SECTION 12

Digests

Section 12(a)

In General

The Section 12 and 13 issues raised on appeal must be decided pursuant to the Act as amended in 1984, since this case was pending before the Board on the enactment date of the 1984 Amendments. Board remands for consideration of whether claimant's failure to give timely notice of injury is excused under Section 12(d). Horton v. General Dynamics Corp., 20 BRBS 99 (1987).

Pre-Amendment Section 12 applies to 1928 D.C. Act. Section 20(b) presumes sufficient notice under Section 12(d) in D.C. Act cases. Gardner v. Railco Multi Construction Co., 19 BRBS 238 (1987), vacated on other grounds, 902 F.2d 71, 23 BRBS 69 (CRT) (D.C. Cir. 1990).

The Board noted its position that it only applies Section 20(b) to Section 13, but as case arose in D.C. Circuit, the Board applied presumption to Section 12. Kulick v. Continental Baking Corp., 19 BRBS 115 (1986); see also Gardner v. Railco Multi Construction Co., 19 BRBS 238 (1987), vacated on other grounds, 902 F.2d 71, 23 BRBS 69 (CRT)(D.C. Cir. 1990).

The Board holds that it will apply the Section 20(b) presumption to Section 12 in all circuits. Thus, in the absence of substantial evidence to the contrary, it is presumed that employer has been given sufficient notice of the injury. To the extent that prior Board decisions are inconsistent with this holding, they are overruled. Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989).

Where a work-related ankle injury caused an impairment to claimant's back, claimant is not required to give employer separate notice of this impairment. Claimant's notice to employer of his work-related ankle injury is sufficient to enable employer to investigate all circumstances surrounding claimant's injury. Thompson v. Lockheed Shipbuilding & Construction Co., 21 BRBS 94 (1988).

The Board has not held that claimant must file written notice under Section 12(a) each time he develops an additional medical problem related to the work accident. *Alexander v. Ryan-Walsh Stevedoring Co., Inc.,* 23 BRBS 185 (1990), *vacated and remanded mem. on other grounds,* 927 F.2d 599 (5th Cir. 1991).

Claimant notified his employer immediately after the injury and filed a claim for benefits within the time limits established by Section 13. Employer's carrier, Houston General, paid benefits to claimant for 12 years before disputing liability, claiming INA, another of employer's carriers, is liable for claimant's benefits. The Board held that neither Section 12 nor Section 13 operates to prevent INA from being held liable, as those sections apply to a claimant's claim for benefits and not to a carrier's request for reimbursement from another carrier. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

The Board holds that the extended time limitations for occupational diseases apply to hearing loss claims. Manders v. Alabama Dry Dock & Shipbuilding Corp., 23 BRBS 19 (1989). But see Vaughn v. Ingalls Shipbuilding, Inc., 28 BRBS 129 (1994) (en banc), aff'g on other grounds 26 BRBS 27 (1992) (under Bath Iron Works Corp. v. Director, OWCP, 506 U.S. 153, 26 BRBS 151 (CRT) (1993) hearing loss is not an occupational disease which does not immediately result in disability so extended limitations are not applicable).

Pursuant to the Supreme Court's decision in *Bath Iron Works Corp.*, 113 S.Ct. 692, 26 BRBS 151(CRT)(1993), that occupational hearing loss is not a disease that does not immediately result in disability or death, Section 12(a) dictates a 30-day notice period in this hearing loss case. As claimant did not give notice within this period, the court addresses the tolling and excusing provisions. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

Aware or Should Have Been Aware - see also Section 13

Board reverses administrative law judge's finding that claimant was first aware of the relationship between his silicosis and his employment in October 1983 when he received Dr. Simon's diagnosis, in view of the evidence indicating claimant's earlier awareness that he suffered from a work-related condition. Claimant testified he attributed his breathing problems to the dust at work, and that he sought alternative employment to avoid dust. Board also rejects claimant's contention that the time for filing notice under Section 12 begins to run when claimant's attorney is aware of the relationship between the employment, disease and disability. Case is remanded for the administrative law judge to consider whether notice was timely under Section 12(a) as amended. Pryor v. James McHugh Construction Co., 18 BRBS 273 (1986).

