SECTION 12

In General

Section 12 contains one of the two timeliness provisions which claimant must satisfy in order to pursue a claim under the Act. These time limitations are mandatory and jurisdictional in nature. *See, e.g., Director, OWCP v. Nat'l Van Lines Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979); *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146 (3d Cir. 1975); *Young v. Hoage*, 90 F.2d 395 (D.C. Cir. 1937). Section 12 provides that claimant must give timely notice of an injury or death. Section 13 contains the requirements for timely filing a claim for compensation.

Prior to the 1984 Amendments, Section 12(a) required that a claimant give written notice of an employment injury or death within 30 days after the date of injury or death or 30 days after the employee or claimant is aware or in the exercise of reasonable diligence should have been aware of the relationship between his injury and employment. This part of Section 12(a) remains applicable in cases involving traumatic injuries. The 1984 Amendments added a new notice provision for cases involving occupational diseases which do not immediately result in death or disability. In such cases, claimant must give written notice within one year of the date the claimant "becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have aware, of the relationship between the employment, disease and death or disability."

Section 12(b) provides that notice must be in writing and details its contents, while Section 12(c) states that notice must be provided to both employer and the deputy commissioner/district director for the compensation district in which the injury or death occurred. *See* 20 C.F.R. §§702.211**,** 215. Section 12(c) of the amended Act and its accompanying regulations require employer to designate an agent for the purpose of receiving notice.

Subsection (d) provides grounds for finding that the failure to file timely notice does not bar the claim. The 1984 Amendments also changed the grounds for this finding, as discussed, *infra.* Where claimant does not provide timely written notice after the date of "awareness," the claim for compensation is barred unless one of the bases provided in Section 12(d) is met.

The changes under the 1984 Amendments were made applicable to cases pending on the enactment date, September 28, 1984, including those cases pending on appeal.

Sections 12 and 13 must be considered in conjunction with Section 20(b), which provides that in the absence of substantial evidence to the contrary, it is presumed "that sufficient notice of such claim has been given." At one time, the Board held that Section 20(b) applied only to Section 13 and did not apply to Section 12. *See Horton v. Gen. Dynamics*

Corp., 20 BRBS 99 (1987); *Jackson v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 15 BRBS 299 (1983) (Miller, J., concurring and dissenting); *Carlow v. Gen. Dynamics Corp*., 15 BRBS 115 (1982) (Miller, J., dissenting) (overruling *Kirkland v. Air Am., Inc*., 13 BRBS 1108 (1981) (Smith, C.J., dissenting); *Mattox v. Sun Shipbuilding & Dry Dock Co.,* 15 BRBS 162 (1982) (Miller, J., dissenting).

Several of the United States Courts of Appeals, however, disagreed with this position and held Section 20(b) applicable to Section 12. *See, e.g., Stevenson v. Linens of the Week*, 688 F.2d 93 (D.C. Cir. 1982), *rev'g* 14 BRBS 304 (1981); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 12 BRBS 478 (5th Cir. 1980); *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979), *aff'g* 6 BRBS 503 (1977); *Duluth, Missabee & Iron Range Ry. Co. v. U.S. Dep't of Labor*, 553 F.2d 1114, 5 BRBS 756 (8th Cir. 1977). In *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 14 BRBS 705 (3d Cir. 1982), *rev'g* 13 BRBS 1052 (1982), the Third Circuit, assuming without deciding that the Section 20(b) presumption was applicable to the Section 12 notice of injury, stated that claimant's prior application for non-occupational sickness benefits was sufficient to rebut the presumption.

Initially, the Board applied the Section 20(b) presumption to both Sections 12 and 13 only in cases arising within these circuits. *See Forlong v. Am. Sec. & Trust Co.*, 21 BRBS 155 (1988); *Gardner v. Railco Multi Constr. Co.*, 19 BRBS 238 (1987), *vacated on other grounds*, 902 F.2d 71, 23 BRBS 69(CRT) (D.C. Cir. 1990); *Kulick v. Cont'l Baking Corp.*, 19 BRBS 115 (1986). However, in *Shaller v. Cramp Shipbuilding & Dry Dock Co*., 23 BRBS 140 (1989), the Board reconsidered its position, and held that, pursuant to Section 20(b), it is presumed, in the absence of substantial evidence to the contrary, that employer has been given sufficient notice of the injury pursuant to Section 12. To the extent that prior decisions were inconsistent with this holding, they were overruled in *Shaller. See also Steed v. Container Stevedoring Co*., 25 BRBS 210 (1991). The Board continued to hold that under Section 20(b), a claim is presumed to be timely filed under Section 13. For additional discussion of Section 20(b) see Section 20 of the desk book.

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Where an occupational disease case was pending before the Board on the enactment date of the 1984 Amendments, the Board held that the Section 12 and 13 issues raised on appeal must be decided pursuant to the 1984 Amendments. The Board vacated the date of awareness, as claimant's testimony was too unreliable to constitute credible evidence of her date of awareness, but nonetheless held that she failed to establish that she gave timely notice. The case was therefore remanded for consideration of whether claimant's failure to give timely notice of injury was excused under Section 12(d). *Horton v. Gen. Dynamics Corp.*, 20 BRBS 99 (1987) (note that this case was decided prior to the *Shaller* holding that Section 20(b) applies to Section 12).

Where a work-related ankle injury caused an impairment to claimant's back, the Board held that claimant was not required to give employer separate notice of this impairment. The administrative law judge found that claimant gave timely notice of the ankle injury, and the Board held that this notice was sufficient to enable employer to investigate all circumstances surrounding claimant's injury. The Board stated that claimant was not required to give employer separate notice of the back condition as it did not arise in a separate accident. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988).

Claimant's failure to state a back injury in her initial notice of injury did not bar the administrative law judge's consideration of a claim for this injury, which was clearly raised before him, and Section 20(a) was thus properly applied to this injury. *Dangerfield v. Todd Pac. Shipyards Corp.,* 22 BRBS 104 (1989).

