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PAULA PRICE V. MONTEREY COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 13, 1990

PAULA PRICE

v. Docket No. LAKE 86-45-D

MONTEREY COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Ford, Chairman; Backley, Lastowka and Nelson, Commissioners

This discrimination complaint is before the Commission by way of cross-petitions for review of Administrative Law Judge Gary Melick's decision on the merits issued April 12, 1989, 11 FMSHRC 614, and his final disposition on costs and attorney fees issued June 19, 1989, 11 FMSHRC 1099. Monterey Coal Company seeks review of Judge Melick's holding that it violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(the Mine Act), by suspending Paula Price for four days in retaliation for a statutorily protected work refusal. Price seeks review of the judge's significant reduction in her claimed costs and attorney fees. For the reasons that follow, we reverse the judge's holding that Monterey discriminated against Price in violation of the Mine Act, we dismiss the complaint and we vacate the award of costs and fees.

Paula Price first filed her discrimination complaint with the Secretary of Labor on July 28, 1985 pursuant to section 105(c)(2) of the Mine Act 1/ alleging that Monterey's newly imposed requirement that all

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1/ Section 105(c)(2), 30 U.S.C. 815(c)(2), 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

(Footnote continued)

miners wear integrated metatarsal work boots had been discriminatorily applied to her and others who could not obtain properly fitting footwear. 2/ On August 26, 1985, Price supplemented her complaint by charging that she had not been allowed to work for two days and was thereafter suspended for three days because she "did not have proper boots to wear." 11 FMSHRC 619. By letter of January 7, 1986, MSHA

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Fn. 1/ continued

> 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 other 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.

30 U.S.C. 815(c).

2/ Integrated metatarsal work boots are boots equipped with a permanent protective shield incorporated into the boot which protects the top of the foot between the ankle and the toes.

informed Price that after its investigation of the matter it had concluded that her complaint of discrimination "ha[d] been satisfied and that no further pursuit of the complaint [was] required." 11 FMSHRC 620. MSHA also informed Price of her right to file a complaint with the Commission on her own behalf pursuant to section 105(c)(3) of the Mine Act, 3/ which she did on January 24, 1986. Id.

Twelve days of hearings on the merits ensued during late 1986 and early 1987. As post-hearing briefing was concluding, the Commission issued its decision in Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (August 1987), wherein the Commission invalidated Commission

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3/ Section 105(c)(3), 30 U.S.C. 815(c) provides 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, an 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) an 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. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 an 110(a).

30 U.S.C. 815(c)(3).

Procedural Rule 40(b), 29 C.F.R. 2700.40(b), by holding that a section 105(c)(3) complaint could not be filed in the absence of a Secretarial determination that no violation of section 105(c) had occurred. Finding that the Secretary's January 7, 1986, letter to Price was not a determination that no violation had occurred, the judge held that he lacked jurisdiction to continue the proceeding and dismissed the case. 9 FMSHRC 1662 (September 1987).

Price's petition for review of the judge's dismissal order was granted by the Commission on October 13, 1987. Meanwhile, the U.S. Court of Appeals for the District of Columbia Circuit reversed the Commission's retroactive application of its revocation of Rule 40(b) in Gilbert supra. Gilbert v. FMSHRC 866 F.2d 1433 (D.C. Cir. 1989). Accordingly, the Commission on February 28, 1989, vacated its direction for review and remanded the case to the judge to complete the record and enter a decision. 11 FMSHRC 183 (February 1989). On remand the judge issued his April 12, 1989, decision on the merits, 11 FMSHRC 614; and his June 19, 1989, disposition of costs and fees, 11 FMSHRC 1099, both presently on review.

