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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta/San Francisco)

KENNETH DEE WELCHER, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD, HAT CREEK CONSTRUCTION, INC. et al., Respondents.	C051263 (WCAB No. RDG 106122)
JACK STRONG, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and CITY AND COUNTY OF SAN FRANCISCO, Respondents.	C051409 (WCAB No. SFO 047903)
AURORA LOPEZ, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD, DEPARTMENT OF SOCIAL SERVICES et al., Respondents.	C051790 (WCAB No. RDG 089060)

HENRY L. WILLIAMS, JR., Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and UNITED AIRLINES, Respondents.	C051894 (WCAB Nos. SFO 0434079, SFO 0474801)

ORIGINAL PROCEEDINGS: Petitions for writ of review. Affirmed.

Leep & Tescher and M. K. Tescher, Jr., for Petitioners Kenneth Dee Welcher and Aurora Lopez.

Robert W. Daneri, Suzanne Ah-Tye and David M. Goi for Respondents Hat Creek Construction, Inc., State Compensation Insurance Fund, and Department of Social Services.

No appearance for Respondent Workers' Compensation Appeals Board.

Gearheart & Otis and Roy J. Otis for Petitioner Jack Strong.

Dennis J. Herrera, City Attorney, Rebecca Liu and M. Diane Weber, Deputy City Attorneys for Respondent City and County of San Francisco.

DuRard, McKenna and Borg and Susan R. Borg for Petitioner Henry L. Williams, Jr.

Laughlin, Falbo, Levy & Moresi and Catherine J. Longman for Respondent United Airlines.

David J. Froba for California Applicants' Attorneys Association as Amicus Curiae on behalf of all Petitioners.

Raymond G. Fortner, Jr., County Counsel, Patrick A. Wu, Assistant County Counsel, Leah D. Davis, Senior Deputy County Counsel, and Vincent A. Lim, Deputy County Counsel for County of Los Angeles as Amicus Curiae on behalf of all Respondents.

Finnegan, Marks, Hampton & Theofel and Ellen Sims Langille for California Workers' Compensation Institute as Amicus Curiae on behalf of all Respondents.

Sedgwick, Detert, Moran, & Arnold LLP, Christina J. Imre and Orly Degani for California Chamber of Commerce as Amicus Curia on behalf of all Respondents.

These four consolidated cases raise the issue of how to properly apportion permanent disability in light of the 2004 amendments to the workers' compensation law. (Stats. 2004, ch. 34.) We conclude that in repealing Labor Code[1] section 4750 and in enacting new sections 4663 and 4664 to govern apportionment, the Legislature did not intend to alter the apportionment method adopted by the California Supreme Court 30 years ago in *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1 (*Fuentes*). In so concluding, we agree with the decision of the Workers' Compensation Appeals Board (WCAB) in *Nabors v. Piedmont Lumber & Mill Company* (2005) 70 Cal.Comp.Cases 856 (*Nabors*) and disagree with our colleagues in the Fifth Appellate District, who reached the opposite conclusion in *E & J Gallo Winery v. Workers' Comp. Appeals Bd.* (2005) 134 Cal.App.4th 1536 (*Gallo*), as well as our colleagues in Division Two of the First Appellate District, who followed *Gallo* in *Nabors v. Workers' Comp. Appeals Bd*. (2006) 140 Cal.App.4th 217. Accordingly, we will affirm the decisions of the WCAB in these cases.

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[1] All further statutory references are to the Labor Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

We begin by briefly summarizing the factual and procedural background of each case now before us.

A

Kenneth Dee Welcher

Welcher sustained an industrial injury in July 1990 when his right arm and leg were caught in a conveyor belt. A stipulated award determined that this injury resulted in a permanent disability of 62.5 percent, and Welcher received $32,193 in permanent disability benefits.

Later work as a laborer for Hat Creek Construction, Inc., through March 2001 resulted in cumulative injury to Welcher's right leg that led to amputation below the knee. The parties stipulated that Welcher's level of permanent disability is now 71 percent.

The workers' compensation judge (WCJ) determined that "[a]pportionment is decided by subtracting percentage from percentage" and awarded Welcher $3,360 in permanent disability benefits from State Compensation Insurance Fund (SCIF) (Hat Creek's workers' compensation carrier). Apparently, the WCJ reached this figure by subtracting Welcher's previous level of permanent disability (62.5) from his current level of permanent disability (71) and rounding the result down (8.5 down to 8). Thus, by the WCJ's calculation, SCIF was liable for 8 percent of Welcher's permanent disability, which corresponds to 24 weeks of payments at $140 per week (24 x $140 = $3,360). (See §§ 4453, subd. (b)(2), 4658, subd. (b)(1) & (2).)

Welcher filed a petition for reconsideration with the WCAB, arguing that his benefits should be determined not by subtracting his previous level of permanent disability from his current level of permanent disability, but by subtracting the monetary value of his previous award ($32,193) from the monetary value of a current award of 71 percent disability ($100,165). Relying on its own en banc decision in *Nabors*, *supra*, 70 Cal.Comp.Cases at page 856,[2] the WCAB disagreed and denied Welcher's petition.

B

Jack Strong

In November 1995, while employed by the City and County of San Francisco (the City), Strong sustained an industrial injury to his left knee which resulted in permanent disability of 34.5 percent. He received permanent disability benefits of $25,830.

In February 1999, Strong sustained another industrial injury while employed by the City, this time to his left shoulder, left knee and ankle, and right wrist, resulting in permanent disability of 42 percent (after apportionment for the prior injury) and permanent disability benefits of $35,700.

In May 2002, Strong sustained a third industrial injury while working for the City, this time to his back. The parties stipulated that Strong's overall level of permanent disability

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[2] Division Two of the First Appellate District reversed the WCAB's decision in *Nabors v. Workers' Comp. Appeals Bd.*, *supra*, 140 Cal.App.4th at page 217.

is now 70 percent. A disability evaluation specialist determined that 60 percent of Strong's permanent disability was due to his prior injuries to his shoulder, knee, ankle, and wrist, while 10 percent was due to his current injury to his back. Based on this apportionment, the WCJ determined the current injury caused permanent disability of 10 percent, and thus the WCJ awarded Strong permanent disability benefits of $4,235 (30.25 weeks of payments at $140 per week).

