

**PART 44—RULES OF PRACTICE FOR PETITIONS FOR MODIFICATION OF MANDATORY SAFETY STANDARDS**

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**Subpart A—General**

**§ 44.1 Scope and construction.**

(a) The procedures and rules of practice set forth in this part shall govern petitions for modification of mandatory safety standards filed under section 101(c) of the Act.

(b) These rules shall be liberally construed to carry out the purpose of the Act by assuring adequate protection of miners and to secure just and prompt determination of all proceedings consistent with adequate consideration of the issues involved.

[43 FR 29518, July 7, 1978, as amended at 55 FR 53440, Dec. 28, 1990]

**§ 44.2 Definitions.**

As used in this part, unless the context clearly requires otherwise, the term—

(a) *Act* means the Federal Mine Safety and Health Act of 1977, Pub. L. 95-173, as amended by Pub. L. 95-164.

(b) *Secretary, operator, agent, person, miner, and coal or other mine*, have the meanings set forth in section 3 of the act.

(c) *Assistant Secretary* means the Assistant Secretary of Labor for Mine Safety and Health.

(d) *Administrative law judge* means an administrative law judge of the Department of Labor appointed under section 3105 of title 5 of the United States Code.

(e) *Representative of miners* means a person or organization designated by two or more miners to act as their representative for purposes of the act and who is in compliance with 30 CFR part 40.

[43 FR 29518, July 7, 1978, as amended at 55 FR 53440, Dec. 28, 1990]

**§ 44.3 Parties.**

Parties to proceedings under this part shall include the Mine Safety and Health Administration, the operator of the mine, and any representative of the miners in the affected mine. Any other

person claiming a right of participation as an interested party in a proceeding may become a party upon application to the Assistant Secretary and the granting of such application. After referral of a petition to the Chief Administrative Law Judge, all applications for status as a party shall be made to the Chief Administrative Law Judge for his disposition.

**§ 44.4 Standard of evaluation of petitions; effect of petitions granted.**

(a) A petition for modification of application of a mandatory safety standard may be granted upon a determination that—

(1) An alternative method of achieving the result of the standard exists that will at all times guarantee no less than the same measure of protection afforded by the standard, or

(2) Application of the standard will result in a diminution of safety to the miners.

(b) Except as may be provided in § 44.16 for relief to give effect to a proposed decision and order, a decision of an Administrator or an administrative law judge granting or denying a petition for modification shall not be effective until time for appeal has expired under § 44.14 or § 44.33, as appropriate.

(c) All petitions for modification granted pursuant to this part shall have only future effect: *Provided*, That the granting of the modification under this part shall be considered as a factor in the resolution of any enforcement action previously initiated for claimed violation of the subsequently modified mandatory safety standard. Orders granting petitions for modification may contain special terms and conditions to assure adequate protection to miners. The modification, together with any conditions, shall have the same effect as a mandatory safety standard.

[43 FR 29518, July 7, 1978, as amended at 55 FR 53440, Dec. 28, 1990]

**§ 44.5 Notice of a granted petition for modification.**

(a) Every final action granting a petition for modification under this part shall be published in the FEDERAL REGISTER. Every such final action published shall specify the statutory

grounds upon which the modification is based and a summary of the facts which warranted the modification.

(b) Every final action or a summary thereof granting a petition for modification under this part shall be posted by the operator on the mine bulletin board at the affected mine and shall remain posted as long as the modification is effective. If a summary of the final action is posted on the mine bulletin board, a copy of the full decision shall be kept at the affected mine office and made available to the miners.

**§ 44.6 Service.**

(a) Copies of all documents filed in any proceeding described in this part and copies of all notices pertinent to such proceeding shall be served by the filing party on all other persons made parties to the proceeding under § 44.3. If a request for hearing has been filed by any party, a copy of all subsequent documents filed shall be served upon the Mine Safety and Health Administration through its representative, the Office of the Solicitor, Department of Labor.

(b) All documents filed subsequent to a petition for modification may be served personally or by first class mail to the last known address of the party. Service may also be completed by telecopier or other electronic means.

(c) Whenever a party is represented by an attorney who has signed any document filed on behalf of such party or otherwise entered an appearance on behalf of such party, service thereafter shall be made upon the attorney.

(d) Any party filing a petition for modification under these rules shall file proof of service in the form of a return receipt where service is by registered or certified mail or an acknowledgment by the party served or a verified return where service is made personally. A certificate of service shall accompany all other documents filed by a party under these rules.

(e) Service by mail shall be complete upon mailing. Service by telecopier or other electronic means shall be complete upon receipt.