Board holds that the administrative law judge erred in relying on claimant's testimony to establish the date of awareness of the relationship between decedent's disease, death and employment because the testimony was inherently unreliable, confusing and vague. Because there is no credible evidence to establish a date of awareness, claimant has not established that sufficient notice of injury was given. However, the case is remanded for findings under Section 12(d). Horton v. General Dynamics Corp., 20 BRBS 99 (1987).

The D.C. Circuit holds that claimant cannot be "aware" until he knows that his injury is causally related to his employment and his injury is impairing his capacity to earn wages. Substantial evidence supports the administrative law judge's finding that claimant had no reason to believe that his lung condition was affecting his wage-earning capacity until his doctor recommended that he retire, despite that the doctor had previously told claimant that his working conditions might aggravate his lung condition. Although notice was not given within thirty days, claim is not barred under Section 12(d). Bechtel Associates, P.C. v. Sweeney, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987).

The Board affirms the administrative law judge's finding that notice was timely under the rationale of Smith v. Aerojet-General, where claimant filed a death benefits claim against the U.S. government within one year after her husband's death, and subsequently amended her claim once she became aware of Social Security records listing employer as decedent's last employer. Moreover, under these circumstances, the administrative law judge properly found that any failure to give formal notice was excused under Section 12(d). Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989).

Where an employee was exposed to asbestos beginning in the early 1950's, learned of his contraction of the disease and the hazards of asbestos exposure in the 1970's, and filed a claim for compensation in 1984, the Board held that neither Section 12 nor 13 bars the claim as the record evidence supports the administrative law judge's finding that claimant was not aware of the relationship between his employment, his disease and his disability until October 1984. The limitations periods begin to run only when an employee becomes aware of the relationship between his employment, his disease and an actual disability which impairs wage-earning capacity. In this case, claimant was told there was no contraindication of his continuing to work. Moreover, the Board rejected employer's contention that the date of awareness can occur when an employee becomes aware of a potential disability, and distinguished *Thorud*, 18 BRBS 232 (1986), and limited it to its facts as it involved a responsible carrier issue, and not Section 12 or 13. *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993).

The Board vacates the administrative law judge's finding that the claim for an injury to claimant's left shoulder was barred by §§12 and 13, and remands for the administrative law judge to reconsider whether the claim is time-barred, affording claimant the benefit of the §20(b) presumption. In reconsidering the evidence regarding claimant's date of awareness pursuant to §12(a), in light of employer's burden of proof, the administrative law judge must consider whether the evidence suggests that claimant received a misdiagnosis reasonably leading him to believe that his left shoulder condition was not work-related. The administrative law judge also must explain his finding that because claimant experienced left shoulder pain upon returning to work, he should have been aware that he had injured this shoulder in his work accident. *Bivens v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 233 (1990).

In hearing loss cases, Section 8(c)(13)(D) states that the time for filing a notice of injury does not begin to run until the employee has received an audiogram, with accompanying report thereon, which indicates that the employee has suffered a loss of hearing. The Board holds that the statute requires actual physical receipt of the audiogram and accompanying report before claimant is "aware" for purposes of Section 12. Mere knowledge of the results are insufficient. Ranks v. Bath Iron Works Corp., 22 BRBS 301 (1989).

The Eleventh Circuit holds that in a hearing loss case, the employee must both receive an audiogram and be aware of the connection between the disability and the employment before the statute of limitations begins to run. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229 (CRT) (11th Cir. 1991).

The Board held that oral explanation of the results of an audiogram will not suffice as an accompanying report and that claimant's actual physical receipt of the audiogram and written accompanying report is required under Sections 12 and 13 of the Act. Accordingly, the Board vacated administrative law judge's finding to the contrary. Because the earliest possible date that claimant received an audiogram and accompanying written report in this case occurred on January 6, 1986, the Board modified the administrative law judge's decision to reflect this date of awareness under Section 8(c)(13)(D) and affirmed the administrative law judge's determination that the notice provided to SAIF on February 13, 1986, and the claim dated January 11, 1986, but filed on February 11, 1986, were timely pursuant to Sections 12 and 13. *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991).

The Board holds that counsel's receipt of an audiogram is not constructive receipt by the employee, as Section 8(c)(13)(D) states that the Section 12 and 13 time limitations do not begin to run until claimant has physical receipt of an audiogram and accompanying report indicating a loss of hearing. *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994).

