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KENNETH L. CHANDLER v. ZEIGLER COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

KENNETH L. CHANDLER, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. LAKE 90-107-D MSHA Case No. VINC CD 90-04
ZEIGLER COAL COMPANY, RESPONDENT	Zeigler No. 11 Mine

DECISION

Appearances: Mr. Kenneth L. Chandler, Tilden, Illinois, pro se, for the Complainant;
Timothy M. Biddle, Esq., Claire S. Brier, Esq., CROWELL & MORING, Washington, D.C., for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant, Kenneth L. Chandler, against the respondent Zeigler Coal Company, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c). The complainant filed his initial complaint with the Mine Safety and Health Administration (MSHA), and after completion of an investigation of the complaint, MSHA advised the complainant by letter dated June 6, 1990, that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, the complainant filed a complaint with the Commission.

A hearing was held in St. Louis, Missouri, and the parties were afforded an opportunity to file posthearing briefs. The respondent filed a brief, but the complainant did not. However, the complainant did file an undated letter received on January 6, 1991, and a second letter received February 4, 1991, in which he explains the circumstances of the incident which precipitated his complaint and cites an arbitrator's decision and a decision by a State unemployment referee with respect to two cases which he believes are relevant to his case. I have considered all of the

posthearing arguments and submissions made by the parties, including their oral arguments made on the record in the course of the hearing, in my adjudication of this matter.

The complainant, who is still employed by the respondent, alleges that he was suspended for 5 days without pay on October 18, 1989, after requesting mine management to provide him with dry clothing after riding a man cage into the mine on October 16, 1989, during an unusual and heavy rainfall which resulted in his becoming "soaking wet and cold." The complainant further alleges that his suspension was "in retaliation for my health and safety efforts for myself and other employees." He requests back pay for the 5-day suspension period, and the removal of all references of the suspension action from his personnel records.

The respondent denies that it has discriminated against the complainant, and maintains that the complainant did not engage in protected activity under section 105(c) of the Act because his refusal to work in wet clothing was unreasonable and not made in good faith. The respondent asserts that it disciplined the complainant for legitimate business reasons and that he was suspended for insubordination for failing to follow an order to go to work on October 16, 1989, and "for acting in concert when leaving the mine in a group exit" with other miners on his working unit prior to the end of the normal work shift that day.

Issues

The issues in this case include the following: (1) whether the complainant was engaged in protected activity when he requested dry clothing on October 16, 1989; (2) whether his leaving the mine prior to the end of his normal work shift constituted a reasonable and protected "work refusal" for health or safety reasons; (3) whether the complainant communicated any health and safety concerns to mine management prior to his leaving the mine; and (4) whether the 5-day suspension disciplinary action by the respondent was a bona fide and legitimate business reason made in good faith, or whether it was carried out to retaliate against the complainant for his engaging in any protected health or safety activity. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Stipulations

The parties stipulated to the following (exhibit ALJ-1):

1. Zeigler Coal Company is subject to the Federal Mine Safety and Health Act of 1977 ("the Act").

2. The Federal Mine Safety and Health Review Commission ("the Commission") has jurisdiction over the parties and subject matter of this case under sections 105(c) and 113 of the Act, 30 U.S.C. 815(c) and 823.

3. Respondent Zeigler Coal Company is the operator of the Zeigler No. 11 Mine.

4. At all times relevant to this case, Complainant Kenneth L. Chandler worked at the Zeigler No. 11 Mine as a miner as defined in section 3(g) of the Act, 30 U.S.C. 802(g).

5. Mr. Chandler reported to work for the second shift at the Zeigler No. 11 Mine on October 16, 1989.

6. On October 16, 1989, there was a rainstorm at the beginning of the second shift and all of the miners working that shift got wet while on their way to the mine.

7. Mr. Chandler and the seven other miners working on his crew on October 16, 1989, left the mine property before the end of the second shift.

8. None of the other miners working the second shift on October 16, 1989, left the mine property before the end of the shift.

9. On October 18, 1989, Mr. Chandler and the seven other miners who left the mine before the end of the second shift on October 16, 1989, were disciplined for insubordination and for leaving the mine prior to the end of their shift. Mr. Chandler and five of the miners were suspended for 5 days, one of the miners was discharged, and another was suspended for 2 days after admitting insubordination.

