TOPIC 12 NOTICE OF INJURY OR DEATH

12.1 NOTIFICATION OF EMPLOYER

Section 12(a) of the LHWCA provides:

> **(a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty 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, except that in the case of an occupational disease which does not immediately result in a disability or death, such notice shall be given within one year after the employee or claimant becomes 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. Notice shall be given (1) to the deputy commissioner in the compensation district in which the injury or death occurred, and (2) to the employer.**

33 U.S.C. § 12(a).

Section 12(a) of the LHWCA provides that notice of an injury or death for which compensation is payable must be given within 30 days after injury or death, or within 30 days after the employee or beneficiary is aware of, 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. It is the claimant's **burden** to establish timely notice.

The **Fifth, Eighth, and District of Columbia Circuits** have held that Section 20(b) applies equally to both Sections 12 and 13 of the LHWCA. Stevenson v. Linens of the Week, 688 F.2d 93 (**D.C. Cir.** 1982), rev'g 14 BRBS 304 (1981); Avondale Shipyards v. Vinson, 623 F.2d 1117 (**5th Cir.** 1980); United Brands Co. v. Melson, 594 F.2d 1068, 1072 (**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 1144 (**8th Cir.** 1977). See also Januszewicz v. Sun Shipbuilding & Dry Dock Co., 677 F.2d 286, 14 BRBS 705 (**3d Cir.** 1982), rev'g 13 BRBS 1052 (1981).

The Board has also adopted this stance, finding that in the absence of substantial evidence to the contrary, it is presumed under Section 20(b) that the employer has been given sufficient notice pursuant to Section 12. Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989). To the extent that the holdings in prior Board cases are inconsistent with this determination, the Board in Shaller specifically overruled those decisions.

Where one injury arises out of an accident that has been reported, the claimant does not have to give separate notice of other injuries resulting from the same incident. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94 (1988).

In Stark v. Washington Star Co., 833 F.2d 1025, 20 BRBS 40 (CRT) (**D.C. Cir.** 1987), the claimant had knowledge of the work-relatedness of the impairment. In this case, the court held that the employer lacked knowledge or notice of the injury. There was no evidence that the employer was ever put on notice of any work connection. Therefore, Section 30(f) of the LHWCA (which requires the employer to report the injury when on notice) did not toll the limitations period of Section 13(a).

A judge is acting within proper authority when determining whether or not a claimant failed to meet the notice requirements of Section 12. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986). Since recommendations of the District Director are not binding, the judge can consider this issue *de novo*. See Shell v. Teledyne Movible Offshore, 14 BRBS 585 (1981), aff'd, 694 F.2d 720 (**5th Cir.** 1982).

12.2 OCCUPATIONAL DISEASE CASES

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 becomes 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. Section 10(i). Thus, the period does not begin to run until the employee is disabled, or, in the case of a retired employee, until a permanent impairment exists. Lewis v. Todd Pacific Shipyards Corp., 30 BRBS 154 (1996). See Topics 12.3.2, 13.1.2, 13.3.2, infra. In Lewis, the time period for filing did not commence to run where the claimant was advised by a physician in 1983 of the "possibility" that he had a work-related lung disease. The Board found that, due to the inconclusive nature of the physician's opinion, the claimant was not aware nor should he have been aware that he had an occupational disease at any time prior to the point that he was diagnosed with asbestos-related pleural disease.

In Morin v. Bath Iron Works Corp., 28 BRBS 205 (1994), the Board upheld a denial of benefits to a voluntary retiree as there was no substantial evidence in the record indicating that the claimant was, or is, medically impaired because of his lung condition. Citing Johnson v. Ingalls Shipbuilding Division, Litton Systems, Inc., 22 BRBS 160, 162 (1989), the Board concluded that the determination of whether a claimant's retirement is "voluntary" or "involuntary" should be based on whether a work-related condition caused him to leave the work force, or whether his departure was due to other, non-work related disability, or commensurate awareness of such, to commence the time period for filing a claim under the LHWCA.