Monterey Coal Company operates a large underground coal mine, the Monterey No. 2, in Albers, Illinois at which Paula Price is employed. Sometime prior to early 1985, Monterey conducted studies of foot injuries at its various operations and determined that those injuries could be significantly reduced if miners wore metatarsal protective work boots. The company also determined that greater protection would be provided if the metatarsal shields were integrated into the miners' boots rather than by means of temporary clip-on metatarsal guards which had not passed American National Standards Institute (ANSI) standards for foot protection. 11 FMSHRC 622-23. Monterey began discussing its integrated metatarsal boot policy with the United Mine Workers of America (UMWA) safety and communications committees in February of 1985, and by a series of announcements in April and May of 1985, declared that all miners would be required to report to work with integrated metatarsal boots beginning July 15, 1985. R. Ex. 1.

In response to a suggestion by the UMWA, Monterey agreed to pay for the first pair of boots so long as they were provided by one of two selected vendors (Hy-Test and Iron Age) who provided "shoemobile" services to the mine where boots could be fitted and selected. Miners were permitted to secure conforming boots from any source but would only be eligible for free boots ordered from the two selected vendors. 11 FMSHRC 623; Tr. 883, 1065-1070. Miners were informed that both vendors could make any size as a special order, 11 FMSHRC 623, but that such orders should be placed as soon as possible. Resp. Ex. 1. The vendors were scheduled to visit the mine three times each during the

latter half of June. Id.

Anticipating that some miners might have difficulty securing the required shoes by the July 15, 1985, deadline, Monterey advised any such miners to so inform the safety department. A list of those miners was drawn up and provision was made for them to wear temporary clip-on metatarsal guards until the boots on order arrived; the general policy, however, was that miners who reported for work after the deadline without

integrated metatarsal boots would not be allowed to work. 11 FMSHRC 623. Price was unable to secure from the shoemobile a pair of Hy-Test boots she had selected, so an order was placed and her name was added to the list of miners awaiting boots. Her pair apparently arrived on time, however, and she reported for work in them on July 16, 1985. Id. Price experienced discomfort with the new boots and complained to her foreman, Don Overturf, and to an unidentified clerk in the safety department. She asked that she be allowed to alternate wearing her new (Hy-Test) boots and her old (Red Wing) boots equipped with temporary clip-on guards until the new pair was broken in. The safety clerk told Price he had no authority to grant such an exemption. From July 16 to July 19, 1985, Price described her discomfort as increasing from redness to chafing, to raised and loosened skin across the top of her arch and toes, to blistering. She also complained that the boots caused pains in her heels at work and "charley horses" in her legs when she tried to sleep at home.

On July 19, Price showed her feet to foreman Overturf who reported observing redness but no blisters. In any event, Price left the mine during the shift on July 19 and reported to the nurse's station. 11 FMSHRC 624-626. The nurse's report also showed redness but no blisters. R. F. 5, Attach. 2. The following day Price visited a doctor who prepared a note indicating that she had vesicles (small blisters) on her feet and that she should not wear the new boots. 11 FMSHRC 626. Upon returning to work on her next scheduled shift of July 22, 1985, Price presented the note to Ben Chauvin, the mine shift manager, and filed a safety grievance regarding the boot policy. She was given a one-week exemption from the new boot policy and was permitted in the interim to wear her old boots with temporary clip-on guards. 11 FMSHRC 627.

On July 24, 1985, Price filed a second grievance regarding the company's refusal to excuse her absence for part of her July 19, 1985, shift and for refusing to treat her foot problem as a work-related injury. The grievance was settled on July 26, 1985, by the following agreed-upon terms:

> 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 arrangement for providing footwear that meets management standards for metatarsal shoes.

It was agreed that Price's boots would be returned to Hy-Test to determine whether they were defective. Id. (Price contended that the boots had "stretched-out." Tr. 657). Price's exemption from the boot policy was

extended until such time as the boots were returned or new boots were provided. Hy-Test responded that the boots were not defective but were too big, and sent a replacement pair of a narrower width with the proviso that Price should be sure the new ones fit before she wore them underground. 11 FMSHRC 627.

