

Subsec. (g). Pub. L. 98-426, §27(a)(2), substituted "Secretary" for "commission". See Transfer of Functions note set out under section 902 of this title.

1972—Pub. L. 92-576, §5(d), added to introductory provision that the compensation shall be known as a death benefit if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury.

Subsec. (a). Pub. L. 92-576, §10(a), substituted "\$1,000" for "\$400".

Subsec. (b). Pub. L. 92-576, §§10(b), 20(c)(2), substituted "50" for "35" per centum in three places and "16%" for "15" per centum in two places and "widow or widower" for "surviving wife or dependent husband" in three places.

Subsec. (c). Pub. L. 92-576, §§10(b), 20(c)(2), substituted "50" for "35" per centum in two places and "16%" for "15" per centum and "widow or widower" for "surviving wife or dependent husband".

Subsec. (d). Pub. L. 92-576, §§10(c), 20(c)(2), in first sentence, substituted "husband or child," and "husband" for "dependent husband or child" and "dependent husband" and "20" for "15" per centum, and inserted "and any other persons who satisfy the definition of the term 'dependent' in section 152 of title 26, but are not otherwise eligible under this section" after "time of the injury," and "during such dependency" after "support of each such person", and in second sentence, substituted "widow or widower" for "surviving wife or dependent husband", respectively.

Subsec. (e). Pub. L. 92-576, §10(d), substituted "less than the applicable national average weekly wage as prescribed in section 906(b) of this title but the total weekly benefits shall not exceed the average weekly wages of the deceased" for "more than \$105 nor less than \$27 but the total weekly compensation shall not exceed the weekly wages of the deceased".

1961—Subsec. (e). Pub. L. 87-87 increased the maximum limitation with respect to average weekly wages from "\$81" to "\$105" in the computation of death benefits.

1956—Subsec. (e). Act July 26, 1956, substituted "\$81" for "\$52.50" and "\$27" for "\$18".

1948—Subsec. (a). Act June 24, 1948, increased funeral expenses from \$200 to \$400.

Subsec. (b). Act June 24, 1948, increased benefits to children of deceased workmen from 10 percent to 15 percent.

Subsec. (c). Act June 24, 1948, increased death benefits of orphaned children from 15 percent to 35 percent.

Subsec. (e). Act June 24, 1948, correlated basis for computing death benefits with basis for computing disability benefits under section 906(b) of this title.

1938—Subsecs. (b) to (d). Act June 25, 1938, struck out references to children as being under eighteen years of age.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by section 9 of Pub. L. 98-426 applicable with respect to any death after Sept. 28, 1984, and amendment by section 27(a)(2) of Pub. L. 98-426 effective Sept. 28, 1984, see section 28(d), (e)(1) of Pub. L. 98-426, set out as a note under section 901 of this title.

EFFECTIVE DATE OF 1972 AMENDMENT

Amendment by section 20(c)(2) of Pub. L. 92-576 applicable only with respect to deaths or injuries occurring after Oct. 27, 1972, see section 20(c)(3) of Pub. L. 92-576, set out as a note under section 902 of this title.

Amendment by Pub. L. 92-576 effective 30 days after Oct. 27, 1972, see section 22 of Pub. L. 92-576, set out as a note under section 902 of this title.

EFFECTIVE DATE OF 1961 AMENDMENT

Amendment by Pub. L. 87-87 effective as to death sustained on or after July 14, 1961, see section 4 of Pub. L. 87-87, set out as a note under section 906 of this title.

EFFECTIVE DATE OF 1956 AMENDMENT

Amendment by act July 26, 1956, applicable only with respect to injuries and death occurring on or after July

26, 1956, see section 9 of act July 26, 1956, set out as a note under section 906 of this title.

EFFECTIVE DATE OF 1948 AMENDMENT

Amendment by act June 24, 1948, applicable to death or injuries occurring after June 24, 1948, see section 6 of act June 24, 1948, set out as a note under section 906 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 904, 908, 931 of this title; title 30 section 932; title 42 sections 1652, 1701, 1702.

§ 910. Determination of pay

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be 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 claims filed after such date and to claims pending on such date, and amendment by section 10(b) of Pub. L. 98-426 effective Sept. 28, 1984, see section 28(a), (e)(1) of Pub. L. 98-426, set out as a note under section 901 of this title.

EFFECTIVE DATE OF 1972 AMENDMENT

Amendment by Pub. L. 92-576 effective 30 days after Oct. 27, 1972, see section 22 of Pub. L. 92-576, set out as a note under section 902 of this title.

EFFECTIVE DATE OF 1948 AMENDMENT

Amendment by act June 24, 1948, applicable to death or injuries occurring after June 24, 1948, see section 6 of act June 24, 1948, set out as a note under section 906 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 902, 906, 908, 909, 944 of this title; title 30 section 932; title 42 section 1702.

§ 911. Guardian for minor or incompetent

The deputy commissioner may require the appointment by a court of competent jurisdiction,