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*302 A.D.2d 851, \*; 756 N.Y.S.2d 326, \*\*;  
2003 N.Y. App. Div. LEXIS 1734, \*\*\**

In the Matter of the Claim of Thomas J. Jansch, Appellant, v. Sagamore Children's Fund et al.,  
Respondents. Workers' Compensation Board, Respondent.

92736

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

302 A.D.2d 851; 756 N.Y.S.2d 326; 2003 N.Y. App. Div. LEXIS 1734

February 27, 2003, Decided

February 27, 2003, Entered

**PRIOR HISTORY:** [\*\*\*1] Appeal from a decision of the Worker's Compensation Board, filed January 17, 2002, which, inter alia, ruled that the Special Fund Conservation Committee is liable for payment of claimant's compensation award.

**DISPOSITION:** Board decision reversed; matter remitted to the board.

### CASE SUMMARY

**PROCEDURAL POSTURE:** Claimant injured worker appealed from a decision of respondent New York Workers' Compensation Board (Board) that affirmed the reclassification of the worker's disability from partial to total, but held that, as an earlier proceeding against respondent employer had been completely closed, the additional benefits were payable by the New York Special Fund Conservation Committee (Special Fund).

**OVERVIEW:** [N.Y. Workers' Comp. Law § 25-a](#) established the Special Fund to cover stale workers' compensation claims, including claims for additional benefits made long after a case was closed. Where an erroneous award was subsequently corrected to provide more benefits, the provision allowed a worker to recover additional benefits only for the two years preceding an application to reopen. The worker lost his sight in his only good eye in a work-related accident and received an award of partial disability. Years later, he realized that, as he had already been legally blind in the other eye, [N.Y. Workers' Comp. Law § 15\(8\)\(c\)](#) entitled him to an award of total permanent disability, and he applied to reopen his case. An administrative law judge and the Board agreed that the earlier award had been erroneous and awarded him total disability. As the erroneous award had been made a decade earlier, the Board's decision to impose liability on the Special Fund instead of the employer cost the worker eight years of increased benefits. The court held that such a decision should not have been made without considering the issue of possible prejudice to the employee, and directed further proceedings.

**OUTCOME:** The court reversed the decision and remanded the matter to the Board for further proceedings at which it was to consider possible prejudice to the worker.

**CORE TERMS:** claimant, matter of law, right eye, compensation benefits, prior award, stale' claims, shifting, carrier, lapsed, blind


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**HN1**  [N.Y. Workers' Comp. Law § 25-a](#) imposes on the New York Special Fund Conservation Committee (Special Fund) the liability for truly stale claims, when seven years have lapsed since the date of the claimant's injury and three years have lapsed since the claimant was last compensated. [N.Y. Workers' Comp. Law § 25-a\(1\)](#). Whether a case is closed for the purposes of shifting liability to the Special Fund is a factual determination to be determined by the Board and upheld if supported by substantial evidence. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN2**  New York's Workers' Compensation Board may exercise its authority to rescind former findings, pursuant to [N.Y. Workers' Comp. Law § 123](#), or modify a decision as to reach a different result upon the same record, despite a claimant's failure to take an appeal from the final order, but the pivotal issue is whether [N.Y. Workers' Comp. Law § 25-a](#) is applicable. Typically, the passage of time will be the sole criterion. The determination typically depends upon whether further proceedings were contemplated at the time of the closing. If such closing can be discerned and there is no prejudice to the claimant, there is no need to thwart the obvious intent of the legislature to transfer liability for stale claims to the New York Special Fund Conservation Committee. However, where there will be a substantial curtailment of payment if the claim is considered under [N.Y. Workers' Comp. Law § 25-a](#), it is incumbent upon the Board to make factual findings as to how much, if anything, the claimant might stand to lose, since prejudice to the claimant is a factor which is to be taken into consideration in determining whether a case was intended to be closed. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN3**  The subsequent filing of a stale initial claim for workers' compensation may be considered the equivalent to a reopening of the case when the basis for that prior award is found to have been erroneous as a matter of law. The earlier decision may be considered to have been rescinded so that the parties can be restored to the same position they were in as of the time of the original injury. [More Like This Headnote](#)

**COUNSEL:** Grey & Grey, Farmingdale (Robert E. Grey of counsel), for appellant.

**JUDGES:** Before: Cardona, P.J., Mercure, Peters, Carpinello and Lahtinen, JJ. Cardona, P.J., Mercure, Carpinello and Lahtinen, JJ., concur.

