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PAULA L. PRICE V. MONTEREY COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

PAULA L. PRICE, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. LAKE 86-45-D
v.	VINC CD 85-18
MONTEREY COAL COMPANY, RESPONDENT	Monterey No. 2 Mine

DECISION

Appearances: Linda Krueger MacLachlan, Esq., 314 North Broadway, St. Louis, Missouri for the Complainant; Thomas C. Means, Esq., Crowell & Moring, Washington, D.C. for the Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Paula L. Price under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging discrimination by the Monterey Coal Company (Monterey) in violation of section 105(c)(1) of the Act.(FOOTNOTE 1)

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In her Complaint to the Secretary of Labor and to the Federal Mine Safety and Health Administration (MSHA) on July 15, 1985, pursuant to section 105(c)(2) of the Act(FOOTNOTE 2) Ms. Price alleged as follows:

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On July 15 1985, Monterey Coal implemented the policy of Mandatory Metatarsal footgear, to cut down on foot injuries in the mine. The Company provided us with the first pair of boots, but I have been having problems with the fit of the boot I chose from the very limited selection they offered. The women were offered 4 styles while the men were offered between 12 to 20 styles. Monterey says if the shoes we were provided do not fit, we must find ones that do, dictating also the type of metatarsal we are allowed to wear. (no clip on type) I feel if Monterey makes this requirement, then the expense of providing a sufficient selection of boots that are fitted properly and comfortably should fall on them. If this is not possible or practical to provide, the rule should be revoked for everyone. The boots I had to wear caused blisters and severe feet and leg cramps. They hindered my ability to walk and were a safety hazard. Also the cramps in my feet and legs stopped me from getting adequate rest. After wearing their boots two days, I went to the safety department and tried to get some temporary approved clip on type because I could hardly walk. Only after having to leave the mine early in my shift on July 19, 1985, and seeking medical treatment from my doctor, then Monterey allowed me the clip on metatarsals. Monterey refuses to acknowledge this as a work related injury even though they required me to wear their boots or the alternative of not work.

In a letter apparently accompanying the above Complaint to MSHA Ms. Price further stated as follows:

> I hereby file a complaint of 105(c)(2) discrimination by my employer in retaliation for my safety and health efforts for myself and other employees. My actions occurred on 7-19-1985 at approximately 2:30 AM. I could no longer tolerate the pain in my legs and feet caused by the now mandatory metatarsal safety boots I am now required to wear by Monterey Coal Company. They do not fit properly and comfortably, and are a safety hazard because they hinder my ability to walk comfortably and would prevent a safe and expedient exit from the mine, should it become necessary because of an emergency at the mine. Leg & foot cramps are a hinderance to my getting adequate and essential rest. The company actions of discrimination occurred on July 15, 1985, by requiring all workers to wear metatarsal protection then dictating what type of metatarsal we are allowed to wear, while refusing to permit an approved add on type of metatarsal, without furnishing adequate and proper fit for all workers. The person responsible for the company action is Gordon Roberts, superintendent of the #2 Mine. Witnesses with similar problems are listed below.

Ms. Price subsequently, on August 26, 1985, submitted an additional statement to MSHA further expanding on her Complaint. The statement reads as follows:

> On Monday, August 12, 1985, I received my second pair of work boots with metatarsal guards from Monterey. These were replacement boots sent from Hy-Test because my first pair was sent in to them to check for defects. The first pair was size 7E and the replacement pair they sent was size 7D. I can't wear a size 7D because of my wide feet. I took then home and wore them at home and tried to break them in for several days but I couldn't keep them on my feet for more than an hour. When I went to on Thursday Ben Chauvin, Mine Manager,

questioned me as to where my new boots were and I told him they were at home and that I was trying to break them in because they hurt my feet. I was wearing the clip-on type metatarsal guards which had been provided by Monterey to wear until my boots were sent by Hy-Test. Several other employees had been given these Hy-Test type to wear while their boots came in (Special ordered sizes). Monterey routinely gives out these clip-on type guards to visitors and inspectors when they come to the mine. Chauvin then told me that on Monday, August 19, 1985, I had to turn in the clip-on guards and be wearing integral metatarsal guard boots or he would not let me go to work.

