

progress reports on a quarterly basis to all reviewing IRB's and FDA in accordance with § 812.36(f).

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Dated: December 11, 1996.

William B. Schultz,

Deputy Commissioner for Policy.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2704

Implementation of Equal Access to Justice Act in Commission Proceedings

AGENCY: Federal Mine Safety and Health Review Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Mine Safety and Health Review Commission is proposing to revise its rules providing for the award of attorneys' fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, applicable to eligible individuals and entities who are parties to administrative proceedings before the Commission. The proposed revisions to the rules are in response to amendments to the EAJA, enacted pursuant to Public Law 104-121, 110 Stat. 862 (1996), and effective on March 29, 1996. The proposed rules authorize fee awards under a newly-defined standard—when the Secretary of Labor's demand is substantially in excess of the decision of the Commission and is unreasonable when compared to that decision. The proposed rules also expand the definition of a "party" eligible for an award under this new standard to include "a small entity" as defined by 5 U.S.C. 601. The maximum hourly rate for attorneys' fees in all EAJA cases before the Commission is increased to \$125. Finally, the Commission is revising its rules to provide that parties submit EAJA applications to the Chief Administrative Law Judge instead of the Chairman. The Commission invites public comments on these proposed rules.

DATES: Comments should be received by January 21, 1997.

ADDRESSES: Comments should be sent to Richard L. Baker, Executive Director, Federal Mine Safety and Health Review Commission, 1730 K Street, NW, 6th Floor, Washington, DC 20006. For the convenience of persons who will be reviewing the comments, it is requested

that commenters provide an original and three copies of their comments.

FOR FURTHER INFORMATION CONTACT:

Norman M. Gleichman, General Counsel, Office of the General Counsel, 1730 K Street, NW, 6th Floor, Washington, DC 20006, telephone 202-653-5610 (202-566-2673 for TDD Relay). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Commission's present rules, the EAJA applies to administrative adjudications, brought pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.*, in which an eligible party prevails over the Department of Labor's Mine Safety and Health Administration. 29 CFR 2704.100 and 2704.103. Prior to the enactment of Public Law 104-121, prevailing parties could receive awards if they met the EAJA's eligibility standards (which set ceilings on the net worth and number of employees) and if the government's position was not "substantially justified."

Public Law 104-121 creates an additional standard under which eligible parties can obtain fees in administrative adjudications. The EAJA amendments authorize an award when a government "demand" is both "substantially in excess of the decision of the adjudicative officer" and "unreasonable." *Id.* at 231(a). Under this standard, if the demand by the Secretary of Labor is substantially in excess of the judgment finally obtained by the Secretary and is unreasonable when compared with that judgment under the facts and circumstances of the case, the Commission shall award to the opposing party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. *Id.*

Public Law 104-121 also establishes a separate definition of a "party" for fee awards under the new standard. Parties that are eligible to apply for awards include "small entit[ies] as defined in section 601 [of title 5]." *Id.* at 231(b)(2). Title 5 U.S.C. 601(6) provides that "small entity" has "the same meaning as the term [] 'small business' . . ." In turn, a "small business" is defined at 5 U.S.C. 601(3) as a "small business concern" under section 3 of the Small Business Act (15 U.S.C. 632). Section 632(a) authorized the Small Business Administration (SBA) to establish standards to specify when a business concern is "small." The SBA has

recently issued updated size standards for various types of economic activity, categorized by the Standard Industrial Classification System (SIC). 13 CFR 121.105. In defining the standards for small businesses engaged in mining, the SBA regulations count either annual receipts or numbers of employees. The number of employees or annual receipts specified is the maximum allowed for a concern and its affiliates to be considered small. 13 CFR 121.201. The standards for the mining industry are as follows:

DIVISION B—MINING:	
MAJOR GROUP 10—METAL MINING.	500 employees.
MAJOR GROUP 12—COAL MINING.	500 employees.
MAJOR GROUP 14—MINING AND QUARRYING OF NON-METALLIC MINERALS, EXCEPT FUELS.	500 employees.

EXCEPT:	
1081 Metal Mining Services.	\$5 million.
1241 Coal Mining Services.	\$5 million.
1481 Nonmetallic Minerals Services, Except Fuels.	\$5 million.

13 CFR 121.201.

Finally, Public Law 104-121 increases the maximum fee award of an attorney or agent from \$75.00 to \$125.00 per hour. *Id.* at 231(b)(1).