(f) Whenever a party has the right to do some act within a prescribed period after the service of a document or other material upon the party and the

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document or other material is served upon the party by mail, 5 days shall be added to the prescribed period: *Provided*, that specific provisions may, for good cause, be made otherwise by an order of an administrative law judge or the Assistant Secretary in a particular proceeding pending before that person.

[43 FR 29518, July 7, 1978, as amended at 55 FR 53440, Dec. 28, 1990]

#### § 44.7 Filing.

For purposes of this part, a petition, request for hearing, notice of appeal, or other document shall be considered to be filed when received, or when mailed by certified mail, return receipt requested. Such documents may be filed by telecopier or other electronic means.

[55 FR 53440, Dec. 28, 1990]

#### § 44.8 Ex parte communication.

There shall be no ex parte communication with respect to the merits of any case not concluded between the Assistant Secretary or the administrative law judge, including any employee or agent of the Assistant Secretary or of the administrative law judge, and any of the parties, intervenors, representatives, or other interested parties.

[55 FR 53440, Dec. 28, 1990]

#### § 44.9 Posting of petition.

An operator of a mine for which there is no representative of miners shall post a copy of each petition concerning the mine on the mine bulletin board and shall maintain the posting until a ruling on the petition becomes final.

### Subpart B—Initial Procedure for Petitions for Modification

#### § 44.10 Filing of petition; service.

A petition for modification of the application of a mandatory safety standard under section 101(c) of the Act may be filed only by the operator of the affected mine or any representative of the miners at such mine. All petitions must be in writing and must be filed with the Director, Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, 1100

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Wilson Blvd., Room 2352, Arlington, Virginia 22209–3939. If the petition is filed by a mine operator, a copy of the petition shall be served by the mine operator upon a representative of miners at the affected mine. If the petition is filed by a representative of the miners, a copy of the petition shall be served by the representative of miners upon the mine operator. Service shall be accomplished personally or by registered or certified mail, return receipt requested.

[55 FR 53440, Dec. 28, 1990, as amended at 67 FR 38384, June 4, 2002]

#### § 44.11 Contents of petition.

(a) A petition for modification filed pursuant to §44.10 shall contain:

(1) The name and address of the petitioner.

(2) The mailing address and mine identification number of the mine or mines affected.

(3) The mandatory safety standard to which the petition is directed.

(4) A concise statement of the modification requested, and whether the petitioner proposes to establish an alternate method in lieu of the mandatory safety standard or alleges that application of the standard will result in diminution of safety to the miners affected or requests relief based on both grounds.

(5) A detailed statement of the facts the petitioner would show to establish the grounds upon which it is claimed a modification is warranted.

(6) Identification of any representative of the miners at the affected mine, if the petitioner is a mine operator.

(b) A petition for modification shall not include a request for modification of the application of more than one mandatory safety standard. A petition for modification shall not request relief for more than one operator. However, an operator may file a petition for modification pertaining to more than one mine where it can be shown that identical issues of law and fact exist as to the petition for each mine.

#### § 44.12 Procedure for public notice of petition received.

(a) Within 15 days from the filing of a petition for modification, the Mine Safety and Health Administration will

give notice of the petition to each known representative of miners or the operator of the affected mine, as appropriate, and shall publish notice of the petition in the FEDERAL REGISTER.

(b) The FEDERAL REGISTER notice shall contain a statement that the petition has been filed, identify the petitioner and the mine or mines to which the petition relates, cite the mandatory safety standard for which modification is sought, and describe the requested relief.

(c) All such notices shall advise interested parties that they may, within 30 days from the date of publication in the FEDERAL REGISTER, in writing, comment upon or provide information relative to the proposed modification.

[43 FR 29518, July 7, 1978, as amended at 55 FR 53440, Dec. 28, 1990]

**§ 44.13 Proposed decision.**

(a) Upon receipt of a petition for modification, the Mine Safety and Health Administration shall cause an investigation to be made as to the merits of the petition. Any party may request that the investigation of the petition for modification be expedited, or that the time period for investigating the petition be extended. Such requests shall be granted in the discretion of the Administrator upon good cause shown.

(b) As soon as is practicable after the investigation is completed, the appropriate Administrator shall make a proposed decision and order, which shall be served upon all parties to the proceeding. The proposed decision shall become final upon the 30th day after service thereof, unless a request for hearing has been filed with the appropriate Administrator, as provided in § 44.14 of this part.

(c) Service of the proposed decision is complete upon mailing.

[55 FR 53440, Dec. 28, 1990]

**§ 44.14 Request for hearing**

A request for hearing filed in accordance with § 44.13 of this part must be filed within 30 days after service of the proposed decision and shall include:

(a) A concise summary of position on the issues of fact or law desired to be raised by the party requesting the hearing, including specific objections

to the proposed decision. A party other than petitioner who has requested a hearing shall also comment upon all issues of fact or law presented in the petition, and

(b) An indication of a desired hearing site.