On Monday, August 19, 1985, I reported to work and turn in the clip-on guards but I wore another set of clip-ons that belonged to me on my boots. I still could not wear the boots provided by Monterey because they were not the right size for my feet. Chauvin stopped me prior to entering the mine and told me that I could not work because I did not have my boots on, I then left the mine. I returned on Tuesday, got dressed to go below still wearing the clip-on guards. I then met with Dave Longe, Head Mine Manager, and Chauvin and Longe advised me to turn my new boots in to the workhouse as suggested by a Hy-Test representative I had talked to if they were not the right size. Chauvin again told me that I could not go to work with just the clip-on guards on. I then left the mine. Longe stated that the two days I missed would be considered AWOL or unexcused absence days. On Wednesday, August 21, 1985, I went to work again and met with D. Longe and Chauvin and was read a letter of suspension, suspending me until August 26, 1985, because I had failed to follow Chauvin's directions to wear my boots with integral metatarsal guards. If I failed to do so there would be further disciplinary action which may include suspension with intent to discharge. I returned to the mine on Thursday to see if Monterey would accept the clip-on type guards if they were permanently attached to my regular work boots. I had found a cobbler that told me he could attach them to my boots if I provided the metatarsal guard. After about 1 1/2 hours I was told that Gordon Roberts, Supt., had decided that the guards would satisfy the company metatarsal policy with certain stipulations; the altered metatarsal would overlap the steel toe, the work would

> have to be done by a certified cobbler and done in a workmanlike manner, and that it be done by August 26, 1985. Larry Krupnik, Safety, gave me the stipulations. I was led to believe that if I did all this I could return to work on August 26, 1985. However it will be Chauvin's decision to let me work or not. I then took my boots to the cobbler and had the work done. I feel that I have been discriminated against because I was not allowed to work on August 19 and 20, and was then suspended for the 21, 22, and 23. I did not have proper boots to wear but I was willing to wear the clip-on guards on these days until I got boots that I could wear. Other employees had been allowed to work with the clip-on types until their boot problems were resolved. Monterey then changed their position and is willing to let me work with clip on types if I get them permanently attached. I am requesting the pay for the days I was not allowed to work because I could not comply with Monterey's request to wear integral metatarsal boots even though I was willing to work with clip on guards which Monterey accepts for visitors and inspector to comply with their metatarsal protection policy.

Subsequently by letter dated December 16, 1985, the Complainant notified the MSHA attorney then handling her case that she had achieved a partial remedy to her Complaint. The letter reads as follows:

> After your phone call today, I'm writing to confirm that Monterey paid me 4 of the 5 days pay I asked for. I still feel they owe me the 5th day. The 5th day they still owe me should have been my idle Friday to work. Eight hours at 14.42 per hours plus 30 cents per hour shift differential which totals to $117.76. I would also like any and all reference due to this policy, concerning any disciplinary action taken by Monterey, and any derogatory inferences concerning my performance as an employee, to be removed from my file.

Thereafter by letter dated January 7, 1986, Ms. Price was notified by MSHA as follows:

> Your complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977 has been investigated by a

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special investigator of the Mine Safety and Health Administration (MSHA).

A review of the information gathered during the investigation has been made. On basis of that review, MSHA has determined that your complaint of discrimination has been satisfied and that no further pursuit of the complaint is required.
If you should disagree with MSHA's determination, you have the right to pursue your action and file a complaint on your own behalf with the Federal Mine Safety and Health Review Commission at the following address:

Federal Mine Safety and Health Review Commission
1730 K Street, N.W. Washington, D.C. 20006 (202) 653-5629

Section 105(c) provides that you have the right, within 30 days of this notice to file your own action with the Commission.

