Chapter 2 - PART 90 PROGRAM

The Part 90 rule provides protection for miners with Coal Worker's Pneumoconiosis. Inspection personnel must be familiar with this rule to make decisions as to whether the operator is in compliance during, inspections and investigations, and to implement an effective enforcement program.

A. Medical Examinations

Section 203 (a) of the Act requires mine operators to provide medical examinations to miners they employ. This requirement applies only to miners employed at underground coal mines and surface work areas of underground coal mines; it does not apply to miners employed at entities identified as surface coal mines or surface coal facilities. The National Institute for Occupational Safety and Health (NIOSH) is responsible for administering all rules for providing medical examinations while MSHA is responsible for the enforcement of these rules.

B. Posting Chest X-Ray Examinations

Underground coal mine operators should either have a NIOSH approved plan for medical examinations under Section 203(a) of the Act and 42 CFR Part 37 or comply with a written notice of arrangements for medical examinations that were made by NIOSH. In either instance, the operator is required to post the approved plan or NIOSH Notice for medical examinations on the mine bulletin board. If the mine has been open for 6 months or more and the most recent NIOSH listings identify an underground mine as having an approved plan, the inspector shall issue the operator a citation if this plan or notice is not posted on the mine bulletin board.

C. Miner Notification

After interpretation of a miner’s chest x-ray, NIOSH, for the Chief, Division of Health (DOH), informs the miner of any rights he or she may have under Part 90 and includes a copy of the NIOSH report of medical findings. If the interpretation reveals evidence of pneumoconiosis, the miner also receives a form that is to be used to exercise the option to work in a low dust area of a mine. It is possible for an underground coal miner, at his or her own expense, to be examined at an “approved facility” which will submit the medical information to NIOSH. NIOSH will evaluate the x-ray in the same manner as if it were submitted under the operator’s plan or the NIOSH arrangements. If the findings from the approved facility show evidence of the development of pneumoconiosis, the miner will be awarded the right to exercise the Part 90 option.

D. Security of Part 90 Miner Information

All medical findings resulting from participation in the chest x-ray program are kept confidential by NIOSH and MSHA. However, when a miner exercises his or her rights under Part 90 by signing and dating the option form, MSHA informs the appropriate officials at the mine that the miner is a “Part 90 miner” and is entitled to protection under the rule. Medical findings are
privileged information and mine operators are prohibited from requiring any miner to disclose his or her medical information.

All records identifying Part 90 miners shall be kept in locked files when the information is not being used. These records include all Part 90 miner computer messages and computer input forms, all part 90 correspondence between the miner, operator and MSHA, the operator’s Part 90 dust control plans, and all information resulting from inspections and investigations that identifies a Part 90 miner.

E.  Exercising the Part 90 Option

When an eligible coal miner receives an exercise of option form, he or she alone is responsible for exercising his or her Part 90 option. If the miner is exercising the option for the first time, this is accomplished by the miner signing, dating and mailing the form in the preaddressed envelope provided to the Chief, Division of Health, Coal Mine Safety and Health, 1100 Wilson Boulevard, Arlington, Virginia 22209. Each request should include the name and address of the mine and company or corporation where the miner is employed.

The eligible miner is under no time limit as to when he or she must exercise the Part 90 option. The option can be exercised at any time. To prevent further development of pneumoconiosis, it is to the miner’s advantage to exercise the option as soon as possible. Only after the option is exercised may the miner be assured of working in a less dusty area of the mine. However, this choice is the miner’s alone, mine operator may not interfere with the miner’s decision.

In several instances, miners have exercised their super-seniority rights as a letter carrier under the contractual agreement to obtain better jobs or hours without first exercising the option. When this situation occurs, the miners will not be protected under Part 90 unless MSHA receives an exercise of option form from the miner. The mine operator is not obligated to comply with Part 90, nor may MSHA enforce Part 90, until the miner has exercised the option. If a dispute should occur, MSHA personnel should inform the miner that the option must be signed, dated and submitted to the Chief, Division of Health.

