

Significant Decision

Nabors reversed.
Court of Appeal follows Dykes and annuls WCAB en banc decision in Nabors

Danny Nabors v. WCAB, Piedmont Lumber Co. and SCIF
Court of Appeal, 1st District, Division 2 (San Francisco)
Civ. No. A110792: WCAB No. SRO122159
Filed June 8, 2006

Significance:

The Court of Appeal for the First District, Division Two has followed the decision of the Fifth District (Fresno) in *E&J Gallo v. WCAB (Dykes)* to hold that when carrying out apportionment the dollar value of the prior disability is subtracted from value of the current overall disability. Like the Court in *Dykes*, the *Nabors* Court did limit its holding to the facts presented.

Facts:

The Court of Appeal opinion in *Dykes* and the WCAB en banc decision in *Nabors* are summarized in Significant Decision memos Nos. 2005.19 and 2005.10, available on the Legal Department Worksite.¹

The essential additional facts are that Nabors sustained two injuries while working for the same employer, Piedmont Lumber Co. His first injury occurred while his employer was insured by Unicare, which later combined with Fremont. His second injury occurred under State Fund's coverage.

Holding:

The Court in *Nabors* essentially adopted the rationale of the *Dykes* decision and held that formula C (subtract dollar value) is the proper method of calculating apportionment in this case.

When addressing a defense argument regarding overburdening a subsequent employer in certain factual situations, the Court stated:

In any event, we express no opinion about whether Formula C should be applied in such cases, but like the *Dykes* court, exercise appropriate restraint by limiting our inquiry to the proper formula for calculating benefits due under the facts of that case...and this one.

¹ At the State Fund Intranet Worksite, click "Claims" (near the top of the page); click "Legal;" click "Significant Decisions."

The *Nabors* Court did not explicitly state which facts of the case limited the holding. But because the *Dykes* Court expressly limited its decision to the circumstance of multiple injuries with the same self-insured employer and the *Nabors* Court stated it was following the same approach, the limitation here probably also relates to the fact of multiple injuries with the same employer. While different carriers were involved here, the better view appears to be that same-employer, same-carrier situations also would be governed by this decision.

Accordingly, in WCAB practice, it appears justified to limit acceptance of the *Nabors* holding to cases involving multiple injuries with the same employer.

The matter is not yet settled. In *Nabors*, State Fund intends to petition the Court of Appeal for rehearing and, if necessary, to petition for review in the Supreme Court. Also, there are nine other cases on *Nabors/Dykes* issues currently pending on grants of writ of review in various districts of the Court of Appeal.

Note:

The official and Lexis case citation are not yet available. The full opinion is available on the Court's website at: <http://www.courtinfo.ca.gov/opinions/documents/A110792.DOC> "(press CTRL and click on link.)