TOPIC 13 TIME FOR FILING OF CLAIMS

13.1 STARTING THE STATUTE OF LIMITATIONS

Section 13(a) of the LHWCA provides:

> **(a) Except as otherwise provide in this section, the right to compensation for disability or death under this Act shall be barred unless a claim thereof is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.**

33 U.S.C. § 13(a).

Section 13(a) states that, except as otherwise provided in the section, the right to compensation for disability or death shall be barred unless the claim is filed within one year from the time the claimant or the beneficiary becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

If voluntary payments have been made, a claim may be filed within one year of the last payment. The time for filing a claim does not begin to run until the employer/claimant is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury/death and the employment. See Spear v. General Dynamics Corp., 25 BRBS 254 (1991) (claimant's date of awareness in 1980 cannot be utilized as his date of awareness of his increased hearing loss as evidenced by the 1986 audiogram); Spear v. General Dynamics Corp., 25 BRBS 132 (1991) (claim not barred under Section 13 where employer which had actual knowledge of injury did not file a first report of injury until five months after claimant filed for benefits under the LHWCA); Madrid v. Coast Marine Constr. Co., 22 BRBS 148 (1989) (claimant's failure to take any further action during the three years following his timely modification request did not constitute an abandonment of the modification claim; since claimant filed no written request with the deputy commissioner to withdraw his claim and the claim was never adjudicated, it remained open and pending).

In Ceres Gulf, Inc. v. Director, OWCP, 111 F.3d 17, 31 BRBS 21 (CRT) (**5th Cir.** 1997), the **Fifth Circuit** reversed both the ALJ and the Board's determination that the claimant had filed a timely claim pursuant to Section 13(a). The evidence was undisputed that the claimant suffered

a work-related injury on June 10, 1988. The claimant filed his claim for benefits under the LHWCA Act on June 27, 1991, alleging that certain neurological problems had resulted from his 1988 work injury. The claimant argued that he had originally filed a claim for his injury on March 21, 1989, but no record of that filing existed. The ALJ found that the claimant failed to carry his burden proving that he filed a claim with OWCP by June 1989. Alternatively, the claimant argued that he did not become aware of his injury until he received a doctor's report on July 20, 1990. Therefore, the claimant argued, and the ALJ agreed, that the claimant had until July 1991 to file his claim. The **Fifth Circuit**, in reversing the ALJ and the Board, noted that the claimant had made it clear in his LS-203 that the work-injury in June 1988 caused him a "head injury" and a "cerebellar infarction." The ALJ had focused on the fact that the claimant had a limited education, was illiterate, and had suffered severe head trauma. The **Fifth Circuit** reasoned that it did not need to make a determination regarding whether a reasonable man of the claimant's abilities would have known of a causal link between the work accident and the injury because the claimant presented evidence that he actually had knowledge of such a relationship. See id. at 20.

The statute of limitations begins to run only after the employee becomes aware of the full character, extent and impact of the injury. Paducah Marine Ways v. Thompson, 82 F.3d 130 (**6th Cir.** 1996). The temporary inability to work while recuperating from an accident does not put an employee on notice that his earning power has been permanently impaired, so as to start the limitation period running. This is particularly the case when the employee returns to work, at his old job, and works for a substantial time period after he recuperates. Paducah. The **Sixth Circuit** further opined that experiencing pain after the accident, particularly when that pain does not prevent the employee from working, doe not put him on notice of a likely impairment of long-term earning capacity so as to start the limitation period running.

Section 13(b)(1) of the LHWCA provides:

> **(b) (1) Notwithstanding the provisions of subdivision (a) failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.**

33 U.S.C. § 913(b)(1).

Section 13(b)(1) provides in part that the Section 13(a) time limitation will not be a bar unless it is raised at the first hearing of the claim.

Although the date a doctor tells a claimant that his injury is work-related can be determinative, the appropriate date is the time the claimant should have been aware of such a relationship. Aurelio v. Louisiana Stevedores, 22 BRBS 418 (1989) (claim denied as not timely filed). See Sun Shipbuilding & Dry Dock Co. v. McCabe, 593 F.2d 234 (**3d Cir.** 1979).

The Board has held the purpose behind the reporting requirements of Section 13 is to ensure that employer will receive prompt written notification of a claim through forwarding of the claim to employer from the district director. Downey v. General Dynamics Corp., 22 BRBS 203 (1989). See Paquin v. General Dynamics/Elec. Boat Div., 4 BRBS 383 (1976).

In Lombardi v. General Dynamics Corp., 22 BRBS 323 (1989), the judge denied relief to a claimant based on a wage-earning capacity issue and therefore did not rule on the awareness issue. The claimant timely appealed the judge's original pre-1984 decision, wherein there was a different awareness provision in effect at that time. The appeal kept the decision from becoming final. (At the time of the original decision, the claim would have been time-barred pursuant to the then-existing statute.)

On remand, the ALJ reopened the record for the submission of medical evidence (in lieu of the 1984 Amendments that overrule Aduddell v. Owens-Corning Fiberglass, 16 BRBS 131 (1984), which involved a wage-earning capacity issue) and for argument concerning the applicability of the 1984 Amendments.

The judge determined that he had not previously ruled on the employer's argument that the claim was untimely because he had denied benefits on other grounds. Subsequently, the judge found that the 1982 claim was barred pursuant to Section 13(b)(2) of the LHWCA as amended, as the claim had not been filed within the two-year period afforded by that provision.

The Board agreed that the judge could properly re-evaluate the awareness issue on remand.

When benefits are denied and the awareness issue is not dealt with by the judge, on appeal, the judge should address this issue. In Lombardi, the period for filing changed between the judge's first decision and order and the remanded decision and order.

The awareness date is also the triggering mechanism for determining which employer (or carrier) is responsible for a claim. Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 21 BRBS 51 (CRT) (**11th Cir.** 1988) (assessing liability among multiple employers). The **"last-injurious-exposure rule"** was developed by the **Second Circuit** in Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (**2d Cir.**), cert. denied, 350 **U.S.** 913 (1955). Faced with the difficult task of assigning liability among a host of potentially liable carriers, the **Second Circuit** enunciated a standard geared to easing the assignment process:

> [W]e conclude that the Congress intended that the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award ... [T]he treatment of carrier liability was intended to be handled in the same manner as employer liability, and ... the carrier

> who last insured the "liable" employer during claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be held responsible. ...

Cardillo, 225 F.2d at 145.

"The underlying rationale [of the Cardillo rule] is that all employers will be the last employer a proportionate share of the time." Cordero v. Triple A Mach. Shop, 580 F.2d 1331, 1336 (**9th Cir.** 1978), cert. denied, 440 **U.S.** 911 (1979). The Cardillo rule has also been adopted in the **Fifth Circuit**, see, e.g., Fulks v. Avondale Shipyards, 637 F.2d 1008 (**5th Cir.**), cert. denied, 454 **U.S.** 1080 (1981), and in the **Eleventh Circuit**, see, e.g., Argonaut Insurance Co. v. Patterson, 846 F.2d 715, 21 BRBS 51 (CRT) (**11th Cir.** 1988). See also Foundation Constructors v. Director, OWCP (Vanover), 950 F.2d 621, 25 BRBS 71 (CRT) (**9th Cir.** 1991), aff'g 22 BRBS 453 (1989).

[ED. NOTE: *For a complete discussion of "last responsible employer/carrier" see Topic 70, infra.**]***

Where an employer has not been put on notice that its employee's respiratory ailments could be work-related, its failure to file a report of injury (as required by Section 30(a) of the LHWCA) does not serve to toll the Section 13(a) limitation periods pursuant to Section 30(f). Stark v. Washington Star Co., 833 F.2d 1025, 20 BRBS 40 (CRT) (**D.C. Cir.** 1987). See Jones v. Navy Exch., 26 BRBS 10 (CRT) (**4th Cir.** 1992) (unpublished).

