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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of Perdita GREEN, Appellant,

v.

POUGHKEEPSIE FORD, Inc. et al., Respondent,

WORKERS' COMPENSATION BOARD, Respondent.

March 30, 2023

Facts: This is an established 1987 claim which resulted in various indemnity awards for periods of lost time and reduced earnings. The claim was later transferred to the Special Fund under WCL §25-a and she was later classified with a permanent partial disability.

In a decision filed September 1, 2011, the claimant was awarded benefits for the period May 9, 2011, through August 29, 2011, with the direction that the awards continue. In 2012, the Special Fund requested a suspension as the claimant had returned to work. By decision filed September 7, 2012, awards were suspended as of April 9, 2012, the date of the claimant's return to work without reduced earnings.

On May 13, 2020, the claimant's neurologist submitted a medical narrative, which was subsequently treated as a request for reopening, indicating that claimant's condition had worsened and that she was totally disabled as a result of this injury. When the matter appeared on calendar the Special Fund asserted that the case had been truly closed since a decision on March 21, 2016 which resolved disputed medical bills in its favor and, further, that any additional awards were precluded pursuant to Workers' Compensation Law § 123 given the lapse of 18 years since the injury and eight years since the last award payment on April 9, 2012 and the Law Judge agreed. On appeal to the Board Panel, the claimant challenged the WCLJ's finding that eight years had passed since the last

payment of awards and also that the case was never truly closed. In its decision the Board Panel declined to address whether the claim was truly closed given that claimant did not raise that issue at the hearing and, therefore, found it unpreserved for review. In so doing, it affirmed the WCLJ's decision that Workers' Compensation Law § 123 was applicable. This appeal ensues.

Holding: *Affirmed.*

Discussion: The Board was within its discretion to decline to address the claimant's argument that there was not true closure of the claim as it was not properly preserved on appeal. There was no evidence offered that it had been less than eight years since the claimant received any awards. The last award was made as of April 9, 2012, and there was no evidence that the awards were paid untimely. Because the case was not reopened until May 13, 2020, more than 8 years had elapsed, and the Board's decision must be affirmed.

Stewart, Greenblatt, Manning & Appel