Strong filed a petition for reconsideration with the WCAB, arguing that "there cannot be apportionment to disability occurring to other regions of the body" and that, even if there can be, "apportionment should be determined by subtracting the monetary equivalent of the pre-existing disability from the current monetary equivalent of the overall disability."

The WCAB granted Strong's petition and in an en banc decision determined that section 4664 "requires the apportionment of overlapping permanent disabilities," even when those disabilities involve different regions of the body. Based on its decision in *Nabors*, the WCAB also concluded that the WCJ had properly apportioned Strong's permanent disability between the prior and current injuries. Accordingly, the WCAB affirmed the WCJ's award.

C

Aurora Lopez

Lopez sustained an industrial injury to her back and lower extremities in September 1998. The parties stipulated that she has an overall permanent disability of 100 percent: 79 percent

caused by her industrial injury and 21 percent caused by other factors. Applying the WCAB's decision in *Nabors*, the WCJ awarded Lopez permanent disability benefits of $80,910.73 for a 79 percent permanent disability.

Lopez filed a petition for reconsideration with the WCAB, arguing that *Nabors* was wrongly decided and that she "should receive the benefit of [a] 100 percent disability rating, which, in [her] case, is $172.20 per week for life," minus the amount of benefits that would be payable for 21 percent permanent disability ("$12,080.00 payable in 75.50 weeks at $159.43 per week"). The WCAB denied her petition.

D

Henry L. Williams, Jr.

While employed by United Airlines, Williams sustained a cumulative industrial injury to his lumbar spine ending in August 2003. The parties stipulated that Williams's overall level of permanent disability is 43 percent. Williams had previously received $17,972.50 in permanent disability benefits for a 28 percent permanent disability based on an earlier injury to his lumbar spine while working for the same employer. The WCJ apportioned Williams's permanent disability pursuant to *Nabors*, concluding that the current injury resulted in 15 percent permanent disability, for an award of $9,296.25 in permanent disability benefits.

Williams filed a petition for reconsideration with the WCAB, arguing that *Nabors* was wrongly decided and that "the proper way to apportion is to convert [his] present overall

percentage of permanent disability into its current monetary equivalent and then subtract the dollar value of [his] prior permanent disability award." The WCAB denied his petition.

DISCUSSION

I

Apportioning Permanent Disability

The primary question in these four cases is how permanent disability is to be apportioned in light of the Legislature's recent overhaul of the workers' compensation laws. Under *Nabors*, the WCAB apportions permanent disability by subtracting the percentage of permanent disability caused by factors other than the current industrial injury from the overall percentage of permanent disability, thus determining the percentage of permanent disability caused by the current injury. The WCAB then determines the monetary value of permanent disability benefits payable for this percentage of permanent disability. The four claimants contend this is incorrect and that the WCAB should instead subtract the monetary value of the percentage of permanent disability caused by other factors from the monetary value of the overall percentage of permanent disability.

For reasons we will explain, we conclude the WCAB's approach is the correct one.

We begin with a discussion of permanent disability, followed by tracing how permanent disability has been apportioned in California. We will then turn to the WCAB's position on apportionment under the current law, and a recent

appellate court opinion on the subject, before turning to our own analysis of the law.

A

Fuentes And Former Section 4750

"Permanent disability is the disability that remains after the healing period. An injured worker is entitled to payments for a permanent disability that affects the worker's ability to compete in the open labor market." (1 Cal. Workers' Compensation Practice (Cont.Ed.Bar 4th ed. 2005) § 5.1, p. 276.)

"Permanent disability is expressed in percentages. If the disability is less than 100 percent, it is permanent partial disability. A worker who suffers permanent partial disability is entitled to a certain number of weeks of indemnity payments for each percent of the rating." (1 Cal. Workers' Compensation Practice, *supra*, § 5.7, at p. 280.)

Section 4658 provides generally that if an industrial injury causes permanent disability, then "the percentage of disability to total disability shall be determined, and the disability payment computed" as described in that statute. (§ 4658, subds. (a), (b), (c), & (d).) "Section 4658, as it read prior to April 1, 1972, provided that, for each percentage point of permanent disability which was of industrial origin, an injured worker was entitled to four weeks of compensation." (*Fuentes*, *supra*, 16 Cal.3d at p. 4.) Thus, a worker who was 10 percent permanently disabled was entitled to 40 weeks of

payments, while a worker who was 90 percent permanently disabled was entitled to 360 weeks of payments.[3] (See *ibid.*)

"However, in 1971 the Legislature amended section 4658, establishing a different method for computing the number of weekly benefits to be awarded. Under the new statute, . . . the number of weekly benefits increase[d] exponentially in proportion to the percentage of the disability." (*Fuentes*, *supra*, 16 Cal.3d at p. 4.) As an illustration of this change, under the new statute a worker who was 10 percent permanently disabled (who was formerly entitled to 40 weeks of payments) was now entitled to 30.25 weeks of payments, while a worker who was 90 percent permanently disabled (who was formerly entitled to 360 weeks of payments) was now entitled to 541.25 weeks of payments. (See *ibid.*)

This change in the law gave rise to conflicts over the proper method for apportioning an employee's permanent disability. "Apportionment is the process employed . . . to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility." (*Ashley v. Workers' Comp. Appeals Bd.* (1995) 37 Cal.App.4th 320, 326.) "Generally, an employer is held responsible in the workers' compensation system only for the disability of an

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[3] Payments are generally made at two-thirds of the claimant's average weekly earnings, subject to certain minimum and maximum rates. (See §§ 4453, 4658, subds. (a)(2) & (b)(2).)

injured employee arising from the particular employment with that employer, but not for disability fairly attributable to periods of employment elsewhere or to nonindustrial conditions." (*Ibid.*)

The conflicts over the proper method for apportioning permanent disability in light of the 1971 amendment to section 4658 reached the Supreme Court five years later in *Fuentes*. In that case, the worker suffered from "cumulative injury to his lungs resulting in an over-all permanent disability rating of 58 percent. One-half of this disability was found by the referee to be industrially related, one-quarter (25 percent) was the result of cigarette smoking, and the final one-quarter (25 percent) due to nonindustrial causes. Of the 25 percent attributable to cigarette smoking, one-third (8.33 percent of over-all disability) was found to have been incurred in the course of 'on-the-job' smoking and [wa]s accordingly compensable. Thus, of the total 58 percent disability, approximately 33.75 percent (58 percent X 58.33 percent) was industrially related. The remaining 24.25 percent was attributable to other factors, and being nonindustrial in origin [wa]s not compensable." (*Fuentes*, *supra*, 16 Cal.3d at pp. 3-4.)