II. Analysis of the Regulations

The present language of § 2704.100 providing for fee awards to prevailing parties when the Secretary's position is not substantially justified is unchanged. The Commission proposes to add new language to the rule to provide that an eligible party may receive an award if the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with that decision, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. For purposes of this part, a decision of the Commission includes not only a decision by the Commission but also a decision by an administrative law judge that becomes final by operation of law.

The present language of § 2704.102 is revised to specify that recovery under the prevailing party standard is available for any adversary adjudication commenced before the Commission after August 5, 1984. Proposed language provides that, where an applicant seeks an award based on a substantially excessive and unreasonable demand of

the Secretary, the adversary adjudication before the Commission must have commenced on or after March 29, 1996, the effective date of the EAJA amendments.

In § 2704.104(a) the Commission proposes to restate the reference to 5 U.S.C. 551(3), which defines "party" in the Administrative Procedure Act. The Commission proposes to add new language referring to the eligibility conditions specified in paragraphs (b) and (c).

Section 2704.104(b) states the eligibility requirements for an applicant seeking an award based on prevailing party status. The requirements in the present paragraph (b) are proposed in renumbered form with one exception; references to charitable or tax exempt organizations and units of local government have been deleted, because it is not apparent that such organizations have ever been involved in a Mine Act proceeding. Paragraph (c) states the standards for an applicant seeking an award based on a substantially excessive and unreasonable demand by the Secretary. Such an applicant must be a small entity as defined in 5 U.S.C. 601. To qualify as a small business under 5 U.S.C. 601(3), the applicant must meet the requirements for a small mining business concern as set forth by the SBA at 13 CFR 121.104, 121.106 and 121.201. Title 13 CFR 121.106 details the SBA's methodology of counting employees, which differs from the Commission's present rule for counting employees for purposes of determining eligibility of a prevailing party.

The Commission proposes that it not reiterate the specific SBA standards for ascertaining whether a mining operation is "small" because those standards are subject to revision periodically by the SBA. Instead, the Commission proposes to notify the mining community, by Federal Register publication, of changes in the SBA standards as they occur. The Commission has omitted any reference to other types of small entities contained in 5 U.S.C. 601, including "small organization," which pertains to not-for-profit enterprises, and "small governmental jurisdiction," 5 U.S.C. 601(4) and (5), because it is unlikely that any of these organizations will be involved in proceedings under the Mine Act.

The Commission proposes to redesignate § 2704.104(c) through (g) and amend paragraphs (c) and (f), in conformance with the EAJA amendments relating to eligibility, by adding language to the present rules. Under proposed paragraph (d), the annual receipts, number of employees

or net worth of the applicant, as applicable, shall be determined as of the date the underlying proceeding was initiated under the Mine Act. Under proposed paragraph (g), the annual receipts, numbers of employees or net worth, as applicable, of the applicant and its affiliates shall be aggregated to determine eligibility. The Commission proposes to leave unchanged, except for redesignating, current paragraphs (d), (e), and (g).

Section 2704.105(a) sets forth the standards for an applicant seeking an award based on prevailing party status and is unchanged except that it is amended to include the sentence regarding denial or reduction of an award because of unreasonable protraction in the proceedings or special circumstances that is presently in paragraph (b).

The proposed language in § 2704.105(b) tracks the language of Public Law 104–121 at section 231(a) and provides that, if the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision, under the facts and circumstances of the case, the Commission shall award to an eligible party applicant fees and expenses related to defending against the excessive demand. Nevertheless, an award may not be made if the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. Whether the applicant has unduly or unreasonably protracted the underlying proceeding may also be considered. The proposed language provides that the burden of proof is on the applicant to show that the demand of the Secretary is substantially excessive and unreasonable. The rule also defines "demand" by tracking language in the EAJA amendments, Public Law 104–121 at section 231(b)(5)(F). While the statutory language might suggest that the new standard of awards is limited to penalty cases, that issue is best left to resolution in individual case adjudication.

In conformity with the EAJA amendments, § 2704.106(b) is amended to provide that the maximum award for fees of an attorney or agent is \$125.00 per hour.

Section 2704.107(a) is amended to reflect that the highest award for fees of an attorney or agent is \$125.00 per hour. The term "agent" is added to the present rule to bring the rule into conformity with the statutory language.