The Eighth Circuit rejected employer's argument that the claim and notice provided were insufficient as they were based on a specific trauma theory and benefits were awarded on a cumulative trauma theory; employer thus asserted that benefits were awarded on a claim which was not made. The court rejected this argument as claimant's claim alleging an injury to his right knee and pretrial stipulation notifying 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, and it was not prejudiced. *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

In a case where claimant injured his hand in an accident and subsequently developed cervical problems, the Board followed *Thompson* and held that claimant was not required to file new written notice under Section 12(a) each time he develops an additional medical problem related to the work accident. The Board rejected employer's argument that it should be allowed to raise this argument for the first time on appeal because the Board's decision in *Addison v. Ryan-Walsh Stevedoring Co*., 22 BRBS 32 (1989) changed the law in this regard. The Board distinguished *Addison* because it involved whether employer's knowledge that an accident had occurred was sufficient to charge it with knowledge of a back injury from that accident and not whether sufficient notice was given; the Board had noted in *Addison* that there was no evidence of formal notice under Section 12(a). *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 gave notice under Section 12 to 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, was 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 initially held that the expanded time periods for occupational diseases applied to hearing loss claims. *Manders v. Alabama Dry Dock & Shipbuilding Corp*., 23 BRBS 19 (1989); *Cox v. Brady-Hamilton Stevedore Co.*, 18 BRBS 10 (1986); *Ronne v. Jones Oregon Stevedore Co.*, 18 BRBS 165 (1985). However, in light of the Supreme Court's holding in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), that hearing loss is not an occupational disease which does not immediately result in disability, the Board subsequently held that the extended limitations are not applicable. *Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994) (en banc), *aff'g on other grounds* 26 BRBS 27 (1992) (under Section 8(c)(13)(D), the notice period in hearing loss claims does not commence until claimant receives and audiogram and written report)

The Ninth Circuit rejected claimant's argument that the Supreme Court's decision in *Bath Iron*, 506 U.S. 153, 26 BRBS 151(CRT), that occupational hearing loss is not a disease that does not immediately result in disability or death, was not retroactively applicable and held that Section 12(a) dictates a 30-day notice period in this hearing loss case. The court also rejected the argument that the time period did not commence until claimant, rather than his attorney, received a copy of an audiogram. Although claimant did not give notice within the 30-day period, the court found that that this failure did not bar the claim as employer was not prejudiced by the late notice. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

Section 12(a)

Aware or Should Have Been Aware

Prior to the 1984 Amendments, Section 12(a) provided that notice of an injury or death for which compensation is payable must be given within 30 days after the date of the injury or death or within 30 days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment. This provision remains applicable in traumatic injury cases.

The 1984 Amendments added language applicable to occupational diseases. It provides that, in the case of an occupational disease which does not immediately result in disability or death, notice must be given within one year after the employee or claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. *Dolowich v. W. Side Iron Works*, 17 BRBS 197, 199 (1985). *See also* 20 C.F.R. §702.212(b). This provision was applicable to cases pending on appeal on the date of enactment of the 1984 Amendments. *See Osmundsen v. Todd Pac. Shipyard*, 755 F.2d 730, 17 BRBS 109(CRT) (9th Cir. 1985).

The "awareness" provisions are identical under Sections 12 and 13. Therefore, additional cases on awareness are contained in Section 13.

Initially, the administrative law judge must determine whether claimant is seeking compensation for a traumatic injury or for an occupational disease. In *Gencarelle v. Gen. Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989), the Second Circuit identified three elements of an "occupational disease:" (1) a disease, which is expansively defined to include "any serious derangement of health;" (2) caused by hazardous conditions of employment; (3) which are "peculiar to" the employee's employment as opposed to other employment generally. With regard to the latter, the court stated that hazardous activity need not be exclusive to particular employment, but it must be sufficiently distinct from hazardous conditions associated with other types of employment. *Accord Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997).

In the case of a traumatic injury, the administrative law judge must then determine the date on which claimant became aware or in the exercise of reasonable diligence or by reason of medical advice should have become aware of the relationship between the injury or death and the employment. Claimant must have given notice within 30 days of this date. Claimant is not "aware" of an "injury" until he knows or reasonably should know that he has sustained a work-related injury which will likely result in an impairment in earning capacity. *See* discussion, *infra.*

With respect to an occupational disease which does not immediately result in death or disability, the administrative law judge must make a similar determination but the claimant's awareness must include awareness of the relationship between the disease, the employment and the death or disability. Claimant has one year from this date in which to give notice. This time cannot commence until claimant is disabled, or in the case of a voluntary retiree, until a permanent impairment exists. 20 C.F.R. §702.212(b). *See* discussion, *infra.*

The Board initially held that the date on which claimant was told by a doctor that he had a work-related injury was the controlling date establishing awareness. *See, e.g., Stark v. Lockheed Shipbuilding & Constr. Co.*, 5 BRBS 186 (1976). The Board, however, modified this ruling to hold that the date of a medical diagnosis, while significant, is not controlling. *See, e.g., Bezanson v. Gen. Dynamics Corp.*, 13 BRBS 928 (1981) (Miller, dissenting); *Geisler v. Columbia Asbestos, Inc.*, 14 BRBS 794 (1981) (Miller, dissenting). *See also Thorud v. Brady-Hamilton Stevedore Co.*, 18 BRBS 232 (1986) (date of diagnosis of chronic condition is not controlling). While the date a physician tells a claimant his injury is work-related establishes a date no later than which a claimant is aware of the relationship between his injury and his employment, it does not exclude a finding that claimant knew or should have known of the relationship between his injury and his employment at an earlier date. *See Geisler*, 14 BRBS 794. *See also Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 100, 12 BRBS 975 (5th Cir. 1981)**.**

In *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 13 BRBS 1052 (1981) (Miller, dissenting), *vacated and remanded*, 677 F.2d 286, 14 BRBS 705 (3d Cir. 1982), the Board reversed a finding that claimant was aware on the date that the claim was filed, February 9, 1976, as unsupported by the record. As claimant was told of a diagnosis of "industrial asthma" in May 1975, the Board held that was the date of awareness under an objective test, and notice was untimely. The Board further held that no exceptions to Section 12(a) applied as a matter of law. The Third Circuit affirmed the finding that February 9, 1976, was not the date of awareness, but vacated the Board's opinion because the court did not agree that further fact-finding was unnecessary and thus held remand was required.

Similarly in *Jasinskas v. Bethlehem Steel Corp.*, 15 BRBS 367 (1983) (Miller, dissenting), *vacated and remanded*, 735 F.2d 1, 16 BRBS 95(CRT) (1st Cir. 1984), the Board reversed the administrative law judge's finding of timely notice, finding claimant was clearly aware of the relationship between asbestos exposure and her husband's death upon viewing a television program and she did not give notice until two to three months later. In vacating this opinion, the court found the facts were sufficiently unclear that remand was required.

The Board has also reversed an administrative law judge's finding of timely notice based on the conclusion that claimant was not aware until he consulted counsel and was informed that his claim was compensable under the Act. *Perkins v. Marine Terminals Corp.*, 16 BRBS 84 (1984).

In *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979), *aff'g* 10 BRBS 391 (1979) (Smith, S., dissenting), claimant felt a sharp pain in his back when he lifted a metal bench at work. Although the pain persisted, claimant attributed the prolongation of the pain to the fact that he had had a cold. He believed that the pain would subside in time. Claimant continued in this belief until two months later when he was informed by his physician that his pain was due to discogenic disease and arthritis. Employer received notice seven days later. The First Circuit affirmed the Board's decision that claimant had provided employer with timely notice. The court reasoned that a worker need not notify his employer until he knows or reasonably should have known that he had sustained an injury that will decrease his earning power.

