

TOPIC 90

EFFECTIVE DATES OF 1984 AMENDMENTS

90.1 PUBLIC LAW NO. 98-426

_____The date of enactment of the 1984 Amendments to the LHWCA, Pub. L. No. 98-426, 98 Stat. 1639, was September 28, 1984. The effective dates of the specific provisions of the 1984 Amendments are detailed in Section 28 of the Amendments.

[ED. NOTE: References to "Section 28" in this topic are references to the section of the amending act, not the LHWCA.]

Subsection 28(a) generally applies the Amendments to claims filed after and pending on the date of enactment, except as otherwise provided.

Subsections 28(b) through (f) specify provisions which are not subject to the general rule of Section 28(a), and which are not necessarily applicable to pending cases. Section 28(a)-(g) of Pub. L. 98-426 provides that:

(a) Except as otherwise provided in this section, the amendments made by this Act [enacting section 942 of this title, amending sections 901 to 910, 912 to 914, 917 to 919, 921, 922, 923, 928 to 935, 938 to 940, 944, and 948a of this title and section 932 of Title 30, Mineral Lands and Mining, repealing sections 945, 946, and 947 of this title, and enacting provisions set out as notes under this section and section 907 of this title] shall be effective on the date of enactment of this Act [Sept. 28, 1984] and shall apply both with respect to claims filed after such date and to claims pending on such date.

(b) The amendments made by sections 7(a), 7(e), 8(f), 11(b), 11(c), and 13 [amending section 907(b), enacting section 907(k), and amending sections 908(i), 912(c) and (d), and 914 of this title] shall be effective 90 days after the date of enactment of this Act [September 28, 1984] and shall apply both with respect to claims filed after such 90th day and to claims pending on such 90th day.

(c) The amendments made by sections 2(a), 3(a), 5, and 8(b) [amending sections 902(3), (21), 903(a) to (d), 905(b), and 908(c)(20) and enacting section 905(c) of this title] shall apply with respect to any injury after the date of enactment of this Act [Sept. 28, 1984].

(d) The amendments made by sections 6(a), 8(d), and 9 [amending section 906(b)(1) and 909 and striking out section 908(d)(3) of this title] shall apply with respect to any death after the date of enactment of this Act [Sept. 28, 1984].

(e)(1) The amendments made by sections 2(c), 8(c)(1), 8(e)(4), 8(e)(5), 8(g), 10(b), 15 through 20, and 22 through 27 [enacting sections 908(f)(2)(B), (f)(3), and (i)(4) and 942 of this title, repealing sections 945, 946, and 947 of this title, and amending this section and sections 902(6) and (13), 908(c)(21), (g), 909(g), 910(f), 914(c), (d), 918(b), 919(a), (b), and (g), 921, 922, 923(b), 928(e), 929, 930, 931, 932, 934, 935, 938, 939, 940, 944, and 948a of this title] shall be effective on the date of enactment of this Act [Sept. 28, 1984].

(2) The amendments made by sections 7(b), 7(c), 7(d), and 8(h) [enacting sections 907(j) and 908(j) and amending section 907(c) and (d) of this title] shall be effective 90 days after the date of enactment of this Act [Sept. 28, 1984].

(f) The amendments made by section 6(b) [striking out section 906(c) of this title, redesignating section 906(d) and (c), and as so redesignated, amending section 906(c) of this title] shall apply with respect to any injury, disability, or death after the date of enactment of this Act [Sept. 28, 1984].

(g) For the purpose of this section-

(1) in the case of an occupational disease which does not immediately result in a disability or death, an injury shall be deemed to arise on 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 disease; and

(2) the term 'disability' has the meaning given such term by section 2(10) of the Act [section 902(10) of this title] as amended by this Act.