F.  Part 90 Dust Standard

The revised rule under Part 90 supersedes Section 203(b) of the Act and provides a miner who has black lung with greater protection from respirable dust. Revised Part 90 prohibits employment of a Part 90 miner in concentrations of respirable dust which exceed 1.0 mg/in³. Evidence shown that mine operators can attain a 1.0 mg/in³ standard in many areas of a mine. The respirable dust standard will be lowered below 1.0 mg/in³ whenever the concentration of quartz in the Part 90 miner’s environment exceeds 10 percent. In that case, a new dust standard applicable to that affected miner would be computed by dividing the percent of quartz present into the number 10. For example, if the concentration of quartz in the Part 90 miner’s environment was 20 percent, then the new standard would be 0.5 mg/in³.

G.  MSHA Notification to Mine Operator
After a signed and dated exercise of option form, or written request for reexercise of option, is received from a Part 90 miner, the Chief, Division of Health, will notify officials at the appropriate mine in writing of the Part 90 miner’s exercise of option. Also, copies of this written notification are sent to the affected miner and the appropriate District Manager.

H. Grace Period (20 Days)

Once an operator receives written notice from MSHA that an employee at the mine exercised the Part 90 option, several obligations must be carried out within certain time frames. Upon receipt of the notice, an operator is allowed a 20-day grace period after which the Part 90 miner must be working in a position which complies with the 1.0 mg/in³ standard. Because the operator has 20 days to assure the Part 90 miner is in a 1.0 mg/in³ environment, MSHA shall not sample Part 90 miners during this time period.

I. Operator’s Written Notice to MSHA

During the same 20-day grace period, the mine operator must give the District Manager written notification of the occupation and, if applicable, the mechanized mining unit to which the Part 90 miner will be assigned on the 21st calendar day. The notice should include the shift or shift rotation and, if nonface, the area of the mine.

J. Achieving Compliance

The rule permits the operator to achieve compliance with the respirable dust standard in either of two ways. The operator must either implement control measures to lower the dust in the Part 90 miner’s position; or transfer the Part 90 miner to an area of a mine where the dust does not exceed 1.0 mg/in³. However, where the Part 90 miner is already working in an atmosphere which complies with the 1.0 mg/in³ standard, there will be no need to lower the dust concentration in that position or to transfer the Part 90 miner to another position. If after this 20-day period the concentration of respirable dust in the Part 90 miner’s job exceeds 1.0 mg/in³, a violation of the rule has occurred and an inspector issues a 104 (a) citation.

During the 20-day period following the operator’s receipt of MSHA’s notification that a miner exercised the option, the mine operator may conduct sampling to determine the concentration of respirable dust in an occupation. However, the mine operator shall inform the District about the samples being used in accordance with 30 CFR 90, Section 90.209(d), if the sampling is being conducted with cassettes and equipment approved under 30 CFR 74. Also, the operator should not submit these samples to MSHA because they were not taken to satisfy any of the requirements of the Part 90 rule.

K. Transfer of Part 90 Miner

1. Defining Transfer - The amended Part 90 rule defines a transfer as “any change in work assignment of a Part 90 miner by the operator and includes (1) any change in occupation code of a Part 90 miner; (2) any movement of a Part 90 miner to or from a mechanized mining unit; or (3) any assignment of a Part 90 miner to the same
occupation in a different location at a mine.”

2. **Transfer Protection**

   a. **Shift Protection** - If, at any time, a Part 90 miner is transferred because the respirable dust standard has been exceeded in that miner’s position, the operator is restricted in the choice of jobs to which the Part 90 miner may be assigned, except as provided in paragraph “b” below. The Part 90 miner has to be transferred to an existing job at the same coal mine on the same shift or shift rotation on which the miner was employed immediately before the transfer.

   b. **Written Agreement** - If, at any time, a Part 90 miner is transferred because the respirable dust standard has been exceeded in that miner’s position, the mine operator may assign the Part 90 miner to a different coal mine (either surface or an underground coal mine), a newly created position, or a position’ on a different shift or shift rotation only if the miner agrees in writing to a transfer of this nature. However, it is important to note that (a) the Part 90 option can only be exercised while the miner is employed at an underground mine; and (b) any Part 90 miner who is transferred to another position by the operator remains a Part 90 miner at the new position, even if the job is at a surface mine.