In her Complaint to this Commission pursuant to Section 105(c)(3) of the Act(FOOTNOTE 3)

Ms. Price stated as follows:

> My complaint of discrimination, I do not feel has been satisfied. I am requesting relief of $117.76 for the idle day of 8-23-85. I have been paid [sic] for the preceding four days (Mon thru Fri) of that week in which Monterey refused me the right to work and then suspended me. I would also like, for my relief, any and all reference due to this policy concerning any disciplinary action taken by Monterey, and any derogatory inferences concerning my performance as an employee, to be removed from my file.

At a subsequent preliminary hearing held in response to Moterey's Motion for a More Definite Statement and in an attempt to clarify the nature of the complaint and the relief sought, Ms. Price stated that she was seeking as damages, pay for one eight hour shift for the "idle" day on August 23, 1985, expenses (postage and phone calls) related to the litigation of her complaint (presumably including expenses relating to the pursuit of her grievance resulting in the recovery of four days pay for August 19 - 22, 1985) and "a pair of boots that fit".

Based on my best understanding of her somewhat rambling and ambigious complaints I conclude that in substance Ms. Price's Complaint of Discrimination as it is now before me is that she was suspended from work by Monterey because she in essence refused to perform work under a work rule that

was unhealthful and unsafe as applied to her.(FOOTNOTE 4) It is undisputed that Monterey refused to allow Ms. Price to work on August 19 and 20, 1985, and that she was suspended on August 21 and August 22, 1985, because of her refusal to wear intregrated metatarsal work boots which she maintains did not fit, caused foot injuries and created an unsafe and unhealthful condition. While Ms. Price also claims she was denied the opportunity to work an "idle" workday on August 23, 1985, there is a separate dispute as to whether she was in any event scheduled to work that day and therefore entitled in any event to be paid for such work.

Within this framework it is apparent that the legal analysis applicable to "work refusals" must be applied to this case. Under that analysis a miner's "work refusal" is protected under section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of a hazardous condition. Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988); Miller v. FMSHRC, 687 F.2d 1994 (7th Cir. 1982); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

By way of background, it is not disputed that sometime before the incident at issue Monterey had conducted studies of foot injuries leading to the conclusion that its underground miners should be required to wear protection for the metatarsus. Monterey was apparently also aware of a decision by the West Virginia State Board of Coal Mine Safety and Health that many foot injuries might have been prevented

or might have been less severe if the injured person had been required to wear metatarsal protective boots. Monterey also concluded that an intregrated metatarsal guard rather than a temporary clip-on guard was preferable. Studies showed problems with clip-ons including evidence they tended to come loose. It also appears that the clip-on type of metatarsal guards had not passed ANSI standards unlike the integrated metatarsal type boot.

In implementing its new policy Monterey agreed to pay for an initial pair of intregrated metatarsal boots for each miner and contracted with two companies to bring "shoemobiles" to the mine. The miners were not prohibited from obtaining their integrated metatarsal boots from other sources but were told that the company would pay only for the cost of the initial pair of boots selected from one of these two vendors. According to Monterey the selection and fit were to be the employee's responsibility. Both of the selected shoe companies reported however that they could make any size as a special order and employees were apparently advised to place orders with the vendors if a special size was required.

Monterey apparently also anticipated that some miners might nevertheless be unable to obtain proper fitting boots by the July 15, 1985, deadline when the policy would take effect. Those who anticipated difficulty locating appropriate boots were advised to see Safety Supervisor Larry Krupnick for assistance. A list of miners who were unable to obtain proper boots due to circumstances beyond their control was provided to shift managers so that these miners would be permitted to work with only the temporary clip-ons until they obtained their shoes. It was Monterey's policy that ordinarily other miners would not be permitted to start work without integrated metatarsal protection except for unusual situations to be dealt with on a case-by-case basis. Monterey anticipated rigid enforcement of the new policy and managers were apparently advised that exceptions from the policy would be closely monitored for abuse.

