

§ 2704.104

29 CFR Ch. XXVII (7-1-05 Edition)

the proceeding or designating the matter for hearing. The Commission's failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 2704.104 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it satisfies the conditions of eligibility set out in this subpart and in subpart B.

(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.

[47 FR 10001, Mar. 9, 1982, as amended at 54 FR 6285, Feb. 9, 1989, 63 FR 63175, Nov. 12, 1998]

§ 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.

[63 FR 63176, Nov. 12, 1998]

§ 2704.106 Allowable fees and expenses.

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

(b) No award for the fee of an attorney or agent under this part may exceed \$125 per hour, except as provided in § 2704.107. No award to compensate an expert witness may exceed the highest rate at which the Secretary of Labor pays expert witnesses. However,

an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item if the attorney, agent or witness ordinarily charges clients separately for such expenses.

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

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

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

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

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

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

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

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

§ 2704.107 Rulemaking on maximum rates for attorney's fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), attorney's fees may be awarded at a rate higher than \$125 per hour. Any such increase in the rate for attorney's fees will be made only upon a petition submitted by the applicant, pursuant to § 2704.201, and only if the administrative law judge determines, in his or her discretion, that it is justified. Any such adjustment in fees is subject to Commission review as specified in § 2704.308.