Price received the replacement pair on August 12, 1985 and wore them at home in an attempt to break them in, but found that she could not "keep them on [her] feet for more than an hour." 11 FMSHRC 617. Shift manager Chauvin became aware on August 15, 1985 that Price had received the replacement pair, and at that point he informed Price that she would no longer be exempt from the policy and that she would have to report to work on August 19, 1985, her next working day, with integrated metatarsal boots. 11 FMSHRC 627. 4/ Price thereupon visited a bootery in an attempt to have the temporary clip-on guards attached permanently to her old Red Wing boots but, according to Price, she was told it could not be done for "liability reasons." On August 19, 1985, Price reported for work wearing her old boots and her own set of temporary clip-on guards. She was refused access to the mine and marked AWOL for the day. 11 FMSHRC 628. Price then secured another doctor's note stating that she required properly fitting boots. She also called Hy-Test to complain that the second pair of boots did not fit and was advised to return them to Monterey's mine warehouse so that a third pair could be provided. On August 20, 1985, after returning the second pair of boots to the warehouse, Price once again reported for work wearing her old boots and temporary clip-ons. Chauvin again denied her access to the mine and marked her AWOL. He also told her that if she failed to appear the following day with integrated metatarsal boots she would be suspended and perhaps discharged. 11 FMSHRC 628-29.

Price made attempts to secure proper boots that day but was told they would have to be specially ordered which would take two weeks. The scenario was repeated at the beginning of the August 21, 1985 shift and when Price and UMWA safety committeeman Burkholder complained to mine superintendent David Lange, he informed her that she was suspended until August 26, 1985, at which time she would have to report to work in boots with integrated metatarsals or risk being discharged. On August 22, 1985, Price met with safety superintendent Gordon Roberts and asked whether she could comply with the boot policy by having temporary clip-on guards attached permanently to her old boots by a cobbler. After conferring with other Monterey officials, Roberts approved this means of compliance and a notice to that effect was posted at the mine. Id. Thereafter Price reported for work on August 26, 1985 in her old boots with the clip-ons permanently attached and was allowed back into the mine. 11 FMSHRC 618, 629.

On August 28, 1985, the UMWA on Price's behalf filed a grievance seeking pay for the four days she was marked AWOL or suspended (August 19, 20, 21 and 22) as well as pay for an "idle day" Price claimed she was entitled to work (August 23) and out-of-pocket expenses connected

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4/ The ALJ's decision indicates that Chauvin apparently learned of Price's

receipt of the second pair of boots and issued his ultimatum on August 18, 1985. This must be error. August 18, 1985, was a Sunday, a non-working day at the mine. Furthermore, both Price (post-hearing brief at p. 16) and Monterey (brief on review at p. 8, fn 11) agree that the correct date was August 15, 1985.

with the grievance. The grievance was settled by the union for four days' pay in return for the withdrawal of Price's other grievance demands but Price was not present at the time the settlement was entered into. Id. Unsatisfied with the terms of the settlement, Price informed MSHA on December 16, 1985 that while she had been reimbursed four days' pay, she felt she was still entitled to the "idle day" pay and to have all references to the dispute removed from her file. 11 FMSHRC 619.

As described above, the Secretary responded that her complaint "ha[d] been satisfied" and that further pursuit of the complaint was not required. In her subsequent section 105(c)(3) filing with the Commission, Price again requested the "idle day" pay and removal of all references to the dispute from her file. 11 FMSHRC 621. After a preliminary hearing before the ALJ, held July 9, 1986, Price added claims for her "expenses related to the litigation of her complaint" and "a pair of boots that fit." Id.

In his decision on the merits, the judge reduced what he described as Price's "somewhat rambling and ambiguous complaints" to the following basic complaint: that Price "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." 11 FMSHRC 622. 5/ This distilled complaint provided what the judge termed a "framework" for analyzing the case in terms of work refusal precedents established by the Commission.