Ms. Price was one of the listed miners. She advised Monterey that the boot she had selected from the Hy-Test company was not in stock and had to be special ordered. She thereafter reported to work in her new integrated metatarsal boots on July 16, 1985. It is not disputed that she began experiencing discomfort with the new boots and complained to various individuals including her foreman Don Overturf. Ms. Price maintains that she also complained around that time to

an unidentified clerk in the Safety Department and purportedly requested permission to use temporary clip-on guards so she could alternate wearing her new boots with her old boots. This person apparently told Ms. Price that he did not have the authority to allow her to do so.

Ms. Price described her injuries at this time as:

> More like a bruise rather than--across the toes rather than a bubbly blister. I didn't have what I would call a raised blister until Wednesday [July 18].

As she continued to work with her new boots the problems increased. She described the problems as follows:

> The marks on the front of the toes became deeper. And the heels started--they still felt very, very bruised on the back part of my heel. There was no [sic] marks on the back part of my heels. It just hurt inside of my heel. And before the end of the day I--I was having cramps from below the knee down, in the calves of my legs, causing cramps in those. And it just--it's indescribable. (Laughs) It felt like I had a toothache from the knee down. It ached inside your muscles from walking. Well, you walk funny so you don't rub your foot any more and walk--well, you walk slow so--so your not going to rub anything else any more to make anything in your toes hurt. (Laughs) And then you walk funny, well, it pulls on muscles that you haven't used in that way for a while and it creates tension in your muscles and causes them to ache." (Tr. 486-487)

Price described the condition of her feet from the new boots after completion of her shift on Tuesday, July 17 as follows: "[t]hey were much, much redder and the top layer of skin on both feet, across the top of the toe was not blistered with liquid behind it but like the top layer the skin was loose, like it is chaffed, chapped." (Tr. 490). She then described how she sought relief when she returned home from work:

> Get out the old wash bucket and put your feet in it. (Laughs.) By then I was having very severe cramps in my arches of my feet that were coming and going. But my problem, biggest problem, was when you lay

> down to go to bed and you'd start to relax you'd be laying flat of [sic] your back and my toes were curling down with both feet going into a charley horse. Maybe not both feet at one time but maybe my right foot and then later my left foot and maybe both feet. But this was going on all day. And you couldn't even sleep because every time you started to relax your feet went. . . . (Laughs.) (Tr. 490)

Other employees were having similar problems with their new integrated metatarsal boots. Ms. Price recalled conversing with her foreman Don Overturf about the problems of another employee who had open blisters on both heels. She also discussed her own problem with Overtuff and purportedly told him as follows:

> I thought these boots were pretty silly because they were seeming to create a bigger safety hazard by wearing them than they were. . . . you know, the metatarsal was supposed to be an extra safety factor for us and I wasn't arguing against that because it would protect the top of your foot. But to criple-up all the rest of your foot--. (Tr. 493).

Overturf acknowledged in his testimony that he "had heard some complaints about her boots a time or two" (Tr. 1358). He recalled that she complained of leg cramps and "she felt that her shoes were causing her not to be able to perform her job properly" (Tr. 1359).

Price testified as follows concerning the condition of her feet after working on July 18.

> By then I had small raised portions on the top of my toes close to the foot, not at the bottom of my toe. My heels were very painful, very, very tender. There were no obvious marks on my heels. I didn't have any blisters or large red heels, nothing like that. It was--the visible marks were on my toes and they were raising the layers of skin to have small little bubbles, you know, not a big one but with large red marks in the whole area, pressure marks like.*** My legs were aching below the knee on down. It was very, very miserable. And when I would take my boots off in the locker room, then the cramps in the arches would get worse. When I

> would sit down and take--like my body weight pressure off of them, when my feet would relax they would cramp up. (Tr. 578).

Price also testified that she had trouble sleeping because of the cramps, had "charley horses" in the arches of her feet and was awakened 2 or 3 times because of this (Tr. 578-579).