The court in *Galen* specifically rejected the argument that claimant was aware of the relationship between his back pain and the incident at work immediately upon the occurrence of his pain. The court stated that a claimant's awareness that his back hurts is not the same as his awareness that his back is injured within the meaning of the statute, quoting the decision of the D.C. Circuit in addressing "awareness" in a Section 13 case in *Stancil* v. *Massey*, 436 F.2d 274, 276-277 (D.C. Cir. 1970),

> "Accident" refers to the event causing the harm, "injury" to the harmful physical (or in some instances psychological) consequences of that event which need not occur or become obvious simultaneously with the event. In short, once the man has been put on the alert (i.e., once he knows or has reason to know) as to the likely impairment of his earning power, there is an "injury;" before that time, while there may have been an accident, there is as yet no "injury" for claim or filing purposes under this statute.

The court also rejected the argument that *Stancil* was not applicable because the claimant in that case was misled by an earlier misdiagnosis.

The Board initially followed *Stancil* but then limited its rationale to cases where claimant received a misleading diagnosis or incorrect prognosis which reasonably led him to believe that his condition was not serious, *i.e.,* that it was not work-related or would not affect his wage-earning capacity. *See Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986) (where claimant was initially informed his condition was not work-related and gave notice on the day he learned his condition was work-related, the Board affirmed the finding that notice was timely); *Wells v. Ocean Drilling & Exploration Co.*, 16 BRBS 59 (1983) (applying this standard to Section 13); *Lunsford v. Marathon Oil Co.*, 15 BRBS 204 (1982), *aff'd*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984) (same). However, in view of appellate opinions in most circuits adopting *Stancil*, the Board ultimately applied the test requiring awareness of a loss in earning capacity in order for claimant to be aware of an "injury" without regard to whether claimant had been misdiagnosed. *See E.M. [Mechler] v. Dyncorp Int'l,* 42 BRBS 73 (2008), *aff'd sub nom. Dyncorp. Int'l v. Director, OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011) (Section 13 case); *Lopez v. Stevedoring*

Services of Am., 39 BRBS 85 (2005), *aff'd*, 377 F. App'x 640 (9th Cir. 2010). The *Stancil* definition of "injury" thus applies in pre-1984 Amendment cases, and post-amendment traumatic injury cases. Additional cases regarding awareness of a loss in earning capacity as a component of awareness of an "injury" are digested in Section 13 in the subsection on "Economic Factors."

Under the 1984 Amendments, in occupational disease cases the time period for giving notice has been extended from one month to one year. The time period also runs from awareness of the relationship between the injury, employment and death or disability. The applicable regulation provides that the notice period does not begin to run until the employee is disabled, or, in the case of a retired employee, until a permanent impairment exists. 20 C.F.R. §702.212(b). *See Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986). In *Lindsay*, claimant was informed of evidence of asbestosis in 1976. As claimant suffered no disability until he was forced to quit work on July 25, 1980, timely notice was given where he filed his claim in August 1980 and employer was notified of it in March 1981.

Thus, the Section 12 and 13 time periods for occupational diseases does not commence until claimant is aware of an actual disability rather than a potential disability. 20 C.F.R. 702.212(b), 702.222(c). *See Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993). In *Love,* the Board addressed a prior decision in *Thorud v. Brady-Hamilton Stevedore Co.*, 18 BRBS 232 (1986), which held notice timely because it was given within one year of claimant's awareness but modified the date of awareness for purposes of determining the responsible carrier to the date a doctor informed claimant that continued exposure to grain dust would result in his forced retirement, which eventually occurred. The Board rejected employer's contention that the date of awareness under Sections 12 and 13 can occur when an employee becomes aware of a potential disability, and limited *Thorud* to its specific facts.

The Fifth Circuit has stated that the Section 12 and Section 13 time limitations do not begin to run against a previous employer where the employee timely filed against a later employer until the employee is aware that liability could be asserted against the earlier employer under the last employer doctrine. *Smith v. Aerojet Gen. Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), *rev'g* 9 BRBS 225(1978). The court reasoned that if it held that the time periods begin to run on claims against all potentially liable employers when the employee discovers his injury is job related, the employee would have to file against all past employers even though the last employer doctrine precludes liability for all but the last responsible employer.

The Board applied the reasoning in *Smith* in *Osmundsen v. Todd Pac. Shipyards*, 18 BRBS 112 (1986), following remand from the Ninth Circuit for reconsideration under the 1984 Amendments. *Osmundsen v. Todd Pac. Shipyard*, 755 F.2d 730, 17 BRBS 109(CRT) (9th Cir. 1985). The Board found that as claimant gave timely notice to a prior employer, Todd, and the later employer, Foss, was notified as soon as claimant became aware of its potential

liability, notice was timely under Section 12. *See Deroucher v. Crescent Wharf & Warehouse*, 17 BRBS 249 (1985) (timely notice to Pacific Maritime Association imputed to employee). *Cf. Hall v. APL-PNW Terminals*, 13 BRBS 964 (1981) (Miller, dissenting) (inability to locate employer does not suspend Section 12 periods).

Where two companies are affiliated, timely notice to one may be imputed to the other. *Dolowich v. W. Side Iron Works*, 17 BRBS 197 (1985).

The Board initially held that the extended time limitations for occupational diseases applied to hearing loss claims, but following the Supreme Court's decision in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), that hearing loss is not an occupational disease which does not immediately result in disability, the Board subsequently held that the extended limitations are not applicable. Thus, hearing loss is treated as a traumatic injury for purposes of Section 12(a).

However, the 1984 Amendments to Section 8(c)(13) provide that a claimant may not be charged with "awareness" of a hearing loss so as to start the Section 12 and 13 time limitations running until he has received an audiogram with the accompanying report thereon indicating that he has suffered a loss of hearing and has knowledge of the causal connection between his work and his hearing loss. 33 U.S.C. §908(c)(13)(D). *See Reggiannini v. Gen. Dynamics Corp*., 17 BRBS 254 (1985); *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985). *Cf. McQuillen v. Horne Brothers, Inc.*, 16 BRBS 10 (1983) (prior to 1984 Amendments, the Board affirmed a finding that timely notice was not given within 30 days of awareness of the relationship between hearing loss and employment). Moreover, under the amendments, claimant must actually receive the audiogram and report to trigger the Sections 12 and 13 time periods. *Swain v. Bath Iron Works Corp.*, 18 BRBS 148 (1986). Additional cases on the requirement that claimant receive an audiogram and report are addressed *infra* as well as in Section 8(c)(13) of the desk book.

