

EFFECTIVE DATES OF 1984 AMENDMENTS

The 1984 Amendments to the Act, Pub. L. No. 98-426, 98 Stat. 1639, were enacted on September 28, 1984. The effective dates of the various provisions of the 1984 Amendments are detailed in Section 28 of the Amendments. 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.

Enactment Date Chart

| Section 28 Subsection | Effective Date | Amendment Section | Section of the Act Amended |
|------------------------------|---|--|--|
| (a) | Claims filed after and pending on September 28, 1984 | All except as otherwise provided | Same |
| (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 |
| (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) |
| (d) | Any death after September 28, 1984 | 6(a) 8(d) 9 | 6(b)(1) 8(d) 9 |
| (e)(1) | Date of enactment | 2(c) 8(c)(1) 8(e)(4) 8(e)(5) 8(g) 10(b) 15 16 17 18 19 | 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 |

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|--------|--|--|---|
| | | 20 22 23 24 25 26 27 | 32(a)(2) 38 42 44 45, 46, 47 (repealed) 49 2(6), 18(b), 39(a) |
| (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) |
| (f) | Any injury, disability or death after September 28, 1984 | 6(b) | 6(c),(d) |

Case Discussion

A “pending” claim within the meaning of Section 28(a) includes any case which has not yet been finally resolved, and includes cases pending on appeal before the Board and the courts of appeal on the date of enactment. *Osmundsen v. Todd Pac. Shipyard*, 755 F.2d 730, 17 BRBS 109(CRT) (9th Cir. 1985); *Yalowchuk v. Gen. 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* (it is not unconstitutional to retroactively extend statute of limitation); (2) new definition of date of injury for occupational disease in Section 10(i), *Yalowchuk*; *Dolowich v. West Side Iron Works*, 17 BRBS 197 (1985); *Pitts v. Bethlehem Steel Corp.*, 17 BRBS 166 (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 (1985); *Hollie v. Bethlehem Steel Corp.*, 17 BRBS 117 (1985); *Reggiannini v. Gen. Dynamics Corp.*, 17 BRBS 254 (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 (1985); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985); and (5) the new addition to Section 33(g). *Monette v. Chevron USA, Inc.*, 29 BRBS 112 (1995) (*en banc*) (Brown, J., concurring), *aff’g on recon.* 25 BRBS 267 (1992).

This application of Section 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(CRT) (5th Cir. 1985); *Alleman v. Bunge Corp.*, 756 F.2d 344, 17 BRBS

58(CRT) (5th Cir. 1984). See generally *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006 (1974).

The provisions enumerated in Section 28(b) apply to all cases pending (*i.e.*, non-final) ninety days after enactment, December 27, 1984. In *Smith v. Director, OWCP*, 17 BRBS 89 (1985), the Board retroactively applied the provision repealing Section 14(j) in a case pending on December 27, 1984. *Accord Thompson v. Todd Pac. Shipyards Corp.*, 17 BRBS 246 (1985).

The amendments to Section 2(3) regarding the Act's coverage are covered by subsection (c) and thus only apply to post-enactment injuries and not to pending cases. *Cefaratti v. Mike Fink, Inc.*, 17 BRBS 95 (1985), *aff'd mem.*, 785 F.2d 309 (6th Cir. 1986); *Dorris v. California Cartage Co.*, 17 BRBS 218 (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 & Dry Dock Co.*, 16 BRBS 31 (1983) (coverage provisions of 1972 Amendments do not retroactively apply to cases of pre-amendment occupational exposure). Thus, the amended version of Section 2(3) of the Act does not apply in cases involving an injury occurring prior to September 28, 1984. *Bazemore v. Hardaway Constructors, Inc.*, 20 BRBS 23 (1987). *Accord Williams v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 42 (1994), *vacated mem. on other grounds*, No. 94-1427 (4th Cir. Feb. 3, 1995); *Barnard v. Zapata Haynie Corp.*, 23 BRBS 267 (1990), *aff'd*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991); *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131 (1989) (amendment applicable to an injury occurring after September 28, 1984).

