

operator keeps the Part 90 miner in the same work position because compliance with the applicable dust standard is maintained, or if the operator transfers the miner to a new work position to achieve compliance, then the Part 90 miner cannot be paid less than the \$10 per hour received immediately before exercising the option. If, then, the miner was to initiate and accept a change in work assignment to a job which paid \$8.50 per hour, no pay protection would accompany the part 90 miner to the new position and the miner would receive \$8.50 per hour.

The remainder of Part 90 provisions, however, would continue to apply to the Part 90 miner in the new work position. As noted earlier, a miner-initiated job change to a position which is at or below the applicable dust standard for a Part 90 miner does not constitute a waiver of Part 90 rights. Thus, in the new job the miner retains Part 90 status and all other requirements of Part 90 continue in effect, including the operator's obligations to continuously maintain the applicable dust standard and to give MSHA notice whenever the miner's work assignment changes last longer than one shift.

For purposes of consistency, redesignated paragraphs (e) and (g) have been revised to read as follows: "\* \* \* under paragraphs (a), (b) and (d) \* \* \*" and "\* \* \* in paragraphs (a), (b), (d), and (e) \* \* \*," respectively.

#### Section 90.104 Waiver of Rights; Re-exercise of Option

The proposed rule would retain the existing provisions of § 90.104, with some minor revisions for purposes of simplification. In paragraph (a)(2), "exceeds the applicable dust standard" would replace the statement beginning with "\* \* \* has an average respirable dust concentration \* \* \*" Paragraph (a)(3) would be revised by replacing the statement beginning with "\* \* \* average respirable dust concentration \* \* \*" with "existing work position exceeds the applicable dust standard." Lastly, the section heading for § 90.3(e) has been removed from existing paragraphs (b) and (c).

#### Sections 90.201 through 90.207

##### *Sampling Procedures*

#### Section 90.201 Sampling; General Requirements

MSHA is proposing to modify the general requirements for operator sampling of new or transferred Part 90 miners under existing § 90.201. Since MSHA would be responsible for collecting samples to determine if an operator has abated a noncompliant

condition, the proposed rule would remove existing paragraph (d). The proposed rule would also revise and redesignate existing paragraphs (b) as (c), (c) as (f), and (e) as (d), revise paragraph (a), and add new paragraph (b).

Revised paragraph (a) specifies the purpose of operator sampling under this proposed rule. While MSHA would be assuming responsibility for most of the sampling currently being carried out by the operator, revised paragraph (a) would continue to require operators to conduct sampling to verify that the working environment of a new or transferred Part 90 miner complies with §§ 90.100 or 90.101 as required by existing § 90.207, which has been redesignated as § 90.204. Also, to minimize repetition and maintain consistency with virtually identical provisions in proposed amendments to Part 70, paragraph (a) would be modified by removing the reference to Part 74 approval (Coal Mine Dust Personal Sampler Units), and replacing it with "approved sampling device," as defined under revised § 90.2.

Proposed new paragraph (b) would retain the requirements in existing §§ 90.202(a) and (b) that sampling required under this part be conducted by an individual certified by MSHA and the manner by which a person would be certified. Therefore, existing § 90.202(a), (b), and (c) would be removed.

Since the objective of operator sampling proposed under this part is to verify that the assigned position of a new or transferred Part 90 miner complies with the applicable dust standard, the sampling device would continue to be worn by each Part 90 miner as required by existing § 90.201(b). However, under redesignated paragraph (c), the requirement that sampling devices "remain operational during the entire shift or for 8 hours, whichever time is less" would be removed. Instead, the sampling device would be operated portal-to-portal and be operational during the Part 90 miner's entire work shift, regardless of the number of hours worked, to ensure that the sampled Part 90 miner is not personally overexposed. That is, the sampling device would be turned "ON" when the Part 90 miner enters the mine and remain operational while traveling to the assigned work position, while performing normal work duties, and while traveling back to the mine entrance, at which time the device would be turned "OFF." It should be pointed out that the duration of MSHA sample collection will continue to be limited to 480 minutes as has been the longstanding practice. Simply stated,

the sampling device would be operated portal-to-portal and remain operational during the entire shift or for 8 hours, whichever time is less. The Agency solicits comments on the duration of MSHA sampling under the proposed rule.

Unless otherwise directed by the district manager, the respirable dust samples will continue to be collected by placing the sampling device on the Part 90 miner; on the piece of equipment which the Part 90 miner operates within 36 inches of the normal working position; or at a location that represents the maximum concentration of dust to which the Part 90 miner is exposed.

Under redesignated paragraph (f), not only would the operator be required to submit the date but also the time when sampling required by this part would begin when requested by the district manager. This is necessary since operators may choose to sample any shift on the date provided to MSHA. Knowing the time of the scheduled sampling will enable MSHA to monitor operator sampling on a case-by-case basis to verify compliance with both the operating conditions and sampling requirements of this part.

Finally, the requirement that operators take corrective action during the time for abatement fixed in a citation for violation of §§ 90.100 or 90.101 specified in existing paragraph (d) of § 90.201 would be transferred to proposed § 90.207(b)(2). The requirement that the operator sample the affected Part 90 miner until five valid samples are taken under existing paragraph (d) would be removed since MSHA is proposing to revoke operator sampling requirements under existing § 90.208.

#### Section 90.202 Approved Sampling Devices; Maintenance and Calibration

In an effort to consolidate the requirements that address maintenance and calibration procedures of approved sampling devices, MSHA is proposing in § 90.202(a) through (e) to retain the requirements in existing § 90.203(a) and (b) and § 90.204(a) through (e), with minor changes. These standards require the sampling device be maintained as approved and calibrated only by a certified person in accordance with MSHA Informational Report IR 1240 (1996). The process of certifying an individual for maintenance and calibration would remain unchanged. It would continue to require an individual to successfully complete the applicable MSHA examination. Scheduling information for MSHA training courses and examinations would be available from MSHA District Offices.