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Supreme Court, Appellate Division, Third Department, New York

RALPH E. SMITH, Respondent

v.

NYS DEPARTMENT OF CORRECTIONS et al., Appellants

and

WORKERS' COMPENSATION BOARD, Respondent

May 23, 2019

**Facts:** A 1993 claim for bilateral knee injuries closed on a schedule loss of use awards in 1998. Carrier requested an amended decision from Workers' Compensation Board between 1999 and 2000 because of a miscalculation of the number of weeks in schedule loss of use award without any response from the Board. The claim was reopened in 2015 for surgery and increase in schedule loss of use. Carrier alleged a Section 123 applied based on passage of 18 years from the date of accident and 8 years from payment of last award. WCLJ found there was no true closing. Carrier appealed and Board Panel affirmed WCLJ decision. Carrier requested full Board review/reconsideration and that was denied. Carrier appealed finding of no Section 123 as well as denial of request for full Board review.

**Holding:** *The finding that Section 123 did not apply was reversed and the case returned to Board for further proceedings. Denial of full Board review deemed moot.*

**Discussion:** The Court held that applicability of Section 123 turns on whether there has been a true closing in the claim previously which is a factual issue for the Board to decide. The Board's decision will be upheld if supported by substantial evidence. A case being characterized by WCLJ as "closed" on the schedule loss of use award, which was a stipulation, evidence that no further proceedings were contemplated. Moreover, the Board ignoring the carrier's request for an amended

decision was indicative of a lack of intention to conduct any further proceedings in the claim. Additionally, any change in the initial award administratively would have been a ministerial change and not a contemplation of further proceedings in the claim. The Court ruled that substantial evidence did not support the Board's decision.

Given this decision, the appeal from the denial of Full Board review was deemed academic.

*Stewart, Greenblatt, Manning & Báez*