(c) *Partial appeal.* (1) If the Administrator has issued a proposed decision and order granting the requested modification, a request for hearing on the proposed decision and order may be made by any party based upon objection to one or more of the terms and conditions of the Administrator's proposed decision and order. If such a request for hearing is made, the request should specify which of the terms and conditions should be the subject of the hearing.

(2) During the pendency of the partial appeal, the proposed decision and order of the Administrator will become final on the 30th day after service thereof, unless a request for hearing on the proposed decision and order is filed in accordance with paragraph (a) of this section by any other party. The decision and order will remain in effect as proposed by the Administrator until the terms and conditions for which the hearing was requested are modified, affirmed, or set aside by a final order of the presiding administrative law judge or the Assistant Secretary. The presiding administrative law judge shall take such action upon a determination of whether—

(i) The terms and conditions for which the hearing was requested are necessary to ensure that the alternative method of achieving the result of the standard will at all times guarantee to the miners at the mine at least the same measure of protection afforded to the miners at the mine by such standard; or

(ii) In the case of a petition involving a finding by the Administrator of a diminution of safety to the miners caused by application of the standard at the mine, whether the terms and conditions for which the hearing was requested are necessary to provide equivalent protection to the miners at the mine from the hazard against which the standard is directed.

[43 FR 29518, July 7, 1978, as amended at 55 FR 53441, Dec. 28, 1990]

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### § 44.15 Referral to Chief Administrative Law Judge.

Upon receipt of a request for hearing as provided in § 44.14 of this part, the Administrator shall, within 5 days, refer to the Chief Administrative Law Judge the original petition, the proposed decision and order, all information upon which the proposed decision was based, any written request for a hearing on the petition filed, any other written comments or information received and considered in making the proposed decision. The MSHA investigation report shall be made part of the record on the petition.

[55 FR 53441, Dec. 28, 1990]

### § 44.16 Application for temporary relief; relief to give effect to the proposed decision and order.

(a) *Time for filing.* An application for temporary relief from enforcement of a mandatory standard may be filed at any time before a proposed decision and order is issued on a petition for modification and shall be served upon all parties to the proceeding.

(b) *With whom filed.* The application shall be filed with and decided by the appropriate Administrator.

(c) *Investigation and decision.* Upon receipt of an application for temporary relief, the Administrator shall cause an investigation to be made as to the merits of the application. As soon thereafter as practicable, but in no event greater than 60 days from filing of the application, the Administrator shall issue a decision. If the Administrator does not issue a decision within 60 days of filing of the application, the application shall be deemed to be denied.

(d) *Contents of application.* An application for temporary relief shall comply with applicable general requirements of this part, state the specific relief requested, and include specific evidence showing how the applicant meets the criteria set forth in paragraph (e) of this section.

(e) *Criteria.* Before temporary relief is granted, the applicant must clearly show that—

(1) The application was filed in good faith;

(2) The requested relief will not adversely affect the health or safety of miners in the affected mine;

(3) An identifiable hazard to miners exists in the mine which is caused by application of the standard at the mine;

(4) Other means will be used to reasonably address the hazard against which the original standard was designed to protect; and

(5) Compliance with the standard while the petition for modification is pending will expose miners to the identifiable hazard upon which the application is based.

(f) *Response.* All parties to the proceeding in which an application for temporary relief has been filed shall have 15 days from receipt of the application to file a written response with the Administrator.

(g) *Evidence.* An application for temporary relief or a response to such an application may be supported by affidavits or other evidentiary matter.

(h) *Findings.* Temporary relief may be granted by the Administrator upon a finding that application of the standard at the mine will result in a diminution of safety to the miners at such mine.

(i) *Appeal to the Office of the Administrative Law Judges.* If the application for temporary relief is granted by the Administrator, any other party may request a hearing within 15 days of the Administrator's decision. The request shall be addressed to the Administrator and shall be referred by the Administrator, along with the petition for modification, to the Chief Administrative Law Judge in accordance with § 44.15. The hearing and decision of the presiding administrative law judge shall be in accordance with subparts C through E of this part. After referral of the petition for modification and application for temporary relief, no further decision shall be rendered by the Administrator.

(j) *Duration of relief.* An order granting temporary relief shall be effective until superseded by the Administrator's proposed decision and order, unless a hearing is requested in accordance with paragraph (i) of this section. If such hearing is requested, the temporary relief shall remain in effect until modified, affirmed or set aside by the presiding administrative law judge.

In no case, however, shall the Administrator's order remain in effect for more than one year, unless renewed or affirmed by the presiding administrative law judge.