3. **Transfer After Grace period** - Part 90 also requires that after the 20-day grace period, the mine operator shall notify the District Manager in writing before any transfer of a Part 90 miner is allowed to occur. This notification must include the scheduled date of transfer.

4. **Transfer to Surface Mine** - Miners can only exercise their Part 90 options while they are employed at an underground mine. Under the amended rule in 30 CFR 90, Section 90.102(a), a Part 90 miner may be transferred from an underground coal mine or surface work area of an underground coal mine to a surface mine or facility identified by a surface identification number and retain his/her Part 90 miner rights.

L. **Part 90 Miner Compensation**

   1. **Same Job** - A Part 90 miner is compensated at not less than the regular rate of pay received by that miner immediately before exercising the option. Also, a Part 90 miner must receive wage increases in the job.

      Example; The miner is earning $7.00/hour, exercises the option, and the operator leaves the Part 90 miner in this job because it meets the 1.0 mg/in\(^3\) standard. The Part 90 miner continues to receive $7.00/hour and any wage increases in that job.

   2. **Transfer to a New Job** - 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 before the transfer. Also, a Part 90 miner must receive wage increases that apply to the new job.

Example: The miner is earning $8.00/hour in Job 1, exercises the option, and the operator transfers the Part 90 miner to Job 2. In Job 2, the Part 90 miner will continue to receive $8.00/hour, although other miners in the same job receive $7.00/hour. If a pay increase occurs in which fellow miners in Job 2 receive a $0.30 wage increase from $7.00 to $7.30/hour, the Part 90 miner will then earn $8.30/hour. If the Part 90 miner is again transferred by the operator to Job 3, the miner will earn not less than $8.30/hour in the new job and be entitled to any wage increases in the new Job 3.

3. **Temporary Employment** - The amended rule addresses compensation of miners who are temporarily employed in an occupation other than his or her regular job classification for 2 months or more before exercising the Part 90 option. In this case, once the option is exercised, the Part 90 miner will receive the higher of the temporary or regular rates of pay and also receive any future wage increases in the assigned position.

Example: The miner is in Job 1 earning $6.25/hour but the operator temporarily assigns him to Job 2 at $6.50/hour. While in Job 2 after 3 months, the miner exercises the option to work in a low dust area of a mine. The operator transfers the Part 90 miner to Job 3 which usually pays the hourly rate of $6.00/hour. Because the Part 90 miner worked at least 2 months in the temporary Job 2 before exercising the option, under this rule, the miner must now be paid at least $6.50/hour and will receive any future wage increases in the new job.

**M. Sampling Part 90 Miner**

Sampling under the Part 90 rule must be performed within specified time frames and must be “valid” dust samples.

1. **Exercise of Option - Sampling (Five Valid Samples - 15 days)** By the end of the 20-day grace period after notification from MSHA, the Part 90 miner is required to be in an environment of 1.0 mg/in\(^3\) or less. During the subsequent 15-day transition period (21st through 35th day after notification), the operator must collect five valid samples from the Part 90 miner while he or she is performing normal work duties. If these samples show compliance with the respirable dust standard, the mine operator will begin a bimonthly schedule of sampling with the next bimonthly period as set forth in the rule; for example, if the last sample was collected in the April–May cycle, the next bimonthly cycle would be June–July. If noncompliance is indicated, a citation shall be issued.
2. **Bimonthly Sampling (One Valid Sample - 60 Days)** The mine operator is required to collect one sample during each bimonthly period for each Part 90 miner while he or she is performing normal work duties.

3. **Bimonthly Sample Exceeds 1.0 mg/in$^3$ (Five valid Samples - 15 Days)** If a bimonthly sample collected for a Part 90 miner exceeds 1.0 mg/in$^3$ or the standard established when quartz is present, the mine operator is required to collect an additional five valid respirable dust samples within 15 calendar days from that Part 90 miner’s environment for a compliance decision. If the results of these five samples show noncompliance with the applicable dust standard, the inspector shall issue a 104(a) citation. However, if these sample results show compliance, the mine operator will begin a bimonthly schedule of sampling for that Part 90 miner with the next specified bimonthly period.