Thus, in a hearing loss case, the time for filing notice does not begin to run until claimant receives an audiogram and accompanying report demonstrating that he has a hearing loss and is aware of the relationship between his hearing loss and his employment. *Cox*, 18 BRBS 10.

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Occupational Disease under 1984 Amendments

The Board reversed the 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 rejected claimant's contention that the time for filing notice under Section 12 began to run when claimant's attorney was aware of the relationship between the employment, disease and disability. The case was remanded for the administrative law judge to consider whether notice was timely under Section 12(a) as amended. *Pryor v. James McHugh Constr. Co.*, 18 BRBS 273 (1986) (note that the 1984 Amendments were subsequently held inapplicable in D.C. Act cases).

The Board held 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 was no credible evidence to establish a date of awareness, the Board held that claimant did not establish that sufficient notice of injury was given. However, the case was remanded for findings under Section 12(d). *Horton v. Gen. Dynamics Corp.*, 20 BRBS 99 (1987) (note that this case was decided prior to the Board's holding that the Section 20(b) presumption applies to Section 12; in accordance with the presumption, notice would be presumed timely and the burden to produce evidence that it was not timely would fall on employer).

The Board affirmed the administrative law judge's finding that notice was timely under the rationale of *Smith*, 647 F.2d 518, 13 BRBS 391, 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 he had asbestosis and of 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 barred the claim as the record evidence supported the administrative law judge's finding that claimant was not aware of the relationship between his employment, his disease and a 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, distinguishing *Thorud*, 18 BRBS 232, and limiting it to its facts as the primary issue in that case involved the awareness component of a responsible carrier issue; the notice and claim in *Thorud* were timely regardless of which possible date was used. *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993).

The Board affirmed a finding that 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, the administrative law judge rationally found he was not aware or should have been aware that he had an employment-related lung condition until 1988, when Dr. Barnhart diagnosed an asbestosis-related lung disease. The administrative law judge relied on the fact that claimant's symptoms were all 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 here to demonstrate disability since claimant was a voluntary retiree, until Dr. Barnhart's impairment rating in 1992. *Lewis v. Todd Pac. Shipyards Corp.*, 30 BRBS 154 (1996).

The Board vacated the administrative law judge's decision granting employer's motion for summary decision on the ground that claimant's notice of injury was untimely. Because claimant had voluntarily retired prior to the date of manifestation of his alleged condition, the filing period begins to run from the date claimant became permanently physically impaired by his alleged work-related condition and was aware of the relationship between the injury, the permanent physical impairment and his employment. 20 C.F.R. §702.212(b). The Board remanded the case for a finding, based on employer's motion for summary decision or after a formal hearing, as to the date claimant became permanently physically impaired and to assess the timeliness of claimant's notice of injury with respect to that date. *Wilson v. Boeing Co.*, 52 BRBS 7 (2018).

Traumatic Injury; *Stancil*

The D.C. Circuit held that claimant cannot be "aware" until he knows that his injury is causally related to his employment and is impairing his capacity to earn wages. In this case, substantial evidence supported 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 of this date, the claim was not barred as employer had knowledge of the injury and was not prejudiced, and thus Section 12(d) applied. *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987).

The Board vacated the administrative law judge's finding that the claim for an injury to claimant's left shoulder was barred by Sections 12 and 13 and remanded for the administrative law judge to reconsider whether the claim was time-barred, affording claimant the benefit of the Section 20(b) presumption. In reconsidering the evidence regarding claimant's date of awareness pursuant to Section 12(a) in light of employer's burden of proof, the administrative law judge must consider whether the evidence suggested 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).

The First Circuit affirmed the findings that claimant was not aware of the relationship between the aggravation of his hereditary neurological condition, his work, and the impairment of his earning capacity until August 28, 1998, when his physician told him to stop working, and that employer received knowledge of the injury shortly thereafter when it received the doctor's report to that effect. Thus, the notice requirement was satisfied under Section 12(d). *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 did not establish his awareness of the relationship between his injury and work with SSA, nor was claimant's awareness of his pain sufficient to commence the notice period; claimant must be aware of a compensable injury, *i.e.,* one which affects his earning capacity. 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) was affirmed. *Lopez v. Stevedoring Services of Am.*, 39 BRBS 85 (2005), *aff'd*, 377 F. App'x 640 (9th Cir. 2010).

In a case involving sequential traumatic injuries, the Board approved the administrative law judge's use of the rationale of *Smith*, 647 F.2d 518, 13 BRBS 391, and *Osmundsen,* 18 BRBS 112, 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. 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 were sufficient to fulfill the Section 12 notice and Section 13 claim requirements. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

Hearing Loss

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 held 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 is insufficient. *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

The Eleventh Circuit held 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 an 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 held 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). On reconsideration, the Board rejected 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).

Pursuant to the Supreme Court's decision in *Bath Iron*, 506 U.S. 153, 26 BRBS 151(CRT), that occupational hearing loss is not a disease that does not immediately result in disability or death, the Ninth Circuit held that Section 12(a) dictates a 30-day notice period in this hearing loss case. Although claimant did not personally receive a copy of his audiogram and did not personally see the report until after the administrative law judge rendered a decision, it was uncontested that claimant's attorney received the audiogram. Under the principles of agency, the Ninth Circuit held that the deadline for giving notice was not

tolled until claimant personally received the audiogram, as the attorney's receipt of the audiogram was constructive receipt by the employee under Section 8(c)(13)(D). The court rejected the Board's contrary holding in *Vaughn*, 26 BRBS 27. The court nonetheless held the notice and claim timely on other grounds. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

The Board initially affirmed the administrative law judge's finding that claimant received an audiogram, rejecting claimant's argument that an audiogram must meet the requirements for presumptive effect. The Board held that Section 8(c)(13)(C) and 20 C.F.R. §702.441, setting out the requirements for an audiogram to be presumptive evidence of the amount of hearing loss, are not related to timeliness determinations under Sections 8(c)(13)(D), 12 and 13. The Board reversed the administrative law judge's finding that a letter accompanying the audiogram, which indicated that claimant had "fair" and "below normal" hearing and was silent as to any employment connection, stating only that due to noise surveys conducted by employer claimant should wear earplugs, was sufficient to constitute an "accompanying report." The Board noted that the letter did not state the extent of the loss or relate it to claimant's employment, nor did it provide a basis to find claimant should have made the connection in view of his history of non work-related hearing loss. The letter was thus insufficient to confer "awareness" of an employment-related hearing loss and inadequate to constitute an accompanying report under the statute. *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

Sections 12(b) and (c)

Section 12(b) provides that the notice must be in writing and must contain the employee's name and address and a statement of the time, place, nature and cause of the injury or death. The notice must be signed by the employee or by some person on his behalf, or, in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

Section 12(c) provides that notice shall be given to the deputy commissioner by delivery or by mail addressed to his office. Notice shall be given to employer by delivery or by mail at its last known place of business. Notice may be given to any partner, if employer is a partnership, or to any agent or officer, if employer is a corporation. *See* 20 C.F.R. §702.211.

