

in existing § 90.206. Also revised under the proposed rule is the example illustrating how a reduced standard is established when respirable dust associated with a Part 90 miner contains more than 10 percent quartz under the proposed revised dust-standard setting procedures.

Section 90.102 Transfer; Notice

MSHA is proposing no substantive changes in existing § 90.102, except to clarify in the regulatory text the application of the transfer provision in paragraph (a) when a Part 90 miner is assigned to a different shift. To conform with MSHA's long-standing policy, the proposed rule permits assigning a Part 90 miner to a different shift under certain circumstances without violating paragraph (a) of § 90.102(a). Unlike the pay protection afforded Part 90 miners by § 90.103(b) which would be applied "[w]henever a Part 90 miner is transferred * * *" (emphasis added), the job and shift protections provided by existing § 90.102(a) apply "whenever a Part 90 miner is transferred in order to meet the respirable applicable dust standard * * *" (emphasis added). The intent to limit the scope of job and shift protections under paragraph (a) of this section and the purpose of doing so were explained as follows in the preamble to the existing Part 90 rules:

The operator may transfer a Part 90 miner without regard to these job and shift limitations if the respirable dust concentrations in the position of the Part 90 miner complies with the applicable dust standard, but circumstances require changes in job assignments at the mine. Reductions in workforce or changes in operational methods at the mine may be the most likely situations which would affect job assignments. Any such transferred Part 90 miner would still be protected by all other provisions under this part. (45 FR 80761)

In instances where operators need to reassign employees to accommodate unforeseen situations and unexpected mine and market conditions, MSHA believes that some leeway should be provided to assist operators in placement of a Part 90 miner. (45 FR 80766)

These explanations show that MSHA did not intend the provisions of existing paragraph (a) to apply when a Part 90 miner is working in a position that meets the applicable dust standard and, for legitimate business reasons, the operator assigns the miner to a new job or shift.¹¹ On the other hand, when the reasons for changing a Part 90 miner's

shift or job involve maintaining compliance with the applicable dust standard, then the provisions of paragraph (a) apply and the miner is entitled to job and shift protections, unless these protections are waived in accordance with this standard. MSHA will continue to carefully scrutinize any changes in job or shift assignments for a Part 90 miner to determine whether paragraph (a) of § 90.102 applies because the change constitutes a transfer to meet the applicable dust standard and, if not, to determine if the change in the Part 90 miner's job or shift assignment was due in any part to action which could be characterized as improper under the Mine Act.

Section 90.103 Compensation

The proposed rule would redesignate existing paragraphs (c) through (f) as (d) through (g) and add new paragraph (c). Proposed new paragraph (c) clarifies MSHA's longstanding policy of not applying the Part 90 miner compensation provisions of existing paragraphs (a) and (b) of this section in situations where, after initial compliance with the applicable dust standard by the operator, the Part 90 miner on his or her own initiative applies for and accepts another job in a work area with an average respirable dust concentration at or below 1.0 mg/m³.¹² Under these circumstances, the miner has not waived Part 90 status.¹³ Therefore, the issue being addressed by proposed paragraph (c) is how the Part 90 wage provisions of existing paragraphs (a) and (b), which would be retained under the proposed rule, should be interpreted when a Part 90 miner initiates and accepts a job change. For the following reasons, MSHA believes that the compensations provisions of Part 90 may be read to provide no compensation protection for a Part 90 miner under these circumstances.

Existing § 90.103, which would be retained in its entirety under the proposed rule, protects a miner from any immediate reduction in hourly wage as a result of exercising the option. Where no transfer of the miner occurs

after the option is exercised, paragraph (a) prescribes:

The operator must compensate each Part 90 miner at not less than the regular rate of pay received by that miner immediately before exercising the option under § 90.3.

Existing § 90.103(b) addresses compensation protection for a Part 90 miner when there is a transfer of the miner. It prescribes:

Whenever a Part 90 miner is transferred, the operator must compensate the miner at not less than the regular rate of pay received by that miner immediately before the transfer.

As defined by proposed § 90.2, a transfer, "by the operator" would include, but is not limited to, an operator-initiated job reassignment in order to meet the applicable dust standard or a reassignment due to a realignment or reduction in the workforce. However, a miner-initiated job change does not necessarily constitute a transfer for purposes of compensation under § 90.103(b). Accordingly, the compensation provision of § 90.103(b) may be interpreted as not applicable to a job change initiated by a Part 90 miner.

The above interpretations of §§ 90.103(a) and (b) are also consistent with statutory language. Section 101(a)(7) of the Mine Act addresses several specific matters relative to mandatory health and safety standards promulgated by MSHA and in relevant part provides:

* * * Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. * * * (emphasis supplied)

Thus, section 101(a)(7) supports an interpretation that the compensation provisions of §§ 90.103(a) and (b) do not apply where a Part 90 miner initiates a job change for reasons of job preference and that § 90.103(b) is limited to job changes which are "a result of" exposure to respirable coal mine dust.

Accordingly when there is a Part 90 miner-initiated job change, the compensation provisions of §§ 90.103(a) and (b) would not be applicable in the Part 90 miner's new job and the miner would be paid whatever the new job usually pays. Thus, for example: A miner exercised the Part 90 option when his or her job paid \$10 per hour. If the

¹¹ As noted above, however, the other protections provided by Part 90 would apply. For example, on the new shift or in the new job there could be no reduction in the miner's pay and compliance would have to be maintained with the applicable dust standard and the sampling requirements.

¹² At mines where a job bidding procedure is in effect, use of the bidding procedure is not dispositive of whether a job change is initiated by the miner. The job bidding procedure is applicable to all job changes, including operator-initiated changes. Thus, factors relating to the intent and actions of the miner and the operator must be evaluated.

¹³ Existing §§ 90.104(a)(2) and (3) provide for waiver of Part 90 miner status when the miner applies for and accepts or retains a position known by the miner to exceed the applicable dust standard.