4. **Part 90 Miner Transfers (Five Valid Samples - 15 Days)**
The mine operator shall collect five valid samples from the environment of a Part 90 miner within 15 calendar days following implementation of any subsequent transfer that occurs after the 20-day grace period. If the results of these five samples show noncompliance with the applicable standard, the inspector shall issue a citation. Similarly, if results of these five samples show compliance with the applicable dust standard, the mine operator will begin a bimonthly schedule of sampling for that Part 90 miner within the next specified bimonthly period.

5. **Part 90 Miner Sample Results** - Mine operators are required to provide a copy of the Part 90 miner sample results to the affected miner, but the operator is prohibited from posting the original or a copy of this report on the mine bulletin board.

6. **Transmittal of Samples** - Each sample collected by the operator must be transmitted to MSHA within 24 hours after the end of the sampling shift. Each sample is assumed to be taken to fulfill the sampling requirements of either Parts 70, 71, or 90. However, if operators want to collect samples for their own use, they must notify the District Manager in writing prior to the intended sampling shift and declare which samples are intended for purposes other than fulfillment of sampling requirements. This prior written notification is not required if non-approved samplers and cassettes were used by an operator for experimental purposes.

7. **Dust Data Card** - All samples transmitted to MSHA must be accompanied by the appropriate completed dust data card. These cards are supplied by the cassette manufacturer and each card has an identification number identical to that on the filter cassette for which it was provided. The card must be completed and signed by a certified person. Each completed card from a sample collected on a Part 90 miner shall have that miner’s social security number on the card. A miner’s social security number will be noted on the data card only for Part 90 miners.

8. **MSHA Reporting of Operator Sampling Results** - In addition to the operator providing copies of sample results to each Part 90 miner, MSHA will notify each
Part 90 miner of respirable dust sampling results whenever a bimonthly sample submitted for that miner exceeds the standard. MSHA will also notify the affected Part 90 miner of the results of compliance sampling taken by the operator in accordance with Section 90.207. As these computer messages are received, the MSHA office shall mail copies of these results to the appropriate Part 90 miner’s resident address.

N. MSHA’s Technical Inspections and Investigations

Prior to inspections and investigations that may involve the Part 90 rule, inspection personnel shall familiarize themselves with the field office records. The Uniform Mine File Notebook will indicate whether Part 90 miners are employed at the mine. When this record indicates “yes,” the inspector shall review the Part 90 miner files that are kept in a locked file to determine the status of the miner in relation to execution of the option, transfer, sampling, dust control plan, correspondence and existence of citations and orders.

1. Posting Medical Examination Plans - At each underground mine which has been open for 6 months or more, the inspector shall check the bulletin board for an approved medical examination plan.

   a. If the mine does not appear on either computer listing from NIOSH, send a completed mine status form to NIOSH’s Division of Respiratory Disease Studies, X-ray Receiving Center, P.O. Box 4258, Morgantown, West Virginia 26505-2888.

   b. If the mine does appear on either list as having an approved x-ray plan and the plan is not posted, a citation shall be issued.

   * A violation of 42 CFR 37, Section 37.4(e), shall be listed on a citation when the operator’s approved plan is not posted on the mine bulletin board; or

   * A violation of 42 CFR 37, Section 37.6(c), shall be listed on a citation if the “Notice of NIOSH Arrangement” for x-ray plans has not been posted on the mine bulletin board.

2. Sampling Frequency

MSHA personnel should make every effort to sample each Part 90 miner during every technical inspection (sampling) as specified in Chapter 1 of this handbook.

O. Part 90 Miner Dust Control Plan

1. Dust Control Plan

If the mine operator abates a violation of the applicable dust standard in the environment of a Part 90 miner by implementing additional control measures at the
Part 90 miner’s work position, a respirable dust control plan must be submitted. This dust control plan shall be submitted to the District Manager for approval within 15 days after the citation is terminated.

Mine operators are required to provide a copy of the Part 90 miner dust control plan to the affected miner, but the operator is prohibited from posting the original or a copy of this plan on the mine bulletin board.

2. Dust Control Plan Content

The plan must include specific details on the control measures that were implemented to reduce the dust and abate the violation and specific time, place and manner that the control measures will be used to continuously maintain compliance with the standard.