The 1984 Amendments make a technical change in Section 12(c) by requiring every employer to designate an agent or other responsible official to receive the Section 12 notice. *See* 20 C.F.R. §§702.211, 702.215. The designee must be among the employer's first line supervisors (including a foreman, hatch boss or timekeeper), local plant manager, or personnel office official who is located full-time on the premises of the covered facility. If the employer fails to appoint an agent or representative, notice may be given to any of the above-mentioned officials. 20 C.F.R. §702.211(a). The employer must designate one individual at each place of employment or one individual for each work crew where there is no fixed place of employment. 20 C.F.R. §702.211(b)(2). The employer shall publish its designation by posting the name and/or title, location and telephone number of the designee in a conspicuous place at the worksite on a form prescribed by the Director. 20 C.F.R. §702.211(b)(2),(3).

Sections 702.211(b)(4) and 702.216 reference Section 12(d)(3)(ii), providing that failure to provide notice may be excused for a satisfactory reason, and state that employer's failure to properly designate and post the individual who is to receive notice pursuant to Section 12(c) shall be a satisfactory reason to excuse the failure to provide notice.

Section 12(d)

Introduction

Failure to give notice as required by Section 12(a) will bar the claim unless Section 12(d) applies. Pursuant to this subsection, the failure to file timely notice will not bar the claim for compensation if: (1) the employer, carrier, or designated official has actual knowledge of the injury or death; (2) the deputy commissioner or administrative law judge determines that the employer or carrier has not been prejudiced; or (3) the deputy commissioner or administrative law judge excuses the claimant's failure to file timely notice because (i) while not given to a designated official, notice was given to an official of employer or its insurance carrier and employer or carrier was not prejudiced by the failure to notify a designated official; or (ii) for some satisfactory reason, notice could not be given. In addition, failure to give notice is not a bar unless employer raises an objection on this basis at the first hearing on a claim for compensation for injury or death. *See* 20 C.F.R. §702.216; *Fulks v. Avondale Shipyards*, 637 F.2d 1008, 12 BRBS 975 (5th Cir. 1981).

Under Section 12(d) as it existed prior to the 1984 Amendments, claimant's failure to comply with Section 12(a) could be excused if (1) claimant established that employer had knowledge of the injury or death during the filing period *and* that employer was not prejudiced by claimant's failure to file timely notice, *or* (2) if the failure was excused. (emphasis added). 33 U.S.C. §912(d) (1982) (amended 1984). *See generally McQuillen v. Horne Brothers Inc.*, 16 BRBS 10 (1983). The 1984 Amendments deleted the word "and" and renumbered Section 12(d) into 3 subsections linked by the word "or." Thus, under amended Section 12(d), Section 12 will not bar the claim if either employer had knowledge of the injury or illness during the filing period, employer was not prejudiced by the failure to provide timely notice, or the failure is excused for one of the specified reasons. *See Sheek v. Gen. Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon. Sheek v. Gen. Dynamics Corp.*, 18 BRBS 1 (1985).

Pursuant to Section 20(b), employer must produce evidence that it did not have knowledge of the injury and was prejudiced by the late notice.

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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. In this case, the evidence established that employer did not have knowledge within the relevant period after awareness, and the requirements of pre-1984 Section 12(d)(1) were thus not met. *Gardner v. Railco Multi Constr. Co.*, 19 BRBS 238 (1987), *vacated on other grounds*, 902 F.2d 71, 23 BRBS 69(CRT) (D.C. Cir. 1990) (Note that the 1984 Amendments are not applicable in D.C. Act cases).

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, the 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 held 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 supported 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, the claim was 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)(l) - Knowledge

The terms "notice" and "knowledge" are occasionally used interchangeably, although the terms are not synonymous. "Notice" is the provision of information by means described with particularity in Sections 12(b) and (c). The possession of "knowledge" of a work-related illness or injury by employer, its agent or other responsible official designated pursuant to Section 12(c) or the carrier excuses claimant's failure to provide formal notice under Section 12(a). *See* 20 C.F.R. §702.216.

Section 702.216 states that under this subsection, "actual knowledge shall be deemed to exist if the employee's supervisor was aware of the injury and/or in the case of a hearing loss, where the employer has furnished to the employee an audiogram and report which indicates a loss of hearing."

Employer must have knowledge not only of the fact of claimant's injury but also of the work-relatedness of that injury in order for Section 12(d)(1) to apply. *See Walker v. Sun Shipbuilding & Dry Dock Co.*, 684 F.2d 266, 14 BRBS 1035 (3d Cir. 1982), *aff'g* 14 BRBS 132 (1981) (Miller, dissenting), *cert. denied*, 459 U.S. 1039 (1982); *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146 (3d Cir. 1975); *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978), *rev'g* 2 BRBS 272 (1975); *Jackson v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 15 BRBS 299 (1981) (Miller, dissenting). Knowledge of the work-relatedness of an injury may be imputed to the employer where the employer knows of the injury and has facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation into the matter is warranted. *See Jackson*, 15 BRBS 299; *Willis v. Washington Metro. Area Transit Auth.*, 12 BRBS 18 (1980).

In *Strachan*, 571 F.2d 968, 8 BRBS 161, the Fifth Circuit raised the question, but refrained from determining, when a situation might arise in which the employer would have a duty to investigate the cause of an injury of which it is aware. In *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979), *aff'g* 6 BRBS 503 (1977), the court again declined to address the question of whether the employer has a duty to investigate, although the Board had found in *Melson* that employer did have such a duty. Rather, citing *Butler v. Dist. Packing Mgmt. Co.*, 363 F.2d 682 (D.C. Cir. 1966), the court stated that Section 20(b) presumes that an employer has knowledge of the work-relatedness of an injury when the injury manifests itself on the job. The court concluded that since United Brands was presumed to know that Melson's injury was work-related, United Brands had sufficient knowledge to toll the limitations period. *See also Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 12 BRBS 478 (5th Cir. 1980), *aff'g* 8 BRBS 597 (1978). *See* Section 20(b).

The following cases involve findings of Section 12(d)(1) knowledge. Where the administrative law judge found claimant orally notified his leadman and foreman of his injury, employer had knowledge. *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986). In

Todd v. Todd Shipyards Corp., 16 BRBS 163 (1984), the Board affirmed the administrative law judge's finding that employer had knowledge of decedent's injury within the meaning of Section 12(d)(1) where employer received timely notice of a state compensation claim relating to the same injury within 30 days of decedent's diagnosis of lung cancer.

