie's overall percentage of permanent disability after these subsequent injuries was 74%.

In *Welcher*, while working in 1990 for the North State Asphalt, insured by Cal. Comp. Ins., Welcher sustained injury to right arm and leg, which resulted in permanent disability of 62.5%. Thereafter, while employed by Hat Creek Construction, insured by State Fund, Welcher sustained a work injury through March 2001, which increased Welcher's overall permanent disability to 71%.

In *Strong*, while employed by the City and County of San Francisco in 1995, Strong sustained an industrial injury to left knee resulting in an award of 34.5% permanent disability. Thereafter, in 1999, Strong sustained a work injury to his left shoulder, left knee and ankle, and right wrist resulting in 42% permanent disability after apportionment of the prior injury. In 2002, Strong sustained a work injury to his back resulting in overall permanent disability of 70%.

In *Lopez*, while working for the State Department of Social Services, petitioner sustained a work injury in 1998 to her back and lower extremities. The parties stipulated her overall permanent disability was 100%: 79% industrial and 21% caused by other factors. State Fund was, and continues to be the adjusting agent for the Department of Social Services. In *Williams*, while working for the

same self insured employer, Williams sustained two injuries to his back. The first injury caused 28% permanent disability. The second work injury sustained through August 2003 increased Williams's overall permanent disability to 43%.

**Discussion** In all of these cases, the issue was which formula should be used to calculate apportionment of permanent disability. The competing formulas are formula A and formula C. Under formula A, the percentage of permanent disability of the preexisting award or condition is subtracted from the overall percentage of permanent disability to determine the percentage of permanent disability directly caused by the current work injury. Under formula C, the dollar value of the percentage of preexisting permanent disability is subtracted from the dollar value of the overall percentage of permanent disability.

The Supreme Court acknowledged that in adopting SB 899 the Legislature did not provide a formula for calculating apportionment. Hence, the Court found the plain language of the Labor Code § 4663 and § 4664 does not resolve whether the Legislature intended to change from formula A, or to retain it. Therefore, the Court reframed the question and asked: "By adopting new and different language governing apportionment, did the legislature intend to adopt a new and different formula?" In concluding the answer is no, the Court examined the nature of apportionment and the related problems the Legislature was trying to solve. The Court identified features of former Labor Code § 4663 and § 4750 that had been used to defeat apportionment (i.e., the features arising from prohibiting apportionment based causation, and from permitting injured employee to show rehabilitation from a previously awarded permanent disability). And from its understanding of how these features impeded or defeated apportionment, the Court found Labor Code § 4663 and 4664 were enacted to remove these impediments.

While it could have stopped here, the Court proceeded to consider the legislative history of the provisions. Finding the legislative history is silent on intent to depart from formula A, the Court also found it unlikely the Legislature intended to adopt a new formula that would give rise to significant increases in awards. This is because a change from formula A "would have drastic fiscal consequences," and SB 899 was enacted "to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time." Moreover, the Court found Labor Code § 3202's mandate of liberal construction is a tool for resolving statutory ambiguity where it is not possible through other means to discern the Legislature's intent. The Court found it unnecessary to resort to section 3202 to construe Labor Code § 4663 and § 4664 because the Legislature's intent could be discerned through other means. Finally, the Court found, "[t]he tables in Labor Code § 4658 are for compensating the current injury only, not the totality of an injured worker's disabilities," and are intended to be read from a base point of zero.

To the extent they are inconsistent with this opinion, the Court disapproved *E & J Gallo Winery v. Workers' Comp. Appeals Bd. [Dykes]* (2005) 134 Cal.App.4<sup>th</sup> 1536, and *Nabors v. Workers' Comp. Appeals Bd.* (2006) 140 Cal.App.4<sup>th</sup> 217. The Court reversed the judgment in *Brodie*, and remanded it back for further proceedings. Finally, the Court affirmed the judgment in *Welcher*.

**Note:** A Supreme Court decision is final 30 days after filing unless the Court orders otherwise.

The full opinion in *Brodie/Welcher et al.* can be found at the Court's website at:  
<http://www.courtinfo.ca.gov/opinions/documents/S146979.PDF>