

STEWART, GREENBLATT, MANNING & BAEZ

ATTORNEYS AT LAW

MADGE E. GREENBLATT (RET.)
ROBERT W. MANNING
RICARDO A. BAEZ
DAVID J. GOLDSMITH
PETER MICHAEL DeCURTIS
LAURETTA L. CONNORS
LISA LEVINE
ANDREA L. De SALVIO
KRISTY L. BEHR
RAYMOND J. SULLIVAN
LUKE R. TARANTINO
THOMAS A. LUMPKIN
DIANE P. WHITFIELD

6800 JERICHO TURNPIKE

SUITE 100W

SYOSSET, NY 11791

516-433-6677

FAX 516-433-4342

DONALD R. STEWART (1949-2021)

KAFI WILFORD (2003-2010)

MICHAEL H. RUINA (1992-2016)

JAMES MURPHY
OF COUNSEL

Supreme Court, Appellate Division, Third Department, New York

In the Matter of JAMES O'DONNELL, Appellant

v.

GROW KIEWIT CATAPANO, et al, Respondent

and

WORKERS' COMPENSATION BOARD, Respondent

November 17, 2022

Facts: An Appeal from a decision which ruled that reopening of the claim was barred by Workers' Compensation Law Section 123.

This claim is established for Caisson disease resulting from exposure to compressed air during employment as a construction worker. The date of disablement was determined to be "July 23, 1999, which was the first medical evidence for the condition." The claimant was awarded schedule loss of use findings and the award commenced as of July 23, 1998.

The case remained closed until submission of a report in January of 2017 noting an increased impairment. In May 2017, the claimant filed an RFA-1 and reopening of the claim. The issue of Section 123 was raised, and the Law Judge found that Section 123 applies. The claimant filed an Appeal asserting that Section 123 did not apply given the fact that the date of disablement was established as July 23, 1999. The Board found that the date of disablement set as July 23, 1999, rather than July 23, 1998 was an inadvertent error and affirmed the Judge's finding that Section 123 applied. The claimant appealed.

Holding: *Affirmed.*

Rationale: Section 123 vests the Board with continuing jurisdiction to reopen closed cases except when the application to reopen is made after 18 years from the date of injury or death and the lapse of 8 years from the date of the last payment of compensation. The Court noted that the decision that documented the date of disablement as July 23, 1999, also noted that it was using the date of first medical evidence for the condition. The medical evidence in the Board File for the first date of treatment is July 23, 1998. Therefore, the Court held that the Board's finding of an inadvertent error was not an abuse of discretion and therefore, the decision was affirmed.

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