**OPINION BY:** Peters

## OPINION

[\*851] [\*\*327] Peters, J.

In October 1980, claimant sustained a work-related injury to his right eye and filed a claim for workers' compensation [\*328] benefits. After several hearings before a Workers' Compensation [\*852] Law Judge (hereinafter WCLJ), it was ultimately found that plaintiff had suffered a 100% loss of vision in such eye. Additional evidence revealed that claimant was legally blind in the left eye prior to such accident. By decision filed July 28, 1987, claimant was awarded workers' [\*\*\*2] compensation benefits and the Special Fund Conservation Committee (hereinafter Special Fund) was found liable pursuant to the provisions of [Workers' Compensation Law § 15 \(8\) \(d\)](#). An additional hearing was held on June 13, 1989 with respect to the workers' compensation carrier's reimbursement and the payment of claimant's award and, by decision filed June 16, 1989, the WCLJ ruled the case closed.

In April 1998, claimant filed an application to reopen, contending that the prior finding was erroneous in that he should have been found permanently and totally disabled pursuant to [Workers' Compensation Law § 15 \(8\) \(c\)](#) as a matter of law, thereby entitling him to greater benefits. By decision filed April 9, 2001, a WCLJ agreed because claimant was legally blind in his left eye prior to the accident that resulted in 100% loss of vision in his right eye. With all parties having had a joint obligation in the prior proceeding to see that claimant received all that he was entitled to as a matter of law, and no claim that current evidence was not previously available, the WCLJ concluded, in the interest of justice, that claimant should [\*\*\*3] now be granted the full award that he should have received had the prior award not been erroneously decided.

The Special Fund appealed to the Workers' Compensation Board, as did the carrier, and, by decision filed January 17, 2002, a panel of the Board affirmed the WCLJ's reclassification of claimant's disability pursuant to [Workers' Compensation Law § 15 \(8\) \(c\)](#), but found that the additional benefits were payable by the Special Fund pursuant to [Workers' Compensation Law § 25-a](#) as there had been a "true closing" of the case on June 16, 1989. Since the Board's determination that [Workers' Compensation Law § 25-a](#) limits claimant's additional award to the two years prior to his April 1998 application, claimant appeals.

**HNI** ↗ The purpose of [Workers' Compensation Law § 25-a](#) "is to impose on the Special Fund the liability for truly 'stale' claims" (*Matter of Gantz v Wallace & Tiernan Lucidol Div.*, 41 A.D.2d 991, 992, 343 N.Y.S.2d 972) when seven years have lapsed since the date of the claimant's injury and three years have lapsed since the claimant was last compensated [\*\*\*4] (see [Workers' Compensation Law § 25-a \[1\]](#); *Matter of Davis v Madden Constr. Co.*, 295 A.D.2d 826, 827, 744 N.Y.S.2d 546). Much has been written concerning the issue of [\*853] whether a case is "closed" for the purposes of shifting liability to the Special Fund (see *Matter of Andrus v Purolator Prods.*, 301 AD2d 762, 763-764, 753 N.Y.S.2d 224, 2003 N.Y. App. Div. LEXIS 87 at 5 [Jan. 9, 2003]; *Matter of Davis v Madden Constr. Co.*, *supra* at 827-828; *Matter of Pegoraro v Tessa Plastics Corp.*, 287 A.D.2d 909, 910, 732 N.Y.S.2d 260, *lv dismissed, lv denied* 98 NY2d 669, 746 N.Y.S.2d 455, 774 N.E.2d 219; *Matter of Knapp v Empire Aluminum Indus.*, 256 A.D.2d 811, 811, 681 N.Y.S.2d 861; *Matter of Gantz v Wallace & Tiernan Lucidol Div.*, *supra* at 993)--a factual determination to be determined by the Board and upheld if supported by substantial evidence (see *Matter of McGarry v Catapano & Grow Constr. Co.*, 44 N.Y.2d 946, 947, 408 N.Y.S.2d 320, 380 N.E.2d 152).