(k) *Application for relief to give effect to the proposed decision and order.* At any time following the proposed decision and order of the Administrator on the accompanying petition for modification, any party may request relief to give effect to the proposed decision and order until it becomes final.

(l) An application for relief under paragraph (k) shall be filed with the Administrator and shall include a good faith representation that no party is expected to contest the granting of the petition for modification.

(m) A decision to grant relief requested under paragraph (k) will take effect on the seventh day following the decision. If a request for hearing on the proposed decision and order is filed in accordance with § 44.14 prior to the seventh day following the granting of such relief, the relief will not become effective. If such request for hearing on the proposed decision and order is filed after relief becomes effective, the relief will expire immediately.

[55 FR 53441, Dec. 28, 1990]

### Subpart C—Hearings

#### § 44.20 Designation of administrative law judge.

Within 5 days after receipt of a referral of a request for hearing in a petition for modification proceeding, the Chief Administrative Law Judge shall designate an administrative law judge appointed under section 3105 of Title 5 of the United States Code to preside over the hearing.

[55 FR 53442, Dec. 28, 1990]

#### § 44.21 Filing and form of documents.

(a) *Where to file.* After a petition has been referred to the Office of the Chief Administrative Law Judge, the parties will be notified of the name and address of the administrative law judge assigned to the case. All further documents shall be filed with the administrative law judge at the address designated or with the Chief Administrative Law Judge, if the assignment has

not been made. While the petition is before the Assistant Secretary at any stage of the proceeding, all documents should be filed with the Assistant Secretary of Labor for Mine Safety and Health, 1100 Wilson Blvd., Room 2322, Arlington, Virginia 22209-3939.

(b) *Caption, title and signature.* (1) The documents filed in any proceeding under this part shall be captioned in the name of the operator of the mine to which the proceeding relates and in the name of the mine or mines affected. After a docket number has been assigned to the proceeding by the Office of the Chief Administrative Law Judge, the caption shall contain such docket number.

(2) After the caption each such document shall contain a title which shall be descriptive of the document and which shall identify the party by whom the document is submitted.

(3) The original of all documents filed shall be signed at the end by the party submitting the document or, if the party is represented by an attorney, by such attorney. The address of the party or the attorney shall appear beneath the signature.

[43 FR 29518, July 7, 1978, as amended at 67 FR 38384, June 4, 2002]

#### § 44.22 Administrative law judges; powers and duties.

(a) *Powers.* An administrative law judge designated to preside over a hearing shall have all powers necessary or appropriate to conduct a fair, full, and impartial hearing, including the following:

(1) To administer oaths and affirmations;

(2) To issue subpoenas on his own motion or upon written application of a party;

(3) To rule upon offers of proof and receive relevant evidence;

(4) To take depositions or have depositions taken when the ends of justice would be served;

(5) To provide for discovery and determine its scope;

(6) To regulate the course of the hearing and the conduct of parties and their counsel;

(7) To consider and rule upon procedural requests;

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(8) To hold conferences for settlement or simplification of issues by consent of the parties;

(9) To make decisions in accordance with the Act, this part, and section 557 of title 5 of the United States Code; and

(10) To take any other appropriate action authorized by this part, section 556 of title 5 of the United States Code, or the Act.

(b) *Disqualification.* (1) When an administrative law judge deems himself disqualified to preside over a particular hearing, he shall withdraw therefrom by notice on the record directed to the Chief Administrative Law Judge.

(2) Any party who deems an administrative law judge for any reason to be disqualified to preside or continue to preside over a particular hearing, may file with the Chief Administrative Law Judge of the Department of Labor a motion to be supported by affidavits setting forth the alleged grounds for disqualification. The Chief Administrative Law Judge shall rule upon the motion.

(c) *Contumacious conduct; failure or refusal to appear or obey rulings of a presiding administrative law judge.* (1) Contumacious conduct at any hearing before the administrative law judge shall be grounds for exclusion from the hearing.

(2) If a witness or party refuses to answer a question after being directed to do so or refuses to obey an order to provide or permit discovery, the administrative law judge may make such orders with regard to the refusal as are just and appropriate, including an order denying the application of a petitioner or regulating the contents of the record of the hearing.

(d) *Referral to Federal Rules of Civil Procedure and Evidence.* On any procedural question not regulated by this part, the act, or the Administrative Procedure Act, an administrative law judge shall be guided to the extent practicable by any pertinent provisions of the Federal Rules of Civil Procedure or Federal Rules of Evidence, as appropriate.