A **hearing loss** is a disease which simultaneously occurs with the exposure to excessive noise and therefore in not covered under Section 10(i). Bath Iron Works v. Director, OWCP, 942 F.2d 811, 25 BRBS 30 (CRT) (**1st Cir.** 1991), aff'd, 506 **U.S.** 153, 26 BRBS 151 (CRT) (1993). Under Section 8(c)(13)(D) of the LHWCA as amended in 1984, the time for filing a notice of a hearing loss, pursuant to Section 12, or a claim for compensation, pursuant to Section 13, does not begin to run until the employee has received an audiogram and its accompanying report indicating a loss of hearing and is aware of the casual connect on between his employment and his loss of hearing. Vaughn v. Ingalls Shipbuilding, Inc., 28 BRBS 129 (1994)(*en banc*). Cf., Jones Stevedoring Co. v. Director, OWCP, 133 F.3d 683 (**9th Cir.** 1997)(Time for filing notice of hearing loss under LHWCA commenced to run when claimant's attorney received audiogram indicating loss of hearing, and time was not tolled because claimant did not personally receive copy of audiogram.) See Topics 8.13 (Hearing Loss) and 2.2.13 (Occupational Diseases: General Concepts).

12.3 AWARENESS (Also applies to Section 13.)

[ED. NOTE:** The awareness provisions of Section 12 and 13 are identical.**]

Under Section 12(a), an employee in a traumatic injury case is required to notify the employer of his work-related injury within 30 days after the date of injury or the time when the employee was aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and the employment. Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990). See Sheek v. General Dynamics Corp., 18 BRBS 1 (1985), on recon., 18 BRBS 151 (1986).

Failure to provide timely notice as required by Section 12(a) bars the claim, unless excused under Section 12(d). Under Section 12(d), failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period (Section 12(d)(1)) or that the employer was not prejudiced by the failure to give timely notice (Section 12(d)(2)). See Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32, 34 (1989); Sheek, 18 BRBS 151.

The one-year limitation period does not commence to run until the employee reasonably believes that he has "suffered a work-related harm which would probably diminish his capacity to earn his living." Stancil v. Massey, 436 F.2d 274 (**D.C. Cir.** 1970). In Stancil, the court interpreted the term "injury" to mean "the harmful physical ... consequences of the event which need not occur or become obvious simultaneously with the event." Stancil, 436 F.2d at 276. Applying its construction of the term "injury," the court held that the claimant had no injury for which to file a claim until his back problem (which claimant had thought was a back strain, and that the symptoms would gradually fade without interfering with his work capacity) was diagnosed as a herniated disc.

See also Newport News Shipbuilding & Dry Dock Co. v. Parker, 935 F.2d 20, 24 BRBS 98 (CRT) (**4th Cir.** 1991); Brown v. I.T.T./Continental Baking Co., 921 F.2d 289 (**D.C. Cir.** 1990); J.M. Marinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 23 BRBS 127 (CRT) (**9th Cir.** 1990); Brown v. Jacksonville Shipyards, 893 F.2d 294, 23 BRBS 22 (CRT) (**11th Cir.** 1990); Marathon Oil Co. v. Lunsford, 733 F.2d 1139 (**5th Cir.** 1984); Todd Shipyards Corp. v. Allan, 666 F.2d 399 (**9th Cir.** 1981), cert. denied, 459 **U.S.** 1034 (1982). Similarly, in Welch v. Pennzoil Co., 23 BRBS 395 (1990), the Board stated that a claimant is not "aware" of the likely impairment of earning capacity or of the true nature of the condition when the treating physician is advising that the work-related condition will improve.

Where an employer has knowledge of a work-related accident but does not have knowledge of the resulting injury, the employer will be deemed not to have knowledge of a work-related accident under Section 12(d). Kulick v. Continental Baking Corp., 19 BRBS 115 (1986).

12.3.1 Traumatic Injury

The trier of fact must determine the date on which the claimant became aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury or death and the employment. The date of a medical diagnosis, although significant, is not always controlling. 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. On the other hand, one physician's unconfirmed diagnosis is not sufficient to make the claimant reasonably aware of a loss of wage-earning capacity in light of a contrary, though wrong, diagnosis by the claimant's treating physician and the claimant's continued ability to perform his work. Gregory v. Southeastern Maritime Co., 25 BRBS 188 (1991).