The Board rejects employer's agency and constructive receipt arguments, holding that Congress specified that the statute of limitations periods in hearing loss cases do not begin to run until the employee is given a copy of the audiogram and the accompanying report. *Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994) (*en banc*), *aff'g* 26 BRBS 27 (1992).

Claimant's notice and claim under Sections 12 and 13 were timely where, although claimant had been advised by a physician in 1983 of the "possibility" that he had work-related lung disease, he was not aware nor should have been aware that he had an employment-related lung condition until 1988, when Dr. Barnhart diagnosed work-related asbestosis or "asbestos-related pleural disease;" the administrative law judge noted that all of claimant's symptoms were consistent with his preexisting non-work-related chronic diseases, previous medical opinions regarding the cause of claimant's respiratory problems were inconclusive and at least one physician had informed claimant that his condition was not work-related. Moreover, there was no indication that claimant had any permanent impairment, required where claim involves a voluntary retiree, until Dr. Barnhart's impairment rating in 1992. *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 156 (1996).

The First Circuit affirmed the finding that claimant was not aware of the relationship between his injury, his work, and his disability until August 28, 1998, when his physician told him to stop working, and that employer received knowledge of the injury shortly thereafter when in received the doctor's report to that effect. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

The Board affirmed, as supported by substantial evidence, the administrative law judge's finding that claimant did not become aware of the relationship between his injury and his work for SSA on April 8, 2003, until June 18, 2003, the date on which claimant signed his claim form seeking compensation from SSA. That claimant had previously filed claims against prior employers does not establish his awareness of the relationship between his injury and work with SSA, nor is claimant's awareness of his pain sufficient to commence the notice period. Consequently, the administrative law judge's finding that claimant's written notice of injury provided on June 23, 2003, was timely filed pursuant to Section 12(a). *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005).

In cases involving sequential traumatic injuries, the Board approves the administrative law judge's use of the rationale of *Smith*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), and *Osmundsen,* 18 BRBS 112 (1986), that claimant need not give notice of the injury or file a claim against subsequent employers until the responsible employer is identified. In this case, the time limitations of Sections 12 and 13 did not begin to run against subsequent employers until the employer against whom claimant initially timely provided notice and filed was found not liable for claimant's benefits. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

The Eighth Circuit denied employer's challenge to the sufficiency of the claim and lack of notice as claimant's claim alleging an injury to his right knee and pretrial stipulation providing notice to employer that he wished to reserve the right to claim that his knee injury was in the nature of a cumulative trauma, put employer on notice prior to the hearing that there was uncertainty as to the nature of claimant's injury with a possibility of cumulative trauma. Additionally, three months prior to the hearing, claimant's counsel sent a letter to the Department of Labor with a copy to the claim representative for employer's insurer stating that, after having time to consider the injury, the work claimant did at employer and not the accident he had there aggravated his knee condition. Thus, employer had sufficient information on which it could investigate the claim. *Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied,* 523 U.S. 1020 (1998).

Claimant timely provided notice and filed against the employer for whom he was working when he sustained the initial traumatic injury. While claimant did not file a claim against subsequent employers for injuries to the same body part, the documents surrounding the joinder to the claim of the subsequent employers by the initial employer are sufficient to fulfill the Section 12 notice and Section 13 claim requirements. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

Section 12(d)

Introduction

Applying the Section 20(b) presumption to Section 12 in this D.C. Act case, in the absence of substantial evidence to the contrary, it is presumed that employer had knowledge of the claimant's injury and was not prejudiced by his failure to give timely written notice. Gardner v. Railco Multi Construction Co., 19 BRBS 238 (1987), vacated on other grounds, 902 F.2d 71, 23 BRBS 69 (CRT)(D.C. Cir. 1990).

Where claimant filed a death benefits claim against the U.S. government within one year after her husband's death, and subsequently amended her claim once she became aware of Social Security records listing employer as decedent's last employer, administrative law judge could properly find that any failure to give formal notice was excused under Section 12(d). Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989).