(e) *Remand.* The presiding administrative law judge shall be authorized to remand the petition for modification proceeding to the appropriate Administrator based upon new evidence which

was not available to the Administrator and which may have materially affected the Administrator's proposed decision and order. Remand may be upon the judge's own motion or the motion of any party, and shall be granted in the discretion of the presiding administrative law judge.

[43 FR 29518, July 7, 1978, as amended at 55 FR 53442, Dec. 28, 1990]

**§ 44.23 Prehearing conferences.**

(a) *Convening a conference.* Upon his own motion or the motion of a party, the administrative law judge may direct the parties or their counsel to meet with him for a conference to consider:

(1) Simplification of issues;

(2) Necessity or desirability of amendments to documents for clarification, simplification, or limitation;

(3) Stipulations and admissions of facts;

(4) Limitation of the number of parties and expert witnesses; and

(5) Such other matters as may tend to expedite the disposition of the proceeding and assure a just conclusion thereof.

(b) *Record of conference.* The administrative law judge may, where appropriate, issue an order which recites the action taken at the conference, amendments allowed to any filed documents, and agreements made between the parties as to any of the matters considered. The order shall limit the issues for hearing to those not disposed of by admissions or agreements. Such an order controls the subsequent course of the hearing, unless modified at the hearing to prevent manifest injustice.

**§ 44.24 Discovery.**

Parties shall be governed in their conduct of discovery by appropriate provisions of the Federal Rules of Civil Procedure, except as provided in § 44.25 of this part. After consultation with the parties, the administrative law judge shall prescribe a time of not more than 45 days to complete discovery. Alternative periods of time for discovery may be prescribed by the presiding administrative law judge upon the request of any party. As soon as is practicable after completion of discovery, the administrative law judge

shall schedule a hearing in accordance with § 44.28 of this part.

[55 FR 53442, Dec. 28, 1990]

**§ 44.25 Depositions.**

(a) *Purpose.* For reasons of unavailability or for purpose of discovery, the testimony of any witness may be taken by deposition.

(b) *Form.* Depositions may be taken before any person having the power to administer oaths. Each witness testifying upon deposition shall be sworn, and the parties not calling him shall have the right to cross-examine him. Questions propounded and answers thereto, together with all objections made, shall be reduced to writing, read to or by the witness, subscribed by him, and certified by the officer before whom the deposition is taken. The officer shall send copies by registered mail to the Chief Administrative Law Judge or the presiding administrative law judge.

**§ 44.26 Subpoenas; witness fees.**

(a) Except as provided in paragraph (b) of this section, the Chief Administrative Law Judge or the presiding administrative law judge, as appropriate, shall issue subpoenas upon written application of a party requiring attendance of witnesses and production of relevant papers, books, documents, or tangible things in their possession and under their control. A subpoena may be served by any person who is not a party and is not less than 18 years of age, and the original subpoena bearing a certificate of service shall be filed with the administrative law judge. A witness may be required to attend a deposition or hearing at a place not more than 100 miles from the place of service.

(b) If a party's written application for subpoena is submitted 3 working days or less before the hearing to which it relates, a subpoena shall issue at the discretion of the Chief Administrative Law Judge or presiding administrative law judge, as appropriate.

(c) Any person served with a subpoena may move in writing to revoke or modify the subpoena. All motions to revoke or modify shall be served on the party at whose request the subpoena was issued. The administrative law judge shall revoke or modify the sub-

poena if in his opinion the evidence required to be produced does not relate to any matter under investigation or in question in the proceedings; the subpoena does not describe with sufficient particularity the evidence required to be produced; or if for any other reason, sufficient in law, the subpoena is found to be invalid or unreasonable. The administrative law judge shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke or modify. The motion to revoke or modify, any answer filed thereto, and any ruling thereon shall become a part of the record.

(d) Witnesses subpoenaed by any party shall be paid the same fees for attendance and mileage as are paid in the District Courts of the United States. The fees shall be paid by the party at whose instance the witness appears.

**§ 44.27 Consent findings and rules or orders.**

(a) *General.* At any time after a request for hearing is filed in accordance with § 44.14, a reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and a rule or order disposing of the whole or any part of the proceedings. Allowance of such opportunity and the duration thereof shall be in the discretion of the Chief Administrative Law Judge, if no administrative law judge has been assigned, or of the presiding administrative law judge. In deciding whether to afford such an opportunity, the administrative law judge shall consider the nature of the proceeding, requirements of the public interest, representations of the parties, and probability of an agreement which will result in a just disposition of the issues involved.