90.2 SIMPLIFIED ENACTMENT DATE CHART

<u>Section 28 Subsection</u>	<u>Effective Date</u>	<u>Amendment Provisions</u>	<u>Amended LHWCA Sections</u>
28(a)	Claims filed after and pending on September 28, 1984	All except as otherwise provided below	Same
28(b)	Claims filed after and pending on December 27, 1984 (90 days after enactment)	7(a) 7(e) 8(f) 11(b) 11(c) 13	7(b) 7(k) 8(i)(1)-(3) 12(c) 12(d) 14
28(c)	Any injury after September 28, 1984	2(a) 3(a) 5 8(b)	2(3) 3(a)-(d) 5(b),(c), 2(21) 8(c)(20)
28(d)	Any death after September 28, 1984	6(a) 8(d) 9	6(b)(1) 8(d) 9
28(e)(1)	Date of enactment (September 28, 1984)	2(c) 8(c)(1) 8(e)(4) 8(e)(5) 8(g) 10(b) 15 16 17 18 19 20	2(13) 8(c)(21) 8(f)(2)(B) 8(f)(3) 8(i)(4) 10(f) 21 22 28(e) 30(a), (b) 31 32(a)(2)

<u>Section 28</u> <u>Subsection</u>	<u>Effective</u> <u>Date</u>	<u>Amendment</u> <u>Provisions</u>	<u>Amended</u> <u>LHWCA</u> <u>Sections</u>
		22	38
		23	42
		24	44
		25	45, 46, 47 (repealed)
		26	49
		27	2 (6), 18 (b), 39(a)
28(e)(2)	90 days after date of enactment (December 27, 1984)	7(b) 7(c) 7(d) 8(h)	7 (c) 7(d) 7(j) 8(j)
28(f)	Any injury, disability of death after September 28, 1984	6(b)	6(c), (d)

90.3

SECTION 28(a): PENDING CLAIM/RETROACTIVITY

A "**pending**" claim, within the meaning of Section 28(a) of Public Law Number 98-426, is any case which has not yet been finally resolved, and includes cases pending on appeal before the Board and the circuit courts on the date of enactment. Osmundsen v. Todd Pac. Shipyard, 755 F.2d 730, 17 BRBS 109, 111 (CRT) (**9th Cir.** 1985); Yalowchuk v. General Dynamics Corp., 17 BRBS 131 (1985).

The Amendments have been retroactively applied to cases pending on appeal under Section 28(a) in regard to the following issues:

(1) extended time limitations for occupational disease in Sections 12 and 13, Osmundsen, 755 F.2d 730, 17 BRBS 109 (CRT) (held, not unconstitutional to retroactively extend statute of limitations);

(2) new definition of date of injury for occupational disease in Section 10(i), Yalowchuk, 17 BRBS 131; Dolowich v. West Side Iron Works, 17 BRBS 197, 199 (1985); Pitts v. Bethlehem Steel Corp., 17 BRBS 166, 168 (1985) (Decision on Reconsideration);

(3) new filing and hearing loss measurement provisions of Section 8(c)(13), Gentile v. Maryland Shipbuilding & Dry Dock Co., 17 BRBS 191, 193 (1985); Hollie v. Bethlehem Steel Corp., 17 BRBS 117, 118 (1985); Reggiannini v. General Dynamics Corp., 17 BRBS 254, 256 (1985);

(4) the new post-retirement injury provisions of Sections 2(10), 8(c)(23), and 10(d), Kellis v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 109, 112 n.4 (1985); Woods v. Bethlehem Steel Corp., 17 BRBS 243, 245 (1985); and

(5) the new addition to Section 33(g). Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25, 28 (1986), appeal dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP, 826 F.2d 1011, 20 BRBS 27 (CRT) (**11th Cir.** 1987). See Shoemaker v. Schiavone & Sons, Inc., 20 BRBS 214, 217 n.2 (1988).

The foregoing application of subsection 28(a) is consistent with the general rule that a change in law while a case is on direct review be given effect. Louviere v. Marathon Oil Co., 755 F.2d 428, 17 BRBS 56, 58 (CRT) (**5th Cir.** 1985). See generally Bradley v. School Board of Richmond, 416 U.S. 696 (1974).