The parties in *Fuentes* "suggested that in computing the number of weekly benefits to which [the worker wa]s entitled under the new section 4658 there [we]re three possible methods which m[ight] be utilized, described for the sake of convenience, as formulas A, B, and C. Under former section 4658 the compensation was the same regardless of which formula was

applied. However, as a result of the 1971 amendments substantial differences ensue[d] in the amount awarded a claimant depending on which formula [wa]s utilized.

"Under formula A, . . . there [wa]s subtracted from the total disability that portion which [wa]s nonindustrial, the remainder being the amount of compensable disability. Thus in the matter before [the Supreme Court] 24.25 percent, representing nonindustrial origin, [wa]s deducted from the 58 percent total disability with a net compensable disability of 33.75 percent. Under the schedule established by section 4658, subdivision (a), this entitled [the worker] to 143.25 weekly benefits which [could] be converted in terms of dollars to an award of $10,027.50.

"Formula B contemplate[d], first, determination of the number of statutory weekly benefits authorized under section 4658 for a 58 percent disability, namely, 297. This figure [wa]s then multiplied by the percentage of industrially related disability (58.33). The product [wa]s 173.25 weeks, which result[ed] in a total monetary award of $12,127.50.

"[Under] formula C, . . . the 58 percent permanent disability [wa]s converted into its monetary equivalent of $20,790. From this figure [wa]s subtracted the dollar value ($6,422.50) of the 24.25 percent of the noncompensable, nonindustrial disability. The result [wa]s an award of $14,367.50, or the equivalent of 205.25 weekly benefits." (*Fuentes*, *supra*, 16 Cal.3d at p. 5.)

Based on "the express and unequivocal language of [former] section 4750," the Supreme Court concluded that formula A was "the proper one." (*Fuentes*, *supra*, 16 Cal.3d at p. 6.) At that time, former section 4750 provided as follows: "'An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. [¶] The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed.'" (*Fuentes*, *supra*, 16 Cal.3d at p. 5.)

According to the Supreme Court, "In enacting section 4750, the Legislature . . . expressed a clear intent that the liability of one who employs a previously disabled worker shall, in the event of a subsequent injury, be limited to that percentage of the over-all disability resulting from the later harm considered alone and as if it were the original injury. The principle has been expressed that '. . . [I]ndustry is to be charged only for those injuries arising out of and in the course of employment and only for the result of that particular injury when considered by itself and not in conjunction with or in relation to a previous injury.'" (*Fuentes*, *supra*, 16 Cal.3d at p. 6, quoting *Gardner v. Industrial Acc. Com.* (1938) 28 Cal.App.2d 682, 684.)

The court explained that "only formula A results in an award complying with the provisions of section 4750. [The worker] has suffered a compensable disability of 33.75 percent. Under formula B, however, he would receive an award which, under the rates provided for in section 4658, subdivision (a), is equivalent to the amount given for a disability carrying a rating of approximately 39 percent. Application of formula C results in a recovery which is the same as that authorized by section 4658, subdivision (a), for a rating of 44 percent. This arithmetic leads to the inevitable conclusion that neither method B nor C can be reconciled with the mandate of section 4750 that the compensation for a subsequent injury be computed 'as though no prior disability or impairment had existed.' On the contrary, B and C result in an enhancement of the benefits due to the existence of a preexisting physical impairment." (*Fuentes*, *supra*, 16 Cal.3d at p. 6.)

The court disagreed with an argument that there was "an irreconcilable conflict between the legislative intent to increase workers' compensation benefits as manifested by section 4658, on the one hand, and the limiting effect of section 4750 on the other" and stated the following: "Section 4658 may be considered as a general provision establishing the amount of compensation benefits for a permanent disability, and section 4750 may be viewed as a specific rule limiting the benefits available in those cases where the employee has a preexisting permanent disability and thereafter sustains a further permanent injury. When so construed the statutes in question are

complementary, not contradictory, and function together quite harmoniously, thus, serving the twin goals of providing proportionately greater benefits for more serious injuries while at the same time protecting employers from bearing a disproportionate share of a financial burden resulting from cumulative injuries." (*Fuentes*, *supra*, 16 Cal.3d at p. 7.)

The court recognized that "under formula A . . . a worker who suffers a single injury resulting in, for example, a disability rating of 50 percent, will receive greater benefits than one who sustains two successive injuries each of which causes a permanent disability of 25 percent when considered alone. This result, however, is neither unjust nor unfair . . . . Rather, it is a consequence of the recent amendments to section 4658 and is consistent with the . . . policy of encouraging employers to hire the disabled. There being no evidence to the contrary, this court must assume that such a result was contemplated by the Legislature."[4] (*Fuentes*, *supra*, 16 Cal.3d at p. 8.)

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[4] "Since the Supreme Court decided *Fuentes*, . . . the workers' compensation system has become even more progressive. [Citation.] Now, in addition to permanent disability tables providing for exponentially progressive higher number of weeks of payments, the maximum weekly benefit payments also increase at specific levels of permanent disability." (*Gallo*, *supra*, 134 Cal.App.4th at p. 1551.)

B

Senate Bill No. 899 And Sections 4663 And 4664

"On April 19, 2004, Governor Schwarzenegger signed into law Senate Bill No. 899 (2003-2004 Reg. Sess.), a package of reforms to the workers' compensation laws. (Stats. 2004, ch. 34.) (Bill No. 899.) The legislation took effect immediately as urgency legislation. [Citation.] Bill No. 899 changed, among other things, the law with regard to apportionment of permanent disability. (Stats. 2004, ch. 34, §§ 33 [repealed Lab. Code, § 4663 (former § 4663)], 34 [added new Lab. Code, § 4663 (§ 4663)], 35 [added Lab. Code, § 4664 (§ 4664)], 37 [repealed Lab. Code, § 4750 (former § 4750)], 38 [repealed Lab. Code, § 4750.5 (former § 4750.5)].)" (*Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.* (2005) 131 Cal.App.4th 517, 521, fn. omitted.)

Under Senate Bill No. 899, two new statutes govern apportionment: sections 4663 and 4664. Section 4663 provides as follows:

"(a) Apportionment of permanent disability shall be based on causation.