(b) *Contents.* Any agreement containing consent findings and rule or order disposing of a proceeding shall also provide:

(1) That the rule or order shall have the same effect as if made after a full hearing;

(2) That the record on which any rule or order may be based shall consist of the petition and agreement, and all other pertinent information, including: any request for hearing on the petition; the investigation report; discovery;

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motions and requests, filed in written form and rulings thereon; any documents or papers filed in connection with prehearing conferences; and, if a hearing has been held, the transcript of testimony and any proposed findings, conclusions, rules or orders, and supporting reasons as may have been filed.

(3) A waiver of further procedural steps before the administrative law judge and Assistant Secretary; and

(4) A waiver of any right to challenge or contest the validity of the findings and rule or order made in accordance with the agreement.

(c) *Submission.* On or before expiration of the time granted for negotiations, the parties or their counsel may:

(1) Submit the proposed agreement to the Chief Administrative Law Judge or presiding administrative law judge, as appropriate, for his consideration; or

(2) Inform the Chief Administrative Law Judge or presiding administrative law judge, as appropriate, that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and rule or order is submitted within the time allowed, the Chief Administrative Law Judge or presiding administrative law judge, as appropriate, may accept the agreement by issuing his decision based upon the agreed findings.

[43 FR 29518, July 7, 1978, as amended at 55 FR 53442, Dec. 28, 1990]

**§ 44.28 Notice of hearing.**

(a) The administrative law judge shall fix a place and date for the hearing and notify all parties at least 30 days in advance of the date set, unless at least one party requests and all parties consent to an earlier date, or the hearing date has been otherwise advanced in accordance with this part. The notice shall include:

(1) The time, place, and nature of the hearing; and

(2) The legal authority under which the hearing is to be held.

(b) In accordance with the provisions of section 554 of title 5 of the United States Code, a party may move for transfer of a hearing on the basis of convenience to parties and witnesses. Such motion should be filed with the administrative law judge assigned to the case.

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**§ 44.29 Motions.**

Each motion filed shall be in writing and shall contain a short and plain statement of the grounds upon which it is based. A statement in opposition to the motion may be filed by any party within 10 days after the date of service. The administrative law judge may permit oral motions during proceedings.

**§ 44.30 Hearing procedures.**

(a) *Order of proceeding.* Except as may be ordered otherwise by the administrative law judge, the petitioner shall proceed first at a hearing.

(b) *Burden of proof.* The petitioner shall have the burden of proving his case by a preponderance of the evidence.

(c) *Evidence—(1) Admissibility.* A party shall be entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for full and true disclosure of the facts. Any oral or documentary evidence may be received, but the administrative law judge shall exclude evidence which is irrelevant, immaterial, or unduly repetitious.

(2) *Testimony of witnesses.* The testimony of a witness shall be upon oath or affirmation administered by the administrative law judge.

(3) *Objections.* If a party objects to admission or rejection of any evidence, limitation of the scope of any examination or cross-examination, or failure to limit such scope, he shall state briefly the grounds for such objection. Rulings on such objections shall appear in the record.

(4) *Exceptions.* Formal exception to an adverse ruling is not required.

(d) *Official notice.* Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice or concerning which the Department of Labor by reason of its functions is presumed to be expert: *Provided,* That the parties shall be given adequate notice at the hearing or by reference in the presiding administrative law judge's decision of the matters so noticed and shall be given adequate opportunity to show the contrary.

(e) *Transcript.* Copies of the transcript of the hearing may be obtained by the parties upon written application filed with the reporter and payment of fees at the rate provided in the agreement with the reporter.

**§ 44.31 Proposed findings of fact, conclusions, and orders.**

After consultation with the parties, the administrative law judge may prescribe a time period of 30 days within which each party may file proposed findings of fact, conclusions of law, and rule or order, together with a supporting brief expressing the reasons for such proposals. Such time may be expedited or extended upon request and at the discretion of the Administrative Law Judge. Proposals and briefs shall be served on all other parties and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

[55 FR 53442, Dec. 28, 1990]

**§ 44.32 Initial decision.**

(a) Within 60 days after the time allowed for the filing of proposed findings of fact and conclusions of law, the administrative law judge shall make and serve upon each party a decision, which shall become final upon the 30th day after service thereof, unless an appeal is filed as provided in § 44.33 of this part. After consultation with the parties, the administrative law judge may expedite or extend the time for issuing the decision. The decision of the administrative law judge shall include:

(1) A statement of findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact, law, or discretion presented on the record; and

(2) The appropriate rule, order, relief, or denial thereof.

(b) The decision of the administrative law judge shall be based upon a consideration of the whole record and shall state all facts officially noticed and relied upon. It shall be made on the basis of a preponderance of reliable and probative evidence.