Reviewing the evidence the judge determined: that Price's first pair of boots was ill-fitting and caused injuries to her feet; that Price was unsuccessful in breaking in the second pair of boots; that ill-fitting boots would present a hazard of possible infection from abrasions and blisters, or could cause a stumbling hazard or interfere with her safe evacuation of the mine in an emergency; and that Price had made good faith efforts to secure properly fitting boots before and during the period of her suspension. On those bases the judge concluded that Price's continued refusal to comply with Monterey's work rule requiring the wearing of integrated metatarsal boots from August 19 through August 22, 1985, constituted a protected work refusal based on a good faith reasonable belief that it would have been hazardous to comply with the rule. 11 FMSHRC 622, 630.

The judge also found that Price had sufficiently communicated the hazards associated with her wearing ill-fitting metatarsal boots to

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5/ The judge made note of other alleged acts of discrimination in Price's post-hearing brief but held they were not properly before him since they had not first been presented to the Secretary under section 105(c)(2). In short, he held that Price had "neither exhausted her administrative

remedies nor met a statutory condition precedent." 11 FMSHRC 622, fn. 4. The judge also noted that Price's underlying complaint had not been amended to include the additional allegations nor had Price or her attorney complied with Commission Rule 42(a), 29 C.F.R. 2700.42(a), dealing with the contents of a discrimination complaint. Id.

various Monterey officials, including foreman Overturf and shift manager Chauvin. Lastly, the judge concluded that Monterey's refusal to allow Price to work from August 19 through August 22, 1985, was motivated solely by her refusal to wear integrated metatarsal boots. 11 FMSHRC 630.

Having found protected activity and adverse action motivated solely by that activity, the judge sustained Price's complaint with respect to the loss of four days' work while she was marked AWOL or on suspension. 6/ He also held that Price was entitled to recover her costs associated will pressing her complaint in both the proceeding before him and in the grievance proceeding. Lastly, the judge directed Monterey to delete from its records any references to disciplinary action taken against Price for her refusal to wear integrated metatarsal boots. The judge denied, however, Price's request for a company-paid pair of integrated metatarsal boots since she had waived such an entitlement by requesting to wear her old boots with clip-on guards permanently attached. He also denied her claim for compensation for the "idle day" of August 23, 1985. The judge thereupon directed the parties to submit written statements and responses with respect to the costs to be awarded.

In the supplemental proceeding to determine fees and costs, Price submitted the following claims: $187.36 incurred in connection with her grievance proceeding: $4,250.98 in costs of prosecuting her section 105(c)(3) claim; and $24,107.79 in attorney's fees. Monterey opposed the award of costs or fees on the grounds that they were not authorized under the circumstances of the case and were, in any event, well in excess of "any conceivable fee and expense entitlement." 11 FMSHRC 1099. Monterey argued that Price was foreclosed from recovering costs associated with her labor grievance since that had been settled by the company's payment of the four days' pay in return for the dropping of all other claims. The judge, however, dismissed the challenge on two grounds. First, the costs incurred by Price in processing her grievance were directly related to the development of evidence necessary for the section 105(c)(3) case and were thus, in terms of 105(c)(3), "in connection with the institution and prosecution" of her discrimination complaint before him. Second, Price had not consented to the settlement reached between Monterey and the UMWA acting on her behalf. 11 FMSHRC 1100.

The judge did, however, substantially reduce the claimed court costs and attorney fees on the ground that section 105(c)(3) limits such awards to those costs and expenses "reasonably incurred." Id. To determine the reasonableness of Price's costs and fees, the judge relied on Hensley v. Eckert, 461 U.S. 424 (1983) and Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). While noting that an appropriate attorney fee may be determined by multiplying the number of hours reasonably

expended on the litigation by a reasonable hourly rate, the judge indicated that the party's partial or limited success may render the product of that multiplication excessive. Thus, "the court necessarily has discretion in making this equitable judgment." 11 FMSHRC 1101. The judge then noted that while Price had alleged 31 protected activities and 14 acts

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6/ As noted above, Price had recovered her pay for the four days' work through settlement of her grievance under the labor contract.

of discrimination (some of which he called "facially frivolous"), she prevailed on only one act of discrimination.

