FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2704

Implementation of Amendments to the Equal Access to Justice Act in Commission Proceedings

AGENCY: Federal Mine Safety and Health Review Commission.

ACTION: Final rule.

SUMMARY: The Federal Mine Safety and Health Review Commission is publishing final revisions to its rules providing for the award of attorney's 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 revisions to the rules are in response to amendments to the EAJA, enacted pursuant to Pub. L. 104–121, 110 Stat. 862 (1996), and effective on March 29, 1996. The 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 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 attorney's fees in all EAJA cases before the Commission is increased to $125.

In addition to the changes in the rules mandated by the EAJA amendments, the Commission is revising other EAJA rules in light of its experience under the present rules and in light of comments submitted during the comment period for the proposed rules. The procedure under the rules for increasing the maximum hourly rate for fees is modified to allow an applicant to request such an increase from an administrative law judge, subject to Commission review. The Commission is revising its rules to provide that parties submit EAJA applications directly to the Chief Administrative Law Judge instead of to the Chairman. Finally, the requirement in the present rules requiring Commission approval of the settlement of an EAJA claim that is resolved prior to the filing of an application is deleted, and the rule is modified to provide for notification of the Commission in the event that an EAJA claim is settled after an application is filed with the Commission.

DATES: Effective December 14, 1998.

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 Pub. L. 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.''

Pub. L. 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 amount finally obtained by the Secretary and is unreasonable when compared with that amount 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 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.*

Pub. L. 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) authorizes 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. 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.

Pub. L. 104–121 also increases the maximum fee award of an attorney or agent from $75 to $125 per hour. *Id.* at 231(b)(1).

In addition to the changes mandated by the EAJA amendments, the Commission has the benefit of experience under its current rules and the comments of the Secretary and other parties who have practiced before it and has determined to revise its rules to handle EAJA applications in a more efficient manner. Accordingly, the Commission is modifying its rules to provide that applicants can file EAJA applications directly with the Chief Administrative Law Judge, that parties are not required to seek Commission approval for settlement of EAJA claims, and that applicants may seek an increase in the maximum rate for attorney's fees by filing a petition with the administrative law judge who is assigned to the EAJA application.

II. Analysis of the Regulations

The Commission published a proposed rule on December 19, 1996 (61 FR 66961). The Commission proposed to add language to the present language of § 2704.100 to provide that an eligible party may receive an award if a demand is made by the Secretary that 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, as required by the EAJA amendments. 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 Commission did not receive any comments to its proposed rule. Accordingly, the Commission is publishing the rule, as proposed, with the exception of an editorial change in the language specifying the new grounds for recovery of fees and expenses in order to fully conform to the language of the statute.

The Commission proposed to change the present language of § 2704.102 to provide for a new subpart to specify that, where an applicant seeks an award based on the new standard for recovery in the EAJA amendments—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 amendments. There were no comments to the proposed rule, and the final rule is published as proposed.

In § 2704.104, as proposed, the Commission has added language to its present rule at paragraph (c) to refer to the new eligibility requirements in the EAJA amendments for the new standard of recovery. Paragraphs (c) through (g) in the present rule are redesignated in light of additions to the section.

The bulk of the comments submitted in reference to proposed § 2704.104 concerned the aggregation of net worth and number of employees of affiliated organizations, subjects currently addressed in the present paragraph (f),which will be redesignated as § 2704.104(b)(2). Several of the comments suggested that the Commission modify its present rule regarding the aggregation of affiliated companies. Another commenter asserts that majority ownership is not always the correct standard for determining control. However, the Commission's present approach to affiliated companies in its rules was based on the Model Rules, promulgated by the Administrative Conference of the United States (''ACUS''). Under the 1996 EAJA amendments, Congress adopted the definition of a ''small business concern'' of the SBA in the new class of claims eligible for relief, which is similar to the present approach in the Commission's rules in addressing affiliated companies. Accordingly, the Commission is not persuaded that its approach to aggregated companies that are prevailing parties should be changed. Further, the Commission believes that it has the flexibility to look at considerations other than majority ownership under its present rules.

The Commission proposed to delete any reference to a ''unit of local government'' in § 2704.104, which specifies those prevailing parties that are eligible for EAJA awards, because of the unlikelihood that they would be involved in Commission proceedings. However, one commenter pointed out a prior Commission proceeding involving such an entity. Accordingly, the reference to units of local government has been retained in § 2704.104(b)(4)(iii). Under the new EAJA grounds for recovery—an excessive and unreasonable demand by the Secretary—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. No commenter objected to the Commission's incorporation by reference, at § 2704.104(c), of the SBA's specification of annual receipts or number of employees that are specified at 13 CFR part 121.