3. No Plan Required

If the mine operator abates a violation of the applicable dust standard by transferring the Part 90 miner to another position, the operator is not required to submit a dust control plan to the District Manager for approval.

P. Report of Status Changes

Any change in status of a Part 90 miner that affects sampling must be reported in writing by the mine operator to a designated MSHA District office within 3 working days after the change in status has occurred. Section 90.220 shall be cited when the operator has failed to collect samples for a Part 90 requirement and it is determined that the operator did not notify the District Manager in writing within 3 days after a status change has occurred.

Whenever changes occur which affect a Part 90 Miner’s option, the procedures listed below shall be followed:

1. Miner Declines Option or Waives Rights

Investigate to determine whether the miner freely made the decision not to complete the transfer.

Explain Part 90 rights and assure that the miner has knowledge of the circumstances and how this decision may affect his/her health.

Promptly notify the Arlington Division of Health (DOH) in writing of the investigation results.

2. Miner Terminated, Laid Off, Retired or Deceased

Promptly inform DOH in writing after this is verified and include the effective date
of the action.

3. Miner in Unavailable Status for More Than One Year

Verify this status with the mine operator and/or the miner and the reason for this prolonged condition.

Record this action in the miner’s file and submit a copy to DOH.

When DOH receives information concerning Item 1 or 2 above, DOH informs the miner that he/she is being removed from active Part 90 status and that the Part 90 rights can be reestablished, provided the miner is employed at an underground coal mine and submits a written request to the DOH Chief.

Q. Waiver of Part 90 Option

A Part 90 miner may waive his or her Part 90 rights by (1) giving written notification to the Chief, Division of Health, Coal Mine Safety and Health; (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 exceeding any standard below 1.0 mg/in$^3$ established by excessive concentrations of quartz; or (3) refusing to accept another position at the same coal mine which meets the requirements of 30 CFR 90, Sections 90.100, 90.101 and 90.102(a), when sample results show that the applicable dust standard is exceeded in his or her current position. When a miner does waive Part 90 rights, protection under Part 90 terminate until the miner reexercises the option at a later date. There is no limit on the number of times a Part 90 miner may waive his or her rights. Once these rights are waived, the miner may reexercise the option at any time, as long as he or she is employed at an underground coal mine or at a surface work area of an underground coal mine.

The Part 90 rule does not require the miner or operator to provide a written statement when the Part 90 miner refuses to accept another position offered by the operator; i.e., when the respirable dust concentration exceeds 1.0 mg/in$^3$ or the standard established by Section 90.101. Written notice by the Part 90 miner or operator also is not required when a miner accepts an occupation where respirable dust concentrations exceed 1.0 mg/in$^3$. When these situations occur, the inspector shall establish facts through reviewing job bidding documents, company records, and through discussions with the Part 90 miner and operator.

R. Ineligibility of Option

1. Notification

There have been occasions where a miner was awarded the option, exercised his or her rights, and later NIOSH discovered that a mistake was made. Because of the mistake, that miner was never actually eligible to exercise the option. Although the miner had been notified of transfer rights under the old Section 203 (b), these rights had to be withdrawn because there was not sufficient evidence of pneumoconiosis.
Under amended Part 90, the miner who exercised the option and then received notice of ineligibility will remain in his or her current job at the same rate of pay until one of two resolutions is agreed upon.

2. Resolutions

a. The miner and operator may agree in writing that the miner will stay in the current position if written agreement is reached, the miner shall be compensated at no less than the regular rate of pay for the agreed upon position and Part 90 protection will terminate.

b. When another position at this same mine becomes available on the same shift and in the same occupation in which the miner was employed immediately before exercising the option, the mine operator shall offer this position to the affected miner. At this point, the miner has 15 days to make up his or her mind on whether to accept this written offer. If the miner accepts the job, the mine operator is required to make the reassignment and compensate the miner at not less than the regular rate of pay for the new job. However, if the miner fails to act on the operator’s offer of this available position within 15 days, his or her failure will act as a rejection of the offer. At this point, the miner is no longer entitled to any protection under this Part 90 rule.