12.3.2 Occupational Disease

The trier of fact must determine the date on which the claimant became aware of, or should have become aware of, the relationship between the disease, the employment, and death or disability. Martin v. Kaiser Co., 24 BRBS 112 (1990); Horton v. General Dynamics Corp., 20 BRBS 99 (1987). In an occupational disease case, the filing period does not begin to run under Section 12 until the claimant is actually disabled, or in the case of a voluntary retired employee, until a permanent impairment exists. Lewis v. Todd Pacific Shipyards Corp., 30 BRBS 154 (1996).

In Bechtel Associates v. Sweeney, 834 F.2d 1029, 20 BRBS 49 (CRT) (**D.C. Cir.** 1987), the employee's widow filed a claim in October 1980, though her now-deceased husband knew as early as 1972 that his pulmonary condition was work-related. The judge found that the decedent had no reason to believe that he had suffered a **compensable** injury prior to March 1980: "Although the [decedent] must have been aware that he suffered from work-related pulmonary disease no later than 1974, he had no reason to believe that this disease would decrease his earning power until [his physician] recommended that he retire in March 1980." Both the Board and the **District of Columbia Circuit** agreed that the widow's claim was neither barred under Section 12(a) nor Section 13(a) of the LHWCA.

12.3.3 Hearing Loss

The Board has held that the extended time limitations for occupational diseases apply to hearing loss claims. Moreover, the 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 time limitations running, until he has received an audiogram with accompanying report thereon indicating that he has suffered a loss of hearing **and** he has knowledge of the causal connection between his work and his hearing loss.

In Alabama Dry Dock & Shipbuilding Corp. v. Sowell, 24 BRBS 229 (CRT) (**11th Cir.** 1991), the **Eleventh Circuit** concluded that, for purposes of fixing compensation in hearing loss cases, the time of injury is the time when the employee is or should be aware of "the relationship

between the employment, the disease, and the disability." 33 U.S.C.A. § 910(i). Other decision-makers have reached the same result. See Machado v. General Dynamics Corp., 22 BRBS 176 (1989) (en banc); see also Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088 (**5th Cir.** 1990).

The plain words of the statute provide that the "time for filing a notice of injury ... shall not begin to run ... until the employee has received an audiogram, with the accompanying report thereon. ..." 33 U.S.C. § 908(c)(13)(D) (Supp. V. 1987). See Ranks v. Bath Iron Works Corp., 22 BRBS 302 (1989). The Board has held that a claimant must actually receive an audiogram with its accompanying report to start the running of the notice and filing requirements of Sections 12 and 13. Grace v. Bath Iron Works Corp., 21 BRBS 244, 247 (1988).

Similarly, in Swain v. Bath Iron Works Corp., 18 BRBS 148 (1986), the judge found that the claimant was aware of work-related hearing loss in 1975 and that the claim was time-barred as the claimant did not file a claim until 1983. The Board vacated the judge's finding, stating that "[a]lthough the record indicates claimant received audiometric testing, there is no evidence in the record that he received a copy of the audiograms with accompanying report at any time prior to the filing of the claim."

12.4 SECTION 12 (d) DEFENSES

Section 12(d) of the LHWCA provides:

> **(d) Failure to give such notice shall not bar any claim under this Act (1) if the employer (or his agent or agents or other responsible officials or officials designated by the employer pursuant to subsection (c)) or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure on the ground that (i) notice, while not given to a responsible official designated by the employer pursuant to subsection (c) of this section, was given to an official of the employer or the employer's insurance carrier, and that the employer or carrier was not prejudices due to the failure to provide notice to a responsible official designated by the employer pursuant to subsection (c), or (ii) for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.**

33 U.S.C. § 912(d).

Failure to give notice under Section 12(a) will bar the claim unless Section 12(d) applies. The claimant must show that either the employer had knowledge during the filing period, **or** that the employer was not prejudiced by the failure to file timely notice, **or** that the failure was excused. The primary purposes of the notice requirement are facilitating effective investigations, providing effective medical services, and preventing fraudulent claims. See Kashuba v. Legion Insurance Co., 139 F.3d 1273 (**9th Cir.** 1998).