The 1984 Amendments apply to a motion for modification filed pursuant to Section 22 which was pending on the effective date of the amendments. McDonald v. Director, OWCP, 897 F.2d 1510, 23 BRBS 56 (CRT) (9th Cir. 1990), rev'g McDonald v. Todd Shipyards Corp., 21 BRBS 184 (1988).

90.4 SECTION 28(b): PENDING 90 DAYS AFTER ENACTMENT

The provisions enumerated in Section 28(b) of Public Law Number 98-426 apply to all cases pending (i.e., non-final) ninety days after enactment, December 27, 1984. In Smith v. Director, OWCP, 17 BRBS 89, 91 (1985), it was held that the provision repealing Section 14(j), which is enumerated in subsection 28(b), retroactively applies to cases pending on December 27, 1984. Accord Thompson v. Todd Pac. Shipyards Corp., 17 BRBS 246, 248 (1985).

The Board explicitly held that Section 8(i), as amended in 1984, is applicable in cases involving post-Amendment settlements. Fuller v. Matson Terminals, 24 BRBS 252, 255 n.4 (1991); Nordahl v. Oceanic Butler, Inc., 20 BRBS 18, 20 n.1 (1987). Section 12 and 13 issues raised in an appeal pending before the Board on the enactment date of the 1984 Amendments must be decided pursuant to the LHWCA as amended in 1984. Horton v. General Dynamics Corp., 20 BRBS 99 (1987), overruled in part by Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989).

Amended Section 8(i) applies to pending claims and allows administrative law judges to approve lump-sum settlement agreements. Downs v. Director, OWCP, 803 F.2d 193, 19 BRBS 36, 44-45 (CRT) (5th Cir. 1986), aff'g Downs v. Texas Star Shipping Co., Inc., 18 BRBS 37 (1986).

90.5 SECTION 28(c): POST-ENACTMENT INJURIES

The jurisdictional amendments to Section 2(3) enumerated in subsection 28(c) only apply to post-enactment injuries, and not to pending cases. Cefaratti v. Mike Fink, Inc., 17 BRBS 95, 98 (1985), aff'd mem. sub nom. Mike Fink, Inc. v. Benefits Review Bd., 785 F.2d 309 (6th Cir. 1986); Dorris v. California Cartage Co., 17 BRBS 218, 220 n.2 (1985), aff'd sub nom. Dorris v. Director, OWCP, 808 F.2d 1362, 19 BRBS 82 (CRT) (9th Cir. 1987). Cf. Wynn v. Newport News Shipbuilding & Drydock Co., 16 BRBS 31 (1983) (jurisdictional provisions of 1972 Amendments do not retroactively apply to cases of pre-amendment exposure). See also Bazemore v. Hardaway Constructors, Inc., 20 BRBS 23, 24 n.1 (1987); Sanders v. Alabama Dry Dock & Shipbuilding Co., 20 BRBS 104, 106 n.1 (1987).

Section 3(a) of the amended LHWCA is not applicable to an employee's death which occurred prior to September 28, 1984. Shippy v. Crowley Maritime Corp., 20 BRBS 55, 56 n.1 (1987).

Section 5(b) of the LHWCA as amended in 1984 does not apply in a case involving pre-amendment exposure to asbestos and a pre-amendment death from asbestos-related injuries. Eagle-Picher Indus., Inc. v. United States, 846 F.2d 888, 892 n.5 (3d Cir.), cert. denied, 488 U.S. 965 (1988).

90.6 SECTION 28(d): DEATH AFTER ENACTMENT

Section 6(b)(1) of the LHWCA, as amended in 1984, applies to all pending claims except for death benefits. Section 6(b)(1) applies only to death benefits claims where the employee died after the date of enactment. Nooner v. National Steel & Shipbuilding Co., 19 BRBS 43, 45-46 (1986).

The 1984 Amendments to Section 6 of the LHWCA have rendered the pre-1972 LHWCA's maximum compensation rate inapplicable in pending cases. MacLeod v. Bethlehem Steel Corp., 20 BRBS 234, 238 n.6 (1988); Nooner, 19 BRBS 43.

