

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 is on the applicant to establish that the Secretary's demand was substantially in excess of the Commission's decision; the Secretary may avoid an award by establishing that the demand was not unreasonable when compared to that decision. 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.

[63 FR 63176, Nov. 12, 1998]

**§ 2704.106 Allowable fees and expenses.**

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under this part may exceed \$125 per hour, except as provided in § 2704.107. 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.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the underlying proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case in the underlying proceeding.

[47 FR 10001, Mar. 9, 1982, as amended at 63 FR 63176, Nov. 12, 1998]

**§ 2704.107 Rulemaking on maximum rates for attorney's 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), attorney's fees may be awarded at a rate higher than \$125 per hour. Any such increase in the rate for attorney's fees will be made only upon a petition submitted by the applicant, pursuant to § 2704.201, and only if the administrative law judge determines, in his or her discretion, that it is justified. Any such adjustment in fees is subject to Commission review as specified in § 2704.308.