

Part 90 miner at his or her regular work classification rate regardless of the temporary wage rate.

(f) If a Part 90 miner is transferred, and the Secretary subsequently notifies the miner that notice of the miner's eligibility to exercise the Part 90 option was incorrect, the operator shall retain the affected miner in the current position to which the miner is assigned and continue to pay the affected miner the applicable rate of pay provided in paragraphs (a), (b), (c) and (d) of this section, until:

(1) The affected miner and operator agree in writing to a position with pay at not less than the regular rate of pay for that occupation; or

(2) A position is available at the same coal mine in both the same occupation and on the same shift on which the miner was employed immediately before exercising the option under §90.3 (Part 90 option; notice of eligibility; exercise of option) or under the old section 203(b) program (36 FR 20601, October 27, 1971).

(i) When such a position is available, the operator shall offer the available position in writing to the affected miner with pay at not less than the regular rate of pay for that occupation.

(ii) If the affected miner accepts the available position in writing, the operator shall implement the miner's reassignment upon notice of the miner's acceptance. If the miner does not accept the available position in writing, the miner may be reassigned and protections under Part 90 shall not apply. Failure by the miner to act on the written offer of the available position within 15 days after notice of the offer is received from the operator shall operate as an election not to accept the available position.

§ 90.104 Waiver of rights; re-exercise of option.

(a) A Part 90 miner may waive his or her rights and be removed from MSHA's active list of miners who have rights under Part 90 by:

(1) Giving written notification to the Chief, Division of Health, Coal Mine Safety and Health, MSHA, that the miner waives all rights under this part;

(2) Applying for and accepting a position in an area of a mine which the

miner knows has an average respirable dust concentration exceeding 1.0 milligrams per cubic meter of air or the respirable dust standard established by §90.101 (Respirable dust standard when quartz is present); or

(3) Refusing to accept another position offered by the operator at the same coal mine that meets the requirements of §§90.100, 90.101 and 90.102(a) after dust sampling shows that the average respirable dust concentration in his or her present position exceeds 1.0 milligrams per cubic meter of air or the respirable dust standard established by §90.101 (Respirable dust standard when quartz is present).

(b) If rights under Part 90 are waived, the miner gives up all rights under Part 90 until the miner re-exercises the option in accordance with §90.3(e) (Part 90 option; notice of eligibility; exercise of option).

(c) If rights under Part 90 are waived, the miner may re-exercise the option under this part in accordance with §90.3(e) (Part 90 option; notice of eligibility; exercise of option) at any time.

Subpart C—Sampling Procedures

AUTHORITY: 30 U.S.C. 811, 813(h), 957.

§ 90.201 Sampling; general requirements.

(a) Each operator shall take respirable dust samples of the concentration of respirable dust in the active workings of the mine as required by this part with a sampling device approved by the Secretary and the Secretary of Health and Human Services under part 74 (Coal Mine Dust Personal Sampler Units) of this title.

(b) Sampling devices shall be worn or carried directly to and from each part 90 miner's position, and shall remain operational during the entire shift or for 8 hours, whichever time is less.

(c) Upon request from the District Manager, the operator shall submit the date on which collecting any respirable dust samples required by this part will begin.

(d) During the time for abatement fixed in a citation for violation of §90.100 (Respirable dust standard) or §90.101 (Respirable dust standard when quartz is present), the operator shall

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take corrective action and then sample the affected part 90 miner until five valid respirable dust samples are taken.

(e) The respirable dust samples required by this part shall be collected while the part 90 miner is performing normal work duties.

(f) Unless otherwise directed by the District Manager, the respirable dust samples required under this part shall be taken by placing the sampling device as follows:

(1) On the part 90 miner;

(2) On the piece of equipment which the part 90 miner operates within 36 inches of the normal working position; or

(3) At a location that represents the maximum concentration of dust to which the part 90 miner is exposed.

§ 90.202 Certified person; sampling.

(a) The respirable dust sampling required by this part shall be done by a certified person.

(b) To be certified, a person shall pass the MSHA examination on sampling of respirable coal mine dust.

(c) A person may be temporarily certified by MSHA to take respirable dust samples if the person receives instruction from an authorized representative of the Secretary in the methods of collecting and submitting samples under this rule. The temporary certification shall be withdrawn if the person does not successfully complete the examination conducted by MSHA on sampling of respirable coal mine dust within six months from the issue date of the temporary certification.

§ 90.203 Certified person; maintenance and calibration.

(a) Approved sampling devices shall be maintained and calibrated by a certified person.

(b) To be certified, a person shall pass the MSHA examination on maintenance and calibration procedures for respirable dust sampling equipment.

(c) A person may be temporarily certified by MSHA to maintain and calibrate approved sampling devices if the person receives instruction from an authorized representative of the Secretary in the maintenance and calibration procedures for respirable dust

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sampling equipment under this rule. The temporary certification shall be withdrawn if the person does not successfully complete the examination conducted by MSHA on maintenance and calibration procedures within six months from the issue date of the temporary certification.

§ 90.204 Approved sampling devices; maintenance and calibration.

(a) Approved sampling devices shall be maintained as approved under part 74 (Coal Mine Dust Personal Sampler Units) of this chapter and calibrated in accordance with MSHA Informational Report IR 1240 (1996) "Calibration and Maintenance Procedures for Coal Mine Respirable Dust Samplers" (supersedes IR 1121)" by a person certified in accordance with § 90.203 (Certified person; maintenance and calibration).

(b) Approved sampling devices shall be calibrated at the flowrate of 2.0 liters of air per minute, or at a different flowrate as prescribed by the Secretary and the Secretary of Health and Human Services for a particular device, before they are put into service and at intervals not to exceed 200 hours of operating time thereafter.

(c) A calibration mark shall be placed on the flowmeter of each approved sampling device to indicate the proper position of the float when the sampler is operating at a flowrate of 2.0 liters of air per minute or other flowrate prescribed by the Secretary and the Secretary of Health and Human Services for the particular device. The standard to denote proper flow is when the lowest part of the float is tangent to the top of the calibration mark.

(d) Approved sampling devices shall be tested and examined immediately before each sampling shift and necessary external maintenance shall be performed to assure that the sampling devices are clean and in proper working condition by a person certified in accordance with § 90.202 (Certified person; sampling) or § 90.203 (Certified person; maintenance and calibration). This testing and examination shall include the following:

(1) Testing the voltage of each battery while under actual load to assure