The judge also considered the quality of Price's representation as another factor in determining the appropriate fee. Here, he concluded that the inordinate length of trial - 12 days for a case that should have taken 2 days - was chargeable to Price's counsel. He also noted counsel's lack of preparation, focus, and understanding of the law; her frequent and extraordinary delays between questions; and her repeated failure to promptly appear and be ready for trial as bases for significantly reducing the "lodestar" fee. Taking the above matters into consideration, the judge reduced the request for costs and fees to $4,800 which added together with the costs claimed for the grievance proceeding, resulted in an award of $4,987.36.

On review, Monterey's first exception to the judge's decision is that he erroneously characterized the dispute over the integrated metatarsal boot policy as a work refusal case. Monterey argues that Price never refused to work; rather, Monterey refused her access to the mine from August 19 to August 22, 1985, because she refused to comply with a company safety rule, i.e., wearing integrated metatarsal boots on the job. Monterey brief pp. 17-18. Viewed from that perspective, the company asserts, it does not matter whether Price was unwilling or unable to comply with the metatarsal boot policy; a mine operator can establish "proactive" company safety rules or requirements and a miner's failure to comply, for whatever reason, should not be deemed protected activity for purposes of the Act.

In the alternative Monterey asserts that even if the case involves a work refusal, Price's claim should be rejected for two reasons: (1) the "hazard" complained of did not justify Price's work refusal, and (2) Price lacked a good faith reasonable belief that a hazard existed. In that regard Monterey first avers that the complained-of hazard was personal to Price and was not under Monterey's control. Monterey further asserts that work refusal rights are intended to be invoked only in the face of a hazard which is "relatively severe and imminent". Monterey contends that the hazard faced by Price on August 19, 1985, was ',discomfort from ill-fitting boots that had not yet been broken in" and that the judge!s finding of a hazard with respect to the boots is so remote and speculative that it cannot justify a refusal to obey a direct work order. Id. p. 27.

With respect to Price's good faith reasonable belief in the existence of a hazard warranting a work refusal, Monterey asserts that Price could have taken the necessary steps that ultimately brought her into compliance with the work boot policy before the threat of suspension with intent to

discharge became a reality. In sum, Monterey takes the position that it was Price's responsibility to secure a pair of boots that complied with the company's integrated metatarsal policy and which fit to her satisfaction; that the company made reasonable efforts to accommodate her by extending her time to comply; and that its imposition of disciplinary measures was justified in order to ensure her compliance.

For her part, Price asserts that she did engage in a protected work refusal based upon her good faith, reasonable belief that her replacement boots were unsafe or unhealthful to wear on August 19, 20 and 21, 1985. Price further argues that once a miner expresses to an operator a good faith reasonable fear of a hazard, the operator has a corresponding obligation to address the perceived danger or provide another method of performing the same work that is safe. Price contends that she continued to reasonably respond to the perceived hazard throughout her suspension while Monterey refused to offer her a reasonable alternative method of performing her job until the work boot dispute could be resolved, i.e., an extension of time for Price to comply until she could: secure a third pair of boots from Hy-Test, have temporary metatarsal guards permanently attached to her old boots, or secure a specially fitted shoe.

In sum, it is Price's contention that the integrated metatarsal boot policy was unhealthful and unsafe as applied to her, since she was unable to secure a pair of boots during July and August of 1985 that would fit her properly and would not cause her discomfort to such an extent that she could not work safely. Given that premise, Price asserts, it was incumbent upon Monterey either to provide Price with a pair of boots that both complied with its policy and did not pose a hazard to her or offer Price an alternative, interim means of compliance until the larger dispute was resolved.