"(b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.

"(c) In order for a physician's report to be considered complete on the issue of permanent disability, it must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate

percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

"(d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments."

Second, section 4664 provides as follows:

"(a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.

"(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

"(c)(1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:

"(A) Hearing.

"(B) Vision.

"(C) Mental and behavioral disorders.

"(D) The spine.

"(E) The upper extremities, including the shoulders.

"(F) The lower extremities, including the hip joints.

"(G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

"(2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent."

In *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.*, *supra*, 131 Cal.App.4th at page 531, this court held that "new section 4663 and section 4664 are applicable to any case still pending [on enactment of Senate Bill No. 899 on April 19, 2004], except those cases that are finally concluded subject only to the WCAB's continuing jurisdiction under sections 5803 and 5804." (See also *Kleemann v. Workers' Comp. Appeals Bd.*

(2005) 127 Cal.App.4th 274; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906.)

C

Nabors

In *Nabors*, *supra*, 70 Cal.Comp.Cases at page 856, the WCAB considered, en banc, the proper method for apportioning permanent disability in light of Senate Bill No. 899. In *Nabors*, a four-member majority of the WCAB (Commissioners O'Brien, Cuneo, Murray, and Brass) decided that when the WCAB "awards permanent disability after apportionment, the amount of indemnity due [the] applicant is calculated by determining the overall percentage of permanent disability and then subtracting the percentage of permanent disability caused by other factors under section 4663(c) or previously awarded under section 4664(b); the remainder is [the] applicant's final percentage of permanent disability for which indemnity is calculated pursuant to section 4453 and 4658." (*Nabors*, *supra*, 70 Cal.Comp.Cases at pp. 857-858.) The majority based its decision on "[t]he plain terms of sections 4663(c) and 4664(a)," which "mandate that the percentage of non-industrial or previously awarded permanent disability be subtracted from the overall percentage of permanent disability in the same manner as formula A adopted by the Supreme Court in *Fuentes*." (*Nabors*, *supra*, 70 Cal.Comp.Cases at p. 861.)

One dissenting member of the WCAB believed "that the express language of section 4663 as amended by SB 899 requires the application of formula B discussed in *Fuentes*." (*Nabors*,

supra, 70 Cal.Comp.Cases at p. 862 (dis. opn. of Chairman Rabine).) The other dissenting member believed "that the express language of sections 4663 and 4664 as amended by SB 899 requires the application of formula C discussed in *Fuentes*." (*Nabors*, *supra*, 70 Cal.Comp.Cases at p. 864 (dis. opn. of Commissioner Caplane).)

D

Gallo

In *Gallo*, *supra*, 134 Cal.App.4th at page 1536, the claimant was rendered 73 percent disabled following an industrial injury to his back in October 2002. (*Id.* at p. 1541.) He had previously received a permanent partial disability award for an earlier industrial injury to his back in September 1996 while working for the same employer. (*Ibid.*) By stipulation, that earlier award (amounting to $11,680) was based on a determination that he was 20.5 percent permanently disabled. (*Ibid.*)

Following a hearing in November 2004, the WCJ apportioned the claimant's permanent disability by determining the monetary value of a 73 percent disability award ($104,305) and subtracting the $11,680 the claimant previously received for his earlier injury. (*Gallo*, *supra*, 134 Cal.App.4th at p. 1541.) Essentially, this was the equivalent of applying formula C from *Fuentes* (except that in *Fuentes* formula C involved subtracting "the dollar value . . . of the [percentage of] noncompensable, nonindustrial disability"). (*Fuentes*, *supra*, 16 Cal.3d at p. 5.)

The employer petitioned the WCAB for reconsideration, "contending that the Labor Code mandated subtracting the percentage, not dollar amount, of the prior award." (*Gallo*, *supra*, 134 Cal.App.4th at p. 1541.) Five months before the WCAB's en banc decision in *Nabors*, a three-member panel of the WCAB denied reconsideration.[5] (*Gallo*, at p. 1541.) The employer sought appellate court review, and the Fifth Appellate District affirmed the denial of reconsideration, approving the use of formula C to apportion permanent disability under new sections 4663 and 4664. (*Gallo*, *supra*, 134 Cal.App.4th at pp. 1553-1555.) The *Gallo* court, however, expressly "limit[ed its] analysis to the [situation] where the injured employee received a prior disability award while working for the same self-insured employer."[6] (*Id.* at pp. 1550-1551.) Recently, Division Two of the First Appellate District followed *Gallo* because the court found "no compelling reason ha[d] been advanced . . . to

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[5] As the appellate court in *Gallo* pointed out, the three members of the WCAB who denied reconsideration in that case, thereby approving the use of formula C from *Fuentes* to apportion permanent disability, were, five months later, three of the four-member majority in *Nabors* who decided that formula A from *Fuentes* is the proper method for apportionment under new sections 4663 and 4664. (See *Gallo*, *supra*, 134 Cal.App.4th at pp. 1541, 1548, fn. 4.)

[6] Thus, by its own terms, *Gallo* does not apply "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." (*Gallo*, *supra*, 134 Cal.App.4th at p. 1553.) This limitation renders the *Gallo* court's holding directly applicable only to Strong's case and Williams's case here.

disagree with it." (*Nabors v. Workers' Comp. Appeals Bd.*, *supra*, 140 Cal.App.4th at p. 226.)

E

Apportionment Under Sections 4663 And 4664

In each of the four cases before us, the primary question is whether the WCAB properly apportioned permanent disability by subtracting the percentage of permanent disability caused by factors other than the current industrial injury from the overall percentage of permanent disability to determine the percentage of permanent disability for which the employer or its insurer is liable, before determining the compensation payable for that percentage of disability under section 4658. To answer this question, we must construe the new apportionment statutes, sections 4663 and 4664.

"The fundamental rule of statutory construction is to ascertain and effectuate the intent of the Legislature in enacting the statute. [Citation.] We construe the workers' compensation scheme as a whole and consider the words used in their usual, commonsense meaning. [Citation.] We liberally construe all aspects of workers' compensation law in favor of the injured worker." (*Henry v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 981, 984.) The "so-called 'liberality rule,'" however, (which is found in section 3202) "cannot supplant the intent of the Legislature as expressed in a particular statute." (*Fuentes*, *supra*, 16 Cal.3d at p. 8.) If the Legislature's intent appears from the language and context of the relevant statutory provisions, then we must effectuate

that intent, "even though the particular statutory language 'is contrary to the basic policy of the [workers' compensation law].'" (*Ibid.*, quoting *Earl Ranch, Ltd. v. Industrial Acc. Com.* (1935) 4 Cal.2d 767, 769.)

