

## Fed. Mine Safety and Health Review Commission

## § 2704.103

2704.206 When an application may be filed.

### Subpart C—Procedures for Considering Applications

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AUTHORITY: (5 U.S.C. 504(c)(1); Pub. L. 99-80, 99 Stat. 183; Pub. L. 104-121, 110 Stat. 862.

SOURCE: 47 FR 10001, Mar. 9, 1982, unless otherwise noted.

### Subpart A—General Provisions

#### § 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.

[63 FR 63175, Nov. 12, 1998]

#### § 2704.101 Definitions.

The following terms shall have the following meaning when used in these rules:

*Adjudication Officer*, as defined in 5 U.S.C. 504(b)(1)(D), means the Commission’s administrative law judge who presided at the underlying adversary adjudication between the applicant and the Secretary of Labor. For the sake of clarity, references hereafter shall be to “administrative law judge”.

*The Act* means the Equal Access to Justice Act 5 U.S.C. 504;

*The Commission* means the Federal Mine Safety and Health Review Commission, created as an independent agency under 30 U.S.C. 823;

*The Mine Act* means the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq*;

*The Secretary* means the Secretary of Labor or his designee.

#### § 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.

[63 FR 63175, Nov. 12, 1998]

#### § 2704.103 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by this Commission. These are adjudications before the Commission arising under the Mine Act in which the position of the Secretary of Labor is represented by an attorney or other representative who enters an appearance and participates in the proceeding. For this Commission, the types of proceedings generally covered include:

(1) Contests of citations or orders issued under section 104 or 107 of the Mine Act (30 U.S.C. 814, 817);

(2) Contests of penalties proposed under section 105 (a) and (b) of the Mine Act (30 U.S.C. 815(a), (b));

(3) Challenges to claims of discrimination under section 105(c) of the Mine Act (30 U.S.C. 815(c)) where the Secretary of Labor represents the miner;

(b) The Commission may also designate a proceeding not listed in paragraph (a) of this section as an adversary adjudication for purposes of the Act by so stating in an order initiating

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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