The amendments enumerated in subsection (e)(1) are effective "on the date of enactment," and those enumerated in subsection (e)(2) are effective "90 days after the date of enactment." In *Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *reconsideration denied*, 18 BRBS 167 (1985), the Board held that new Section 8(i)(4) (precluding post-settlement Section 8(f) relief), which is covered by subsection 8(e)(1), does not retroactively apply in cases pending on appeal before the Board. The Board held that this new provision applies only 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 Bd. of City of Richmond*, 416 U.S. 696, 94 S. Ct. 2006 (1974). *Brady*, 18 BRBS at 170, n. 5.

Subsection (e) has been described as an exception to the general rule of subsection (a) that the amendments apply to all pending cases. *Lambert v. Atl. & Gulf Stevedores*, 17 BRBS 68 (1985) (amendment to Section 22 precluding modification of settlements not applicable, but same result reached under 1972 Act); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984) (amendment to definition of wages in Section 2(13) does not apply; same result, however, is reached under pre-amendment case law). In *Brady*, the Board stated that

the language in *Lambert* and *Thompson* was overbroad insofar as those cases may have suggested that the provisions in subsection (e) do not generally apply to any cases pending at any level. In *Brady*, 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. Thus, while the amendments to statutory sections covered by Section 28(e)(1) do not generally apply to cases pending on appeal before the Board on the date of enactment of the 1984 Amendments, the amendments may apply to cases pending at the deputy commissioner or administrative law judge level at that time unless manifest injustice would result or there is statutory direction or legislative history to the contrary. Thus, Section 26(b) of the amendments, amending the allowable fines under Section 49 of the Act, may be applied to a case pending before the administrative law judge on the date of enactment. *Powell v. Nacirema Operating Co., Inc.*, 19 BRBS 124 (1986).

In *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 154(CRT) (11th Cir. 1985), the court held that new Section 8(f)(3), which is listed in Section 28(e)(1), was inapplicable as employer requested Section 8(f) relief before September 28, 1984, and only claims filed after this date are covered by the amended section.

The United States Court of Appeals for 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 Longshore Act. *Keener v. WMATA*, 800 F.2d 1173 (D.C. Cir.1986), *cert. denied*, 480 U.S. 918 (1987). The court recognized that its ruling was 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). Pursuant to the holding in *Keener*, the Board held that the 1984 Amendments do not apply to cases arising under the 1928 D.C. Workmen's Compensation Act. *Pryor v. James McHugh Constr. Co.*, 27 BRBS 47 (1993); *Gardner v. Railco Multi Constr. Co.*, 19 BRBS 238 (1987), *vacated on other grounds*, 902 F.2d 71, 23 BRBS 69 (CRT) (D.C. Cir. 1990), *decision after remand*, 27 BRBS 266 (1993); *Kulick v. Cont'l Baking Corp.*, 19 BRBS 115 (1986).

Since the 1984 Amendments do not apply to D.C. Act cases, reconsideration *en banc* pursuant to Section 21(b)(5) of the amended statute is not available in those cases. *Higgins v. Hampshire Gardens Apartments*, 19 BRBS 192 (1987). *See also* 20 C.F.R. §801.301(d).

Digests

Neither present nor retroactive application of the voluntary retiree provisions enacted by the 1984 Amendments violates the Due Process clause of the 5th Amendment of the United States Constitution. *Shaw v. Bath Iron Works Corp.*, 22 BRBS 73 (1989).