While we agree with the Board's determination that this case should have been decided under [Workers' Compensation Law § 15 \(8\) \(c\) \[\\*\\*\\*5\]](#) and that <sup>HN2</sup> it may exercise [\[\\*\\*329\]](#) its authority to rescind former findings (see [Workers' Compensation Law § 123](#); [Matter of Spaminato v Bay Transp. Corp.](#), 32 A.D.2d 345, 346-347, 302 N.Y.S.2d 14) or "... modify a decision as to reach a different result upon the same record" ([Matter of Spaminato v Bay Transp. Corp.](#), *supra* at 347, quoting [Matter of McSweeney v Hammerlund Mfg. Co.](#), 275 App Div 447, 449, 90 N.Y.S.2d 347), despite claimant's failure to take an appeal from the final order (see [Matter of Stimburis v Leviton Mfg. Co.](#), 5 N.Y.2d 360, 366-367, 184 N.Y.S.2d 632, 157 N.E.2d 621; [Matter of Spaminato v Bay Transp. Corp.](#), *supra* at 347), the pivotal issue is whether [Workers' Compensation Law § 25-a](#) is applicable. Typically, "the passage of time [will be] the sole criterion" ([Matter of Andrus v Purolator Prods.](#), *supra* at 763). While numerous factual scenarios have prompted a reconsideration of what will constitute a "true closing" to see whether the claim falls outside the limitations of [Workers' Compensation Law § 25-a \[\\*\\*\\*6\]](#) (see [Matter of Pegoraro v Tessy Plastics Corp.](#), *supra* at 910; [Matter of Knapp v Empire Aluminum Indus.](#), *supra* at 811; [Matter of Gantz v Wallace & Tiernan Lucidol Div.](#), *supra* at 992), such determination will typically depend "upon whether further proceedings [were] contemplated at the time of the closing" ([Matter of Knapp v Empire Aluminum Indus.](#), *supra* at 811). If such closing can be discerned and there is no prejudice to the claimant, "there is no need to thwart the obvious intent of the Legislature to transfer liability for stale claims to the Special Fund" ([Matter of Berlinski v Congregation Emanuel of City of N.Y.](#), 29 A.D.2d 1036, 1037, 289 N.Y.S.2d 503). However, where, as here, there will be a substantial curtailment of payment if the claim is considered under [Workers' Compensation Law § 25-a](#), it is "incumbent upon the Board to make factual findings as to how much, if anything, claimant might stand to lose, since prejudice to the claimant is a factor which is to be taken into consideration in determining whether a case was intended to be closed" [\[\\*\\*\\*7\]](#) ([Matter of Gantz v Wallace & Tiernan Lucidol Div.](#), *supra* at 993).

[\[\\*854\]](#) While we agree that the language of the June 16, 1989 decision certainly supports the determination that no further proceedings were contemplated and that <sup>HN3</sup> "the subsequent filing of a stale 'initial' claim [has been considered] the equivalent to a reopening of the case" ([Matter of Loiacono v Sears Roebuck & Co.](#), 230 A.D.2d 351, 353, 654 N.Y.S.2d 463), when the basis for that prior award is found to have been erroneous as a matter of law, the issue of "closing" is more tenuous. \* With the difference in the recoverable award reaching almost a decade of compensation, the Board, in our view, was obligated to assess the prejudice which would have ensued to this claimant if the case were "closed" for the purpose of shifting liability pursuant to [Workers' Compensation Law § 25-a](#). Having failed to make such assessment, the decision must be reversed.

## FOOTNOTES

\* There is authority for a finding that the earlier decision may be considered to have been rescinded so that the parties could be restored to the same position as they were as of the time of the original injury (see [Matter of Leonescu v Star Liq. Dealers](#), 25 A.D.2d 932, 270 N.Y.S.2d 480, *affd* 20 NY2d 956, 233 N.E.2d 853, 286 N.Y.S.2d 849; see generally [Matter of Stimburis v Leviton Mfg. Co.](#), 5 N.Y.2d 360, 367, 184 N.Y.S.2d 632, 157 N.E.2d 621, *supra*). [\[\\*\\*\\*8\]](#)

Cardona, P.J., Mercure, Carpinello and Lahtinen, JJ., concur.

Ordered that the decision is reversed, without costs, and matter remitted to the Workers' Compensation Board for [\[\\*\\*330\]](#) further proceedings not inconsistent with this Court's decision.

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