

miner immediately before exercising the option under § 90.3.

(b) 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.

(c) Paragraphs (a) and (b) of this section do not apply when a Part 90 miner initiates and accepts a change in work assignment for reasons of job preference.

(d) The operator must compensate each miner who is a section 203(b) miner on January 31, 1981, at not less than the regular rate of pay that the miner is required to receive under section 203(b) of the Act immediately before the effective date of this part.

(e) In addition to the compensation required to be paid under paragraphs (a), (b) and (d) of this section, the operator must pay each Part 90 miner the actual wage increases that accrue to the classification to which the miner is assigned.

(f) If a miner is temporarily employed in an occupation other than his or her regular work classification for two months or more before exercising the option under § 90.3, the miner's regular rate of pay for purposes of paragraph (a) and (b) of this section is the higher of the temporary or regular rates of pay. If the temporary assignment is for less than two months, the operator may pay the Part 90 miner at his or her regular work classification rate regardless of the temporary wage rate.

(g) 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 must 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), (d) and (e) 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 or under the old section 203(b) program.

(i) When such a position is available, the operator must 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 must 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 this 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 exceeds the applicable dust standard; 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 existing work position exceeds the applicable dust standard.

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

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

Subpart C—Sampling Procedures

§ 90.201 Sampling; general requirements.

(a) Each operator must conduct respirable dust sampling required by this part with an approved sampling device to assure that the assigned work position of a new or transferred Part 90 miner meets §§ 90.100 or 90.101.

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

(c) The sampling device must be worn by each Part 90 miner, must be operated portal-to-portal, and must be operational during the Part 90 miner's entire work shift.

(d) Sampling required by this part must be conducted while the Part 90 miner is performing normal work duties.

(e) Unless otherwise directed by the district manager, the sampling device must be placed:

(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 respirable dust to which the Part 90 miner is exposed.

(f) Upon request from the district manager, the operator must submit the date and time when sampling required by this part will begin.

§ 90.202 Approved sampling devices; maintenance and calibration.

(a) Sampling devices must be maintained as approved and calibrated by a certified person in accordance with MSHA Informational Report IR 1240 (1996) "Calibration and Maintenance Procedures for Coal Mine Respirable Dust Samplers "(supercedes IR 1121)." To be certified, a person must pass the MSHA examination on maintenance and calibration for approved sampling devices.

(b) Sampling devices must 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 the particular device, before they are put into service and, thereafter, at time intervals prescribed by the manufacturer.

(c) If equipped with a flowmeter, a calibration mark must be placed on the flowmeter of each 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 lined up with the top of the calibration mark.

(d) Each sampling device must be tested and examined immediately before each sampling shift and necessary external maintenance must be performed by a certified person to assure that the sampling device is clean and in proper working condition. This testing and examination must include the following:

(1) Testing the voltage of each battery while under actual load to assure the battery is fully charged. The voltage for nickel cadmium cell batteries must not be lower than the product of the number of cells in the battery pack multiplied by 1.25. The voltage for other than nickel cadmium cell batteries must not be lower than the product of the number of cells in the battery pack multiplied by