

Dear Subscriber,

Court Rulings:

Supreme Court Rules in Consolidated cases of *Brodie, et al., v. WCAB, et al., that Fuentes Formula A Stands as Method for Calculating Apportionment*

The California State Supreme Court unanimously held that the proper method for calculating permanent disability apportionment under Labor Code §§4663 and 4664 remains consistent with the Court's holding in *Fuentes v. WCAB* (1976), 16 Cal. 3d 1, 547 P.2d 449, 128 Cal. Rptr. 673, 41 Cal. Comp. Cas. 42, to subtract the percentage of non-industrial disability (Labor Code §4663) and/or previously awarded permanent disability (Labor Code §4664) from the overall level of permanent disability.

By way of example, the Court indicated that where an employee suffers overall disability of 60%, and it is found that there was permanent disability of 30% caused by non-industrial factors or a previous award, the defendant is liable for an overall permanent disability of 30% as the non-industrial or previously awarded disability of 30% is to be subtracted from the existing disability of 60%, as per the holding in *Fuentes*.

In reaching their conclusion, the Court conducted a thorough review of the Legislative history of Senate Bill 899 and of prior cases addressing apportionment. In doing so, the Court reasoned that there was no evidence of any intent by the legislature to change the manner in which apportionment is calculated. The Court continued, noting that the principle of liberally construing the Labor Code (§3202) to provide benefits is to be applied where there is ambiguity in the law. Here, the Court found no ambiguity in Labor Code §§4663 or 4664 that would lead to the application of a liberal construction.

For the full Supreme Court Opinion, [Click here.](#)

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Permanent Disability Schedule Found to be "arbitrary and capricious" by San Francisco Judge

In a trial Opinion in *Boughner v. Comp USA Inc.*, (SFO 491230) dated May 9, 2007 from Judge Duncan at the San Francisco Workers' Compensation Appeals Board, it was found that the Division of Workers' Compensation failed to base calculations of lost future earnings capacity on empirical evidence, thus violating the provisions of Labor Code Section 4660(b)(2) requiring that "diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees."

In so finding, Judge Duncan reasoned that the Division of Workers' Compensation failed to properly consider sufficient wage loss data from any source, including the Rand study, to properly support the Future Earning Capacity Adjustment found in the presumptively correct rating schedule.

It was Judge Duncan's opinion that evidence presented by the applicant, including testimony of the Administrative Director, established that the future earnings capacity adjustment was "arbitrary and capricious" and thus in violation of the Legislature's mandate in Labor Code Section 4660(b)(2).

Based upon this initial finding, the case is now to move forward with supplemental proceedings allowing the applicant to present alternative lost earnings evidence to provide a basis for an ultimate award of permanent disability.

The Judge further found that as the record was fully developed in the instant case, the case was distinguishable from the WCAB's recent en banc opinion in *Costa v. Hardy*, where the evidence was not found to overcome the presumptively correct rating schedule.

The case is only at the trial level and thus not binding upon any other Workers' Compensation Appeals Board Judges or Venues. It is expected by industry observers that the matter will be the subject of a Petition for Reconsideration.

Costco v. WCAB (Chavez) [cite pending]

In an opinion certified for publication, the California Court

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of Appeals, First District, held that in order for the 1997 rating schedule to apply to a given applicant's injuries, there must be an indication of permanent disability in a medical report prior to 01/01/2005.

The Court reasoned that the clear intent of the statute was to bring as many cases as possible under the new rating schedule. In so holding, the Court declined to follow the applicant's interpretation of Labor Code Section 4660 that any comprehensive medical report prior to 01/01/05 was sufficient to preserve the 1997 rating schedule. The Court looked first to the language of Labor Code Section 4660 pertaining to the applicant's argument, then to the remaining circumstances in Labor Code Section 4660 allowing for preservation of the 1997 schedule and found that all of the other circumstances were consistent with the aim of bringing claims under the new schedule based upon the American Medical Association guidelines.

The Court further held that in order for the 1997 rating schedule to apply based upon the notice requirement concurrent with the last payment of temporary disability, the last day of temporary disability must have occurred before 01/01/05.

In so reasoning, the Court rejected the argument that the duty to issue the notice at a future date is triggered by the first payment of temporary disability. The Court again noted that this interpretation is inconsistent with the intent of the legislature in enacting the provisions of Labor Code Section 4660 and held that as the actual notice is not to be sent until the last payment of temporary disability, it is the date that the notice is actually to be sent that is to be considered for purposes of determining the correct rating schedule to apply.

The above is the first in what many expect to be several decisions that will issue from the Courts of Appeal on the application of the correct rating schedule. Currently, multiple cases are pending before various District Courts of Appeal for determination of similar arguments.

Click here for the full Opinion, [Click here.](#)

Rash v. WCAB (2007)
[cite pending]

In an opinion not certified for publication, the Court of Appeal, Fifth District, held that a county deputy who sustained an injury while returning from a horseshoeing class at a local college did sustain injury on an industrial basis when the applicant was required by his job to own,

care for, train and transport his own horse for his duties with the horse mounted unit. Several days before a shift, the applicant noticed that his horse was missing a shoe and brought the horse to his horseshoeing class. After repairing the missing shoe, the applicant was en route home when he was struck head on by another vehicle.

The Court reasoned that the injuries were industrial because the act of bringing the horse to and from the class on the day of his injury was a method of complying with the requirement that his horse be ready at all times for duty. The Court noted that officers would sometimes be required to transport their horse to a farrier for shoe changing and that this was a duty imposed upon him that was not altered in its character by the fact that the applicant took the horse to his class for horseshoeing rather than a farrier. Based upon the above, the Court found that the applicant's act conferred a direct benefit upon his employer.

Click here for the full Opinion, [Click here.](#)

Sarabi v. WCAB (2007)

[cite pending]

In an opinion certified for publication, the Court of Appeal, First District, held that temporary disability can be awarded by a workers' compensation judge after five years from the date of injury where a timely petition to reopen was filed and the temporary disability is in conjunction with a surgery requested by the applicant's treating physician prior to the expiration of five years from the date of injury, though performed after five years from the date of injury. This opinion is notwithstanding the fact that the applicant's surgery was significantly postponed while the applicant was receiving treatment for an underlying non-industrial condition to allow for him to obtain clearance for requested surgery. Moreover, an Agreed Medical Evaluator was utilized who opined after the expiration of the five year period that the applicant could be considered permanent and stationary if the applicant could not be medically cleared for surgery.

In finding the applicant entitled to ongoing temporary disability, and reversing the WCAB, the Court reasoned that the new and further disability commenced within the five year period, thus preserving the jurisdiction of the WCAB beyond five years from date of injury to decide issues relating to the petition to reopen.

The reader should note that this is a pre-SB899 date of injury.

Click here for the full Opinion, [Click here.](#)

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