The present language of § 2704.108 provides for awards only to prevailing parties in cases where the Secretary's

position is not substantially justified. The Commission proposes to amend the rule to add a reference to the new standard for recovery in the EAJA amendments set forth in § 2704.105(b). The rule provides that, if an applicant is entitled to an award under either standard in § 2704.105, the award shall be made by the Commission against the Department of Labor.

Proposed § 2704.201 designates the Chief Administrative Law Judge as the Commission official to whom EAJA applications are submitted, revising the present procedure requiring submission of applications to the Chairman. The Commission further proposes to amend present § 2704.201(a) and (b) by moving their major portions relating to the contents of an application by a prevailing party to § 2704.202. The remaining portions of the proposed rule set forth the information common to applications based on either prevailing party status or a substantially excessive and unreasonable demand by the Secretary and are a redesignation of major portions of present § 2704.201(a) to (f).

In § 2704.202(a) the Commission proposes to amend the present rule by adding the requirements presently in § 2704.201(a) for an EAJA application by a prevailing party. Present § 2704.202(b) is redesignated as § 2704.204.

Proposed § 2704.202(b) is primarily a redesignation of present § 2704.201(b) concerning the applicant's net-worth exhibit. Language from present § 2704.201(b) permitting a tax-exempt organization to omit a net-worth statement has not been retained because of the low likelihood that such an organization would ever be a party to a Commission proceeding.

Present § 2704.203 is redesignated as § 2704.205. Proposed § 2704.203(a) amends the present rule by adding the new standard for recovery. Proposed § 2704.203(b) provides that the application must show that the applicant is a small entity as defined in 5 U.S.C. 601(6). Paragraph (b) also refers to the SBA regulations at 13 CFR Part 121 and provides that the application shall include a statement of the applicant's annual receipts or number of employees, where the applicant seeks eligibility based on being a small business. Paragraph (b) requires a brief description of the type and purpose of the applicant's organization or business. Because the EAJA amendments rely on the SBA's definition of "small business concern," and because the SBA has defined small business concerns engaged in mining in terms of annual receipts or number of employees and has set forth its methodology for

calculating the annual receipts or number of employees (13 CFR 121.104 and 121.106), the Commission intends that parties be guided by those regulations in meeting the SBA's standards of annual receipts or number of employees to qualify as a "small business."

Present § 2704.204 is redesignated as § 2704.206. Proposed § 2704.204 is a redesignation of § 2704.202(b). In addition, the Commission proposes to modify the language in present § 2704.202(b) for regulating the public disclosure of financial information in the network and annual receipts exhibits. Present § 2704.202(b) only relates to the net-worth exhibit.

Proposed § 2704.205 is a redesignation of present § 2704.203.

Proposed § 2704.206 is a redesignation of § 2704.204. Paragraph (a) adds new language that an application may also be filed when a demand by the Secretary is substantially in excess of the decision finally obtained in the case and unreasonable. In addition, language has been added to provide for the filing of EAJA applications with the Commission 30 days after final disposition by a court in the event that an applicant wishes to file in light of the court's disposition. See *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202 (5th Cir. 1991). Section 2704.206(b) proposes language to include the new standard for recovery. Section 2704.206(c) is changed to delete an inadvertent reference to section 105(a) of the Mine Act, 30 U.S.C. 815(a), in the definition of final Commission dispositions in the present rule; in addition, references to Commission EAJA decisions in § 2704.307 and 2704.308 are deleted.

Proposed § 2704.305 eliminates "prevailing" from present § 2704.305 to reflect that an EAJA award is no longer limited to proceedings involving a prevailing party but includes those proceedings in which the Secretary has made a substantially excessive and unreasonable demand.

Because an EAJA award is no longer limited to a prevailing party, language has been added to § 2704.307 to provide for the issuance of written findings and conclusions covering whether the applicant has been subjected to a substantially excessive and unreasonable demand. Commission judges are instructed to make specific findings depending on whether the application was filed pursuant to § 2704.105 (a) or (b).

III. Matters of Regulatory Procedure

The Commission has determined that these rules are not subject to Office of

Management and Budget review under Executive Order 12866.

The Commission has determined under the Regulatory Flexibility Act (5 U.S.C. 601-612) that these rules, if adopted, would not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Statement and Analysis has not been prepared.

The Commission has determined that the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) does not apply because these rules do not contain any information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects in CFR Part 2704

Administrative practice and procedure, Equal access to justice.