The D.C. Circuit holds that claimant cannot be "aware" until he knows that his injury is causally related to his employment and his injury is impairing his capacity to earn wages. Substantial evidence supports the administrative law judge's finding that claimant had no reason to believe that his lung condition was affecting his wage-earning capacity until his doctor recommended that he retire, despite that the doctor had previously told claimant that his working conditions might aggravate his lung condition. Although notice was not given within thirty days, claim is not barred under Section 12(d) because employer knew about claimant's condition from the doctor and there was no showing of prejudice. Bechtel Associates, P.C. v. Sweeney, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987).

Section 12(d)(1) - Knowledge

Board affirms the administrative law judge's finding that employer had no knowledge of claimant's respiratory injury under Section 12(d). Employer's awareness of the general hazards at the place of employment is insufficient to put an employer on notice of an injury to a specific employee as required by the Longshore Act. Pryor v. James McHugh Construction Co., 18 BRBS 273 (1986).

The Board held that the administrative law judge's analysis as to knowledge under Section 12(d) is erroneous. Mere knowledge of an accident at work does not equal actual knowledge of the likelihood of a compensable work-related injury that employer would likely investigate. Therefore, it would be unreasonable, as the administrative law judge did, to impute knowledge to employer when even claimant was not aware of his own injury. Williams v. Nicole Enterprises, Inc., 19 BRBS 66 (1986).

The Board affirms the administrative law judge's finding that employer did not have

knowledge of claimant's injury under Section 12(d) so as to excuse claimant's late notice of injury. Although claimant's supervisor knew of claimant's fall at work, he was told she was not injured. Thus, employer was unaware of the work-relatedness of the injury and was unaware of facts which would lead a reasonable person to conclude compensation liability was possible and to investigate the matter more fully. Kulick v. Continental Baking Corp., 19 BRBS 115 (1986).

The Board affirms both the administrative law judge's application of the Section 20(b) presumption to the issue of employer's knowledge in a D.C. Act Case and his finding that the presumption was not rebutted. Knowledge under Section 12(d) refers to employer receiving knowledge within the same time period as that for giving effective notice under Section 12(a). Here, there was no evidence that employer had not learned of the work-related effects of claimant's injury and thus the Section 20(b) presumption was not rebutted. Forlong v. American Security & Trust Co., 21 BRBS 155 (1988).

In a case of first impression, Board concludes that on the facts presented the administrative law judge rationally determined that employer did not have actual knowledge under Section 12(d) where employer knew that claimant sustained a work-related accident which had resulted in injury to his chest but did not know of the particular bodily injury (back) for which compensation was being sought. The administrative law judge credited claimant's testimony that he was aware of the relationship between the back injury and his employment since the injury occurred on December 3, 1979. In addition the administrative law judge noted that while claimant testified that he knew he injured his back virtually immediately and that he had reported this to the physicians who treated him in December 1979 and January 1980 he did not report any complaints of back pain until March 19, 1980. In addition, the administrative law judge noted that claimant had filed for this treatment and all other medical benefits associated with his back pain with his group insurance carrier, which generally precludes application of the knowledge exception. Board holds that the administrative law judge reasonably found that employer did not have actual knowledge of the back injury until the claim was filed two years later. Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32 (1989).

Employer errs in arguing that *Addison,* 22 BRBS 32 (1989), changed the law to require claimant to give subsequent notice of each sequela of his work accident. In *Addison*, there was no indication of whether claimant actually gave formal written notice of his accident under Section 12(a), and the Board therefore addressed claimant's arguments under Section 12(d)(1), affirming the administrative law judge's conclusion that employer's knowledge of the work accident alone was not sufficient to charge employer with knowledge of a work-related back injury. *Alexander v. Ryan-Walsh Stevedoring Co.*, 23 BRBS 185 (1990), *vacated and remanded mem. on other grounds,* 927 F.2d 599 (5th Cir. 1991).

The Board affirmed the administrative law judge's finding that claimant's benefits are not barred by his failure to file a notice of injury under Section 12(a), as employer had actual knowledge of claimant's injury. In this case, the injury occurred on employer's premises, during working hours, and claimant's supervisor investigated the accident immediately thereafter and filed a report the following day. Additionally, the Board stated that claimant's later certification on a health claim application that the injury was non-industrial does not negate employer's previous actual knowledge of the injury, as employer was put on notice that the injury was probably work-related and as it had sufficient information to conduct an investigation. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

The Board affirmed the administrative law judge's finding that claimant's benefits are not barred by his failure to file a timely notice of injury under Section 12(a), as employer had actual knowledge of claimant's injury pursuant to Section 12(d)(1). Specifically, the administrative law judge relied on the testimony of claimant, his fiancée, and employer's president and owner, confirming that via a series of telephone conversations, employer had actual knowledge of the injury within ten days from the date that it occurred. *Vinson v. Resolve Marine Services,* 37 BRBS 103 (2003).