In interpreting sections 4663 and 4664, we are further guided by "'the policy that it should not "be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication."'" (*Fuentes*, *supra*, 16 Cal.3d at p. 7, quoting *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92.)

Here, it was established law under *Fuentes* for almost 30 years that permanent disability is apportioned by subtracting the percentage of the disability attributable to factors other than the current industrial injury from the overall percentage of disability to determine the percentage of the disability that is compensable, then determining the amount of permanent disability benefits payable under section 4658 by reference to the compensable percentage of disability. Thus, we begin with the question of whether, by repealing the former law (including former section 4750) and enacting new sections 4663 and 4664, the Legislature clearly expressed or necessarily implied an intent to abandon this approach and adopt instead the approach advocated by the claimants here (and the appellate court in *Gallo*) -- namely, converting the percentages of disability into their monetary equivalents under section 4658 *before* performing the necessary subtraction.

In our view, no such intent appears in the new apportionment provisions. Section 4663 expresses the principle that apportionment of permanent disability is to "be based on causation" "of the permanent disability." (§ 4663, subds. (a), (b).) Moreover, a physician addressing the issue of permanent disability must "make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (§ 4663, subd. (c).)

Thus, section 4663 speaks of apportioning permanent disability based on causation by determining the percentage of the permanent disability directly caused by the current industrial injury as distinguished from the percentage of the permanent disability caused by other factors. Subdivision (a) of section 4664 then expressly provides that the employer is liable *only* for the former percentage -- that is, "the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (§ 4664, subd. (a).)

In our view, these provisions neither clearly express nor necessarily imply an intent to abandon formula A from *Fuentes* for apportioning permanent disability. On the contrary, we conclude these provisions compel the continued application of that formula. By its plain terms, section 4664 limits an

employer's liability for a claimant's overall permanent disability to "the percentage of permanent disability directly caused by" the present industrial injury. Thus, the employer is *not* liable for "the percentage of permanent disability" caused by any other factors -- including both nonindustrial factors and previous industrial injuries. In this context, the phrase "percentage of permanent disability" is easily referable to the phraseology used in section 4658 to express the extent of permanent disability caused by an injury, which in turn is used to determine the amount of permanent disability benefits payable to a claimant for that injury. That statute provides that where an industrial injury "causes permanent disability, the percentage of disability to total disability shall be determined, and the disability payment computed" by awarding the claimant a certain amount of money for a certain number of weeks "for each 1 percent of disability." (§ 4658, subds. (a), (b), (c), (d).)

We are given no reason to believe that the Legislature intended the term "percentage of permanent disability," as used in sections 4663 and 4664, to have a different meaning than the term "percentage of disability," as used in section 4658. In his dissenting opinion in *Nabors*, Chairman Rabine concluded that a different meaning *was* intended, which compelled him to conclude that formula B from *Fuentes* is now the proper way to apportion permanent disability. (*Nabors*, *supra*, 70 Cal.Comp.Cases at pp. 862-864.) None of the claimants in these four cases, however, proposes we adopt Chairman Rabine's

approach. Moreover, we are unpersuaded by his reasoning. He asserts in his opinion that "percentage," as used in sections 4663 and 4664, "is the ratio of the disability caused by the industrial injury to the [claimant's] overall disability." (*Nabors*, *supra*, 70 Cal.Comp.Cases at p. 863.) Thus, where the claimant had an overall permanent disability of 80 percent, with a prior permanent disability award of 49 percent, Chairman Rabine concluded that "the percent of his disability that was directly caused by his present injury is 31/80ths" (i*bid.*) -- that is to say, 38.75 percent -- rather than the 31 percent that is obtained by subtracting 49 from 80 under formula A from *Fuentes*.

In our view, there is no sound explanation for why the Legislature would have intended "percentage," as used in sections 4663 and 4664, to mean the ratio of a claimant's partial disability to his overall disability, when that same word is used in section 4658 to mean the ratio of a claimant's disability to *total* disability.

"The words of [a] statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) Here, we conclude that sections 4663 and 4664 can best be harmonized with section 4658 by construing the word "percentage" as having the same meaning in both contexts. Thus, "percentage of permanent disability," as that term is used in

sections 4663 and 4664, means the percentage of permanent disability *to total disability*. Indeed, the primary definition of "percentage" is "a part of *a whole* expressed in hundredths." (Merriam-Webster's Collegiate Dict. (10th ed. 2000) p. 859, col. 1, italics added.) In this context, the "whole" is total (i.e., 100 percent) permanent disability, and a "percentage of permanent disability" is any part of *that whole* expressed in hundredths.

What this means is that under section 4663, permanent disability must be apportioned based on causation by determining the percentage of the permanent disability *to total disability* that was directly caused by the current industrial injury as distinguished from the percentage of the permanent disability *to total disability* that was caused by other factors. Then, under subdivision (a) of section 4664, the employer is liable only for the percentage of the permanent disability *to total disability* that was directly caused by the current industrial injury. Having thus complied with the requirement of section 4658 to determine "the percentage of [permanent] disability to total disability" that is compensable for the current industrial injury, the amount of permanent disability benefits payable to the claimant for that injury is computed by awarding the claimant the requisite number of weeks of payments for each percent of permanent disability directly caused by that injury. Thus, the approach to apportionment adopted by the majority in *Nabors* is correct.

Having reached this conclusion, we turn back to the Fifth Appellate District's opinion in *Gallo*, upon which the claimants in this case primarily rely to support their claim that formula C is now the proper method for apportioning permanent disability. As we will explain, we cannot agree with the *Gallo* court's analysis or its conclusion that the Legislature intended formula C to supplant formula A.

"'[I]t should not "be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication."'" (*Fuentes*, *supra*, 16 Cal.3d at p. 7.) However, the *Gallo* court did not discuss whether the Legislature expressly declared or necessarily implied in Senate Bill No. 899 that it intended to overthrow the use of formula A from *Fuentes* to apportion permanent disability. The *Gallo* court also did not attempt to construe the term "percentage of permanent disability" in sections 4663 and 4664 consistently with the term "percentage of disability" in section 4658.

