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Supreme Court, Appellate Division, Third Department, New York

MICHAEL J. HERBERGER, Claimant

v.

THOMAS JOHNSON, INC., Respondent

and

SPECIAL FUND FOR REOPENED CASES, Appellant

and

WORKERS' COMPENSATION BOARD, Respondent

May 30, 2019

Facts: Claimant injured his back in 1991. He was classified with a permanent partial disability in 1997. In 1995 this claim and a 1990 back claim were placed on calendar to consider apportionment. Awards were made in the 1991 claim for actual reduced earnings through January 1, 1997 without prejudice to apportionment. Thereafter Section 15(8)(d) was established in the 1991 claim. Case was marked "no further action" in 1999 and was found to be subject to Section 25-a in 2000. The 1991 claim was reopened in 2016 for surgery and awards for lost time associated with the surgery. Special Funds raised Section 123 based on the passage of more than 18 years from the date of the accident and more than 8 years from the payment of the last award. The Board held that because awards had been made without prejudice to apportionment there was no true closing and therefore Section 123 did not apply. Special Funds appealed.

Holding: *Affirmed.*

Discussion: Time limits for the applicability of Section 123 apply only to cases which have been closed and are being reopened but would not bar a new claim or continuing consideration of an open case. The Court held that the Board direction in 1995 to

develop the record on apportionment was a contemplation of further proceedings, even though this was never done and even though liability was thereafter shifted to Special Funds. As there was never a true closure of the file, Section 123 could not be established in the claim. The Court determined that the Board's finding that Section 123 did not apply in the claim was supported by substantial evidence and should not be disturbed.

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