Price further testified that at the beginning of her shift on July 19, her feet continued to be "very painful" and "it was very hard to walk anywhere" (Tr. 582). She again complained to Overturf that the boots were unsafe because of the crippling effect (Tr. 583). She nevertheless began working in her job as a continuous miner operator and rotated duties as a continuous miner helper keeping the power cable from being run over. Price testified that during this time her "feet hurt so bad I also felt sick, I just--I was in misery" (Tr. 587).

Because of the "aching, the blisters, the very painful heels that felt very, very bruised" she returned to the shop area to see Overturf and to arrange for a ride out of the mine (Tr. 588). She removed her shoes and socks and showed Overturf her feet. She then left the mine and reported to the nurse's station where she showed "the blisters, the red marks, all the pressure marks on the top of my toes" to the nurse on duty (Tr. 592). Price maintains that she had three blisters on each foot located on top of her toes (Tr. 592). Overturf reported the redness but did not report observing blisters and, apparently consistent with Monterey's policy that blisters from ill-fitting clothes were not work related, classified the condition has non-work-related. On July 20, 1985, Ms. Price visited a doctor who prepared a note indicating that she should not wear the boots and that she then had vesicles(FOOTNOTE 5) on her feet.

On her return to work on July 22, 1985, Price presented the doctor's note to Ben Chauvin, the Shift Mine Manager, and filed a safety grievance under the collective bargaining agreement. She was given temporary clip-on metatarsal guards to use with her old boots and a one-week exemption from the policy.

Price continued to have cramps in her feet and sought additional medical care on July 24, 1985. She apparently also sought advice from this specialist concerning how to find boots meeting the Monterey policy. She filed another grievance under the collective bargaining agreement on July 24, 1985, over the company's denial to excuse her shift and to treat her injury as work-related. The grievance was settled on July 26, with a written agreement that states as follows:

> The appropriate manufacturing representative shall be contacted regarding this employee's shoes. After such contact is made and a determination given by the manufacturer, the employee shall make necessary arrangement for providing footwear that meets management standards for metatarsal shoes.

Ms. Price was also then given an extended exemption and was allowed to wear temporary clip-ons until her boots were returned or she obtained new boots. The Hy-Test manufacturer was contacted and the boots were returned for evaluation. Hy-Test later told Safety Supervisor Larry Krupnick that it had not found the boots defective but would nevertheless replace them with a smaller size at no charge. According to Krupnick Hy-Test advised Price that she should be sure the replacement boots fit before she wore them in the mine.

Ms. Price received the new boots on August 12, 1985. She attempted to break them in at home over several days. She had already tried the same size boot (Size 7-D) at the shoemobile and found that they cut into her toes. On August 18, 1985, shift manager Chauvin told Price that she would be expected to report to work with these boots on the next working day or she would not be allowed to work. Price purportedly told Chauvin that the replacements were the wrong size, that they hurt her feet and that she had tried without success to break them in. She told him that she planned to discuss the problem with Hy-Test the next time the shoemobile was on the premises. Chauvin then apparently told Price that her "time was up" and that she would have to turn in the temporary clip-ons the next working day (Monday, August 19, 1985) and comply with the policy.

It is not disputed that, in an apparent effort to comply with the policy, Price then visited the "London Bootery" and was told that the replacement boot might no longer comply with Federal regulations governing steel-toe boots if the steel toe was stretched and that they had no integrated metatarsal guard boots in her size in stock except other Hy-Test boots. She also inquired if they would attach a metatarsal to one of the Red-Wing brand boots that she had been buying for the previous eight years but they apparently declined for "liability reasons". Price also contacted the MSHA investigator who was handling her complaint and purportedly was told that Monterey's threat was so unreasonable that it would not implemented on August 19. Price maintains that union representatives including an attorney also agreed with this assessment of the situation.