For the reasons set out in the preamble, it is proposed that 29 CFR part 2704 be amended as follows:

PART 2704—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN COMMISSION PROCEEDINGS

1. The authority citation for part 2704 is revised to read as follows:

Authority: Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)); Pub. L. 99-80, 99 Stat. 183; Pub. L. 104-121, 110 Stat. 862.

Subpart A—General Provisions

2. Section 2704.100 is revised to read as follows:

§ 2704.100 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504, provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before this Commission. An eligible party may receive an award when it prevails over the Department of Labor, Mine Safety and Health Administration (MSHA), unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make an award unjust. In addition to the foregoing ground of recovery, an eligible party may receive an award if the demand of the Secretary is substantially in excess of the decision, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. The rules in this part describe the parties eligible for each type of awards. They also explain how to apply for awards, and the procedures and standards that this Commission will use to make the awards.

3. Section 2704.102 is revised to read as follows:

§ 2704.102 Applicability.

Section 2704.105(a) applies to adversary adjudications before the Commission pending or commenced on or after August 5, 1984. Section 2704.105(b) applies to adversary adjudications commenced on or after March 29, 1996.

4. Section 2704.104 is amended by revising paragraphs (b) through (e) and removing paragraphs (f) and (g) to read as follows:

§ 2704.104 Eligibility of applicants.

* * * * *

(b) For purposes of awards under § 2704.150(a) for prevailing parties:

(1) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis;

(2) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the administrative law judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(3) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business.

(4) The types of eligible applicants are as follows—

(i) An individual with a net worth of not more than \$2 million;

(ii) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and employs not more than 500 employees;

(iii) Any other partnership, corporation, association, or public or private organization with a net worth of not more than \$7 million and not more than 500 employees;

(c) For the purposes of awards under § 2704.105(b), eligible applicants are small entities as defined in 5 U.S.C. 601, subject to the annual-receipts and number-of-employees standards as set forth by the Small Business Administration at 30 CFR part 121;

(d) For the purpose of eligibility, the net worth, number of employees, or annual receipts of an applicant, as applicable, shall be determined as of the date the underlying proceeding was initiated under the Mine Act.

(e) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

5. Section 2704.105 is revised as follows:

§ 2704.105 Standards for awards.

(a) A prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Secretary was substantially justified. The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of proof that an award should not be made to a prevailing applicant because the Secretary's position was substantially justified is on the Secretary, who may avoid an award by showing that his position was reasonable in law and fact. An award will be reduced or denied if the applicant has unduly or unreasonably protracted the underlying proceeding or if special circumstances make the award unjust.

(b) If the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision, under the facts and circumstances of the case, the Commission shall award to an eligible applicant the fees and expenses related to defending against the excessive demand, unless the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The burden of proof that the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision is on the applicant. As used in this section,

“demand” means the express demand of the Secretary which led to the adversary adjudication, but does not include a recitation by the Secretary of the maximum statutory penalty—

- (1) In the administrative complaint, or
- (2) Elsewhere when accompanied by an express demand for a lesser amount.

6. Section 2704.106(b) is revised to read as follows:

§ 2704.106 Allowable fees and expenses.

* * * * *

(b) No award for the fee of an attorney or agent under this part may exceed \$125.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Secretary of Labor pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item if the attorney, agent or witness ordinarily charges clients separately for such expenses.

* * * * *

7. Section 2704.107(a) is revised to read as follows:

§ 2704.107 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Commission may adopt regulations providing that the fees of an attorney or agent may be awarded at a rate higher than \$125.00 per hour in some or all of the types of proceedings covered by this part.

* * * * *

8. Section 2704.108 is revised to read as follows:

§ 2704.108 Awards.

If an applicant is entitled to an award because it has met its burden of proof under § 2704.105 (a) or (b), the award shall be made by the Commission against the Department of Labor.

9. Subpart B is revised to read as follows:

Subpart B—Information Required From Applicants

Sec.

2704.201 Contents of application—in general.

2704.202 Contents of application—where the applicant has prevailed.

2704.203 Contents of application—where the Secretary's demand is substantially in excess of the judgment finally obtained and unreasonable.

2704.204 Confidential financial information.

2704.205 Documentation of fees and expenses.

2704.206 When an application may be filed.

Subpart B—Information Required From Applicants

§ 2704.201 Contents of application—in general.