10. Mr. Chandler filed a complaint with the United States Department of Labor, Mine Safety and Health Administration ("MSHA") on November 17, 1989.

11. MSHA subsequently notified Mr. Chandler that its investigation of his November 17, 1989, complaint did not reveal any violation of section 105(c) of the Act.

12. On July 6, 1990, Mr. Chandler filed a complaint with the Commission against Zeigler Coal Company.

13. This complaint was properly served on Zeigler Coal Company on July 25, 1990.

Complainant's Testimony and Evidence

Kenneth L. Chandler, the complainant, testified that on October 16, 1989, he was working as a face man on the second shift (4:00 p.m. to midnite). He stated that "it was raining cats and dogs, really pouring down," and that he ran approximately 100 yards from the surface dressing area to reach the shaft cage to go underground. He stated that it took approximately 4 to 7 minutes to reach the underground area on the "open cage" which had no top and large overhead holes. The temperature was approximately 42 degrees, and after an 18-minute ride on the man trip, he reached the working section "sopping wet and cold."

Mr. Chandler stated that during the man-trip ride he and the other miners asked face foreman Lawrence Rainey whether they would get dry clothing, and Mr. Rainey left to "make the faces." Mr. Chandler then proceeded to the transformer area and took his coat off and was putting it on the transformer when Mr. Rainey returned and informed him that he could not allow him to stand by the transformer "because they'll fire me." Mr. Chandler asked Mr. Rainey again about getting coveralls, and Mr. Rainey left to make a phone call.

Mr. Chandler stated that Mr. Rainey returned and that "the words I caught he said was go to work or go home, we are not going to give you no coveralls" (Tr. 18). Mr. Chandler stated that he did not know whether Mr. Rainey called mine manager Shan Thomas, or assistant superintendent William Patterson, but understood or "speculated" that he called Mr. Patterson. Mr. Chandler and seven other miners then went to the man trip to leave the area.

Mr. Chandler stated that after arriving on the surface, he and the other miners went to the "tool crib shack" and spoke to Ms. Carla Lehr who was on duty. She told them she would return in 15 or 20 minutes and left, but did not return. Mr. Chandler then went to the mine foreman's office, and after finding no one there, he returned to the locker room, took a shower, and went home. On his way out, he looked into the foreman's office, and saw mine superintendent Mike Smart there (Tr. 22).

Mr. Chandler stated that he returned to the mine the next day, October 17, put on his work clothes, and proceeded to the man cage to go to work, but was met by mine manager Shan Thomas who told him "to stand aside." Mr. Thomas informed Mr. Chandler and the other seven miners who left the mine the previous day, that their "work assignment was in the office." They were then taken to a room at the mine office, and Mr. Chandler and each miner were interviewed privately and individually (Tr. 23-25).

Mr. Chandler confirmed that Mr. Smart, Mr. Patterson, Mr. Rainey, and a labor relations representative (Nick) were all present as management representatives during his interview, and that two union representatives, or committeeman, were also present (Tr. 27). Mr. Chandler believed that he was at the mine office for 5-1/2 hours, and after he was interviewed, he was told to go home, and he left the mine. He confirmed that the other miners on his work shift "walked out when they took us in the office" and there was a "wildcat strike" because he and the other seven miners were not allowed to go to work. Mr. Chandler stated that the strike began when Mr. Thomas "stopped us from getting on the cage," and that the second shift did not work on October 17 (Tr. 30-31).

Mr. Chandler stated that he next returned to the mine on October 18, and was kept in the locker room. Several union representatives were present, and they informed him that mine management was considering discharging him. The union president produced a "letter," which he refused to sign. He was then given another letter informing him that the respondent was suspending him for 5 days (Tr. 33-34; exhibit C-1).

Mr. Chandler believed that the mine was idle for approximately 3 days "over this--trying to make people work with sloppy clothing and stuff like that, you, know, safety," but that the miners returned to work under a court injunction (Tr. 38).

Mr. Chandler confirmed that he completed his 5-day suspension and was not paid his hourly rate of $14 or $15 for these days. He further confirmed that he filed a grievance for loss of pay on October 16, and 17, and received pay for 4-1/2 hours, which settled and ended part of the grievance, but did not settle that part "on wet, sloppy clothing; whether a company could make me work in wet sloppy clothing for 8 hours" (Tr. 41).