[43 FR 29518, July 7, 1978, as amended at 55 FR 53442, Dec. 28, 1990]

**§ 44.33 Departmental review.**

(a) *Notice of appeal.* Any party may appeal from the initial decision of the administrative law judge by filing with the Assistant Secretary a notice of appeal within 30 days after service of the initial decision. The Assistant Secretary may consolidate related appeals. Copies of a notice of appeal shall be served on all parties to the proceeding in accordance with § 44.6 of this part.

(b) *Statement of objections.* Within 20 days after filing the notice of appeal, the appellant shall file his statement of objections to the decision of the administrative law judge and serve copies on all other parties to the proceeding. The statement shall refer to the specific findings of fact, conclusions of law, or terms of the order objected to in the initial decision. Where any objection is based upon evidence of record, the objection need not be considered by the Assistant Secretary if specific record citations to the pertinent evidence are not contained in the statement of objections.

(c) *Responding statements.* Within 20 days after service of the statement of objections, any other party to the proceeding may file a statement in response.

[43 FR 29518, July 7, 1978, as amended at 55 FR 53442, Dec. 28, 1990]

**§ 44.34 Transmission of record.**

If an appeal is filed, the administrative law judge shall, as soon thereafter as is practicable, transmit the record of the proceeding to the Assistant Secretary for review. The record shall include: the petition; the MSHA investigation report; any request for hearing on the petition; the transcript of testimony taken at the hearing, together with exhibits admitted in evidence; any documents or papers filed in connection with prehearing conferences; such proposed findings of fact, conclusions of law, rules or orders, and supporting reasons, as may have been filed; and the administrative law judge's decision.

[55 FR 53442, Dec. 28, 1990]

## § 44.35

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### § 44.35 Decision of the Assistant Secretary.

Appeals from a decision rendered pursuant to § 44.32 of this part shall be decided by the Assistant Secretary within 120 days after the time for filing responding statements under § 44.33 of this part. The Assistant Secretary's decision shall be based upon consideration of the entire record of the proceedings transmitted, together with the statements submitted by the parties. The decision may affirm, modify, or set aside, in whole or part, the findings, conclusions, and rule or order contained in the decision of the presiding administrative law judge and shall include a statement of reasons for the action taken. The Assistant Secretary may also remand the petition to the administrative law judge for additional legal or factual determinations. Any party may request that the time for the Assistant Secretary's decision be expedited. Such requests shall be granted in the discretion of the Assistant Secretary.

[55 FR 53442, Dec. 28, 1990]

### Subpart D—Summary Decisions

#### § 44.40 Motion for summary decision.

(a) Any party may, at least 20 days before the date fixed for any hearing under Subpart C of this part, move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within 10 days after service of the motion, serve opposing affidavits or countermove for summary decision. The administrative law judge may set the matter for argument and call for submission of briefs.

(b) Filing of any documents under paragraph (a) of this section shall be with the administrative law judge, and copies of such documents shall be served in accordance with § 44.6 of this part.

(c) Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and

supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(d) The administrative law judge may grant the motion if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and a party is entitled to summary decision. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

(e) The denial of all or part of a motion for summary decision by the administrative law judge shall not be subject to interlocutory appeal to the Assistant Secretary unless the administrative law judge certifies in writing that (1) the ruling involves an important question of law or policy as to which there are substantial grounds for difference of opinion, and (2) an immediate appeal from the ruling may materially advance termination of the proceeding. The allowance of an interlocutory appeal shall not stay the proceedings before the administrative law judge unless ordered by the Assistant Secretary.

#### § 44.41 Summary decision.

(a) *No genuine issue of material fact.* (1) Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue an initial decision to become final 30 days after service thereof, unless, within such time, any party has filed an appeal with the Assistant Secretary. Thereafter, the Assistant Secretary, after consideration of the entire record, may issue a final decision.

(2) An initial decision and a final decision made under this paragraph shall include a statement of—

(i) Findings and conclusions, and the reasons therefor, on all issues presented; and

(ii) Any terms and conditions of the rule or order.

(3) A copy of an initial decision and final decision under this paragraph shall be served on each party.

(b) *Hearings on issues of fact.* Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing in accordance with Subpart C of this part.

**Subpart E—Effect of Initial Decision**

**§ 44.50 Effect of appeal on initial decision.**

Except as provided in § 44.14(c), a proposed decision and order of an Administrator is not operative pending appeal to an administrative law judge, and a decision of an administrative law judge is not operative pending appeal to the Assistant Secretary.

[55 FR 53443, Dec. 28, 1990]

**§ 44.51 Finality for purposes of judicial review.**

Only a decision by the Assistant Secretary shall be deemed final agency action for purposes of judicial review. A decision by an Administrator or administrative law judge which becomes final for lack of appeal is not deemed final agency action for purposes of 5 U.S.C. 704.