The court in Stark determined that even though the employer had begun to require that employees wear breathing masks, and had knowledge of the claimant's respiratory difficulties, these considerations were insufficient to establish that the employer had been put on notice that the claimant's difficulties could be work-related. The employer's failure to file a report of injury, therefore, did not toll the Section 13(a) limitations period.

13.1.1 Voluntary Payments

Section 13(a) provides that in cases in which compensation is paid without an award, the right to disability benefits is barred unless a claim is filed within one year of the date of the last voluntary payment. See 33 U.S.C. § 913(a); Peterson v. Washington Metro. Area Transit Auth., 17 BRBS 114 (1984). It is well established that an attending physician's report, which indicates the possibility of a continuing disability, filed within one year after the termination of voluntary payments, meets the filing requirement of Section 13(a). See Peterson, 17 BRBS 114; Paquin v. General Dynamics/Elec. Boat Div., 4 BRBS 383 (1976).

Moreover, the Board has determined that medical reports indicating the requisite disability, which are filed while voluntary payments are being made, may satisfy the Section 13(a) filing requirement. Paquin, 4 BRBS 383.

In considering whether the record contained medical reports by an attending physician sufficient to satisfy Section 13(a), the judge in Chong v. Todd Pacific Shipyards Corp., 22 BRBS 242 (1989) determined that any such reports must have been generated during the one-year time period following the cessation of voluntary payments.

All voluntary payments do not forestall the running of the Section 13 filing period. See, e.g., Marshall v. Pletz, 317 **U.S.** 383 (1943) (payment of medical benefits will not toll the Section 13(a) period); Taylor v. Security Storage, 19 BRBS 30 (1986). Payment of claimant's full salary during hospitalization is not payment of compensation under the LHWCA. Welch v. Pennzoil Co., 23 BRBS 395 (1990).

Where an employer had voluntarily paid compensation for several years, the claimant argued that the doctrine of latches applied and that the employer recognized that the injury occurred by making the payments. The Board found that this issue was improperly raised for the first time on appeal and therefore refused to consider it. Goldsmith v. Director, OWCP, 838 F.2d 1079 (**9th Cir.** 1988).

Payment of a claimant's salary during hospitalization does not constitute payment of compensation so as to toll the statute of limitations until a year after the date of the last payment. Taylor v. Security Storage, 19 BRBS 30 (1986). Where the claimant files a claim beyond one year after the last voluntary payment, the claim will be dismissed as not complying with the requisite of Section 13(a). Daigle v. Scully Bros. Boat Builders, 19 BRBS 74 (1986).

13.1.2 Section 13(b) Occupational Diseases

Section 13(b)(2) of the LHWCA provides:

> **(2) Notwithstanding the provisions of subdivision (a), a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years 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, or within one year of the date of the last payment of compensation, whichever is later.**

Section 13(b)(2), as amended in 1984, states that a claim for death or disability due to an occupational disease which does not immediately result in disability or death, will be timely filed within two years 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, or within one year from the date of the last payment of compensation, which ever is later. See, e.g., Blanding v. Director, OWCP, 186 F.3d 232,

234-35 (**2d Cir.** 1999); Lewis v. Todd Pacific Shipyards Corp., 30 BRBS 154 (1996), Morin v. Bath Iron Works Corp., 28 BRBS 205 (1994).

[ED. NOTE:** While hearing loss is technically classified as an "occupational disease," it is not the type of occupational disease that is commonly contemplated by the LHWCA, jurisprudence or workers compensation law commentators such as Larson, and should be treated similarly to traumatic injuries . Examples of what the jurisprudence contemplates as "true" occupational diseases are the asbestos related illnesses. (I.e., mesothelioma, asbestosis.) In distinguishing true occupational diseases from traumatic type injuries, the LHWCA itself references a true occupational disease as "an occupational disease which does not immediately result in a disability or death." See Section 12(a) and 13(b)(1). In Bath Iron Works Corp. v. Director, OWCP, 506 **U.S.** 153, 26 BRBS 151 (CRT) (1993), a **unanimous Supreme Court** followed the **First Circuit** and held that claims for hearing loss, whether filed by current workers or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13) of the LHWCA, ["the Schedule" for some traumatic injuries] **not** Section 8(c)(23) [the occupational disease retiree section]. Noting that hearing loss occurs simultaneously with the exposure to excessive noise, the **Court** found that hearing loss is **not** an occupational disease "which does not immediately result in ... disability," and therefore is not to be treated the same as, for example, asbestosis, where it takes years for the symptoms to manifest after the injurious exposure. This concept of a true occupational disease as requiring a gradual, rather than sudden, onset, is in line with most commentators. See, e.g., 1B A. Larson, Workman's Compensation Law § 41.31 (1992).**]

Thus, in an occupational disease claim, the filing period does not begin to run until the employee is disabled, or in the case of a retired employee, until a permanent impairment exists. Therefore, the classification of the injury as an occupational disease or not may ultimately determine whether a timely claim has been filed. Gencarelle v. General Dynamics Corp., 892 F.2d 173, 23 BRBS 13 (CRT) (**2d Cir.** 1989), aff'g 22 BRBS 170 (synovitis is not an occupational disease); Steed v. Container Stevedoring Co., 25 BRBS 210 (1991) (lumbar stenosis is **not** an occupational disease).

Prior Board case law applied the occupational disease provisions of the LHWCA to work-related injuries that are potential hazards to the entire class of longshore employees in employment similar to that of the claimant, i.e., asbestosis, bronchial asthma, hearing loss, all of which result from work exposure to environmental hazards common to all employees in similar positions of employment. Gencarelle, 892 F.2d 173, 23 BRBS 13 (CRT), supra.

Prior to the 1984 Amendments, Section 12(a) required that the claimant must give notice of an injury within 30 days after the injury or awareness of the relationship between the injury and the employment. Section 13 stated that the claim had to be filed within one year of injury or the claimant's awareness. The 1984 Amendments, however, specify that in the case of a hearing loss, the time for giving notice and filing a claim under Sections 12 and 13 does not begin to run until the employee receives an audiogram, with accompanying report, which indicates that he has suffered a loss of hearing. 33 U.S.C. § 908(c)(13)(D). The Board has further held that the extended time limitations for occupational diseases apply to hearing loss claims, so that a claim for hearing loss

must be filed within two years and notice must be given within one year after the claimant has received an audiogram with accompanying report. Cox v. Brady-Hamilton Stevedore Co., 18 BRBS 10 (1985).

The Board has held that an employer is liable for disability suffered by a deceased employee even though the claim was filed after his death, as the right to disability compensation survives the employee's death. See Muscella v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 830, 831 (1978). See generally Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP, 804 F.2d 1558, 19 BRBS 61 (CRT) (**11th Cir.** 1986), aff'g Andrews v. Alabama Shipbuilding & Dry Dock Co., 17 BRBS 209 (1985). See also Maddon v. Western Asbestos Co., 23 BRBS 55 (1989).

In Carlisle v. Bunge Corp., 33 BRBS 133 (1999), aff'd at 227 F.3d. 934 (**7th Cir.** 2000), claimant worked as a river operator, operating joysticks for usually three to four hours per day, but sometimes would work as much as eight hours a day for several weeks at a time. The claimant's other job duties included carrying heavy loads, pulling cables through loaded barges, climbing ladders, lifting barge doors and scooping beans with a shovel. The ALJ held that the claimant had suffered an occupational disease for pain and weakness in his hands.