The First Circuit held that the administrative law judge properly concluded pursuant to Section 12(d), that claimant's claim is not barred because employer had actual knowledge of the aggravation of claimant's condition. Specifically, the administrative law judge found that employer gained actual knowledge when claimant and his union representative met with employer's medical staff to discuss his neurological condition and its connection to his work. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Section 12(d)(2) - Prejudice

The Board remands the case for the administrative law judge to consider whether employer was prejudiced by claimant's failure to give timely notice under Section 12(d). Pryor v. James McHugh Construction Co., 18 BRBS 273 (1986).

The Board remands for a determination regarding prejudice, noting the administrative law judge ignored possible prejudice to employer resulting from employer's inability to timely investigate the ship's activities at the time of injury. Williams v. Nicole Enterprises, Inc., 19 BRBS 66 (1986).

The Board held as a matter of law that claimant's failure to give timely written notice did not bar his claim where employer merely alleged that it would have difficulty in investigating whether employer's vessel was in navigation at the time of the injury due to the fact that the crew had scattered by the time employer received written notice. The Board stated that this allegation is not sufficient to establish prejudice under Section 12(d)(2). Moreover, since the Board affirmed the administrative law judge's finding that the vessel was not in navigation, employer was not prejudiced by its alleged inability to elicit testimony on this point. Williams v. Nicole Enterprises, 21 BRBS 164 (1988), aff'd mem. sub nom. Jones v. Director, OWCP, 915 F.2d 1557 (1st Cir. 1990).

In this case, although the administrative law judge properly found that claimant had not carried her burden of establishing timely notice pursuant to Section 12, because the administrative law judge did not determine whether employer was prejudiced by claimant's failure to provide timely notice of injury, the case must be remanded. Horton v. General Dynamics Corp., 20 BRBS 99 (1987).

The administrative law judge's failure to apply the Section 20(b) presumption to the question of prejudice was harmless error in this D.C. Act case, as there was no evidence of record sufficient to meet employer's rebuttal burden. Employer's allegation that the destruction of records prejudiced it is insufficient, as it had four months after it received notice to check the records or prevent their destruction, and employer does not indicate how access to those records would aid its case. Forlong v. American Security & Trust Co., 21 BRBS 155 (1988).

Board affirms administrative law judge's finding that employer was prejudiced by claimant's lack of timely notice where employer was not made aware that claimant's back had been injured until more than two years subsequent to his work-related accident. Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32 (1989).

Employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim by reason of claimant's failure to provide timely notice. Employer is in a far better position than claimant to know the manner in which it has been prejudiced by claimant's failure to provide timely notice. As the administrative law judge made no findings on this issue, the case is remanded. Bukovi v. Albina Engine/Dillingham, 22 BRBS 97 (1988).

The Fifth Circuit rejects employer's general claim that it was prejudiced by lack of timely notice of injury because a conclusory claim of inability to investigate the claim when it was fresh is unpersuasive. ITO Corp. v. Director, OWCP, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989).

The Board vacates the administrative law judge's finding that the claim for an injury to claimant's left shoulder was barred by §§12 and 13, and remands for the administrative law judge to reconsider whether the claim is time-barred, affording claimant the benefit of the §(b) presumption. In addition to reconsidering the evidence regarding claimant's date of awareness pursuant to §12(a), pursuant to §12(d)(2), the administrative law judge must adequately address the question of whether employer sustained its burden of proof that it was unable to effectively investigate the claim for the left shoulder injury due to claimant's failure to provide timely notice. *Bivens v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 233 (1990).