The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the Mine Act must prove that he or she engaged in protected activity and that the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated by the protected activity. Failing that, the operator may defend affirmatively against the prima facie case by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula supra; Robinette, supra, (the so-called Pasula-Robinette test). See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC 719 F.2d 194, 195-96 (6th Cir. 1983).

Within this general construct, it is also well-established that in certain circumstances a miner's refusal to work constitutes protected activity. Pasula, supra, Robinette, supra; Miller v. FMSHRC, 687 F.2d

1994 (7th Cir. 1982); Simpson v. FMSHRC 842 F.2d 453 (D.C. Cir. 1988). The genesis for the recognition of certain work refusals as protected activity is the Senate Report on the 1977 Act, which endorsed a miner's right to refuse "to work in conditions which are believed to be unsafe or unhealthful." S. Rep. No. 81, 95th Cong., 1st Sess. 35 (1977). In order to be protected work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." Robinette, 3 FMSHRC 812; Gilbert v. FMSHRC supra 866 F.2d at 1439.

The Commission has eschewed the setting of a bright line threshold of severity in determining how severe a hazard must be in order to trigger a miner's right to refuse work." Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1533 (September 1983). We have instead preferred to resolve that issue on a case by case basis. Id., See also e.g., Pasula supra at 2793 and Robinette, supra at 809 fn. 11. Mindful that work refusals are not explicitly addressed in the Mine Act but are derived from its legislative history and our own decisional attempts to implement the overall safety and health goals of the Act, we are initially skeptical as to whether Congress would have envisioned that discomfort arising from a miner's wearing of ill-fitting clothing would constitute a "sufficiently serious danger" (Robinette, 3 FMSHRC at 816) to justify a work refusal.

Mining is not the most comfortable of professions. Many items of basic miner's apparel or gear such as clothing, personal protection equipment and other safety accessories (e.g., cap lamps and batteries, self-rescuers, hard-toed shoes and hard hats) contribute to the general discomfort of laboring in an underground mining environment. It is problematic, however, to compare such discomfort, in either type or degree, to the hazards heretofore at issue in work refusal cases brought before the Commission.

With the foregoing as a preface, our analysis of the record in this case leads us to conclude first that the judge was correct in treating the events of August 19 through August 22, 1985 as a work refusal on Price's part. While it is true, as Monterey argues, that Price actually presented herself for work on those days, but was refused access to the mine for lack of mandated footwear, Price's refusal/failure to comply with the company's metatarsal boot policy constitutes a refusal to comply with a mandatory work rule. We therefore reject Monterey's assertion that the judge erred in treating this matter as a work refusal case and analyzing it in those terms.

We find, however, that the work refusal was not a reasonable one and therefore was not protected by section 105(c) of the Mine Act. Consequently, Monterey did not violate the Act by denying Price access to the mine and suspending her until such time as she came into compliance with the metatarsal boot policy. We reach that conclusion on the ground that the "hazard" posed to Price by the wearing of metatarsal boots was not sufficient to warrant her continued refusal/failure to comply with Monterey's work rule. We further find that whatever "hazard" Price subjectively feared with respect to wearing metatarsal boots was one within her power to overcome as she ultimately did once disciplinary measures were imposed by Monterey. 7/

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7/ While substantial evidence supports the judge's finding that the first pair of metatarsal boots did cause Price discomfort and that she was unsuccessful in breaking in the second pair, his findings that the boots would present a stumbling hazard or impede her safe evacuation of the mine in the event of an emergency are highly conjectural and are based on Price's own speculative assertions. We therefore reject these latter findings as they relate to the work refusal at issue.

Part of the difficulty in resolving this case is attributable to the complainant's (and t some extent the judge's) tendency to narrow. the dispute before us to the two or three days immediately preceding Monterey's denial of access to Price and her ensuing suspension. In fact, however, disciplinary measures were not taken until a full four months after the metatarsal boot policy was first announced and more than a month after the new policy actually took effect. During that period Price's problems with compliance were accommodated and extensions of time for her to comply were granted in connection with her ongoing grievance concerning the policy. While we do not minimize the discomfort owing to ill-fitting shoes or boots, we are at a loss to determine what more Monterey could have done in these circumstances where the level of comfort associated with the wearing of new boots is a particularly subjective and personal matter.