In *Anzalone v. Quinn Marine Services*, 14 BRBS 418 (1981), claimant had informed his supervisor that he was not feeling well two hours after being assigned a particularly strenuous task. The supervisor, noting that claimant did not look well, advised him to go home. Claimant never returned to work. The Board held that under these circumstances, there was sufficient evidence to support a conclusion that employer knew of claimant's injury and had facts that would lead a reasonable person to conclude that compensation liability was possible. *See also Vinson*, 623 F.2d 1117, 12 BRBS 478.

In *Pilkington v. Sun Shipbuilding & Dry Dock Co*., 14 BRBS 119 (1981), the Board affirmed the administrative law judge's finding that employer had knowledge where claimant, after receiving emergency treatment for a breathing problem, telephoned employer to inform it that he had been advised to avoid the conditions that he was exposed to at work. The Board also indicated that the fact that claimant subsequently certified on an insurance form that his illness was not work-related was insufficient to dispel employer's knowledge. In *Stevenson v. Linens of the Week,* 688 F.2d 93 (D.C. Cir. 1982), *rev'g* 14 BRBS 304 (1981), the court reversed the Board's finding that employer lacked knowledge of claimant's injury on two grounds. First, the court held that employer had not provided substantial evidence to rebut the Section 20(b) presumption that employer had knowledge of claimant's injury and was not prejudiced by claimant's failure to give timely notice. Alternatively, the court stated that employer had knowledge of claimant's injury and circumstances existed that should have lead employer to investigate further into the possibility of liability. The facts indicated that employer knew that claimant had previously injured his back and that claimant was to avoid heavy work to avoid re-injury. Employer also was aware of the physical nature of claimant's work and had received reports of a re-injury to claimant's back indicating a worsening of claimant's back pain.

The Third Circuit held that employer did not have "knowledge" under pre-1984 Section 12(d)(l) where claimant had previously certified twice on his group health insurance claim form that his injury (pneumonia) was not work-related and a physician had submitted the certifications to employer. *Sun Shipbuilding & Dry Dock Co. v. Walker*, 590 F.2d 73, 9 BRBS 399 (3d Cir. 1978), *rev'g* 7 BRBS 134 (1977). *See Januszie wicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 291, 14 BRBS 705 (3d Cir. 1982) (claimant's statement on application for benefits under group health plan that injury was non-occupational held sufficient to rebut Section 20(b); case remanded for findings on date of claimant's "awareness"); *Sheek v. Gen. Dynamics Corp*., 18 BRBS 1 (1985), *modified on recon.* 18 BRBS 185 (1986) (employer lacked knowledge where claimant submitted hospital admission form indicating injury was not work-related; on reconsideration, Board applied 1984 Amendments and remanded for consideration of prejudice); *Mattox v. Sun*

Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982) (Miller, dissenting) (Board affirmed finding employer knew of claimant's lung impairment, but held the administrative law judge's finding it had sufficient facts to investigate further was not supported by substantial evidence and thus reversed the finding employer had knowledge of a work-related injury under pre-1984 Section 12(d)(1)). In *Noack v. Zidell Explorations*, 17 BRBS 36 (1985), the Board affirmed the administrative law judge's finding of no Section 12(d)(l) knowledge, concluding that the administrative law judge acted within her discretion in rejecting claimant's statement that he had reported his hearing loss to his supervisors and employer's safety director. Note that this case was decided before the Board's decision in *Sheek* that Section 12(d) applies to excuse untimely notice where employer has knowledge *or* was not prejudiced.

In *Jackson v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 15 BRBS 299 (1983) (Miller, dissenting), claimant was seeking compensation for work-related asbestosis. The Board rejected claimant's argument that, because employer knew that claimant had suffered pneumonia during his employment, employer had knowledge within the meaning of Section 12(d)(l). The Board indicated that since there was nothing in the record to indicate that claimant was suffering from work-related asbestosis when he contracted pneumonia, even if employer knew that claimant had pneumonia, it cannot be assumed that employer knew, or should have known, of claimant's asbestosis. The Board also held that the mere fact that employer knew of general hazards at the place of employment was not enough to put employer on notice of an injury to claimant.

In *Carlow v. Gen. Dynamics Corp.*, 15 BRBS 115 (1982) (Miller, dissenting), the Board concluded that, where employer knew that claimant had a nervous condition but did not know that the condition was work-related, claimant had not met his burden of establishing Section 12(d)(l) "knowledge."

In *McQuillen v. Horne Brothers, Inc.*, 16 BRBS 10 (1983), the Board rejected claimant's argument that employer had knowledge of claimant's injury because its representatives had seen him wearing a hearing aid and because employer had instituted a hearing protection program. The Board affirmed the administrative law judge's determination that there was no evidence that employer was aware that claimant wore a hearing aid and held that the fact that employer had instituted a hearing protection program did not establish the requisite knowledge since a general awareness of the hazards of the work place is insufficient to put employer on notice as to a particular employee.

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The Board affirmed 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 Constr. Co.*, 18 BRBS 273 (1986) (D.C. Act case; 1984 Amendments inapplicable).

The Board held that the administrative law judge erred in finding that employer had knowledge under Section 12(d). Mere knowledge of an accident at work does not equal knowledge of the likelihood of a compensable work-related injury that employer would likely investigate. Although employer's representatives witnessed the accident, claimant returned to work without apparent problems for several months. On these facts, it was unreasonable to impute knowledge to employer when even claimant was not aware of his own injury. Moreover, while claimant did discuss insurance coverage with employer at one point, he inquired about medical insurance and there was no indication it was for a work injury. *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986) (note that the Board did not apply Section 20(b)).

The Board affirmed 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. Cont'l Baking Corp.*, 19 BRBS 115 (1986).

The Board affirmed 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's 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. Am. Sec. & Trust Co.*, 21 BRBS 155 (1988).

In a case of first impression, the Board concluded 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 to employer until March 19, 1980. In addition, the administrative law judge noted that claimant had filed for this treatment and all other medical treatment for his back pain with

his group insurance carrier, which generally precludes application of the knowledge exception. The Board held 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).