Black letter law on failure to provide notice to employer, excuse of such failure, and the Section 20(b) presumption that claimant has given sufficient notice. Thus, it is employer's burden to show by substantial evidence that it was unable to effectively investigate some aspect of the claim due to claimant's failure to provide adequate notice. In this case, although claimant's notice of injury was inadequate, the Board affirms the administrative law judge's finding that any failure by claimant to give proper notice did not prejudice employer, since employer was aware pre-hearing that the responsible employer issue was governed by the standard enunciated in *Cardillo*, that the date of claimant's awareness was at issue, and it conceded it exposed claimant to injurious noise levels. *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991).

The administrative law judge's finding that claimant's untimely notice is excused because employer failed to establish it was prejudiced is affirmed as supported by substantial evidence. Furthermore, the Board rejected employer's argument of prejudice because it was unable to timely investigate a subsequent injury unrelated to the claim for benefits. The administrative law judge rationally credited the treating physician's opinion that claimant was in need of surgery before the second injury, and claimant did not seek compensation for the period following the subsequent injury. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

The Board affirmed the administrative law judge's determination that claimant was excused from failing to file a notice of injury because employer was not prejudiced by claimant's omission. The Board rejected employer's argument that it was unable to conduct an investigation of the incident because employer had sufficient information as of the date of the injury to investigate, and in fact claimant's supervisor proceeded to do so. Moreover, the Board rejected employer's argument that it was prejudiced because key witnesses were unavailable for trial. The Board noted that, contrary to employer's contention, those witnesses were available for a sufficient time after the claim was filed to depose or obtain affidavits from them, thereby making their testimony available for the hearing. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

Failure to give timely notice does not bar a claim if the employer was not prejudiced by the delay, and it is the employer's burden to establish prejudice. In this case, the court affirmed the administrative law judge's finding that employer failed to meet its burden of demonstrating prejudice from claimant's late notice as employer had sufficient time to investigate the claim. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

The Ninth Circuit reversed the administrative law judge's finding that employer was not prejudiced by lack of timely notice as, given proper notice, employer may have been able to rebut the presumption that claimant's injury was related to his employment. In this case, employer did not receive notice until after claimant had undergone back surgery without a second opinion, and as claimant had a history of back problems, employer was unable to investigate if a work accident occurred and whether it could have been responsible for claimant's injury. *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62 (CRT) (9th Cir. 1998), *cert. denied,* 119 S.Ct. 866 (1999).

Citing *Kashuba,* 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), for the proposition that a conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden of proof, the Board affirmed the administrative law judge's finding that employer was not prejudiced by claimant's lack of timely notice. The Board rejected employer's allegation that the delayed notice made the identification of witnesses difficult as unsupported by record evidence. The Board further rejected employer's argument that it was prejudiced by its inability to supervise claimant's medical care, as unsupported by any evidence that such supervision would have altered the course of claimant's medical treatment. *Bustillo v. Southwest Marine, Inc.,* 33 BRBS 15 (1999).

Section 12(d)(3) - Excuse

Satisfactory Reason - Section 12(d)(3)(ii)

The Board affirms the administrative law judge's finding that claimant did not provide "some satisfactory reason" for failing to comply with Section 12(a), finding no abuse of discretion. Employer had signs on the wall stating that work-related accidents were to be reported immediately. Claimant argued that she did not give notice immediately because she was not injured then and did not give notice later because it was after the accident. Claimant argued that employer's signs on the wall prevented reports of work-related injuries after the day on which the incident occurred. Kulick v. Continental Baking Corp., 19 BRBS 115 (1986).

The Board holds that employer's failure to argue that claimant failed to give timely notice before the administrative law judge precludes it from relying on this defense before the Board because Section 12(d)(3)(ii) requires employer to raise a Section 12 defense in its first hearing on a claim. Board also rejects employer's argument that it should be permitted to raise Section 12 on appeal because at the time of the hearing, when it stipulated to having received timely notice, the law was contrary to *Addison,* 22 BRBS 32 (1989). *Alexander v. Ryan-Walsh Stevedoring Co., Inc.*, 23 BRBS 185 (1990), *vacated and remanded mem. on other grounds,* 927 F.2d 599 (5th Cir. 1991).

The Board holds that LIGA may not raise a Section 12 defense in a hearing on modification when the employer did not raise the issue in the initial proceeding. Section 12(d)(3)(ii) requires that employer raise a Section 12 defense in the first hearing on a claim. *Lucas v. Louisiana Ins. Guaranty Assoc.*, 28 BRBS 1 (1994).