The Board noted that the "claimant's employment requiring the operation of joysticks and bobcat levers, involved 'harmful' repetitive hand and arm movements, which are peculiar to his job as a river operator ... claimant's use of joysticks would require 'a marked amount of flexion/extension, ulnar and radial flexion in alternating movements,' and thus, those activities are significantly attributable to his condition." Accordingly, the Board affirmed the ALJ and found that the claimant's occupational disease afforded him the benefit of the longer statute of limitations prescribed by Section 13(b)(2) and his claim for compensation was therefore timely.

13.1.3 Section 13(c) Minors and Legal Incompetents

Section 13(c) of the LHWCA provides:

> **(c) If a person who is entitled to compensation under this Act is mentally incompetent or a minor, the provisions of subdivision (a) shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such guardian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.**

33 U.S.C. 913(c).

Section 13(c) basically provides that the Section 13 time limitation period does not apply to a mentally incompetent person or a minor until an authorized representative or guardian has been

appointed. In the case of a minor who has had no guardian before becoming of age, the time limitation begins to run from the date the minor becomes of age.

[Query:** What level and proof of mental incompetence should suffice to toll the statute of limitations? In a non-LHWCA case the **First Circuit** stated that, "It is clear that merely to establish a diagnosis such as severe depression is not enough" to equitably toll a statute of limitations. Melendez-Arroyo v. Cutler-Hammer de P.R. Co. 273 F.3d 30 (**1st Cir.** 2001).**]

However, the LHWCA neither defines the word "minor," nor the phrase "becoming of age." The term "child," as defined at Section 2(14), can not simply be substituted for "minor." In fact, the Board has specifically noted that Congress did not use the term "child" in Section 13(c). Smith v. Shell Offshore, Inc., 33 BRBS 161 (1999)(Defining "minor" differently than "child" is not an inherent contradiction; a person's status as a "minor" merely affects how and when a person might undertake actions on her own behalf while the status as a "child" affects the person's entitlement to support from others.). Since there is no federal common law, and as the term "minor" is neither defined by the LHWCA nor has a clear common meaning, the Board has held that the use of state law is appropriate to determine when an individual is entitled to file a claim under the LHWCA in one's own right. Smith.

13.2 DEFINING A CLAIM

Neither the LHWCA nor the Regulations define what constitutes a "claim" under the LHWCA. "A contextual reading of the LHWCA and the relevant regulations, however, strongly suggests that the term "claim" refers to the whole of the employee's demand for compensation, rather than to specific categories of benefits allowed under the LHWCA." Pool Co. v. Director, OWCP, ___ F.3d ___ (No 99-60615, 00-60093) (**5th Cir.** Nov. 20, 2001).

Section 13(a) provides that the claim must be in writing and filed with the District Director in the compensation district in which the injury or death occurred. In the past, the Board and the courts have been liberal in allowing **almost any writing** to constitute a "claim" in order to effectuate the liberal policy of the LHWCA. The claim need not be filed on a particular form. Any writing will do, as long as it discloses an intention to assert a right to compensation. It is not necessary that the writing implicitly state that a claim is being made, as long as a claim is inferred from the writing. A memorandum recording by OWCP of a telephone conversation with a claimant has been found by the Board to constitute a claim since it disclosed the claimant's intent to assert a right to compensation. I.T.O. Corp. Of Virginia v. Pettus, 73 F.2d 523, 30 BRBS 6 (CRT)(**4th Cir.** 1996), cert. denied, 519 **U.S.** 807 (1996); McKnght v. Carolina Shipping Co., 32 BRBS 165, aff'd on recon en banc, 32 BRBS 165, aff'd on recon en banc, 32 BRBS 251 (1998).

An amended claim for death benefits will be deemed to be a timely claim for death benefits where the original claim for death benefits was filed timely. Mikell v. Savannah Shipyard Co., 24 BRBS 100 (1990). In Mikell, the amended claim for death benefits indicated for the first time that a decedent's permanent total disability due to his back injury at the time of his death was also a theory under which to seek death benefits. Previously, the claimant had indicated that the decedent's asbestos-related condition was the basis of her request for death benefits.

The ALJ determined that, in Mikell, the carrier was not prejudiced by the claimant's amendment to her claim, as the carrier was aware, prior to the time of the hearing, that the decedent's permanent total disability as a basis for an award of death benefits was at issue, and the carrier had an adequate opportunity to prepare for consideration of that issue.

In U.S. Industries/Federal Sheet Metal v. Director, OWCP, 455 **U.S.** 608, 14 BRBS 631 (1982), the **United States Supreme Court** quoted Professor Larson's observation that considerable liberality usually is shown in allowing the amendment of pleadings to correct defects, unless the effect is one of undue surprise or prejudice to the opposing party. 455 **U.S.** at 613, 14 BRBS at 633 n.7.

In Smith v. Aerojet-General Shipyards, 647 F.2d 518 (**5th Cir.** 1981), the **Fifth Circuit** held that in occupational disease cases, where there is a succession of employers and a claim is timely filed against a later employer, the statute of limitations under Sections 12 and 13 do not begin to run against a prior employer until the claimant becomes aware, or should have become aware, that liability should be asserted against that particular employer. In Osmundsen v. Todd Pacific

Shipyard, 18 BRBS 112 (1986), the Board held that the rationale in Smith applies where the claim was filed against a prior employer and the later employer becomes liable.

In Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989), the Board held that the Smith rationale equally applies where the claimant filed a death benefits claim against the United States Government within one year after her husband's death, and subsequently amended her claim once she became aware of the updated Social Security records listing the decedent's last employer.

13.2.1 What Constitutes a Claim

The requirement of Section 13 that a "claim" must be filed may be satisfied by any writing(s) from which an inference may reasonably be drawn that a claim for compensation is being made. See Peterson v. Washington Metro. Area Transit Auth., 17 BRBS 114, 116 (1984).

A memorandum recording by OWCP of a telephone conversation with a claimant has been found by the Board to constitute a claim since it disclosed the claimant's intent to assert a right to compensation. I.T.O. Corp. Of Virginia v. Pettus, 73 F.2d 523, 30 BRBS 6 (CRT)(**4th Cir.** 1996), cert. denied, 519 **U.S.** 807 (1996); McKnght v. Carolina Shipping Co., 32 BRBS 165, aff'd on recon en banc, 32 BRBS 165, aff'd on recon en banc, 32 BRBS 251 (1998).

An attending physician's report indicating the possibility of a continuing disability filed within the requisite time period may be sufficient to satisfy the filing requirements of Section 13(a). See Walker v. Rothschild Int'l Stevedoring Co., 526 F.2d 1137, 3 BRBS 6 (**9th Cir.** 1975). Where a medical report does not indicate the existence of any disability from work or anticipate any permanent effects, it will not be sufficient to constitute a claim. Peterson, 17 BRBS 114; Bezanson v. General Dynamics Corp., 13 BRBS 928 (1981).

A third-party tort suit in which the employer intervened did not constitute a claim. Grant v. Interocean Stevedoring, 22 BRBS 294 (1989). In Grant, the Board held that the employer may have been put on notice that a compensation claim might be filed in the future, but since the suit is a claim against a third party, the employer was not put on notice that the claimant was asserting a right to compensation under the LHWCA.

There is no requirement in Section 13 that payments to a specific survivor toll time limits only with regard to that individual. In Lewis v. Bethlehem Steel Corp., 19 BRBS 90 (1986), the Board affirmed the judge's finding that the widow's claim was timely filed under Section 13 because it was filed while voluntary Section 9 death benefits were being paid to her two minor children. The judge found that Section 9 provides only for one death benefit, with differing distributions depending upon whom the survivors are.