The Board rejected employer's argument that *Addison,* 22 BRBS 32, changed the law to require claimant to give subsequent notice of each sequela of his work accident and that this change permitted it to raise Section 12 for the first time on appeal. In *Addison*, the Board specifically noted that there was no indication as to whether claimant 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. The Board thus did not change its holding that claimant need not file new written notice under Section 12(a) each time he develops an additional medical problem related to the work accident. *See Thompson*, 21 BRBS 94. *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 were 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 were not barred by his failure to file 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 was 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

Prior to the 1984 Amendments, if claimant failed to establish employer's knowledge, then it was not necessary for the Board or administrative law judge to consider whether employer was prejudiced, as both elements were necessary in order for the claim to be timely. Pursuant to the 1984 Amendments, however, lack of prejudice alone is sufficient to excuse the failure to give timely notice. Thus, remand may be necessary if prejudice is not considered or inadequate findings have been made. *See Sheek v. Gen. Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon. Sheek v. Gen. Dynamics Corp.*, 18 BRBS 1 (1985).

"Prejudice can be established if the employer can show that due to [claimant's] failure to provide the written notice required by subdivisions 912(a) and (b), it has been unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services." *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972, 8 BRBS 161, 165 (5th Cir. 1978), *rev'g* 2 BRBS 272 (1975); *White v. Sealand Terminal Corp.*, 13 BRBS 1021 (1981) (Miller, dissenting).

In *Cunningham v. Washington Gas Light Co.*, 12 BRBS 177 (1980), the administrative law judge found that employer had knowledge of claimant's injury and that employer had not been prejudiced by lack of notice. Employer appealed, arguing that it had been prejudiced in that it had to pay increased interest and penalties because of the delay, and it had not established reserves to cover projected payments to claimant. The Board held that evidence of financial detriment to employer is insufficient to establish prejudice. It concluded that, since there was no evidence that employer's handling of the case would have been different if formal notice had been given, no prejudice as defined in *Strachan*, 571 F.2d 968, 8 BRBS 161, had been demonstrated.

In *Belsom v. T. Smith & Son, Inc.*, 9 BRBS 333 (1978) (Smith, dissenting), *aff'd mem.*, 599 F.2d 447 (5th Cir. 1979), employer argued that it had been prejudiced by claimant's failure to file notice until 18 years after his injury because it had destroyed all relevant records. The Board affirmed the administrative law judge's finding that, because claimant had orally reported his injury to employer within one or two days of the injury, any prejudice employer suffered was the result of its own actions and not from claimant's failure to file notice.

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The Board remanded 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 Constr. Co.*, 18 BRBS 273 (1986).

The Board remanded for a determination regarding prejudice, noting that while the administrative law judge found employer was able to investigate claimant's medical problems, he ignored possible prejudice to employer resulting from employer's inability to timely investigate the ship's activities at the time of injury in order to determine whether it was in navigation. *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986).

Following remand, 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 it received written notice. The Board stated that this allegation was not sufficient to establish prejudice under Section 12(d)(2). Moreover, since there was substantial evidence that the vessel was not in navigation, employer was not prejudiced by its alleged inability to elicit further 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, the Board held that although the administrative law judge properly found that claimant had not carried her burden of establishing timely notice pursuant to Section 12, the case must be remanded because the administrative law judge did not determine whether employer was prejudiced by claimant's failure to provide timely notice. *Horton v. Gen. Dynamics Corp.*, 20 BRBS 99 (1987) (note that this case was decided prior to the Board's holding that the Section 20(b) presumption applies to Section 12; in accordance with the presumption, notice would be presumed timely and the burden to produce evidence that it was not timely would fall on employer).

The Board held that 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 was insufficient; it had four months after it received notice to check the records or prevent their destruction and employer did not indicate how access to those records would have aided its case. *Forlong v. Am. Sec. & Trust Co.*, 21 BRBS 155 (1988).

The Board affirmed the administrative law judge's finding that employer was prejudiced by claimant's lack of timely notice. As employer was not made aware that claimant's back had been injured until more than two years subsequent to his work-related accident, the administrative law judge rationally found that it was unable to investigate the circumstances of the injury or provide medical services. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989).

The Board held that in order to establish prejudice, employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to 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 was remanded. *Bukovi v. Albina Eng./Dillingham*, 22 BRBS 97 (1988).

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

The Board vacated the administrative law judge's finding that the claim for an injury to claimant's left shoulder was barred by Sections 12 and 13, and remanded for the administrative law judge to reconsider whether the claim was time-barred, affording claimant the benefit of the Section 20(b) presumption. In addition to reconsidering the evidence regarding claimant's date of awareness under Section 12(a), the Board held that the administrative law judge must adequately address whether employer presented evidence establishing that it was prejudiced under Section 12(d)(2), i.e., 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).

Addressing Section 12(d)(2) and the Section 20(b) presumption, the Board held that 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, the Board affirmed 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 was excused because employer failed to establish it was prejudiced was 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 claimant had a history of back problems which he failed to disclose in his employment application. Moreover, the administrative law judge found claimant lacked credibility. On the facts presented, employer established that it was prejudiced, since if it had been able to investigate in a timely manner, prior to claimant's surgery, it may have been able to establish it was not liable for claimant's injury. *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999).

Citing *Kashuba,* 139 F.3d 1273, 32 BRBS 62(CRT), 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, 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. Sw. Marine, Inc.,* 33 BRBS 15 (1999).

The Ninth Circuit rejected employer's contention that the administrative law judge erred in finding that employer was not prejudiced by claimant's late notice of injury. Employer did not allege that it lacked evidence of claimant's medical condition following his stroke, as it had access to all of claimant's medical records, his doctors, and claimant himself for five independent medical examinations over nearly four years. It is insufficient merely to allege that an immediate medical examination might have provided more or different information. The court therefore affirmed the finding that the claim is not barred due to

claimant's late notice of injury. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

The Board vacated the administrative law judge's finding that employer was prejudiced by claimant's failure to provide timely written notice of his injury under Section 12(a) because the administrative law judge failed to cite specific evidence to support the finding. The Board remanded for the administrative law judge to reconsider employer's allegation of prejudice. Employer contended it was prejudiced because, aside from an itemization of claimant's paychecks, it has no record of claimant's employment or the vaccines that allegedly caused his disease. *Wilson v. Boeing Co.*, 52 BRBS 7 (2018).

After the record closed following the first hearing, but prior to the ALJ's bench decision hearing, Claimant filed a post-hearing brief, where he raised a psychological sequela claim for medical benefits to his initial claims. In his bench decision, and again on Claimant's motions for reconsideration and modification, the ALJ dismissed the claim as untimely under Sections 12 and 13. The Board vacated the determination that Employer was prejudiced by Claimant's failure to give timely notice of his psychological claim, noting Section 12 was irrelevant to Claimant's claim because consequential injuries or natural sequelae of timely filed claims are not required to be separately pleaded. However, the Board declined to determine whether Claimant's psychological condition was a sequela claim. Instead, the Board concluded 20 C.F.R. §702.336(b) applied because Claimant raised a new issue in his post-hearing brief before the ALJ rendered a final decision on the merits. The Board remanded the case for the ALJ to determine whether Claimant's psychological sequela issue should be addressed under 20 C.F.R. §702.336(b). *Ballard v. U.S. Marine Corp/MCCS*, __ BRBS ___ (2023).