On August 19, 1985, the Complainant turned in her company issued clip-ons and reported for work in her old boots with another pair of temporary clip-ons. Chauvin refused to permit her to work in these clip-ons and she was marked "AWOL". Price explained to Krupnick that the replacement boots did not fit and that she had tried everything she could think of to come up with another pair of boots but had been unsuccessful. When she nevertheless attempted again to go to work she was refused entry to the elevator. She then filed another grievance under the collective bargaining agreement stating that there was "no reason whatsoever for them to be denying me work, it was unsafe to require me to wear something that didn't fit my feet". It was around this time that Krupnick also told Price that the company had fulfilled its responsibility by having furnished her a pair of boots. According to Price she was told that it was her responsibility to deal with the vendor directly.

Before reporting to work on the night shift of August 20, 1985, Price obtained a note from her doctor indicating that she needed special-made boots to be able to comply with the policy. This note was given to Monterey the same day. She also called the Hy-Test shoe company before reporting to work and was told to return the boots to the warehouse. She returned the boots and then reported to work in her old boots with temporary clip-ons. She told Chauvin that she no longer had the boots and that she had returned the replacements for the "correct" size at Hy-Test's direction. She was again denied permission to work and was suspended for failure to follow orders to wear integrated

metatarsal safety boots. She was also warned that failure to wear the proper shoes the following morning could result in discharge.

Price apparently continued in her efforts to resolve the problem when she and Safety Committeemen Burkholder went to the office of Mine Superintendent Lange. They informed Lange that Price's doctor had submitted a note stating that she was not to work in the replacement boots, that at Hy-Test's direction replacement boots had been turned in for exchange and that Ms. Price had been unable to locate any integrated metatarsal boots that fit her feet. Lange apparently told Price to retrieve her boots from the warehouse and to wear them. Before her shift on August 21, Price again called various shoe stores and confirmed that no store had any other brands in stock other than the brands already tried. She determined that any other integrated metatarsal boots would have to be special ordered taking at least two weeks. She again reported to work in her old boots with clip-ons on August 21. She was again denied work and when she and Burkholder again went to Lange's office to complain, they were told she was suspended until August 26, 1985. She was also told to report to work at that time in boots with integrated metatarsal work shoes.

On the following day, August 22, Richard Morlegan another employee, reported to Mine Superintendent Roberts that the boots which the Company had been special-ordered for him did not fit properly. He asked if he could cut the integrated metatarsal off the new boots and have it reintegrated by a cobbler onto another pair of boots that did fit. Roberts approved this procedure. Later that same afternoon Price asked Roberts if she could have a metal clip-on guard attached to her existing boots by a cobbler. After conferring with other officials Roberts granted Price's request. The boot policy was according revised and posted the following Friday, August 23. Price thereafter returned to work and apparently has continued to work wearing her old boots with a metatarsal guard permanently attached.

On August 28, 1985, the union filed a grievance under the collective bargaining agreement for the days Price was marked "AWOL" and suspended and demanded payment for an "idle" day and for her out-of-pocket expenses. The grievance was settled by the union for four days pay in return for the withdrawal of her other demands. The Complainant was not present at the settlement meeting. She maintains that she

did not consent to the settlement and was not even told about it until several days later. According to Price she was not compensated for the loss of pay for an "idle" work day on August 23, for a free pair of integrated metatarsal boots that fit and for her expenses.

The above narration of evidence is essentially undisputed and I find it to be credible. Within this framework I find that the Complainant has met her burden of proving that her refusal to comply with Monterey's work rule requiring the wearing of an integrated metatarsal boot on August 19, 20, 21, and 22, 1985, was a protected work refusal based on a good faith, reasonable belief that it would have been hazardous to comply with. The credible evidence supports a finding that Ms. Price made good faith and reasonable efforts to obtain properly fitting integrated metatarsal boots comporting with Monterey's policy prior to August 19, 1985, and continued with such efforts through August 22, 1985. Based on her prior experience with ill fitting boots the month before and her unsuccessful efforts to break in another pair of boots and obtain properly fitting boots at the time of her suspension it is also clear that she then entertained a good faith, reasonable belief that it would have been hazardous to have worked in ill-filling boots.