The Board held that a pending petition for modification alone is not a claim “pending” for purposes of application of the 1984 Amendments, reasoning that the claim must actually be reopened under Section 22, or else the claim must be considered to have been finally adjudicated once the original decision became final. Here, the modification petition was based on a change in law and thus, proper grounds for reopening the claim under Section 22 were not shown. The original Decision and Order became final in 1982, and the fact that this modification petition was filed prior to the 1984 Amendments did not make the claim “pending” within the meaning of the Amendments. *McDonald v. Todd Shipyards Corp.*, 21 BRBS 184 (1988), *rev’d sub nom. McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56(CRT) (9th Cir. 1990). In reversing this opinion, the Ninth Circuit concluded that where a Section 22 modification petition was pending on the effective date of the 1984 Amendments, the 1984 Amendments apply to that motion. The court thus remanded the case for recalculation of claimant’s benefits in accordance with the amended Act. *McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56(CRT) (9th Cir. 1990).

In a case involving an individual who was exposed to asbestos while working for the U.S. Navy, the court holds that Section 5(b) of the Act as amended in 1972 does not allow a manufacturer of asbestos to bring a contribution action against the U.S. in its capacity of vessel owner. The court noted that, in any event, Section 5(b) as amended in 1984 no longer permits an employee to sue his employer in its capacity of vessel owner. *Eagle-Pitcher Indus., Inc. v. U.S.*, 846 F.2d 888 (3d Cir. 1988), *cert. denied*, 488 U.S. 965 (1988).

Pursuant to the 1984 Amendments to Section 6 of the Act and Section 28(a) of the Amendments, the \$70 per week maximum limit on compensation contained in the pre-1972 Act is not applicable in pending cases. *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988); *Nooner v. Nat’l Steel & Shipbuilding Co.*, 19 BRBS 43, 44-45 (1986).

Amended Section 6(b)(1) applies to all pending claims except for death benefits claims. In death benefits cases, amended Section 6(b)(1) applies only to death benefit claims where the employee died after the date of enactment of the 1984 Amendments. *Nooner v. Nat’l Steel & Shipbuilding Co.*, 19 BRBS 43 (1986).

When the hearing was held in 1985, the administrative law judge had the authority to adjudicate the issue of whether claimant had unreasonably refused to undergo medical treatment under Section 7(d)(4), as the amended section became effective on December 27, 1984, pursuant to Section 28(e)(2) of the amendments. *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

Amended Section 8(i) applies to pending claims and allows administrative law judges to approve settlements. *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986), *aff’g Downs v. Texas Star Shipping Co. Inc.*, 18 BRBS 37 (1986). The court affirmed the Board’s holding that amended Section 22 prohibiting the modification of settlements does not apply to a pending claim, as that provision falls within Section

28(e)(1). Nonetheless, Section 22 modification was not permitted as modification was not available for Section 8(i) settlements even prior to the 1984 Amendments.

Section 8(i), as amended in 1984, applicability of which is governed by Section 28(b) of the Amendments, is applicable in cases involving post-amendment settlements. *Nordahl v. Oceanic Butler, Inc.*, 20 BRBS 18 (1987), *aff'd*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988).

The Board noted that Section 8(i) as amended in 1984 applies in a case involving settlement negotiations conducted subsequent to the effective date of the 1984 Amendments to the Act. *Fuller v. Matson Terminals*, 24 BRBS 252 (1991).

In a footnote, the Board notes that the amended version of Section 8(i) applies to claims filed after or pending on the 90th day after Sept. 28, 1984, and that the regulations implementing amended Section 8(i) were not promulgated until Jan. 1985. Thus, an alleged settlement submitted to the district director in Nov. 1984 could not have been evaluated under the new regulations. *Henson v. Arcwel Corp.*, 27 BRBS 212 (1993).

Section 9 as amended in 1984 is not applicable where the employee's death occurred prior to the effective date of the amendments, pursuant to Section 28(d) of the amendments. *Swasey v. Willamette Iron & Steel Co.*, 20 BRBS 52 (1987).

In a case where decedent died in 1986 due to causes unrelated to his 1979 work injury, the Board affirms the denial of death benefits, as the 1984 Amendments eliminated recovery for non-work-related deaths. *Close v. Int'l Terminal Operations*, 26 BRBS 21 (1992).