The *Gallo* court concluded "the Legislature contemplated a variation in determining apportionment by repealing section 4750 and replacing it with different language in section 4664." (*Gallo*, *supra*, 134 Cal.App.4th at p. 1550.) Of particular importance to the *Gallo* court was its conclusion that "[t]he Supreme Court's holding in *Fuentes* expressly rested on . . . language in section 4750 that the level of permanent disability caused by a subsequent injury was to be determined without

reference to or consideration of the employee's prior condition." (*Gallo*, *supra*, 134 Cal.App.4th at p. 1549.) According to the *Gallo* court, Senate Bill No. 899 "reversed that policy. Now, a prior award is conclusively presumed to exist as a means of establishing the level of permanent disability directly caused by the subsequent injury. (§ 4663, subd. (b).) Evaluating physicians must also make similar apportionment percentage determinations. (§ 4664, subd. (c).) The WCAB may no longer apportion liability without considering a prior or other noncompensable disability."[7] (*Gallo*, at p. 1549.)

We cannot agree with the *Gallo* court's conclusion that in apportioning permanent disability under former section 4750, "*the level of permanent disability* caused by a subsequent injury was to be determined without reference to or consideration of the employee's prior condition," while under new sections 4663 and 4664, the employee's prior condition must (for the first time) be taken into account in performing that task. (*Gallo*, *supra*, 134 Cal.App.4th at p. 1549, italics added.) The limiting

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[7] The language of former section 4750 to which the *Gallo* court was apparently referring is italicized in the following quotation of the statute: "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself *and not in conjunction with or in relation to the previous disability or impairment*. [¶] The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury *as though no prior disability or impairment had existed*."

language in former section 4750 to which the *Gallo* court was referring was not directed at *the determination of* the *level of permanent disability* caused by the current industrial injury, but rather at *the payment of compensation* based on that injury. Thus, former section 4750 provided that an employee who sustained a subsequent industrial injury was not entitled to "*compensation for the later injury* in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment," and the employer was liable "only for that portion [of the compensation] due to the later injury as though no prior disability or impairment had existed." (Italics added.) The purpose of this language in former section 4750 was to ensure that the employer was not "required to compensate the employee for an aggregate disability which included a previous injury" (*Fuentes*, *supra*, 16 Cal.3d at p. 6), but instead was required to compensate the employee only for the permanent disability stemming from the current industrial injury.

Of course, to accomplish this result, it was *always* necessary to compare the claimant's present overall level of permanent disability to his or her previous level of disability in order to identify the portion of the overall permanent disability that stemmed from the current industrial injury. This is what formula A from *Fuentes* did. Under that formula (for the claimant in that case), "24.25 percent, representing [the portion of the claimant's permanent disability of] nonindustrial origin, [wa]s deducted from the 58 percent total

[or overall] disability with a net compensable disability of 33.75 percent." (*Fuentes*, *supra*, 16 Cal.3d at p. 5.) Thus, contrary to the *Gallo* court's conclusion, even under former section 4750 as the Supreme Court applied that statute in *Fuentes*, "the level of permanent disability caused by a subsequent injury" could not be determined *except by* "reference to . . . the employee's prior condition." (*Gallo*, *supra*, 134 Cal.App.4th at p. 1549.)

Accordingly, the enactment of sections 4663 and 4664 did *not* represent a reversal of policy on this point. Now, as then, the level of permanent disability caused by the current industrial injury can be determined only by reference to the level of disability attributable to other factors -- including the claimant's prior condition. Once the level of permanent disability caused by the current industrial injury has been isolated from the level of disability attributable to other factors, then compensation can be awarded for the portion of the disability attributable to the current injury. It is in the awarding of compensation, once the level of disability attributable to the current injury has been isolated, that the claimant's prior condition is necessarily ignored.

Because Senate Bill No. 899 did not evidence any change of policy on this point, we cannot agree with the *Gallo* court's conclusion "the Legislature contemplated a variation in determining apportionment by repealing section 4750 and replacing it with different language in section 4664." (*Gallo*, *supra*, 134 Cal.App.4th at p. 1550.)

We acknowledge that "[i]t is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (*People v. Valentine* (1946) 28 Cal.2d 121, 142; see *Gallo*, *supra*, 134 Cal.App.4th at p. 1550, quoting *Lockheed Martin Corp. v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1237, 1246.) That presumption, however, is rebutted here with respect to the Legislature's repeal of former section 4750 by replacement of that section with a new section covering the same subject. Where former section 4750 limited an employer's liability for compensation to "that portion [of the claimant's combined disability] due to the later injury as though no prior disability or impairment had existed," subdivision (a) of section 4664 now limits the employer's liability for compensation to "the percentage of permanent disability directly caused by the [current industrial] injury." We perceive no intended change in meaning between these two provisions; thus, the presumption on which the *Gallo* court relied is not controlling here. The remaining portions of former section 4750, which the Legislature did not reenact in the new law, were likely omitted because they were simply superfluous.

Unable to discern in Senate Bill No. 899 "any particular method for apportioning . . . a permanent disability award," the *Gallo* court relied on the liberality rule of section 3202, "keep[ing] firmly in mind the exponentially progressive nature of the workers' compensation disability tables, the increasing maximum weekly benefit rates, and the lifetime pension for

disabilities over 70 percent--all of which serve to compensate employees with higher levels of permanent disability in greater proportion to those with lower levels of permanent disability." (*Gallo*, *supra*, 134 Cal.App.4th at pp. 1552-1553.) Based on these factors, the *Gallo* court concluded that "only formula C ensures both that an employee is adequately compensated and that an employer is directly liable for the percentage of disability directly caused by the injury arising out of employment." (*Id.* at p. 1553.) According to the court, "By not recognizing the injured employee's total disability and artificially shifting compensation down on the permanent disability tables, all of the other formulas shortchange an employee by treating him or her as though no prior injury or disability existed, which is now no longer permitted." (*Ibid.*)

We cannot agree with this reasoning. First, the language of sections 4663 and 4664 shows the legislative intent to continue applying formula A from *Fuentes* to apportion permanent disability. Only the continued application of formula A ensures that an employer is liable only for "the percentage of permanent disability directly caused by the [current industrial] injury," as section 4664 requires, and harmonizes the use of the word "percentage" in sections 4663 and 4664 with the use of that word in section 4658.