13.3 AWARENESS STANDARD

[ED. NOTE:** In dealing with the awareness issue, keep in mind the Section 20(b) presumption.**]

The awareness provisions of Sections 12 and 13 are identical. Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990). (See generally Topic 12, supra.)

The ALJ must make distinct findings as to when the claimant was aware or in the exercise of reasonable diligence should have been aware. A failure to make such findings will necessitate a remand if the case is appealed to the Board.

In Port of Portland v. Director, OWCP, 932 F.2d 836, 24 BRBS 137 (CRT) (**9th Cir.** 1991), the court rejected the Board's view that the same date of "awareness" must govern for purposes of fixing employer liability and for purposes of starting the running of limitations.

When timeliness pursuant to Section 13 remained an open issue in an occupational disease case originating prior to the 1984 Amendments, the judge was not precluded from reevaluating the issue of awareness on remand. Lombardi v. General Dynamics Corp., 22 BRBS 323 (1989). Prior to the 1984 Amendments, the LHWCA provided a one-year limitation period for the filing of a claim. See 33 U.S.C. § 913(a) (1982). In Lombardi, the judge found the date of the claimant's awareness to be March 1980. The claim filed on February 1, 1982, would have been time-barred under the version of Section 13 which was then effective. Accordingly, at the time the original Decision and Order was issued in April 1984, the employer had no basis for filing a cross-appeal of the ALJ's awareness finding. See generally Bukovi v. Albina Engine/Dillingham, 22 BRBS 97 (1988).

It was not until after enactment of the 1984 Amendments, when the limitation period for occupational disease claims was extended to two years, that the judge's awareness finding had significance with respect to the question of the timeliness of the claim. See 33 U.S.C. § 913(b)(2) (Supp. V 1987); Lombardi, 22 BRBS 323.

13.3.1 Effect Of Diagnosis/Report

The Board initially held that the date on which a claimant is told by a doctor that he has a work-related injury is the controlling date establishing awareness. Under current Board case law, however, the date of diagnosis is significant but not always controlling.

Although the date on which a physician told an employee that his injury is work-related establishes a date no later than which the employee knew this fact, it does not exclude the possibility that the employee should have known of the relationship of the injury to the employment prior to that date. The appropriate test for the date of injury is not subjective, but objective, i.e., when the claimant should have been aware of the relationship between his injury and his job.

Where a claimant receives a **misdiagnosis or incorrect prognosis** which reasonably leads him to believe his condition is not work-related or will not affect his wage-earning capacity, the claimant is not "aware" until he secures a correct diagnosis. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988); Grant v. Interocean Stevedoring, 22 BRBS 294 (1989). See Pittman v. Jeffboat, Inc., 18 BRBS 212, 214 (1986). In Caudill, in light of an erroneous medical opinion that the claimant's condition had stabilized, the absence of an effect on earnings, and the Section 20(b) presumption, the Board reversed the judge's finding of a Section 13 time-bar.

Misdiagnosis is not a basis, however, for tolling the statute of limitations where a claimant's wage-earning capacity is continuously affected after the work injury. Grant v. Interocean Stevedoring, 22 BRBS 294 (1989). In Grant, the Board applied Marathon Oil Co. v. Lunsford, 733 F.2d 1139, 16 BRBS 100 (CRT) (**5th Cir.** 1984), aff'g 15 BRBS 204 (1982), to reject the claimant's argument that prior misdiagnoses meant that the statute of limitations did not begin to run until he received the proper diagnoses. The Board held that the course of the claimant's injury fell within the category enumerated in Lunsford (affecting wage-earning capacity) and therefore he should have filed for benefits as soon as he was aware that the work injury would affect his wage-earning capacity.

In Lunsford, the **Fifth Circuit** adopted some **"awareness" parameters** for deciding whether or not a claim is timely filed pursuant to Section 13. The court reasoned that the claimant did not become aware that a work injury would affect his wage-earning capacity until two years after the injury. The **Fifth Circuit** stated, however, that its holding would be different if the claimant had sustained a significant disability at the time of the injury for which no claim had been filed until that disability became even greater.

The **Fourth Circuit** has held that the statute of limitations begins with a claimant's knowledge that the impairment will produce a loss of earning capacity. Newport News Shipbuilding & Dry Dock Co. v. Parker, 935 F.2d 20 (**4th Cir.** 1991) (experiencing pain after accident is insufficient as matter of law to establish awareness of likely impairment of earning power so as to commence running of one year statue of limitations).

The **Sixth Circuit** has stated that the statute of limitations begins to run only after the employee becomes aware of the full character, extent and impact of the injury. Paducah Marine Ways v. Thompson, 82 F.3d 130 (**6th Cir.** 1996). The temporary inability to work while recuperating from an accident does not put an employee on notice that his earning power has been permanently impaired, so as to start the limitation period running. This is particularly the case when the employee returns to work, at his old job, and works for a substantial time period after he recuperates. Paducah.
The **Sixth Circuit** further opined that experiencing pain after the accident, particularly when that pain does not prevent the employee from working, doe not put him on notice of a likely impairment of long-term earning capacity so as to start the limitation period running.

The **Eleventh Circuit** has held that the statute of limitations for hearing loss begins when a claimant becomes aware of the impairment on an audiogram. Alabama Dry Dock & Shipbuilding Co. v. Sowell, 933 F.2d 1561 (**11th Cir.** 1991).

13.3.2 Occupational Diseases

Where a claimant suffers from an occupational disease, he must be aware that the disease will affect his wage-earning capacity before the statute begins to run.

Prior to the 1984 Amendments, where a claimant filed a protective claim upon becoming aware of his asbestosis and its relationship to his employment, but conceded that he had no disability, the Board held that the claim must proceed to a resolution. The Board stated that the LHWCA did not provide for protective filings to avoid future statute of limitations problems. The 1984 Amendments rectify this problem. 33 U.S.C. § 912(a) & 913(a). In Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants, 17 F.3d 130 (**5th Cir.** 1994), the **Fifth Circuit** held that the Director had a clear, ministerial and nondiscretionary duty pursuant to the LHWCA to transfer claims for hearing and, thus, the Director's delay warranted a writ of mandamus regardless of any administrative efficiency concerns. The **Fifth Circuit** went on to hold that the 1984 amendments to the limitations period for the LHWCA eliminated the need for protective claims to be filed before disability occurred and, thus, all claims, including protective claims, had to be treated as active and transferred for hearing.

The Board has held that hearing loss due to long-term exposure to noise is an occupational disease and, thus, the extended time limits apply. Moreover, the 1984 Amendments to Section 8(c)(13) provide that the Section 13 period does not begin to run until the claimant receives an audiogram and accompanying report. Thus, in a hearing loss case, the time does not begin to run until the claimant receives an audiogram indicating a hearing loss and is aware of the relationship between the hearing loss and the employment. (See Topic 8.13 on hearing loss, supra.)

Where there is not any evidence of record that the claimant was aware of the relationship between the disease, disability, and covered employment before he filed his claim, the employer cannot be found to have rebutted the Section 20(b) presumption that the claim was timely filed.

Under the 1984 Amendments, the relevant inquiry is the claimant's date of awareness of the relationship between the injury, employment, and disability. See Lindsay v. Bethlehem Steel Corp., 18 BRBS 20 (1986). Neither the LHWCA nor its accompanying regulations require that the claimant's awareness be based upon a medical opinion. Rather, both Section 13(b)(2) of the LHWCA and Section 702.222(c) of the accompanying regulations are unequivocally written in the disjunctive. Thus, in an occupational disease case, a claimant has two years from the date upon which he 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, to file a claim. See 33 U.S.C. § 913(b)(2) (Supp. V 1987); 20 C.F.R. § 702.222(c) (emphasis added).