Furthermore, the record clearly indicates that the method by which Price ultimately came into compliance with the policy was available to her prior to August 19, 1985. Price testified that she was aware that another miner experiencing problems with Hy-Test boots, Dorothy Liske, had on July 23, 1985 removed the metatarsals from her new boots and had them permanently attached to her old boots by a cobbler, apparently without incident and with Monterey's knowledge. Tr. 792-794. Price, herself, had on August 17, 1985 sought to have the clip-on metatarsals permanently attached to her old boots at one bootery but was told it could not be done for "liability reasons." 11 FMSHRC 628. Nevertheless, she was able to quickly locate another cobbler who would do the work several days later as soon as she was placed under the threat of suspension with intent to discharge.

In addition to retrofitting her old boots to achieve compliance, the record indicates that from the outset of the policy Monterey informed the miners that those with particular fitting problems could special order boots from one of the designated vendors. Yet, for reasons unexplained in the record Price had apparently never attempted to place a special order with Hy-Test although by the time of the hearings in this case she had ordered and sent back five pairs of boots to the vendor. Tr. 839. We note in this regard the grievance settlement entered into between Price and Monterey on July 26, 1985 placed the onus of securing footwear that met the metatarsal boot policy squarely on Price.

Lastly, it should be borne in mind that the work rule at issue is one specifically designed to enhance Price's safety. We cannot, accordingly, conclude that her refusal to comply with a legitimate work rule adopted to advance the Mine Act's goal of protecting miner safety falls within the realm of conduct intended by Congress to be protected by section 105(c).

We therefore reverse the judge's finding that Monterey discriminated against Price in violation of the Mine Act and dismiss the complaint. In view of our disposition on the merits, we also vacate the judge's award of costs and attorney fees. 8/

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8/ Since we are vacating the award of costs and fees, the issue raised in Price's petition with respect to the propriety of the judge's substantial reduction of costs and fees is moot.

Commissioner Doyle, concurring:

In its decision, the majority concludes that Monterey did not discriminate against Price in violation of the Mine Act. It does so after finding that Price was engaged in a work refusal but that the hazard posed was not sufficient to warrant her refusal to comply with Monterey's work rule. Slip op. at 11. I concur in the conclusion that Monterey did not discriminate against Price but do so based on my opinion that Price's conduct was a refusal to comply with a work rule, not a refusal to work.

Monterey Coal Company, after conducting studies of foot injuries at its operations, determined that those injuries could be significantly reduced if miners were required to wear integrated metatarsal-protective work boots. After discussing its plans with the UMWA, Monterey instituted a policy requiring all miners to wear such boots and agreed to pay for the first pair for each miner, who purchased his boots from one of two particular vendors. Price experienced a series of problems with the boots she ordered. As indicated in the majority's decision, Monterey attempted for more than a month to accommodate Price's problem with her boots. Slip op. at 12. Those accommodations did not resolve the problem and Price reported to work on August 19 wearing her old boots with temporary clip-on guards. She was denied access to the mine on that day and again on August 20 and August 21, when she was suspended. 11 FMSHRC 618, 628-29.

A miner's refusal to perform work is protected under section 105(c) of the Mine Act if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2789-2796 (October 1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 807-12 (April 1981). "The case law addressing work refusals contemplates some form of conduct or communication manifesting an actual refusal to work." Perando v. Mettiki Coal Corporation, 10 FMSHRC 491, 494 (April 1988), quoting Secretary on behalf of Sedgmer v. Consolidation Coal Co., 8 FMSHRC 303, 307 (March 1986).