As set forth in the proposed rules, § 2704.105(a) specifies the standard for an award based on prevailing party status and is unchanged except that it is revised 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).

Section 2704.105(b) tracks the language of Pub. L. 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 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.

In the proposed § 2704.105(b), it was specified that the burden of proof is on the applicant to show that the demand of the Secretary is substantially excessive and unreasonable. In response to the proposed rule, two commenters argued that it was at odds with EAJA to place on the applicant the burden of showing that a demand of the Secretary was excessive and unreasonable. Upon further consideration, the Commission has concluded that the burden of proof of showing the reasonableness of Secretary's demand is best borne by the Secretary, because she is in the best position to plead and prove the facts and circumstances leading to the formulation of her demand. As one of the commenters suggested, the showing of reasonableness of the Secretary's demand is analogous to the Secretary's burden of proving substantial justification. However, as stated in the proposed rules, the burden is on the applicant to establish that the Secretary's demand was excessive. Unlike reasonableness of the Secretary's demand, this threshold determination is based on objective facts ascertainable to the applicant.

Section 2704.105(b) defines ''demand'' by tracking language in the EAJA amendments, Pub. L. 104–121 at § 231(b)(5)(F).

In conformity with the EAJA amendments, the Commission proposed to amend § 2704.106(b) to provide that the maximum award for fees of an attorney or agent is $125 per hour. No comments were received in response to the proposed rule. An additional reference has been included in the final § 2704.106(b) to the revised procedure in § 2704.107(a), governing increases to the maximum rate.

As proposed, § 2704.107(a) is amended to reflect that the highest award for attorney's fees is $125 per hour. A number of commenters suggested that the Commission further amend its present procedure to authorize the administrative law judge assigned to an EAJA application to grant increases in the $125 per hour rate for fees in light of increases in the cost of living or other ''special factors.'' The Commission has concluded that delegating to its judges the authority to authorize increases in the level of fees is a more efficient and expeditious way of implementing such increases. Further, authorization of higher fees because of ''special circumstances'' is,

by necessity, a matter determined by the unique facts and circumstances in an individual case. Therefore, the Commission has revised § 2704.107(a) to provide that requests for increases in fees are submitted to the administrative law judge assigned to the matter, subject to Commission review as specified in § 2704.308.

Section 2704.108 presently provides for awards to prevailing parties in cases where the Secretary's position is not substantially justified, the basis for recovery specified in § 2705.105(a). As proposed, the rule is amended to refer to the new basis for recovery in § 2704.105(b), which specifies that recovery under EAJA also includes an excessive and unreasonable demand by the Secretary. 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. At the suggestion of one commenter, a reference in the rule that the applicant must meet its burden of proof under § 2704.105 was deleted as unnecessary.

As proposed, § 2704.201 designates the Chief Administrative Law Judge as the Commission official to whom EAJA applications are submitted, revising the present procedure that requires submission of applications to the Chairman. The rule has been revised substantially to limit specification of the contents of an EAJA application to those matters common to all applications, whether based on prevailing party status or a substantially excessive and unreasonable demand by the Secretary. In addition to the revisions in the proposed rule, the final rule contains a new reference to the filing of a request for an increase in fees with the application, as provided for in § 2704.107.

Section 2704.202 specifies the contents of an EAJA application by a prevailing party, formerly covered in § 2704.201(a) and (b). 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 EAJA proceeding.

Present § 2704.203 is redesignated as § 2704.205. Revised § 2704.203(a) specifies the new standard for recovery—whether the Secretary's demand was substantially in excess of the decision of the Commission and unreasonable. The subsection has also been revised, consistent with the changes to § 2704.105(b), to specify that application shall show that the Secretary's demand is excessive; further, the application shall allege the Secretary's demand that is deemed to be unreasonable. Revised § 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) and provides that the application shall include a statement of the applicant's annual receipts or number of employees, as appropriate, where the applicant seeks eligibility based on being a small business. Section 2704.203(b) also 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. The new § 2704.204 is a redesignation of § 2704.202(b). The Commission has revised the language of the rule to regulate the public disclosure of financial information in the annual receipts exhibits under the new EAJA standard for recovery, in addition to the present coverage of net worth exhibits.

Section 2704.205 is a redesignation of present § 2704.203. The Commission did not propose to revise the content of the rule. However, one commenter suggested several modifications to the rule. It was recommended that the rule specify that the applicant file with its application a statement that it actually paid the fees to preclude an application when a mine operator or other ineligible party has paid the fees. The commenter further requested that an applicant be required to segregate out fees and expenses related to that application when there are multiple positions and parties. We agree with the commenter's concern that there must be an adequate segregation of claims and fees when there are multiple claims and issues present. However, we believe that the rules adequately address the problem. See §§ 2704.105(a), (b), 2704.202(a), and 2704.203(a). We also conclude that § 2704.205, as presently drafted, is adequate to ensure that the applicant has actually paid the expenses and fees claimed. (''The administrative law judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.''). See also § 2704.104(e) (barring recovery of fees and expenses by an applicant who appears in a Commission EAJA proceeding on behalf of an entity that is ineligible). Accordingly, we have not adopted the suggested revisions.