Section 9 of the LHWCA as amended is not applicable where the employee's death occurred before September 28, 1984. Mikell v. Savannah Shipyard Co., 24 BRBS 100, 103 n.1 (1990); Swasey v. Willamette Iron & Steel Co., 20 BRBS 52, 53 n.2 (1987). Where decedent dies of a non-work-related heart attack after the effective date of amended Section 9, no vested right to death benefits existed as of the date of enactment of amended Section 9. Close v. International Terminal Operations, 26 BRBS 21 (1992).

90.7 SECTION 28(e): DATE OF ENACTMENT; 90 DAYS AFTER ENACTMENT

The amendments enumerated in Public Law Number 98-426, subsection 28(e)(1) are effective "on the date of enactment," and those enumerated in subsection 28(e)(2) are effective "90 days after the date of enactment."

In Brady v. J. Young & Co., 17 BRBS 47, 52, motion for recon. denied, 18 BRBS 167 (1985), the Board held that new Section 8(i)(4) (precluding post-settlement Section 8(f) relief), which is enumerated in subsection 28(e)(1), does not retroactively apply in cases pending on appeal before the Board. The Board held that this new provision should only apply to settlements entered into after enactment. Brady, 18 BRBS at 170. The Board stated that the effective dates of the provisions within subsection 28(e) should be determined in light of relevant policy considerations and the general rule of retroactivity of Bradley v. School Board of Richmond, 416 U.S. 696 (1974). Brady, 18 BRBS at 170 n.5.

Subsection 28(e) has been described as **an exception to the general rule of subsection 28(a)** that the amendments apply to all pending cases. Lambert v. Atlantic & Gulf Stevedores, 17 BRBS 68, 70 (1985) (amendment to Section 22 precluding modification of settlements not applicable, but same result reached under 1972 LHWCA); Thompson v. McDonnell Douglas Corp., 17 BRBS 6, 8 n.1 (1984) (amendment to definition of wages in Section 2(13) does not apply; same result, however, reached under pre-amendment case law). See also Downs v. Director, OWCP, 19 BRBS at 44-45 (modification proceedings under Section 22 not applicable to Section 8(i) settlements).

In Brady, the Board stated that the language in Lambert and Thompson was overbroad insofar as they may have suggested that the provisions in subsection 28(e) do not generally apply to any pending cases at any level. Brady, 18 BRBS 171 n.5. The Board stated that although the relevant amendment was not retroactively applicable in cases pending on appeal, it did apply to post-enactment settlements in cases pending on the date of enactment. Id.

In Powell v. Nacirema Operating Co., Inc., 19 BRBS 124, 127 n.2 (1986), however, the Board concluded that provisions in subsection 28(e)(1) may apply to cases pending at the district director or administrative law judge level unless manifest injustice would result or there is statutory direction or legislative history to the contrary. Thus, Section 26(b), which amended the allowable fines under Section 49 of the LHWCA, may be applied to a case pending before an administrative law judge on the date of enactment of the 1984 Amendments.

In Verderane v. Jacksonville Shipyards, Inc., 772 F.2d 775, 17 BRBS 154 (CRT) (11th Cir. 1985), the court stated that new Section 8(f)(3), which is enumerated in 28(e)(1), "is inapplicable on this appeal because employer requested Section 8(f) relief before September 28, 1984, and only claims filed after this date are covered by the Amendment." Id. at 157 n.5.

The **District of Columbia Circuit** has held that the 1984 Amendments do not apply to claims arising under the 1928 D.C. Extension of the LHWCA as amended in 1982. Keener v.