The Board has held that, in determining the date of awareness, the date on which a claimant is informed by a doctor of the relationship between his work and his injury is significant, but is not always controlling, especially where there is other evidence that the claimant was aware of the relationship at an earlier date. See Pryor v. James McHugh Constr. Co., 18 BRBS 273 (1986); Geisler v. Columbia Asbestos Inc., 14 BRBS 794 (1981).

Moreover, the legislative history accompanying the addition of Section 13(b)(2) in 1984 states that awareness "should in all but the most unusual of circumstances be founded on specific medical advice relating to the hazards of exposure to a given toxic substance in the employer's work place, and the relationship between the disease suffered by the employee, that toxic substance, and the work place," see 1984 U.S. Code Cong. & Admin. News 2734, 2744, thus recognizing that it is possible for a claimant to be aware without a doctor's opinion.

There is no indication that Congress intended to overrule existing law in this regard. See Geisler, 14 BRBS 794. Accordingly, based upon clear and unequivocal language contained within Section 13(b)(2) of the LHWCA, the Board in Wendler v. American National Red Cross, 23 BRBS 408 (1990), held that the judge did not err as a matter of law in determining the date of the claimant's awareness based upon the claimant's personal opinion.

Section 13 of the LHWCA, as amended in 1984, provides, in part, that a claim for disability due to an occupational disease, which does not immediately result in disability, will be timely if filed within two years after the claimant becomes aware, or should have been aware, of the relationship between his employment, disease, and disability. 33 U.S.C. § 913(b)(2) (Supp. IV 1986). Thus, in an occupational disease case, the filing period does not begin to run until the claimant is actually disabled, or in the case of a voluntarily-retired employee, until a permanent impairment exists. See Lindsay v. Bethlehem Steel Corp., 18 BRBS 20 (1986); 20 C.F.R. §§ 702.212(b), 702.222(c).

Based on the plain language of Section 13(b)(2), the Board in Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988), held that the judge erred in finding that the claimant had to file his claim within two years after he became aware of his work-related disease and the likelihood of a **future** loss in earning capacity. In the instant case, although the claimant became aware of his asbestosis in October 1979, he was not actually disabled by this condition until he was unable to perform his duties in February 1983 because of his respiratory problems. See Lindsay, 18 BRBS at 23. The claimant then filed his claim for compensation in March 1983, one month after becoming disabled. The claim for compensation was, therefore, timely filed pursuant to Section 13(b)(2) of the LHWCA.

The plain words of Section 8(c)(13)(d) 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); Ranks v. Bath Iron Works Corp., 22 BRBS 302 (1989). Hence, 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 the Sections 12 and 13. Grace v. Bath Iron Works Corp., 21 BRBS 244, 247 (1988).

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 until 1983. The Board vacated the judge's finding, stating that "[a]lthough the record indicates the 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 finding of the claim." 18 BRBS at 150.

In Horton v. General Dynamics Corp., 20 BRBS 99 (1987), the Board held that a claimant's testimony was so unreliable as to not provide substantial evidence to support a finding of awareness. The Board held that the claimant's testimony was "too inherently unreliable" to provide substantial evidence to support the judge's findings of awareness. Since there was no credible evidence of record to establish the claimant's date of awareness, and giving the claimant the benefit of Section 20(b), the Board found that the employer had failed to establish that the claim was filed more than two years after awareness.

The **Eleventh Circuit** has held that the statute of limitations for hearing loss begins when the claimant becomes aware of impairment on an audiogram. Alabama Dry Dock & Shipbuilding Co. v. Sowell, 933 F.2d 1561 (**11th Cir.** 1991).

13.3.3 Economic Factors

Under the 1972 Amendments, the Section 13 period did not begin to run until the claimant was aware of a work-related harm which would probably diminish his earning capacity. 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." Id. at 276.

Following Stancil, the **Eleventh Circuit** held that a claimant need not file a claim until he is aware that he is suffering a compensable injury, i.e., when he is aware of a loss of wage-earning capacity. Brown v. Jacksonville Shipyards, 893 F.2d 294, 23 BRBS 22 (CRT) (**11th Cir.** 1990). See also Newport News Shipbuilding & Dry Dock Co. v. Parker, 935 F.2d 20 (**4th Cir.** 1991); Brown v. I.T.T./Continental Baking Co., 921 F.2d 289 (**D.C. Cir.** 1990); J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 23 BRBS 127 (CRT) (**9th 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.

The Board initially followed Stancil. More recently, however, the Board has applied Stancil only in those instances where the 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. Gregory v. Southeastern Maritime Co., 25 BRBS 188 (1981); Welch v. Pennzoil Co., 23 BRBS 395 (1990).

The court in Stancil considered the issue of when a claimant becomes aware "of the relationship between the injury ... and the employment," so that the LHWCA's limitations period begins to run. 33 U.S.C. § 913(a). The court held there that it is only after the claimant knows or should have known that the accident he has suffered will probably impair his ability to earn his previous wage that an "injury" arises within the meaning of the LHWCA. Stancil, 436 F.2d at 277. See also Bechtel Assocs., P.C. v. Sweeney, 834 F.2d 1029, 1033 (**D.C. Cir.** 1987) ("limitation period begins only when the employee knows or should know that (1) his injury is causally related to his employment, and (2) his injury is impairing his capacity to earn wages"). The issue for determination then is "whether the employee reasonably believed that he ... had suffered a work-related harm which would probably diminish his capacity to earn his living." Stancil, 436 4.2d at 279.

The **District of Columbia Circuit** found that this interpretation of the LHWCA's limitations provision is consistent with the liberality with which courts have construed the LHWCA. Brown v. I.T.T./Continental Baking Co., 921 F.2d 289, 24 BRBS 75 (CRT) (**D.C. Cir.** 1990). In Brown, the issue was phrased in terms of "whether the employee reasonably believed that he ... had suffered a work-related harm which would probably diminish his capacity to earn his living."

In Parker, 935 F.2d 20, the **Fourth Circuit** found that the Board did not err in relying upon Stancil and holding that respondent's time for filing his claim under Section 13(a) did not begin to run until he knew or had reason to know that his 1962 injury was likely to impair his earning capacity.

In Brown v. Jacksonville Shipyards, 893 F.2d 294, 23 BRBS 22 (CRT) (**11th Cir.** 1990), the court found that where a claimant had missed no time from work due to his 1981 accident until 1983 there was no need to have filed a claim within one year of the date of the accident. Bechtel Assocs., P.C. v. Sweeney, 834 F.2d 1029, 20 BRBS 49 (CRT) (**D.C. Cir.** 1987); Todd Shipyards v. Allan, 666 F.2d 399 (**9th Cir.** 1981), cert. denied, 459 **U.S.** 1034 (1982) (the statute of limitations does not begin to run until claimant is aware of the full character, extent, and impact of the harm done to him); Bath Iron Works Corp. v. Galen, 605 F.2d 583 (**1st Cir.** 1979) (the test is the awareness of the suffering of a compensable injury).

In Todd Shipyards v. Allan, 666 F.2d 399, the court held that Section 13(a) means that the limitations period does not begin to run until the employee is aware that his injury has resulted in the impairment of his earning power. Furthermore, it held that a claimant is not injured for purposes of the Section 13(a) statute of limitations until "he [becomes] aware of the full character, extent and impact of the harm done to him." Id. at 401 (emphasis in original). The Board concluded that the standard articulated in Todd is applicable only when a physician misdiagnoses the work-related nature of a claimant's injury. The court disagreed.