12.4.1 Employer Knowledge of Work-Relatedness

The Board and circuit courts generally require that the employer have knowledge not only of the fact of the claimant's injury, but also of the work-relatedness of that injury. Spear v. General Dynamics Corp., 25 BRBS 132 (1991).

Knowledge of the work-relatedness of an injury may be important 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. Id.

In Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32 (1989), the judge reasonably found that the employer did not know of the possibility that the claimant's back injury was work-related

until the claim was filed over two years later on January 22, 1982. In the context of the facts of this case, the Board rejected the claimant's argument that notification of an accident is sufficient.

In Addison, the ALJ also found that the employer was prejudiced by the claimant's delay in notifying the employer that his back had been injured in the accident because it was unable to determine what immediate back trauma the claimant suffered due to the fall and the extent, if any, to which that trauma contributed to the claimant's present disability.

Prejudice is established where the employer demonstrates that due to the claimant's failure to provide timely written notice, it was 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 (**5th Cir.** 1978), rev'g 2 BRBS 272 (1975); Jones Stevedoring Co. v. Director, OWCP, 133 F.3d 683 (**9th Cir.** 1997), citing 1A Benedict on Admiralty §71b, at 4-20 to 4-21 (7th ed. 1997)("'Prejudice' means merely that the employer's ability to investigate the case has been impaired due to the delay in giving notice."); White v. Sealand Terminal Corp., 13 BRBS 1021 (1981).

Inasmuch as the employer was not made aware that the claimant's back had been injured until more than two years subsequent to his work-related accident, it was rational for the judge to conclude that the employer was unable to effectively investigate the circumstances surrounding the injury or to provide medical services. Addison, 22 BRBS 33. In Kashuba v. Legion Insurance Co., 139 F.3d 1273 (**9th Cir.** 1998), cert. denied ___ **U.S.** ___, 119 S.Ct. 866 (1999), the **Ninth Circuit** held that the employer had been prejudiced because the delay had impeded the employer's ability to investigate the claim and manage the claimant's medical condition. Had timely notice allowed the employer to participate in the claimant's medical care, the employer might have been able to take measures to prevent the claimant from suffering additional disability and possibly to avoid surgery. Kashuba at 1276. The **Ninth Circuit** in Kashuba further stated that evidence of the employer's post-notice attempts to investigate the claim is not required to establish prejudice. Kashuba at 1276.

[ED. NOTE:** The holding in Kashuba should be distinguished from the factual situation where an employer makes **generalized assertions** of prejudice based on the delay in its ability to supervise a claimant's medical care and fails to support its allegations with any evidence that such supervision would have altered the course of a claimant's medical treatment. A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet the employer's burden of proof.**]

When an employer's supervisor knew of a claimant's fall at work but was told that the claimant was not injured, the employer did not have knowledge of the claimant's injury under Section 12(d) so as to excuse the claimant's late notice of injury. Kulick v. Continental Baking Corp., 19 BRBS 115 (1986). The Board found that the employer was unaware of facts which would lead a reasonable person to conclude compensation liability was possible and to investigate the matter more fully.

12.4.2 Knowledge Defined

"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" by an employer, its agent, or other responsible designated official pursuant to Section 12(c), excuses a claimant's failure to give notice.

12.4.3 Employer Not Prejudiced

Prior to the 1984 Amendments, if a claimant failed to establish the employer's knowledge, then it was not necessary for the Board or judge to consider whether the employer was prejudiced. Since lack of prejudice alone will now excuse failure to give timely notice, however, remand may be necessary if prejudice is not considered or inadequate findings are made.

Prejudice can be established if an employer can show that due to a claimant's failure to provide the written notice required by subdivisions 12(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. Steed v. Container Stevedoring Co., 25 BRBS 210 (1991) (employer had 7.5 months before the hearing to arrange for an independent medical exam; additionally, the employer had access to medical records fully documenting the nature and extent of claimant's injury).

In Cox v. Brady-Hamilton Stevedore Co., 25 BRBS 203 (1991), the Board found that an employer failed to establish that it was prejudiced by an inaccurate notice of injury that contained the wrong date and place of injury. In the absence of evidence to the contrary, it is presumed, pursuant to Section 20(b) of the LHWCA, that an employer has been given sufficient notice under Section 12. See Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989). Accordingly, an employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. See Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990).