Indeed Monterey does not appear to challenge Ms. Price's complaint that the boots she had obtained did not fit properly and caused injuries to her feet. Not only would the wearing of such boots in itself present a hazard of possible infection from abrasions and blisters but, as Ms. Price points out, could present a stumbling hazard and interfere with the safe evacuation of the underground mine should an emergency develop. Since it is undisputed that Monterey refused to allow Ms. Price to work based on her refusal to wear the integrated metatarsal boots on August 19 through 22, 1985, it is clear that the denial of such work was motivated solely by her refusal to wear such boots.

It is also apparent from the history of the problem that Ms. Price had communicated to various company officials, including Don Overturf and Ben Chauvin, the hazardous nature of wearing ill-fitting integrated metatarsal boots. The "communication" requirement has accordingly been met. See Simpson supra.; Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

Accordingly Ms. Price is entitled to lost pay for the period she was denied opportunity to work i.e. four days pay for August 19 through 22, 1985, as well as those costs directly related to the prosecution of this claim in the grievance proceeding below. She is also entitled to recover her costs in these proceedings necessary to recover the costs related to the grievance proceedings. I do not find however that Ms. Price is entitled to a company-paid pair of integrated metatarsal boots. She has of course, consistently maintained that she cannot find any such boots that fit her. In any event the Monterey policy was changed at her request to permit her to wear her old boots with a professionally attached metatarsal guard. Ms. Price then elected this alternative thereby waiving any claim to the company paid integrated metatarsal boots.

Ms. Price also makes the bald assertion that she is entitled to one day "idle" day pay for August 23, 1985. I do not however find that she has sustained her burden of proving that she would have been entitled to such pay in any event. Indeed the Complainant's own evidence through the testimony of the union local president Jim Kimball, is that she was not entitled to "idle" day pay on August 23rd (Tr. 732-733). Another of Complainant's witnesses, union committeeman Ron Burkholder, also failed to support her claim (Tr. 2468-2469).

ORDER

Based on the foregoing decision I find that the Complainant is entitled to reimbursement for her initial costs (alleged to be postage and phone calls) in prosecuting her grievance leading to her retrieval of four days pay (August 19, through August 22, 1985) and her subsequent costs in the instant proceedings to recover those costs. Any petition for such costs as well as any petition by Respondent must be filed with the undersigned on or before May 1, 1989. The parties are directed to file any response to such petition(s) on or before May 12, 1989. Monterey Coal Company is further directed to delete from its records any reference to disciplinary action taken against Ms. Price for her refusal to wear integrated metatarsal boots in August 1985.

~632
Monterey Coal Company has also alleged "nonfeasance and malfeasance" by Complainant's trial counsel. Any such allegations must be directed to the Commission under its Rule 80, 29 C.F.R. 2700.80. This decision is not a final disposition of these proceedings and no final disposition can be made until the issue of costs is determined.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

~FOOTNOTE_TWO
2. Section 105(c)(2) of the Act provides as follows:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the

miner, applicant for employment, or representative of miners, alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing order appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

~FOOTNOTE_THREE

3. Section 105(c)(3) provides in part as follows:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order based upon findings of fact dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, and order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. . . .

~FOOTNOTE_FOUR

4. In her post-hearing brief Ms. Price has alleged other acts of discrimination. To the extent however that these allegations were not first presented to the Secretary under the procedures set forth in section 105(c)(2) of the Act she has neither exhausted her administrative remedies nor met a statutory condition precedent. The merits of these allegations are accordingly not properly before me. Moreover the complaint in

this proceeding has never been properly amended to incorporate these new allegations, the allegations cannot be considered as having been timely filed and the allegations do not in any event comport with the requirements of Commission Rule 42(a), 29 C.F.R. 2700.42(a). In addition as noted, infra, she has obtained al of the remedies requested in her complaint herein except those to which she is not otherwise entitled.

~FOOTNOTE_FIVE

5. "Vesicles" are defined as a circumscribed, elevated, fluid-containing lesion of the skin, 5 mm or less in diameter. Dorland's Pocket Medical Dictionary, 21st edition, W.B. Saunders Co.