The determinative issue in Todd was whether the claimant knew or should have known the full extent of his work-related injury. In reaching a decision in Todd, the **Ninth Circuit** relied on the **District of Columbia Circuit's** decision in Stancil v. Massey, 436 F.2d 274 (**D.C. Cir.** 1970).

The **Ninth Circuit** recently reaffirmed Todd in J.M. Martinac Shipbuilding v. Director, OWCP (Grage), 900 F.2d 180, 183-84, 23 BRBS 127 (CRT) (**9th Cir.** 1990). In Grage, the claimant's doctor diagnosed a severe back injury, advised the claimant that it would take two to three years for his back to heal, and released him for work three weeks after the injury occurred. Three years later, the claimant was diagnosed as having degenerative joint disease, a bulging disc, and nerve root compression. In holding that the LHWCA's statute of limitations period was tolled until the claimant discovered that his disability was permanent, the court concluded: "Public policy is served by not discouraging workers' attempts to return to work and by not encouraging premature claims of permanent disability." Grage, 900 F.2d at 184. To limit the Todd holding to cases of misdiagnosis would circumvent this purpose.

Again, in Abel v. Director, OWCP, 932 F.2d 819, 24 BRBS 130 (CRT) (**9th Cir.** 1991), the court applied the Todd standard. In determining whether the statute of limitations period under section 13(a) has begun to run, Todd required a determination as to when Abel became aware of the full character, extent, and impact of the harm done to him. See also Grage, 900 F.2d 180, 23 BRBS 127 (CRT).

13.4 SECTION 13(d): TOLLING THE STATUTE

Section 13(d) of the LHWCA provides:

> **(d) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this Act and that such employer had secured compensation to such employee under this Act, the limitation of time prescribed in subdivision (a) under this Act, the limitation of time prescribed in subdivision (a) shall begin to run only from the date of termination of such suit.**

33 U.S.C. § 913(d).

The burden of establishing the elements of Section 13(d) is on the claimant. George v. Lykes Bros., 7 BRBS 877 (1978). See also Calloway v. Zigler Shipyards, 16 BRBS 175 (1984), wherein the Board stated that under **Fifth Circuit** law the grounds on which recovery is denied is irrelevant because, according to Ingalls Shipbuilding Division, Litton Systems v. Hollinhead, 571 F.2d 272 (**5th Cir.** 1978), the filing of an action alone is sufficient to toll the statute. Recently, in *dictum* the **First Circuit** expressed "substantial doubts" regarding the **Fifth Circuit's** opinion in Hollinhead that the one-year statute of limitations for filing a claim under the LHWCA was tolled by filing a state workers' compensation claim. The **First Circuit** questioned whether such an approach was beyond the scope of the plain language of Section 13(d) of the LHWCA. See Bath Iron Works Corp. v. Director, OWCP, 125 F.3d 18 (**1st. Cir.** 1997). However, even in the **Fifth Circuit**, the state claim must be timely filed in order to toll the statute of limitations for the filling of a LHWCA claim. Hill v. Director, OWCP, 195 F.3d 790, (**5th Cir.** 1999).

Section 13 must be read in conjunction with Sections 30(a) and 30(f) of the LHWCA. Wendler v. American Nat'l Red Cross, 23 BRBS 408 (1989). Section 30(a) requires that an employer submit to the Secretary of Labor a report of a claimant's injury within ten days of the date it has knowledge of that injury. **Pursuant to Section 30(f), the Section 13 filing period is tolled until such time as the employer complies with the requirements of Section 30(a).** See Bustillo v. Southwest Marine, Inc., 33 BRBS 15 (1999); Nelson v. Stevens Shipping & Terminal Co., 25 BRBS 277 (1992); Ryan v. Alaska Constructors, Inc., 24 BRBS 65 (1990).

Section 30(f) cannot be used to save a claim in a case where the claimant had knowledge of the work-relatedness of his injury, but the employer did not receive notice, or otherwise obtain knowledge, of the injury by the end of the relevant filing period. Wendler, 23 BRBS 408; Keatts v. Horne Bros., Inc., 14 BRBS 605 (1982).

The Board consistently has held that the 1984 Amendments, including the new audiogram requirement, apply to claims filed after the effective date, regardless of when the claim arose. Alabama Dry Dock & Shipbuilding Corp. v. Sowell, 933 F.2d 1561, 24 BRBS 229 (CRT) (**11th Cir.** 1991). See, e.g., Manders v. Alabama Dry Dock & Shipbuilding Corp., 23 BRBS 19, 22-23 (1989) (hearing loss claim timely filed in 1986, though claimant had retired in 1965).

Where a claim is timely filed, but is never adjudicated, it remains open until an order is issued. Lewis v. Norfolk Shipbuilding & Dry Dock Corp., 20 BRBS 126, 130 (1987) (citing Intercounty Constr. Corp. v. Walter, 422 **U.S.** 1 (1975)).

In Krotsis v. General Dynamics Corp., 22 BRBS 128 (1989), no action was taken on the claimant's 1979 claim following the disapproval of the settlement and the employer's voluntary payment of compensation. Thus, the claim remained open at the time of the hearing on the 1983 claim. Since the claims were for the same injury, hearing loss due to noise exposure, the judge could properly treat the 1979 claim and the 1983 claim as one. The ALJ, therefore, did not err in computing one award for claimant's entire hearing loss as of the time of the hearing and in determining the respective liabilities of the employer and the Director at that time.

To withdraw a claim, a claimant must file a written request with the district director, who must approve it as being for a proper purpose and in the claimant's best interest. 20 C.F.R. § 702.255; Madrid v. Coast Marine Constr. Co., 22 BRBS 148 (1989). Moreover, in Intercounty Construction Co. v. Walter, 422 **U.S.** 1 (1975), the **United States Supreme Court** held that where a claim is timely filed under Section 13 of the LHWCA, but is never adjudicated, it remains open and pending until an order is issued. In Madrid, the claimant filed no written request to withdraw his claim and the modification request was never adjudicated. The Board concluded that the claimant's modification request similarly remained open and pending. See O'Berry v. Jacksonville Shipyards, 21 BRBS 355 (1988); Lewis v. Norfolk Shipbuilding & Dry Dock Corp., 20 BRBS 126 (1987).

As part of its burden to rebut Section 20(b), an employer must preliminarily establish that it complied with the requirements of Section 30(a), which provides that within ten days from the date of any injury, an employer must submit a report of injury to the deputy commissioner (district director). Section 30(f) provides that where an employer has been given notice or has knowledge of any injury and fails to file the report, the statute of limitations under Section 13(a) does not begin to run until such report has been provided. See Hartman v. Avondale Shipyard, 23 BRBS 201, 204, modified on recon., 24 BRBS 63 (1990).

In Ryan v. Alaska Constructors, 24 BRBS 65 (1990), the employer failed to file a First Report of Injury until May 31, 1985. The Board agreed with the claimant that the Section 13(a) statute of limitations was tolled, pursuant to Section 30(f), and that, as a result, the claim filed on April 25, 1985 was timely. See generally Hartman, 23 BRBS 201. Where an employer has knowledge that an employee has sustained an injury, it must file a Section 30(f) report. See Cooper

v. John T. Clark & Son, Inc., 11 BRBS 453 (1979), aff'd, 687 F.2d 39, 15 BRBS 5 (CRT) (**4th Cir.** 1982).

The application of Section 30(f) does not require an employer to have definite knowledge that the injury comes within the jurisdiction of the LHWCA. Ryan, 24 BRBS 65. See Castro v. McLean Indus., 12 BRBS 911, 914 (1980). Moreover, the fact that the case may arise under a statute other than the LHWCA does not excuse an employer's failure to file the Section 30(a) report. Ryan, 24 BRBS 65; Cooper, 11 BRBS 453.

