

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.

## § 2704.108

(b) Any person may file with the Commission a petition for rulemaking to increase the maximum rate for attorney fees. The petition should identify the rate the petitioner believes the Commission should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. The Commission will respond to the petition within 60 days after it is filed, by initiating an informal rulemaking proceeding, denying the petition, or taking other appropriate action.

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

### § 2704.108 Awards.

If an applicant is entitled to an award under § 2704.105(a) or (b), the award shall be made by the Commission against the Department of Labor.

[63 FR 53176, Nov. 12, 1998]

### § 2704.109 Delegations of authority.

The Commission retains authority to take final action on matters pertaining to the Equal Access to Justice Act in actions arising under the Mine Act. The Commission may, however, by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases to other subordinate officials or bodies.

## Subpart B—Information Required From Applicants

SOURCE: 63 FR 63176, Nov. 12, 1998, unless otherwise noted.

### § 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 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001. 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. The application may also include a request that attor-

## 29 CFR Ch. XXVII (7–1–06 Edition)

ney's fees be awarded at a rate higher than \$125 per hour because of an increase in the cost of living or other special factors.

(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.

[63 FR 63176, Nov. 12, 1998, as amended at 67 FR 60863, Sept. 27, 2002]

### § 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