Washington Metro. Area Transit Auth., 800 F.2d 1173 (**D.C. Cir.** 1986), cert. denied, 480 U.S. 918 (1987). **This ruling is contrary to earlier Department of Labor regulations stating that the 1984 Amendments apply to 1928 D.C. Act claims.** See 20 C.F.R. § 701.101(b); 51 Fed. Reg. 4270-73 (February 3, 1986) (commentary). The ruling is also inconsistent with earlier Board cases applying the 1984 Amendments to D.C. Act claims. Gardner v. Railco Multi Constr. Co.(Gardner I), 18 BRBS 264, 266 (1986), vacated by Gardner II, 19 BRBS 238 (1987); Pryor v. James McHugh Constr. Co., 18 BRBS 273, 275 (1986).

For a discussion of the legislative history of the 1928 D.C. Extension of the LHWCA, see Shea v. Director, OWCP, 929 F.2d 736, 24 BRBS 170 (CRT) (**D.C. Cir.** 1991).

In Kulick v. Continental Baking Corp., 19 BRBS 115 (1986), the Board followed Keener by not applying the 1984 Amendments to a D.C. workmen's compensation case. See also Higgins v. Hampshire Gardens Apartments, 19 BRBS 192 (1987).

The new provisions of Sections 10(i) and 10(d)(2)(B) should have been applied in the average weekly wage calculations pending before the administrative law judge on the date of the enactment of the 1984 Amendments. MacLeod v. Bethlehem Steel Corp., 26 BRBS at 236 n.2.

The Board vacated a Decision and Order based upon Aduddell v. Owens-Corning Fiberglass, 16 BRBS 131 (1984), which denied benefits to persons who were retired when their occupational disease became manifest, holding that the 1984 Amendments specifically overruled Auddell. The Board concluded that the survivor of a voluntary retiree whose occupational disease manifested itself [10(i)] more than one year after retirement, and who died from the disease, is entitled to Section 9 death benefits based on the national average weekly wage. Arganbright v. Maranship Corp., 18 BRBS 281, 283 (1986). See Bath Iron Works Corp. v. Director, OWCP, 506 U.S. 153, 26 BRBS 151 (CRT) (1993), aff'g 942 F.2d 811, 25 BRBS 30 (CRT) (**1st Cir.** 1991).

The 1984 Amendments, including the new audiogram requirements, 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, 231 (CRT) (**11th Cir.** 1991); Manders v. Alabama Dry Dock & Shipbuilding Corp., 23 BRBS 19, 21 (1989).

Where an employee involuntarily withdraws from the workforce due to an occupational disability, the post-retirement injury provisions of Sections 2(10), 8(c)(23) and 10(d)(2) do not apply. MacDonald v. Bethlehem Steel Corp., 18 BRBS 181, 184 (1986).

The amended Section 10(f) limitation provision applies **prospectively** to all adjustments to which a claimant is entitled beginning on October 1, 1984. Application of Section 28(e) amendments is to be decided on a **case-by-case basis**. Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233, 238 (1988), aff'd, 877 F.2d 1231, 22 BRBS 83 (CRT) (**5th Cir.** 1989), on reh'g, en banc, 895 F.2d 1033 (**5th Cir.** 1990). See also Bowen v. Director, OWCP, 912 F.2d 348, 24 BRBS 9, 12 n.3 (CRT) (**9th Cir.** 1990); Taddeo v. Bethlehem Steel Corp., 22 BRBS 52, 56 n.3 (1989).

Sections 33(f) and 33(g), as amended, are applicable in cases pending before administrative law judges on the enactment date of the 1984 Amendments. Sellman v. I.T.O. Corp. of Baltimore, 24 BRBS 11, 14 n.6 (1990); Armand v. American Marine Corp., 21 BRBS 305, 308 n.3 (1988); Chavez v. Todd Shipyards Corp., 21 BRBS 272, 275 n.1 (1988); Mobley v. Bethlehem Steel Corp., 20 BRBS 239, 241 n.5 (1988).

The notice requirement established by Section 33(g)(2) cannot be retroactively imposed on a settlement entered into prior to the effective date of the 1984 Amendments. Cretan v. Bethlehem Steel Corp., 24 BRBS 35, 38 n.1 (1990); Blake v. Bethlehem Steel Corp., 21 BRBS 49, 52 n.2 (1988).