In Ryan, the claimant had entered into an agreement (not a Section 8(i) settlement) with the employer for $54,000. Although the claimant clearly benefitted from his 1980 settlement with the employer, this factor is irrelevant to determining when the Section 13(a) statute of limitations began to run. If the claimant is entitled to benefits under the LHWCA, the employer is entitled to a credit under Section 3(e) for the net value of this settlement. See Lustig v. Todd Shipyards Corp., 20 BRBS 207, 211 (1988), aff'd in pert. part sub nom. Lustig v. U.S. Dep't of Labor, 881 F.2d 593, 22 BRBS 159 (CRT) (**9th Cir.** 1989).

In O'Berry v. Jacksonville Shipyards, 21 BRBS 355 (1988), the Board found that a claim remained open because the deputy commissioner had no authority to issue a compensation order subsequent to the effective date of the 1972 Amendments. Thus, the Board found that the deputy commissioner's order was not valid and the employer's compensation payments were therefore voluntary. Additionally, a $65,000 "settlement" between the claimant and the carrier did not close the claim and had no legal effect as it was not approved. Nor was a purported "withdrawal" of the claim valid since it also was unapproved. Thus, the 1970 claim was never closed and remained pending in 1982. Relying on Intercounty Construction Corp. v. Walter, 422 **U.S.** 1 (1975) (where a claim is timely filed under Section 13 but is never adjudicated, it remains open and pending until an order is issued), the Board found that the claim remained open.

In Maddon v. Western Asbestos Co., 23 BRBS 55 (1989), the employer did not properly file a Section 30(a) report of injury. The judge concluded that under the doctrine of laches (see infra at Topic 13.4.5), the claimant was too late in filing the decedent's LHWCA claim. The judge reasoned that the filing, resolution, and final payment of the decedent's state claim nearly five years prior to the filing of the federal claim was insufficient to put the employer on notice to preserve and produce evidence on the issues not common to the two claims, such as situs and status. The judge concluded that this would prejudice the employer in its litigation of the LHWCA disability claim.

The Board, however, noted that Section 13 could not ban the disability claim since the employer did not properly file its Section 30(a) report of injury.

In Grage v. J. M. Martinac Shipbuilding, 21 BRBS 66 (1988), aff'd sub nom. J.M. Martinac Shipbulding v. Director, OWCP, 900 F.2d 180, 23 BRBS 127 (CRT) (**9th Cir.** 1990), the employer created a situation where its clinic appeared to be its agent and the clinic advised the claimant that he had seven years to file a claim.

Although noting that Section 13(a) limits the period in which a claimant may file a claim in order to protect employers and their carriers from having to investigate and defend state claims, the Board found this "strong policy is outweighed in the instant case, where a claimant has been lulled into a false sense of security by employer regarding the filing requirements for his claim." Grage, 21 BRBS at 69. See also Blackwell Constr. Co. v. Garrell, 352 F. Supp. 192 (**D.D.C.** 1972); Paquin v. General Dynamics/Elec. Boat Div., 4 BRBS 383 (1976).

The Board affirmed the judge's finding that, on the specific facts of this case, the employer's conduct created an apparent agency relationship thereby estopping the employer from disputing the agency relationship and asserting the Section 13(a) time bar defense.

The **Ninth Circuit**, however, relying on Todd, 666 F.2d 399, and Stancil, 436 F.2d 274, found that the LHWCA's statute of limitations period of Section 13 was tolled until the claimant discovered that his disability was permanent. Grage, 900 F.2d 180, 23 BRBS 127 (CRT). Only then did he become "aware of the full character, extent and impact of the harm done to him." Todd, 666 F.2d at 401.

The **Ninth Circuit** discussed the use of agency principles and rejected that application. The apparent authority of an agent can only be inferred from acts of the principal and not from acts of the agent. Pierson v. United States, 527 F.2d 459, 462 (**9th Cir.** 1975) (interpreting Washington state law). Since the employer's actions did not place the clinic in a position of authority to give legal advice, the **Ninth Circuit** found that the employer was not bound by the clinic's inaccurate legal information and could assert a time bar defense. As previously noted, however, the court found that the statute of limitations had not run. Grage, 900 F.2d 180, 23 BRBS 127 (CRT).

Section 13 must be read, however, in conjunction with Sections 30(a) and 30(f) of the LHWCA. See e.g., Wendler v. American Nat'l Red Cross, 23 BRBS 408 (1990). Section 30(a) requires that an employer submit a report of a claimant's injury to the Secretary of Labor within ten days of the date it has knowledge of that injury. **Pursuant to Section 30(f), the Section 13 filing period is tolled until such time as the employer complies with the requirements of Section 30(a).**

Section 30(f) cannot be used to save a claim in a case where a claimant had knowledge of the work-relatedness of his injury, but the employer did not receive notice, or otherwise obtain knowledge, of the injury by the end of the relevant filing period. Wendler, 23 BRBS 408; Keatts v. Horne Bros., Inc., 14 BRBS 605 (1982).

Imputing knowledge of a work-related injury based on the claimant's application for non-occupational health and disability insurance benefits has been rejected by the Board and federal courts. Alston v. Safeway Stores, 19 BRBS 86 (1986). See Sun Shipbuilding & Dry Dock Co. v. Walker, 590 F.2d 73, 9 BRBS 399 (**3d Cir.** 1978); Sheek v. General Dynamics Corp., 18 BRBS 1 (1985), on recon., 18 BRBS 151 (1986); Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982).

In Alston, 19 BRBS 86, although the claimant had noted on her medical insurance form that she was injured in a parking lot, the record did not indicate that the employer knew or should have known that the injury occurred in a Safeway parking lot. The Board reasoned that since the claimant certified her illness as not work-related, the employer had no duty to further investigate. Alston, 19 BRBS at 89; see Stevenson v. Linens of the Week, 688 F.2d 93, 100-01 (**D.C. Cir.** 1982).

13.4.1 Filing LS-201

The filing of a claimant's LS-201 Notice of Injury is sufficient to constitute the filing of a claim pursuant to Section 13. Peterson v. Columbia Marine Lines, 21 BRBS 299 (1988). Although the LS-201 was intended by the United States Department of Labor to provide notice of an injury pursuant to Section 12, this form contains language asserting a right to compensation. **A claim need not be on a particular form to satisfy the requirements of Section 13, and any writing will suffice so long as it discloses an intention to assert a right to compensation.** Bingham v. General Dynamics Corp., 14 BRBS 614 (1982). A memorandum recording by OWCP of a telephone conversation with a claimant has been found by the Board to constitute a claim since it disclosed the claimant's intent to assert a right to compensation. I.T.O. Corp. Of Virginia v. Pettus, 73 F.2d 523, 30 BRBS 6 (CRT)(**4th Cir.** 1996), cert. denied, 519 **U.S.** 807 (1996); McKnght v. Carolina Shipping Co., 32 BRBS 165, aff'd on recon en banc, 32 BRBS 165, aff'd on recon en banc, 32 BRBS 251 (1998).

13.4.2 Filing A State Claim

A claim technically is not barred under Section 13 because of an employer's failure to file its First Report of Injury under Section 30(f). Simpson v. Bath Iron Works Corp., 22 BRBS 25 (1989). In Simpson, the Board noted that since the LHWCA contains a specific statutory period for filing a claim under Section 13, the doctrine of laches does not apply.

Additionally, the Board noted that even if the defense was available to the employer, it would not be applicable in the instant case since for laches to apply, the plaintiff must have unreasonably and inexcusably delayed bringing suit. The judge had concluded that the claimant's 36-year delay in filing the claim was not unreasonable, noting that at the time of the claimant's injury, there was no precedent holding him within the jurisdiction of the LHWCA. The Board found the claimant's decision to file for benefits under the State of Maine Workers' Compensation Act to be reasonable justification for the claimant's 36-year delay in filing a claim under the LHWCA.