**§ 44.52 Revocation of modification.**

(a) *Petition for revocation.* Any party to a proceeding under this part in which a petition for modification of a mandatory safety standard was granted by an Administrator, administrative law judge, or the Assistant Secretary may petition that the modification be revoked. Such petition shall be filed with the Chief Administrative Law Judge for disposition.

(b) *Revocation by the Administrator.* The appropriate Administrator may propose to revoke a modification previously granted by the Administrator, an administrative law judge, or the Assistant Secretary, by issuing a proposed decision and order revoking the modification. Such proposed revocation and a statement of reasons supporting the proposal must be served upon all parties to the proceeding, and shall become final on the 30th day after

service thereof unless a hearing is requested in accordance with § 44.14.

(c) Revocation of a granted modification must be based upon a change in circumstances or because findings which originally supported the modification are no longer valid.

(d) Disposition of the revocation shall be subject to all procedures of subparts C through E of this part.

[55 FR 53443, Dec. 28, 1990]

**§ 44.53 Amended modification.**

(a) The Administrator may propose to revise the terms and conditions of a granted modification by issuing an amended proposed decision and order, along with a statement of reasons for the amended proposed decision and order, when one or both of the following occurs:

(1) A change in circumstances which originally supported the terms and conditions of the modification.

(2) The Administrator determines that findings which originally supported the terms and conditions of the modification are no longer valid.

(b) The Administrator's amended proposed decision and order shall be served upon all parties to the proceeding and shall become final upon the 30th day after service thereof, unless a request for hearing on the proposed amendments is filed under § 44.14. If a request for hearing is filed, the amended proposed decision and order shall be subject to all procedures of subparts C through E of this part as if it were a proposed decision and order of the Administrator issued in accordance with § 44.13. The original modification shall remain in effect until superseded by a final amended modification.

(c) In cases where the original decision and order was based upon an alternative method of achieving the result of the standard, the amended decision and order shall at all times provide to miners at the mine at least the same measure of protection afforded to the miners at the mine by such standard. In cases where the original decision and order was based upon a diminution of safety to the miners resulting from application of the standard at such time, the amended decision and order

shall not reduce the protection afforded miners by the original decision and order.

[55 FR 53443, Dec. 28, 1990]

## PART 45—INDEPENDENT CONTRACTORS

Sec.

45.1 Scope and purpose.

45.2 Definitions.

45.3 Identification of independent contractors.

45.4 Independent contractor register.

45.5 Service of documents; independent contractors.

45.6 Address of record and telephone number; independent contractors.

AUTHORITY: 30 U.S.C. 802(d), 957.

SOURCE: 45 FR 44496, July 1, 1980, unless otherwise noted.

### § 45.1 Scope and purpose.

This part sets forth information requirements and procedures for independent contractors to obtain an MSHA identification number and procedures for service of documents upon independent contractors. Production operators are required to maintain certain information for each independent contractor at the mine. The purpose of this rule is to facilitate implementation of MSHA's enforcement policy of holding independent contractors responsible for violations committed by them and their employees.

### § 45.2 Definitions.

As used in this part:

(a) *Act* means the Federal Mine Safety and Health Act of 1977, Pub. L. 91-173, as amended by Pub. L. 95-164;

(b) *District Manager* means the District Manager of the Mine Safety and Health Administration District in which the independent contractor is located;

(c) *Independent contractor* means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine; and,

(d) *Production-operator* means any owner, lessee, or other person who operates, controls or supervises a coal or other mine.

### § 45.3 Identification of independent contractors.

(a) Any independent contractor may obtain a permanent MSHA identification number. To obtain an identification number, an independent contractor shall submit to the District Manager in writing the following information:

(1) The trade name and business address of the independent contractor;

(2) An address of record for service of documents;

(3) A telephone number at which the independent contractor can be contacted during regular business hours; and

(4) The estimated annual hours worked on mine property by the independent contractor in the previous calendar year, or in the instance of a business operating less than one full calendar year, prorated to an annual basis.

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 44496, July 1, 1980, as amended at 47 FR 14696, Apr. 6, 1982; 60 FR 33722, June 29, 1995]

### § 45.4 Independent contractor register.

(a) Each independent contractor shall provide the production-operator in writing the following information:

(1) The independent contractor's trade name, business address and business telephone number;

(2) A description of the nature of the work to be performed by the independent contractor and where at the mine the work is to be performed;

(3) The independent contractor's MSHA identification number, if any; and

(4) The independent contractor's address of record for service of citations, or other documents involving the independent contractor.

(b) Each production-operator shall maintain in writing at the mine the information required by paragraph (a) of this section for each independent contractor at the mine. The production-operator shall make this information available to any authorized representative of the Secretary upon request.