Section 12(d)(3) - Excuse

Prior to the 1984 Amendments, current Section 12(d)(1), (2) was Section 12(d)(1), and Section 12(d)(2) stated that failure to give notice under Section 12(a) would not bar the claim "if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given." This language is now contained in Section 12(d)(3)(ii). The failure to file formal notice may be excused pursuant to Section 12(d)(3)(i) where notice, while not given to the designated official under Section 12(c), *supra*, was given to an official of the employer or carrier and the employer or carrier was not prejudiced by the failure to notify the proper official.

Designation of Official - Section 12(d)(3)(i)

Where employer has failed to designate an agent for the purpose of receiving notice, Section 702.211(a) of the regulations, 20 C.F.R. §702.211(a), provides that notice may be given to: (1) the first line supervisor (including foreman, hatch boss or timekeeper), local

plant manager or personnel office official; (2) any partner if the employer is a partnership; or, (3) any authorized agent or officer or person in charge of business at the place of injury if employer is a corporation. *See e.g., Deroucher v. Crescent Wharf & Warehouse*, 17 BRBS 249 (1985) (claimant's notice to Pacific Maritime Association (PMA) was sufficient to confer knowledge on employer where PMA was functioning as both a timekeeper and personnel office for employer).

The regulation further provides that in the case of a retiree, notice may be submitted to any of the aforementioned persons whether or not employer has designated a person to receive notice.

Sections 702.211(b)(4) and 702.216 state that, with regard to Section 12(d)(2)(ii) excuse for a satisfactory reason, employer's failure to properly designate and post the individual who is to receive notice pursuant to Section 12(c) shall be a satisfactory reason to excuse the failure to provide notice.

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

Section 12(d)(3)(ii) was enumerated Section 12(d)(2) prior to the 1984 Amendments and will be found referred to as such in pre-1984 cases.

As stated above, employer's failure to properly designate and post the individual who is to receive notice pursuant to Section 12(c) shall be a satisfactory reason to excuse the failure to provide notice. 20 C.F.R. §§702.211(b(4), 702.216.

Lack of notice has been excused where notice was not given by claimant because he and his physicians were unsure as to the relationship between his injury and employment, *Jordan v. Gen. Dynamics Corp.*, 4 BRBS 201 (1976); *Shillington v. W.J. Jones & Son, Inc.*, 1 BRBS 191 (1974), and where claimant lacked knowledge of his employer's identity and could not locate the person who hired him. *Johnson v. Treyja, Inc.*, 5 BRBS 464 (1977).

Following these decisions, the Board held in a pre-1984 case that "excuse" under this subsection is a term of art and the subsection applies only in limited circumstances such as those stated above. Thus, the Board reversed an administrative law judge's finding of "excuse" where claimant became "aware" on October 13, but provided notice to the deputy commissioner on November 15 and to employer one month later. The administrative law judge in using the term "excuse" had referenced Section 12(d)(1), and the Board had reversed the conclusion that employer had "knowledge" under this subsection, and there was no evidence permitted excuse under the limited circumstances approved in the case precedent. *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982) (Miller, dissenting).

In *Hall v. APL-PNW Terminals, Inc.*, 13 BRBS 964 (1981), the Board stated that failure to give notice due to an inability to locate employer properly falls under this section but found the administrative law judge's rejection of claimant's reasons for the delay reasonable. Therefore, his refusal to excuse untimely notice was affirmed.

In *Smith v. Aerojet Gen. Shipyards Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), the Fifth Circuit reversed the administrative law judge's finding that claimant's failure to file timely notice within 30 days of decedent's death was not excused. The court believed that the accumulated impact of the following circumstances excused claimant's lack of timely notice: (1) the claimant-widow was barely literate; (2) at the time of decedent's death his disability claim for silicosis had been in litigation almost four years; (3) claimant had not delayed notice for the illicit purpose of receiving continuing disability payments; (4) employer was not prejudiced by the lack of notice as it had been investigating the disability claim for several years prior to decedent's death; and, (5) the claim for death benefits had been timely filed.

In *Muse v. Pollard Delivery Serv.*, 15 BRBS 56 (1981)(Kalaris, dissenting), the Board affirmed the administrative law judge's finding that claimant's failure to file timely notice was excused despite certification on his health insurance benefits form that his injury was non-work-related where employer conceded that it had forced claimant to enter into an agreement whereby claimant consented to termination in the event that he sustained another injury.

The claimant's lack of education and the nature of his disease have been held insufficient to excuse the lack of notice. *Jackson v. lngalls Shipbuilding Div., Litton Sys., Inc.*, 15 BRBS 299 (1983); *Arcus v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 34 (1983), *aff'd mem.*, 740 F.2d 856 (3d Cir. July 9, 1984) (table). The inaction of claimant's counsel will only excuse claimant's failure to provide notice if claimant's counsel has a satisfactory reason for failing to comply with the statutory requirement. *See Walker v. Sun Ship, Inc.*, 684 F.2d 266, 14 BRBS 1035 (3d Cir. 1982), *cert. denied*, 459 U.S. 1039 (1982).

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The Board affirmed 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. Cont'l Baking Corp.*, 19 BRBS 115 (1986).

Raising a Section 12 Defense at the First Hearing

The final clause of Section 12(d) requires that employer raise a Section 12 defense in its first hearing on the claim. *See Hoopes v. Todd Shipyards Corp.*, 16 BRBS 160 (1984) (employer could not raise defense where it failed to do so at the hearing or in its pre-hearing statement). Where employer raised Section 12 at the hearing and in its LS-18 pre-hearing statement, the Board reversed an administrative law judge's finding that it was not timely raised. *Carlow v. Gen. Dynamics Corp.*, 15 BRBS 115 (1982) (Miller, dissenting).

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The Board held that employer's failure to argue that claimant failed to give timely notice before the administrative law judge precluded it from relying on this defense before the Board because Section 12(d) requires that employer raises a Section 12 defense in its first hearing on a claim. The Board also rejected employer's argument that it should be permitted to raise Section 12 on appeal because the Board's decision in *Addison*, 22 BRBS 32, represented a change in law from the time of the hearing, when it stipulated to having received timely notice. The Board distinguished *Addison* and reiterated that claimant is not required to give new notice of each sequela of a work injury. *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 held 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) requires that employer raise a Section 12 defense in the first hearing on a claim. *Lucas v. Louisiana Ins. Guar. Assoc.*, 28 BRBS 1 (1994).