The judge found that Price's refusal to comply with Monterey's work rule requiring integrated metatarsal boots "was a protected work refusal based on a good faith, reasonable belief that it would have been hazardous to comply with." 11 FMSHRC 630. He also found that she had communicated the hazardous nature of wearing ill-fitting integrated metatarsal boots, thus meeting the "communication" requirement. 11 FMSHRC 630.

While the record may support the judge's finding that Price communicated what she saw as the hazardous nature of wearing ill-fitting

boots, the record does not show, nor did the judge find, that Price at any time communicated a refusal to work. And while the majority agrees that Price presented herself for work each day but was refused access to the mine, it concludes that Price's refusal to comply with a mandatory work rule equates to a refusal to work. Slip op. at 11. I disagree.

In Perando 10 FMSHRC 491, the claimant, an underground miner, developed industrial bronchitis and her physician recommended that she be placed in a "position without exposure to coal dust." She agreed to be transferred to a

laboratory position, but then failed to report to work for a substantial period of time. Subsequently, she filed a section 105(c) claim against the operator because he did not retain her higher, underground rate of pay. The administrative law judge concluded that while Perando had never refused to work underground, her medically substantiated inability to work underground" was the "functional equivalent of a work refusal" and that this "refusal" was protected activity. 8 FMSHRC 1220, 1222.

The Commission unanimously reversed the judge, finding no evidence of a work refusal, and specifically disagreeing with the judge's determination that, while Perando had never refused to work underground in the traditional sense, her medical condition was the functional equivalent of a work refusal. 10 FMSHRC 495. The Commission also found that none of the doctors' reports stated directly or indirectly that Perando was refusing to work. Even viewing the doctor's reports and Perando's actions together, we found no work refusal. Id

I am unable to distinguish the present case from Perando. Price, like Perando, presented a doctor's note, which diagnosed small blisters and recommended that she not wear her new boots. In addition, Price presented herself for work each day, something more than Perando did. Price's.actions alone or taken in conjunction with her doctor's note did not communicate an "actual refusal to work" as required by Sedgmer, 8 FMSHRC 303, or Perando. Accordingly, I would dismiss her complaint on that basis.

The Mine Act gives miners and their representatives the right to play a major role in enforcement of the Mine Act. In order to encourage the exercise of those rights, section 105(c) was enacted in an effort to preclude discrimination motivated by those activities. Also protected is the right to refuse to work in unsafe or unhealthful conditions and the right to refuse to comply with orders that are violative of the Mine Act. 1/ Congress intended that miners not be inhibited in exercising any rights afforded by the Act.

I see nothing in the legislative history, however, to indicate that Congress intended to give miners the right to refuse work on the basis of problems that are totally idiosyncratic to the miner and over which the operator has no control. While a particular miner may hold a good faith, reasonable belief that it is unsafe or unhealthy for him or her to wear shoes that don't fit or a hard hat that provokes a headache, to work underground with industrial bronchitis, to lift timbers with a bad back or while pregnant, or to work at all because of

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1/ The Senate Committee stated that section 105(c) "is intended to give

miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law" (emphasis added). S. Rep. No. 181, 9th Cong., 1st Sess. 36 (1977). The Committee cited with approval Phillips v. IBMA, 500 F.2d 772 and Munsey v. Morton, 507 F.2d 1202. In Phillips the conditions involved excessive coal dust and defective electrical wiring, 500 F.2d at 774-775, while Munsey involved a roof fall and loose roof. 507 F.2d at 1204-1205. See S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977).

lack of sleep, I do not believe that these are rights protected by the Mine Act or that Congress intended the operator to be charged with discrimination for failing to accommodate them, irrespective of the seriousness of the hazard. On this broader basis, I would also dismiss Price's complaint.

Joyce A. Doyle, Commissioner

Distribution

Thomas C. Means, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Michael J. Hoare, Esq.
134 North Broadway
St. Louis, Missouri 63102

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041