In ITO Corp. of Baltimore v. Director, OWCP , 883 F.2d 422, 22 BRBS 126 (CRT) (**5th Cir.** 1989), the **Fifth Circuit** found that the determination by the judge and the Board that the employer was not prejudiced by the lack of timely notice was supported by substantial evidence. Here, the only suggestion of prejudice the employer advanced was a general one of "no opportunity to investigate the claim when it was fresh." Accordingly, in ITO, the Board's finding of no prejudice due to lack of notice was affirmed.

The allegation of difficulty in investigating is not sufficient to establish prejudice. Williams v. Nicole Enters., 21 BRBS 164 (1988).

As noted, the 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 the claimant's failure to provide timely notice as required by Section 12. Strachan Shipping Co. v. Davis, 571 F.2d 968, 8

BRBS 161 (**5th Cir.** 1978) (An employer can establish prejudice by providing substantial evidence that failure to receive timely notice of the injury has impeded its ability to investigate to determine the nature and extent of the alleged illness or to provide medical services.), rev'g 2 BRBS 272 (1975); Bukovi v. Albina Engine/Dillingham, 22 BRBS 97 (1988); Williams v. Nicole Enters., 21 BRBS 164 (1988). Although the employer contended that it would be "highly inappropriate" to place this burden upon it, its argument overlooks the fact that the employer is in a far better position than the claimant to know the manner in which it has been prejudiced by the claimant's failure to provide timely notice. Bukovi, 22 BRBS 96. In Kashuba v. Legion Ins. Co., 139 F.3d 1273 (**9th Cir.** 1998), the **Ninth Circuit** held that evidence of the employer's post-notice attempts to investigate the claim is not required to establish prejudice. "Evidence that lack of timely notice did impede the employer's ability to determine the nature and extent of the injury or illness or to provide medical services is sufficient; a conclusory allegation of prejudice is not." Id.

Knowledge by an employer of a work-related injury in and of itself may not necessarily excuse the claimant's lack of giving notice. Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32 (1989). In Addison, the claimant's failure to provide timely notice, as required by Section 12(a), was not excused under Section 12(d). Here the employer knew that the claimant had sustained a work-related accident which resulted in injury but did not have knowledge of the back injury for which compensation was sought.

Also, in Addison, the claimant certified on his group health insurance form that his injury was not work-related, thus precluding a charge of imputed knowledge. The Board and the courts have recognized that application of the Section 12(d) knowledge exception is precluded where the claimant has previously certified on his group health insurance form that the injury was not work-related. See Sun Shipbuilding & Dry Dock Co. v. Walker, 590 F.2d 73 (**3d Cir.** 1978); Sheek v. General Dynamics Corp., 18 BRBS 1 (1985). Cf. Pilkington v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 119 (1981); Boyd v. Ceres Terminals, 30 BRBS 218 (1997)("Unlike the situation in Addison, employer here knew of the accident and the full extent of claimant's injuries prior to receiving information on the health insurance form indicating the injury was non-industrial. Under these circumstances, the Board has held that later receipt of conflicting information does not bar a claimant from obtaining benefits because the employer was put on notice that the injury was probably employment-related, as there was either an apparent connection or enough information to conduct an investigation..").

Citing Bradley v. School Board of Richmond, 416 **U.S.** 696 (1974), the Board has stated that if manifest injustice would result from the application of an intervening law to a pending action so as to deprive a party of a substantive right absent notice, the law should not be applied. Phillips v. Marine Concrete Structures, 21 BRBS 233 (1988). Retroactive application of a statute has been held to be manifestly unjust where the settled expectations of private parties are disturbed. See, e.g., Sikora v. American Can Co., 622 F.2d 1116, 1122-24 (**3d Cir.** 1980).

In Janusziewicz v. Sun Shipbuilding & Dry Dock Co., 22 BRBS 376 (1989) (original decision prior to 1984 Amendments), the employer argued that it had a settled expectation in 1975

that an injured employee must give notice of his injury within thirty days after his date of awareness or be barred from pursuing his claim.