(a) An application for an award of fees and expenses under the Act shall be made to the Chief Administrative Law Judge of the Commission at 1730 K Street NW, 6th Floor, Washington, DC 20006. The application shall identify the applicant and the underlying proceeding for which an award is sought.

(b) The application shall state the amount of fees and expenses for which an award is sought.

(c) The application may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(d) The application should be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

(e) Upon receipt of an application, the Chief Administrative Law Judge shall immediately assign it for disposition to the administrative law judge who presided over the underlying Mine Act proceeding.

§ 2704.202 Contents of application—where the applicant has prevailed.

(a) An application for an award under § 2704.105(a) shall show that the applicant has prevailed in a significant and discrete substantive portion of the underlying proceeding and identify the position of the Department of Labor in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application also shall include a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants including their affiliates, as described in § 2704.104(b)(2) of this part).

(c) Each applicant must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as described in § 2704.104(b)(2) of this part) when the underlying proceeding was initiated. The exhibit may be in any form convenient to the applicant that

provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The administrative law judge may require an applicant to file additional information to determine its eligibility for an award.

§ 2704.203 Contents of application—where the Secretary's demand is substantially in excess of the judgment finally obtained and unreasonable.

(a) An application for an award under § 2704.105(b) shall show that the Secretary's demand is both substantially in excess of the decision of the Commission and is unreasonable when compared with such decision.

(b) The application shall show that the applicant is a small entity as defined in 5 U.S.C. 601(6) and must conform with the standards of the Small Business Administration at 13 CFR 121.201 for mining entities. The application shall include a statement of the applicant's annual receipts or number of employees, as applicable, in conformance with the requirements of 13 CFR 121.104 and 121.106. The application shall describe briefly the type and purpose of its organization or business.

§ 2704.204 Confidential financial information.

Ordinarily, the net-worth and annual receipts exhibits will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of such exhibits and believes there are legal grounds for withholding the information from disclosure may submit that portion of the exhibit directly to the administrative law judge in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)–(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the Secretary of Labor against whom the applicant seeks an award, but need not be served on any other party to the proceeding. If the administrative law judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding.

Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the established procedures under the Freedom of Information Act (29 CFR part 2702).

§ 2704.205 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the underlying proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The administrative law judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 2704.206 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the underlying proceeding or in a significant and discrete substantive portion of that proceeding. An application may also be filed when a demand by the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision. In no case may an application be filed later than 30 days after the Commission's final disposition of the underlying proceeding, or 30 days after issuance of a court judgment this is final and nonappealable in any Commission adjudication that has been appealed pursuant to section 106 of the Mine Act, 30 U.S.C. 816.

(b) If review or reconsideration is sought or taken of a decision on the merits as to which an applicant has prevailed or has been subjected to a demand from the Secretary substantially in excess of the decision of the Commission and unreasonable when compared to that decision, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this part, final disposition before the Commission means the date on which a decision in the underlying proceeding on the merits becomes final under sections 105(d) and

113(d) of the Mine Act (30 U.S.C. 815(d), 823(d)).

Subpart C—Procedures for Considering Applications

10. Section 2704.305 is revised to read as follows:

§ 2704.305 Settlement.

If an applicant and counsel for the Secretary agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

11. Section 2704.307 is revised to read as follows:

§ 2704.307 Decision of administrative law judge.

The administrative law judge shall issue an initial decision on the application within 75 days after completion of proceedings on the application. In all decisions on applications, the administrative law judge shall include written findings and conclusions on the applicant's eligibility, an explanation of the reasons for any difference between the amount requested and the amount awarded. As to applications filed pursuant to § 2704.105(a), the administrative law judge shall also include findings on the applicant's status as a prevailing party and whether the position of the Secretary was substantially justified; if at issue, the judge shall also make findings whether the applicant unduly protracted or delayed the underlying proceeding or whether special circumstances make the award unjust. As to applications filed pursuant to § 2704.105(b), the administrative law judge shall include findings that the Secretary made a demand that is substantially in excess of the decision of the Commission and unreasonable when compared with that decision; if a issue, the judge shall also make findings whether the applicant has committed a willful violation of the law or otherwise acted in bad faith or whether special circumstances make the award unjust. The initial decision by the administrative law judge shall become final 40 days after its issuance unless review by the Commission is ordered under § 2704.308 of this part.

Issued this 6th day of December, 1996 at Washington, D.C.

Mary Lu Jordan,

Chairman, Federal Mine Safety and Health Review Commission.

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