

manent total disability, the employer should provide compensation only for the disability caused by the subsequent injury, and proviso of such former par. (1) providing that in addition to compensation for the permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee should be paid the remainder of the compensation that would be due for permanent total disability and provision that additional compensation should be paid out of the special fund established in section 944 of this title. See par. (2) of this subsection.

Subsec. (f)(2). Pub. L. 92-576, §9, incorporated proviso of first sentence and second sentence of former par. (1) in provisions designated as par. (2) and struck out former par. (2) which stated that in all other cases in which, following a previous disability, an employee received an injury which was not covered by former par. (1), the employer should provide compensation only for the disability caused by the subsequent injury, and in determining compensation for the subsequent injury or for death resulting therefrom, the average weekly wages should be such sum as would reasonably represent the earning capacity of the employee at the time of the subsequent injury. See par. (1) of this subsection.

Subsec. (i). Pub. L. 92-576, §20(a), designated existing provisions as subpar. (A), substituted "Whenever" for "In cases under subsection (c)(21) and subsection (e) of this section, whenever", "he may approve" for "he may, with the approval of the Secretary, approve", and "deputy commissioner" for "Secretary", and struck out after "Provided," where first appearing "That the sum so agreed upon shall be payable in installments as provided in section 914(b) of this title, which installments shall be subject to commutation under section 914(j) of this title; *And provided further,*" and added subpar. (B).

1956—Subsec. (c). Act July 26, 1956, §2, increased periods in schedule of compensation as follows:

Par. (1) Arm lost, increased from two hundred and eighty to three hundred and twelve weeks' compensation.

Par. (2) Leg lost, increased from two hundred and forty-eight to two hundred and eighty-eight weeks' compensation.

Par. (3) Hand lost, increased from two hundred and twelve to two hundred and forty-four weeks' compensation.

Par. (4) Foot lost, increased from one hundred and seventy-three weeks to two hundred and five weeks' compensation.

Par. (5) Eye lost, increased from one hundred and forty to one hundred and sixty weeks' compensation.

Par. (6) Thumb lost, increased from fifty-one to seventy-five weeks' compensation.

Par. (7) First finger lost, increased from twenty-eight to forty-six weeks' compensation.

Par. (8) Great toe lost, increased from twenty-six to thirty-eight weeks' compensation.

Par. (9) Second finger lost, increased from eighteen to thirty weeks' compensation.

Par. (10) Third finger lost, increased from seventeen to twenty-five weeks' compensation.

Par. (11) Toe other than great toe lost, increased from eight to sixteen weeks' compensation.

Par. (12) Fourth finger lost, increased from seven to fifteen weeks' compensation.

Subsec. (g). Act July 26, 1956, §3, substituted "\$25" for "\$10".

1948—Subsec. (c). Act June 24, 1948, inserted in opening par. "or temporary partial disability", "or subsection (e)", and "respectively".

1938—Subsec. (c). Act June 25, 1938, §4, in par. (22), inserted exception clause.

Subsecs. (h), (i). Act June 25, 1938, §5 added subsecs. (h) and (i).

1934—Subsec. (c). Act May 26, 1934, §2, inserted in opening par. "which shall be in addition to compensation for temporary total disability paid in accordance with subsection (b) of this section" and decreased periods in schedule of compensation of pars. (1) to (12).

Subsec. (c). Act May 26, 1934, §3, substituted new par. (22), providing that "In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively.", for former provisions, providing that "In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in this subdivision: Arm, thirty-two weeks; leg, forty weeks; hand, thirty-two weeks; foot, thirty-two weeks; eye, twenty weeks; thumb, twenty-four weeks; first finger, eighteen weeks; great toe, twelve weeks; second finger, twelve weeks; third finger, eight weeks; fourth finger, eight weeks; toe other than great toe, eight weeks.

"In any case resulting in loss or partial loss of arm, leg, hand, foot, eye, thumb, finger, or toe, where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in this subdivision."

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by section 8(a), (c)(2), (e)(1), (2) 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, amendment by section 8(b) of Pub. L. 98-426 applicable with respect to any injury after Sept. 28, 1984, amendment by sections 8(c)(1), (e)(4), (5), (g), and 27(a)(2) of Pub. L. 98-426 effective Sept. 28, 1984, amendment by section 8(d) of Pub. L. 98-426 applicable with respect to any death after Sept. 28, 1984, amendment by section 8(f) of Pub. L. 98-426 effective 90 days after Sept. 28, 1984, and applicable both with respect to claims filed after such 90th day and to claims pending on such 90th day, and amendment by section 8(h) of Pub. L. 98-426 effective 90 days after Sept. 28, 1984, see section 28(a)-(e) 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 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.

### § 909. Compensation for death

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding \$3,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or

children of the deceased, the additional amount of 16% per centum of such wages for each such child; in case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16% per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66% per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16% per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66% per centum of such wages.

(d) If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than 66% per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, 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, 20 per centum of such wages for the support of each such person during such dependency and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subsection exceed the difference between 66% per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

(e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 906(b) of this title, but—

(1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 906(b)(1) of this title; and

(2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 910(i) of this title) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(f) All questions of dependency shall be determined as of the time of the injury.

(g) Aliens: Compensation under this chapter to aliens not residents (or about to become non-residents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the Secretary may, at his option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary.

(Mar. 4, 1927, ch. 509, § 9, 44 Stat. 1429; June 25, 1938, ch. 685, § 6, 52 Stat. 1166; June 24, 1948, ch. 623, § 3, 62 Stat. 602; July 26, 1956, ch. 735, § 4, 70 Stat. 655; Pub. L. 87-87, § 2, July 14, 1961, 75 Stat. 203; Pub. L. 92-576, §§ 5(d), 10, 20(c)(2), Oct. 27, 1972, 86 Stat. 1253, 1257, 1265; Pub. L. 98-426, §§ 9, 27(a)(2), Sept. 28, 1984, 98 Stat. 1647, 1654.)

#### AMENDMENTS

1984—Pub. L. 98-426, § 9(a), amended generally provision preceding subsec. (a), striking out "or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury," after "injury causes death".

Subsec. (a). Pub. L. 98-426, § 9(b), substituted "\$3,000" for "\$1,000".

Subsec. (e). Pub. L. 98-426, § 9(c), amended subsec. (e) generally. Prior to amendment, subsec. (e) read as follows: "In computing death benefits the average weekly wages of the deceased shall be considered to have been not 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".

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.

### § 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 substan-

tially 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