Additionally, it was noted that by the time of the **United States Supreme Court**'s holding in Calbeck v. Travelers Insurance Co., 370 **U.S.** 114 (1962) (which extended coverage under the 1927 LHWCA to employees, such as the claimant, who were injured while engaged in new ship construction), the claimant had already been injured almost 21 years, had long since ceased contact with his attorney, and had no reason to know prior to contacting another attorney that he might have a claim under the LHWCA.

In Smith v. Universal Fabricators, 21 BRBS 83 (1988), aff'd, 878 F.2d 843, 22 BRBS 104 (CRT) (**5th Cir.** 1989), cert. denied, 493 **U.S.** 1070 (1990), the claimant was receiving state workers' compensation benefits when he filed the federal claim. Since the employer, with full knowledge of the injury, chose to pay the claimant pursuant to the state statute, the claim was timely under Section 13(a).

In Ingalls Shipbuilding Division, Litton Systems v. Hollinhead, 571 F.2d 272 (**5th Cir.** 1978), the court found that the filing of an action alone is sufficient to toll the statute. In Hollinhead, the one-year statute of limitations for filing a claim under the LHWCA was tolled by filing a state workers' compensation claim. However, the **First Circuit** questioned whether such an approach was beyond the scope of the plain language of Section 13(d) of the LHWCA. See Bath Iron Works Corp. v. Director, OWCP, 125 F.3d 18 (**1st. Cir.** 1997). It should be noted that even in the **Fifth Circuit**, the state claim must be timely filed in order to toll the statute of limitations for the filling of a LHWCA claim. Hill v. Director, OWCP, 195 F.3d 790, (**5th Cir.** 1999).

In Saylor v. Ingalls Shipbuilding, Inc., 9 BRBS 561 (1978), the Board recognized that Section 13 was designed to ensure fairness to the employer by preventing the revival of stale claims in cases in which evidence has been lost, memories have faded, and witnesses have disappeared. Since an employer who pays a claimant benefits pursuant to a state workers' compensation statute is fully aware of the claimant's injured condition, however, the Board held that such payments toll the running of the statute of limitations, since the purposes of Section 13 would not be served by barring the claim. Id.

13.4.3 Suit in Law or Admiralty

Section 13(d) provides that the Section 13(a) statute of limitations is tolled where a claimant has brought a suit in law or admiralty for damages due to injury or death, recovery is denied because the parties are subject to the LHWCA, and the employer has secured compensation for the claimant under the LHWCA. The statute of limitation begins to run from the date of termination of the suit. Vodanovich v. Fishing Vessel Owners Marine Ways, Inc., 27 BRBS 286 (1994); Calloway v. Zigler Shipyards, Inc., 16 BRBS 175 (1984); McCabe v. Ball Builders, Inc., 1 BRBS 290 (1975).

***[ED. NOTE:** However the reverse is not true. An employee's pursuit of a LHWCA claim against an employer, which is ultimately denied on jurisdictional grounds, does not equitably toll the limitations period applicable to a Jones Act claim. Wilson v. Zapata Off-Shore Co., 939 F.2d 260 (**5th Cir.** 1991).]*

At least one ALJ has held that the mistaken filing of a claim under a state workers' compensation law constituted a suit for damages within the meaning of Section 13(d) and thus tolled the Section 13(a) one year statute of limitations. Kauffman v. Martha's Vineyard Shipping, 26 BRBS 266 (ALJ) (1992). However, in Hill v. Avondale Industries, Inc., 32 BRBS 186 (1998), the Board

held that an untimely claim filed under a state worker's compensation law could not toll the statute of limitations for filing a LHWCA claim.

[ED. NOTE:** The circuits are in disagreement as to whether the filing of a state compensation claim tolls the statute of limitations under the LHWCA. See Topic 13.4.4 below.**]

In Nelson v. Stevens Shipping & Terminal Co., 25 BRBS 277 (1992), the Board held that an employer's filing of an LS-202 where the claimant has not lost time from work cannot commence the running of the Section 13(a) time period.

13.4.4 Payment of State Worker's Compensation

Payments made by an employer under a state workers' compensation act constitute payment of compensation as defined in Section 13(a), so as to toll the running of the one year statute of limitations. Payment of medical benefits is not the payment of "compensation" which will toll the Section 13(a) period.

Where a claimant received voluntary compensation benefits under a state workers' compensation system, those benefits tolled the Section 13 statute of limitations. Universal Fabricators v. Smith, 878 F.2d 843, 22 BRBS 104 (CRT) (**5th Cir.** 1989), aff'g 21 BRBS 83 (1988) (claimant's failure to file a claim until almost three years after his accident was found to be not untimely).

Payments an employer makes under state workers' compensation acts toll the statute of limitations for filing under the LHWCA. Saylor v. Ingalls Shipbuilding, Inc., 9 BRBS 561 (1978). See also United Brands Co. v. Melson, 594 F.2d 1068, 1071 (**5th Cir.** 1979); Ingalls Shipbuilding Div., Litton Sys. v. Hollinhead, 571 F.2d 272 (**5th Cir.** 1978) (filing for recovery under the state workers' compensation system tolled the statute of limitations under the federal LHWCA action).

Section 13(a) provides that in traumatic injury cases, a claim must be filed within one year of the claimant's "awareness" or, where voluntary payments are made, within one year of the last payment of compensation. As noted previously, the Board has held that payments made by an employer under a state workers' compensation act constitute payment of compensation under Section 13(a) so as to toll the one-year statute of limitations. Smith, 878 F.2d 843, 22 BRBS 104 (CRT); Saylor, 9 BRBS 561.

The rationale expressed in Saylor and Smith anticipates that the claim is filed while benefit payments are ongoing or within one year of the last payment; therefore, the claim may be timely regardless of whether the employer chooses to pay under a state act. Colburn v. General Dynamics Corp., 21 BRBS 219 (1988) (where the last voluntary payment of compensation was paid under the LHWCA in July 1979, and **both** federal and state claims were filed in October of 1980, the claim was not timely filed--the fact that claimant received state benefits almost two years after the federal claim was filed did not toll the time for filing the LHWCA claim).

13.4.5 Laches

The equitable doctrine of laches may serve as a bar to a claim which has been neglected or ignored to the prejudice of an adverse party. The **United States Supreme Court** has summarized the test for laches as: (1) a lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. Costello v. U.S., 365 **U.S.** 265 (1965); Galliher v. Cadwell, 145 **U.S.** 368, 373 (1892).

In Rodriguez v. California Stevedore & Ballast Co., 16 BRBS 371 (1984), the Board disallowed a stale claim which had not been officially closed under the technical requirements of the regulations. Although the Board did not use the term "laches," it appears to have employed the test articulated by the **Supreme Court** in Costello. The Board specifically addressed the doctrine of laches in Lewis v. Norfolk Shipbuilding & Dry Dock Corp., 20 BRBS 126 (1987). The Board reasoned that as the LHWCA contains a specific statutory limitation period for filing a claim under Section 13, **the doctrine of laches is inapplicable**. Id. at 130. See Director v. National Van Lines, 613 F.2d 972, 984, 11 BRBS 298, 312 (**D.C. Cir.** 1979); Simpson v. Bath Iron Works Corp., 22 BRBS 25 (1989) (36-day delay in filing). The Board, in Lewis, distinguished Rodriguez, on the basis that neither party in Simpson had attempted to close an earlier claim. 20 BRBS at 130 n.3.