The 1984 Amendments clearly direct that Section 12(a) shall be applied **retroactively**. See Section 28(a), Pub. L. No. 98-426, 98 Stat. 1639, 1655 (1984). Moreover, the Board's statement regarding the "manifest injustice" exception applies only to those 1984 Amendments which, unlike amended Section 12(a), are not clearly applicable to pending cases. See Phillips, 21 BRBS 233; Brady v. J. Young & Co., 18 BRBS 167 (1985), denying recon. of 17 BRBS 46 (1985); see also Section 28(e), 98 Stat. at 1655. Finally, retroactive application of amended Section 12(a) to cases pending on appeal, and its extension to claims time-barred prior to enactment of the Amendments, has been held not violative of the employer's right to due process of law. See, e.g., Osmundsen v. Todd Pac. Shipyard, 755 F.2d 730, 733, 17 BRBS 109, 111 (CRT) (**9th Cir.** 1985).

12.4.3.1 Failure to File Normal Notice

Failure to file notice may be excused by the judge pursuant to Section 12(d)(3)(i) of the LHWCA where notice, while not given to the designated official, was given to an official of the employer or carrier and no prejudice resulted. The judge may also excuse the claimant's failure if a satisfactory reason exists as to why such notice could not be given.

12.4.3.2 Failure to Designate Agent

Where an employer has failed to designate an agent for the purpose of receiving notice, 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, therefore, upon whom legal process may be serviced or person in charge of business at the place of injury if the employer is a corporation.

In the case of a retiree, notice may be submitted to any of the above persons, whether or not the employer has designated a person to receive notice.

Under the LHWCA as amended in 1984, an employer's failure to properly designate and post the individual who is to receive notice pursuant to Section 12(c), will excuse the failure to provide notice.

12.4.3.3 Satisfactory Reason

The Board has held that **"excuse"** is a term of art used in Section 12(d)(2) and applies only in limited circumstances as those stated above.

12.5 SECTIONS 12(b), (c) PROCEDURE

12.5.1 Form of Notice

Section 12(b) of the LHWCA provides:

> **(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall 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.**

33 U.S.C. § 912(b).

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.

12.5.2 Who Gets Notice

Section 12(c) of the LHWCA provides:

> **(c) Notice shall be given to the deputy commissioner by delivering it to him or sending it by mail addressed to his office, and to the employer by delivering it to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred. Each employer shall designate those agents or other responsible officials to receive such notice, except that the employer shall designate as its representatives individuals among first line supervisors, local plant management, and personnel office officials. Such designations shall be made in accordance with regulations prescribed by the Secretary and the employer shall notify his employees and the Secretary of such designation in a manner prescribed by the Secretary in regulations.**

33 U.S.C. § 12(c).

Section 12(c) provides that notice shall be given to the District Director and to the employer. Notice may be given to a partner, if the employer is a partnership, or to any agent or officer, if the employer is a corporation.

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. The designee must be among the employer's first-line supervisors (including 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 designate, notice may be given to any of the above. 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.

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 work site on a form prescribed by the Director. If the employer fails to comply with these requirements, it is precluded from raising the failure to given timely notice as a bar to the award of compensation.

12.5.3 How Notice Is Given

Notice shall be given to the District Director by delivery or by mail addressed to his office. Notice shall be given to the employer by delivery or by mail to its last known place of business.

12.5.4 When To Raise Defenses

The final clause of Section 12(d) requires that the employer raise a Section 12 defense in its first hearing of the claim.

"First hearing of a claim" refers to the hearing before the administrative law judge, rather than before the district director. See 33 U.S.C. § 919(d); Lucas v. Louisiana Insurance Guaranty Association, 28 BRBS 1 (1994); Barthelemy v. J. Ray McDermott & Co., 537 F.2d 168, 4 BRBS 325 (**5th Cir.** 1976), aff'g 1 BRBS 23 (1974); Carlow v. General Dynamics Corp., 15 BRBS 115 (1982). See also, Alexander v. Ryan Walsh Stevedoring Co., Inc., 23 BRBS 185, 187 (1990), vacated and remanded mem. 90-4670 (**5th Cir.** Feb. 14, 1991); Bukovi v. Albina Engine/Dillingham, 22 BRBS 97 (1988).