Section 2704.206 is a redesignation of present § 2704.204. As proposed, paragraph (a) adds new language to provide for an application, as required by the EAJA amendments, when a demand by the Secretary is substantially in excess of the decision 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 1202,1206–07 (5th Cir. 1991). Cases that are remanded back to the Commission by the court of appeals, in which an applicant then becomes a prevailing party, are governed by the rule that an application must be filed no later than 30 days after the Commission's final disposition of the underlying proceeding.

Section 2704.206(b), which specifies that an application for fees is stayed in the event that review or reconsideration of the merits decision is sought, adds language to include the new standard for recovery. Section 2704.206(c) is revised 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 decisions in §§ 2704.307 and 2704.308 are deleted because those provisions pertain to decisions on EAJA applications, rather than decisions on the merits.

The Commission is revising § 2704.305 to eliminate the reference to ''prevailing'' party status because 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. In addition, the Commission proposed to eliminate a portion of the present rule requiring Commission approval of some, but not all, settlement agreements that resolve EAJA claims. In response to the proposed rule, one commenter noted that no provision in the Mine Act or EAJA requires Commission approval of such settlements. We agree. Accordingly, the Commission is revising the present rule to require only that parties notify the Commission if a case settles, after an EAJA application is filed, in order that the Commission can properly maintain its docket.

Because under the EAJA amendments, an EAJA award is no longer limited to

a prevailing party, the Commission proposed adding language to § 2704.307 to provide for the issuance of written findings and conclusions addressing whether the applicant has been subjected to a substantially excessive and unreasonable demand. The proposed rule further delineated between the specific findings depending on whether the application was filed pursuant to § 2704.105(a) (prevailing party) or (b) (excessive and unreasonable demand). The Commission received numerous comments to this rule and § 2704.308, which governs Commission review of EAJA decisions issued by its judges. The comments addressed none of the proposed changes but rather addressed the provisions in §§ 2704.307 and 2704.308, which reference Commission review of administrative law judge EAJA decisions. The commenters asserted that there is no provision for administrative review of decisions adverse to the government in EAJA or its amendments, nor was there mention of such review in its legislative history. Further, in the view of one commenter, such administrative review would have a ''chilling effect'' on the willingness of small businesses to challenge unreasonable actions of MSHA.

The Commission has fully addressed this issue in *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, (Sept. 1998). As noted in that decision, provisions in EAJA and its legislative history support such administrative appellate review. Further, as we noted, such administrative review ensures a uniform body of caselaw in this area. None of the comments persuade us to change our view that the Commission should have the same ability to review judges' decisions on EAJA applications that it has with regard to judges' decisions under the Mine Act.

Finally, the Commission is revising § 2704.308(c) by eliminating the last two sentences of the present rule. The matter of when a Commission order can be appealed is beyond the scope of the Commission's rules and addressed by EAJA, 5 U.S.C. 504(c)(2), and federal rules of procedure. The finality of an unreviewed decision of an administrative law judge is addressed in § 2704.307.

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 29 CFR Part 2704

Administrative practice and procedure, Equal access to justice.

For the reasons set out in the preamble, 29 CFR part 2704 is 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: (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 of the Commission and unreasonable, 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 award. 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 § 2704.105(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 interests.

(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, unit of local government, 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 13 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 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.

6. Section 2704.106 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 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.

* * * * *

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

§ 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.

* * * * *

8. Section 2704.108 is revised to read as follows:

§ 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.

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. The application may also include a request that attorney'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.

§ 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 substantially in excess of the decision of the Commission; the application shall further allege that the Secretary's demand is unreasonable when compared with the Commission's decision.

(b) The application shall show that the applicant is a small entity as defined in 5 U.S.C. 601(6), and the application must conform to 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 that 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.

In the event that counsel for the Secretary and an applicant agree to settle an EAJA claim after an application has been filed with the Commission, the applicant shall timely notify the Commission of the settlement and request dismissal of the application.

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, and 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 on 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 on whether the Secretary made a demand that is substantially in excess of the decision of the Commission and unreasonable when compared with that decision; if at issue, the judge shall also make findings on 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. Under either paragraph, the decision shall include, if at issue, detailed findings and conclusions on whether an increase in the cost of living or any other special factor justifies a higher fee than the $125 per hour fee set forth in

the statute. 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.

