

Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 5, 2012

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In the Matter of the Claim of
SHARON HOSEY,
Respondent,

AFFIRMED Board's ruling that there
was no true closing under §25-a

v

MEMORANDUM AND ORDER

CENTRAL NEW YORK DDSO et al.,
Appellants,
and

SPECIAL FUND FOR REOPENED
CASES,
Respondent.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: November 15, 2011

Before: Spain, J.P., Lahtinen, Malone Jr., Stein and
Egan Jr., JJ.

Gregory J. Allen, New York State Insurance Fund, Liverpool
(Susan B. Marris of counsel), for appellants.

Steven Licht, Special Funds Conservation Committee, Albany
(Jill B. Singer of counsel), for Special Fund for Reopened Cases,
respondent.

Egan Jr., J.

Appeal from a decision of the Workers' Compensation Board,
filed January 27, 2010, which ruled that Workers' Compensation
Law § 25-a is not applicable to claimant's award of workers'

compensation benefits.

Claimant injured her back in 2000 during the course of her employment as a social worker and thereafter was awarded workers' compensation benefits. In 2009, the workers' compensation carrier for the employer sought to have liability shifted to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a. Following a hearing, the Workers' Compensation Law Judge determined that Workers' Compensation Law § 25-a applied and directed that liability be shifted to the Special Fund. Upon review, the Workers' Compensation Board determined that the case had not truly been closed and, therefore, rescinded the finding that liability shifted to the Special Fund pursuant to Workers' Compensation Law § 25-a. The employer and its carrier now appeal.

Workers' Compensation Law § 25-a provides that "[l]iability for a claim shifts to the Special Fund where a workers' compensation case that was fully closed is reopened more than seven years after the underlying injury occurred and more than three years after the last payment of compensation" (Matter of Guidice v Herald Co., 88 AD3d 1175, 1176 [2011] [internal quotation marks and citation omitted]; see Matter of Beder v Big Apple Circus, 84 AD3d 1653, 1654 [2011]). Even where the requisite time frames have elapsed, however, Workers' Compensation Law § 25-a applies only if the case was truly closed (see Matter of Aposporos v NYNEX, 46 AD3d 1016, 1016 [2007]; Matter of Bates v Finger Lakes Truck Rental, 41 AD3d 957, 959 [2007]). Whether a case is truly closed is a factual determination for the Board to resolve based primarily upon whether any further proceedings are contemplated with regard to issues concerning the payment of compensation (see Matter of Rathbun v D'Ella Pontiac Buick GMC, Inc., 61 AD3d 1293, 1294-1295 [2009]; Matter of Bates v Finger Lakes Truck Rental, 41 AD3d at 959).

Here, claimant had been working continuously with the same restrictions since 2002, had no compensable lost time and was receiving ongoing payments for medical treatment and care. Although claimant's treating physician indicated in 2002 that he believed claimant to have a permanent disability, the issue of

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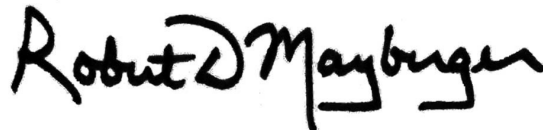
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permanency was not addressed and remained unresolved as of the date of the carrier's application to shift liability pursuant to Workers' Compensation Law § 25-a. Accordingly, we find that the Board's determination that there had not been a true closing is supported by substantial evidence.

Spain, J.P., Lahtinen, Malone Jr. and Stein, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court