Second, as to the liberality rule of section 3202, we are guided by the admonition in *Fuentes* that that rule "cannot supplant the intent of the Legislature as expressed in a particular statute." (*Fuentes*, *supra*, 16 Cal.3d at p. 8.)

Here, we have discerned the legislative intent to continue applying formula A and therefore the rule of liberal construction is of no moment.

Third, to the extent the *Gallo* court's analysis was driven by what it perceived to be the unfairness of applying formula A -- because under that formula a claimant who sustains a given level of permanent disability as a result of a single industrial injury will receive more compensation than a claimant who sustains the same level of disability as a result of multiple industrial injuries -- the Supreme Court rejected the same claim of unfairness in *Fuentes*. (*Fuentes*, *supra*, 16 Cal.3d at p. 8.) Moreover, for nearly 30 years following *Fuentes*, the Legislature left section 4750 in place, thus allowing formula A to govern apportionment of permanent disability for a substantial period of time. The Legislature then enacted sections 4663 and 4664, which, in our view, compel the continued application of that formula. It is not for us to question the wisdom or fairness of that decision. (See *Schnyder v. State Bd. of Equalization* (2002) 101 Cal.App.4th 538, 549.)

In any event, as section 4658 and former section 4750 did when *Fuentes* was decided, we conclude that sections 4658, 4663, and 4664 "function together quite harmoniously, . . . serving the twin goals of providing proportionately greater benefits for more serious injuries while at the same time protecting employers from bearing a disproportionate share of a financial burden resulting from cumulative injuries." (*Fuentes*, *supra*, 16 Cal.3d at p. 7.) Any unfairness to injured workers in this

system is balanced against the unfairness to employers that would result if formula C were applied.[8]

In closing our comments on *Gallo*, we note that the court there 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." (*Gallo*, *supra*, 134 Cal.App.4th at p. 1553.) It may well be that, in such a situation, the policy of "protecting employers [and their insurers] from bearing a disproportionate share of a financial burden resulting from cumulative injuries" has little or no weight, since the same employer is liable for the compensation stemming from all of the claimant's industrial injuries in any event. Be that as it may, we find no basis in the law (nor did the *Gallo* court offer one) 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, even if its application to claimants like Strong and Williams -- who sustained all of their industrial injuries while working for the

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[8] For example, if an employer that hired a worker with a preexisting permanent disability of 20 percent (sustained in earlier employment for another employer) had to pay compensation for a new injury that took the employee's overall level of disability to 40 percent, under formula C that employer would have to pay substantially more compensation than the first employer, even though the percentage of permanent disability directly caused by each injury was the same -- 20 percent.

same, self-insured employers -- appears unfair when compared to other, hypothetical claimants who sustained similar levels of permanent disability from a single industrial injury.

We have examined the arguments presented by the four claimants on this issue and found nothing in them to which we have not already responded in the analysis set forth above. Accordingly, we conclude the WCAB applied the proper method for apportioning permanent liability in each of their cases.[9]

II

Apportioning Permanent Disability

Between Parts Of The Body

Our conclusion on the previous issue disposes of three of the four cases before us. In the fourth case, however, the claimant (Strong) asserts two additional arguments, to which we now turn our attention.

As we previously explained, Strong sustained three industrial injuries while working for the same employer: (1) an injury to his left knee in 1995 which resulted in permanent disability of 34.5 percent; (2) an injury to his left shoulder, left knee and ankle, and right wrist in 1999, resulting in permanent disability of 42 percent (after apportionment for the prior injury); and (3) an injury to his back in 2002 which

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[9] Amici curiae County of Los Angeles and California Workers' Compensation Institute have each filed a request for judicial notice along with their amicus briefs. Because we find the materials of which they ask us to take judicial notice unnecessary to our decision, we deny those requests.

resulted in an overall permanent disability of 70 percent (before apportionment). A disability evaluation specialist determined that 60 percent of Strong's permanent disability was due to his prior injuries to his shoulder, knee, ankle, and wrist, while 10 percent was due to his current injury to his back. Based on this apportionment, the WCJ determined the current injury caused permanent disability of 10 percent.

Strong filed a petition for reconsideration with the WCAB, arguing that "there cannot be apportionment to disability occurring to other regions of the body." The WCAB granted Strong's petition and in an en banc decision determined that section 4664 "requires the apportionment of overlapping permanent disabilities," even when those disabilities involve different regions of the body. (*Strong v. City & County of San Francisco* (2005) 70 Cal.Comp.Cases 1460, 1461-1462 (*Strong*).) In reaching this conclusion, the WCAB undertook a thorough analysis of the apportionment of overlapping permanent disabilities prior to the enactment of Senate Bill No. 899. In part, the WCAB explained as follows:

"In applying former section 4750 [to apportion permanent disability], when the permanent disability resulting from a new injury included factors of disability that were the same as ones that already existed as the result of a prior injury or condition, the disabilities were said to 'overlap.' [Citations.] If all of the factors of permanent disability attributable to the subsequent industrial injury already existed as a result of the prior injury or condition, then there was

'total' overlap, and the employee was not entitled to any additional permanent disability indemnity; if, however, the subsequent industrial injury caused some new factors of permanent disability that were not pre-existing, then there was 'partial' overlap, and the employee was entitled to permanent disability indemnity to the extent the subsequent industrial injury further restricted his or her earning capacity or ability to compete." (*Strong*, *supra*, 70 Cal.Comp.Cases at pp. 1465-1466; see also *Mercier v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 711.)

Under this preexisting law, "it was not the part of the body involved in the subsequent industrial injury that was important; rather, it was the nature of the disability resulting from the new injury in relation to the pre-existing disability that was determinative." (*Strong*, *supra*, 70 Cal.Comp.Cases at pp. 1466-1467.)

Turning to the new apportionment statutes enacted in 2004, the WCAB concluded "there is nothing in new section 4664 that evinces a clear expression of legislative intent to abandon the longstanding policy of encouraging employers to hire workers with disabilities by assuring that such employers are not made liable for pre-existing disabilities if those workers subsequently sustain an industrial injury. . . . [¶] Thus, we conclude that, as was true before the repeal of former section 4750 and continuing with the enactment of new section 4664, an employee is not entitled to be compensated for permanent disability resulting from a new industrial injury to the extent

that this permanent disability is overlapped by prior permanent disability, even where the prior permanent disability involves and/or includes different regions of the body." (*Strong*, *supra*, 70 Cal.Comp.Cases at pp. 1469-1470.)