Where the case was pending before the administrative law judge when new Sections 10(i) and 10(d)(2)(B) became effective, these provisions should have been applied in the judge's average weekly wage calculation. *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988).

Section 10(f) as amended in 1984, limiting yearly adjustments to the lesser of the percentage increase in the national average weekly wage or five percent, applies prospectively to all adjustments to which a claimant is entitled beginning on October 1, 1984. Therefore, the administrative law judge erred in finding the amended provision inapplicable. Determinations regarding the applicability of amended provisions covered by Section 28(e) of the amendments must be done on a case-by-case basis. *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd on other grounds*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *vacated on other grounds*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990)(*en banc*).

Issues raised involving Sections 12 and 13 must be decided pursuant to the Act as amended in 1984 where the case was pending on appeal before the Board on the enactment date of the Amendments. *Horton v. Gen. Dynamics Corp.*, 20 BRBS 99 (1987).

Since Section 28(a) of the 1984 Amendments provides that the amendments to Sections 8(c)(13), 12, and 13 apply to claims pending on or filed after September 28, 1984, the Amendments were applicable to these claims for hearing loss filed in 1986. *Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989).

The statute clearly provides that the 1984 Amendments extending the statute of limitations for filing a hearing loss claim apply to claims filed after September 28, 1984 regardless of when the events underlying the claim occurred. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229(CRT) (11th Cir. 1991).

Although the Board has stated in cases covered by Section 28(e) of the Amendments that if manifest injustice would result from application of an intervening law to a pending claim, so as to deprive a party of a substantive right absent notice, the law should not be applied, this rule does not apply to those amendments which are expressly made applicable to pending claims. The plain language of Section 28(a) of the Amendments mandates that the amended Section 12(a) time limitation for occupational diseases apply to all pending claims. *Januszewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989).

Pursuant to Section 28(e)(1) of the 1984 Amendments, the amended definition of wages at Section 2(13) of the Act applies, since claimant's injury occurred after the date of enactment of the Amendments. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

Amended Section 33(f) and (g) applies in cases pending before administrative law judges on the effective date of the 1984 Amendments. *Pinell v. Patterson Serv.*, 22 BRBS 61 (1989); *Chavez v. Todd Shipyards Corp.*, 21 BRBS 272 (1988); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988).

While the 1984 Amendments to Section 33(g), which added Section 33(g)(2) to the Act, apply to pending claims, the Section 33(g)(2) notice requirement cannot be applied retroactively to settlements entered into prior to the enactment date of the Amendments. In any event, the notice requirement was satisfied as employer had notice of the settlements at the time of the hearing. *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified*, 22 BRBS 430 (1989); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In a case in which the claimant entered into a third-party settlement prior to the effective date of the 1984 Amendments, the Board held that the 1984 Amendments to Section 33(g) must be applied to the claim based upon the clear intent of Congress that the amendment to Section 33(g) is to be applied to pending claims. Moreover, the Supreme Court's

decision in *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), must be applied to this case, for the reasons stated in *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994). That claimant may have relied on the statute and case law in existence at the time of her settlement cannot alter the result given the law on retroactivity. *Monette v. Chevron USA, Inc.*, 29 BRBS 112 (1995) (*en banc*) (Brown, J., concurring), *aff'g on recon.* 25 BRBS 267 (1992).

Although claimant sustained an injury in 1977 and a jury verdict was rendered in the third-party claim in 1981, this case did not come before an administrative law judge until 1993. Because this case was pending either on or after the effective date of the 1984 Amendments, September 28, 1984, and because Congress specifically provided that the amendments shall be applicable to such claims, the Board agreed that the 1984 version of Section 33(g) is applicable to this case. *Pool v. General American Oil Co.*, 30 BRBS 183, 185 (1996) (Smith and Brown, JJ., dissenting on other grounds).