

such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d)(1) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i) of this section) occurs—

(A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or

(B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 906(b) of this title) applicable at the time of the injury.

(e) If it be established that the injured employee was a minor when injured, and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by the lesser of—

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

(g) The weekly compensation after adjustment under subsection (f) of this section shall be fixed at the nearest dollar. No adjustment of less than \$1 shall be made, but in no event shall compensation or death benefits be reduced.

(h)(1) Not later than ninety days after October 27, 1972, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to October 27, 1972, shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 906(b) of this title and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following October 27, 1972, and (B) subtracting therefrom the compensation to which such employee or survivor

was entitled on October 27, 1972; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on October 27, 1972. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this chapter at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following October 27, 1972. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 944 of this title, and 50 per centum shall be paid from appropriations.

(3) For the purposes of subsections (f) and (g) of this section an injury which resulted in permanent total disability or death which occurred prior to October 27, 1972, shall be considered to have occurred on the day following such date.

(i) For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which 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.

(Mar. 4, 1927, ch. 509, § 10, 44 Stat. 1431; June 24, 1948, ch. 623, § 4, 62 Stat. 603; Pub. L. 92-576, § 11, Oct. 27, 1972, 86 Stat. 1258; Pub. L. 98-426, § 10, Sept. 28, 1984, 98 Stat. 1647.)

#### AMENDMENTS

1984—Subsec. (d). Pub. L. 98-426, § 10(a)(1), designated existing provisions as par. (1) and added par. (2).

Subsec. (f). Pub. L. 98-426, § 10(b), substituted "subject to this chapter" for "sustained after October 27, 1972," and inserted "the lesser of—" after "by" in introductory language, designated balance of existing provisions as par. (1), substituted " ; or " for a period at end of par. (1), and added par. (2).

Subsec. (i). Pub. L. 98-426, § 10(a)(2), added subsec. (i). 1972—Subsecs. (f) to (h). Pub. L. 92-576 added subsecs. (f) to (h).

1948—Subsec. (a). Act June 24, 1948, included a factor (a 260 multiplier) so as to make this subsec. useful in 5-day week employments.

Subsec. (b). Act June 24, 1948, included the new factor (a 260 multiplier) to make this subsec. consistent with subsec. (a).

Subsec. (c). Act June 24, 1948, permitted the inclusion of all earnings of the injured workman in determining the employee's annual earning capacity.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by section 10(a) of Pub. L. 98-426 effective Sept. 28, 1984, and applicable both with respect to