12. Section 2704.308(c) is revised to read as follows:

§ 2704.308 Commission review.

* * * * *

(c) If review of the initial decision of the administrative law judge is granted by the Commission, the Commission shall, after allowing opportunity for presentation of views by opposing parties, review the case and issue its own order affirming, modifying or vacating in whole or in part the initial decision or directing other appropriate relief.

Issued this 30th day of October, 1998 at Washington, D.C.

Mary Lu Jordan,

Chairman, Federal Mine Safety and Health Review Commission.

[FR Doc. 98–29680 Filed 11–10–98; 8:45 am]

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PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4011 and 4022

Disclosure to Participants; Benefits Payable in Terminated Single-Employer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This rule amends the appendix to the Pension Benefit Guaranty Corporation's regulation on Benefits Payable in Terminated Single-Employer Plans by adding the maximum guaranteeable pension benefit that may be paid by the PBGC with respect to a plan participant in a single-employer pension plan that terminates in 1999. This rule also amends Appendix B to the PBGC's regulation on Disclosure to Participants by adding information on 1999 maximum guaranteed benefit amounts. The amendment is necessary because the maximum guarantee amount changes each year, based on changes in the contribution and benefit base under section 230 of the Social Security Act. The effect of the amendment is to advise plan participants and beneficiaries of the increased maximum guarantee amount for 1999.

EFFECTIVE DATE: January 1, 1999.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026; 202–326–4024. (For TTY/TDD users, call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: Section 4022(b) of the Employee Retirement Income Security Act of 1974 provides for certain limitations on benefits guaranteed by the PBGC in terminating single-employer pension plans covered under Title IV of ERISA. One of the limitations, set forth in section 4022(b)(3)(B), is a dollar ceiling on the amount of the monthly benefit that may be paid to a plan participant (in the form of a life annuity beginning at age 65) by the PBGC. The ceiling is equal to ''$750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 230 of the Social Security Act) in effect at the time the plan terminates and the denominator of which is such contribution and benefit base in effect in calendar year 1974 [$13,200].'' This formula is also set forth in § 4022.22(b) of the PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR Part 4022). The appendix to Part 4022 lists, for each year beginning with 1974, the maximum guaranteeable benefit payable by the PBGC to participants in single-employer plans that have terminated in that year.

Section 230(d) of the Social Security Act (42 U.S.C. 430(d)) provides special rules for determining the contribution and benefit base for purposes of ERISA section 4022(b)(3)(B). Each year the Social Security Administration determines, and notifies the PBGC of, the contribution and benefit base to be used by the PBGC under these provisions, and the PBGC publishes an amendment to the appendix to Part 4022 to add the guarantee limit for the coming year.

The PBGC has been notified by the Social Security Administration that, under section 230 of the Social Security Act, $53,700 is the contribution and benefit base that is to be used to calculate the PBGC maximum guaranteeable benefit for 1999. Accordingly, the formula under section 4022(b)(3)(B) of ERISA and 29 CFR § 4022.22(b) is: $750 multiplied by $53,700/$13,200. Thus, the maximum monthly benefit guaranteeable by the PBGC in 1999 is $3,051.14 per month in the form of a life annuity beginning at age 65. This amendment updates the appendix to Part 4022 to add this maximum guaranteeable amount for plans that terminate in 1999. (If a benefit is payable in a different form or begins at a different age, the maximum guaranteeable amount is the actuarial equivalent of $3,051.14 per month.)

Section 4011 of ERISA requires plan administrators of certain underfunded plans to provide notice to plan participants and beneficiaries of the plan's funding status and the limits of the PBGC's guarantee. The PBGC's regulation on Disclosure to Participants (29 CFR Part 4011) implements the statutory notice requirement. This rule amends Appendix B to the regulation on Disclosure to Participants by adding information on 1999 maximum guaranteed benefit amounts. Plan administrators may, subject to the requirements of that regulation, include this information in participant notices.

Because the maximum guaranteeable benefit is determined according to the formula in section 4022(b)(3)(B) of ERISA, and these amendments make no change in its method of calculation but simply list 1999 maximum guaranteeable benefit amounts for the information of the public, general notice of proposed rulemaking is not required.

The PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this regulation, the Regulatory Flexibility Act of 1980 does not apply (5 U.S.C. 601(2)).

List of Subjects

29 CFR Part 4011

Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4022

Pension insurance, Pensions, Reporting and recordkeeping requirements.

In consideration of the foregoing, 29 CFR parts 4011 and 4022 are amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

. The authority citation for Part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

2. The appendix to part 4022 is amended by adding a new entry to the table to read as follows. The introductory text is reproduced for the convenience of the reader and remains unchanged.