Strong contends the WCAB's decision on this point is incorrect, but he makes no real effort to refute the WCAB's reasoning. He does suggest that because subdivision (c)(1) of section 4664 generally provides that "[t]he accumulation of all permanent disability awards issued with respect *to any one region of the body* in favor of one individual employee shall not exceed 100 percent over the employee's lifetime" (italics added), this implies there is no such limitation "to the whole body or to all regions of the body combined." That may be true, but it has no bearing on the WCAB's conclusion here. If a claimant with a preexisting permanent disability of 60 percent based on an industrial injury to his leg sustains a subsequent injury to his back that results in a permanent disability of 60 percent, *and* the permanent disability resulting from the subsequent back injury is based entirely on *new* factors of permanent disability that are *different* from the factors of permanent disability caused by the prior leg injury, then in that instance *there would be no overlap*, and two awards of 60 percent permanent disability would be permitted. There is nothing in section 4664, however, that indicates the Legislature intended to repudiate the long-standing legal principles applied to apportioning permanent disability where there *is* overlap in the factors of disability.

Here, the WCAB explained that Strong "succeeded in disproving total overlap . . . between his current disability [caused by his back injury] and the disability upon which his prior permanent disability awards were based [caused by the previous injuries to other parts of his body]," but there remained a partial overlap. (*Strong*, *supra*, 70 Cal.Comp.Cases at p. 1478.) According to the board, the evidence established that at the time of his back injury, Strong "had pre-existing overall disability consisting of limitation to light work." (*Ibid.*) The evidence also established that the 70 percent permanent disability that resulted from his back injury was "based on an *overall* limitation to semi-sedentary work." (*Ibid.*) Finally, the evidence established that "the *increase* in disability from a limitation to light work to a limitation to semi-sedentary work [wa]s the result of [his] back injury." (*Ibid.*)

A disability evaluation specialist concluded that Strong's "preexisting light work limitation rated 60%, after adjustment for his current occupation," and neither party raised any issue with respect to that adjustment. (*Strong*, *supra*, 70 Cal.Comp.Cases at pp. 1463, 1478, fn. 19.) Accordingly, it was a matter of simple mathematics to "deduct[] the pre-existing 60% disability . . . from the stipulated 70% of overall disability" to determine that Strong's back injury had caused 10 percent permanent disability. (*Id.* at p. 1478.)

Strong has shown no rational basis why, under the new statutes governing apportionment, having been fully compensated

for a disability consisting of limitation to light work, he should also receive the *full* value of a disability consisting of a limitation to semi-sedentary work, which overlaps his preexisting disability. In the absence of such a showing, we conclude the WCAB properly apportioned Strong's permanent disability based on the overlap between his prior and current disabilities.

III

The Presumption Of A Prior Disability

Strong purports to raise one further issue regarding subdivision (b) of section 4664, which relates to the apportionment of permanent disability when the claimant received a prior award of permanent disability. That statute provides that "[i]f the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof."

Strong contends the statute is contradictory because "if an award of permanent disability is 'conclusively presumed', then it cannot be rebutted by any evidence. However, the next sentence in the same subsection (b) indicates that 'this is a presumption affecting the burden of proof." He contends this apparent contradiction can be reconciled by holding that "the conclusive presumption applies to what level of disability existed at the time of the prior stipulation or award, which then goes to the burden of proof of whether that level of

disability remained immediately prior to or at the same time of any subsequent injury . . . from which rehabilitation can be demonstrated."

We need not attempt to decipher the meaning or purpose of this argument, because ultimately Strong fails to show how the WCAB's application of this statute to his case operated to his detriment, or how the application of his approach to the statute would operate to his benefit. Strong does not contend that he wanted to, but was prohibited from, trying to prove before the WCJ that his prior permanent disability no longer existed at the time of his back injury. Accordingly, we will leave for another day how this apparently contradictory statute is to be interpreted.

DISPOSITION

In the Welcher and Lopez cases (cases Nos. C051263 and C051790), the WCAB's opinions and orders denying reconsideration are affirmed.

In the Strong case (case No. C051409), the WCAB's opinion and decision after reconsideration is affirmed.

In the Williams case (case No. C051894), the WCAB's order denying reconsideration is affirmed.

The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 56 (l)(2).)

ROBIE, J.

I concur:

BUTZ, J.

I concur in Justice Robie's fine opinion.

I write separately to add another reason why, with respect, I think *E & J Gallo Winery v. Workers' Comp. Appeals Bd.* (2005) 134 Cal.App.4th 1536 was wrongly decided.

New Labor Code sections 4663 and 4664 were enacted by the sweeping overhaul of the workers' compensation laws effected in 2004 by Senate Bill No. 899. (Stats. 2004, ch. 34, § 49.)

Section 49 of that enactment provides:

"This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

"*In order to provide relief to the state from the effects of the current workers' compensation crisis* at the earliest possible time, it is necessary for this act to take effect immediately." (Stats. 2004, ch. 34, § 49; italics added.)

The "workers' compensation crisis" referred to in section 49 of the enactment is described in a report prepared by the RAND Institute for Civil Justice at the request of the California Commission on Health and Safety and Workers' Compensation as follows: "By 2004, the state's workers' compensation system was associated with the highest employer costs in the nation despite evidence indicating that the state's injured workers were not being adequately compensated." (RAND Institute for Civil Justice, "An Evaluation of California's Permanent Disability Rating System" (2005) ch. one, p. 1.)

The "workers' compensation crisis" was therefore, in the main, a crisis of high costs imposed on private sector employers. It was reported that employers were leaving the state as a consequence. (See, e.g., Garcia & Cohen, "Learning from California: The Macroeconomic Consequences of Structural Changes" (1993) Berkeley Roundtable on the International Economy, § 4.2.) It is inconceivable to me that the Legislature intended to fix this "crisis" in workers' compensation costs by abandoning the long-established formula of apportionment of permanent disability announced in *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, and by adopting a new formula that would dramatically increase awards to employees and therefore *increase* employers' costs.

SIMS, Acting P.J.