Mr. Chandler stated that he was given an unexcused absence for October 16, which is still on his record, but that "neither side said nothing" about the "wet clothes issue" (Tr. 43). He confirmed that in 1983 the respondent supplied him with boots and coveralls when he was "sopping wet," that he came out of the mine on another occasion to get some coveralls when he was saturated

with oil when a hydraulic line broke, and that on September 12, 1989, another miner was saturated with oil and came out of the mine, showered, and returned to work with no lost time (Tr. 45).

Mr. Chandler stated that pursuant to a union/management agreement, boots or "waders" are made available to miners, and that the respondent furnishes rain gear when bolting is done in wet areas. He confirmed that he keeps a supply of personal clothes at the mine, that he is paid an annual clothing allowance of $190 by the respondent, but does not keep an extra set of work clothes at the mine (Tr. 46-47).

Mr. Chandler stated that there were no raincoats to wear on October 16, before he went to the cage, and in order to obtain a raincoat he would have "to go outside and back around to the crib," and he did not know whether he would have been permitted to do so. He confirmed that since the incident in question, the day shift has been provided with plastic trash bags for protection against the rain, but he did not consider this to be "raingear" (Tr. 49). He stated that the dry clothes issue has not been bargained by the union, and that the October 16, rainfall was the first time it has rained so hard (Tr. 50).

On cross-examination, Mr. Chandler confirmed that he could have remained in the dressing area at the start of his shift rather than going to the cage, that he did not ask the foreman to hold the cage, and made no attempt to ask anyone for rain gear before going to the cage (Tr. 53). He stated that the distance to the cage "might be 100 feet" rather than 100 yards, and that he could have gone to the supply room by walking through an inside office rather than walking outside if he had obtained permission to do so. He confirmed that he did not ask for permission (Tr. 55). He confirmed that there are no restrictions as to how he spends his clothing allowance, that he could have purchased a spare set of clothing to keep at the mine, and that he had an extra coat and extra pair of shoes at the mine on October 16 (Tr. 56).

Mr. Chandler confirmed that the union advised him that it would not pursue the dry clothing issue part of his grievance any further after the pay issue concerning his pay for October 16 and 17, was resolved, and that he disagreed with the union's decision (Tr. 56-57).

Mr. Chandler confirmed that "one of the main issues" with respect to the wildcat strike was the termination of one miner (Burnett), a member of his crew who left the mine on October 16 (Tr. 60). He confirmed that eight miners and a foreman were assigned to his work shift unit on October 16, and there are two additional units and a labor crew, or a total of 38 to 40 men on the shift. He confirmed that everyone on the shift got wet, and

that everyone stayed and worked on that shift except for the seven miners on his unit who left the mine (Tr. 62).

Mr. Chandler stated that boots and rain gear are available at the mine, but that he has not been "sopping wet" in the past, and would only want a full change of clothes when he is "sopping wet" (Tr. 64). He confirmed that he left the mine at 6:30 p.m., on October 16, 5-1/2 hours before his normal work shift ended. When asked whether he had permission to leave, he stated as follows at (Tr. 65):

> Q. So if it was 6:30, then you left the mine five and a half hours then before the shift ended?
>
> A. Right.
>
> Q. And you didn't have permission to leave the mine from anybody on the property, is that correct?
>
> A. I'd say so, when the mine manager come there and asked me what my trouble was, yeah.
>
> Q. And the mine manager gave you permission to go home?
>
> A. He didn't tell me I couldn't go or I could go. He never said nothing. All he said was that I'm sorry you're wet.
>
> Q. And you construed that as permission that you could go home?
>
> A. Yeah.

Mr. Chandler identified exhibits R-1 and R-1(a), as the respondent's rules concerning "early outs," and confirmed that they were in effect on October 16, 1989 (Tr. 67). He conceded that he left work early that day, but stated that he notified the mine manager that he was leaving the mine. He explained that he notified foreman Rainey that he wanted to leave and go home, and that Mr. Rainey "gave me the ultimatum to go to work or go home, so he give me a choice" (Tr. 70). However, Mr. Chandler further stated that he did not tell mine manager Shan Thomas that he was going home, but did tell him that "I'm wet, sloppy clothing, I'm froze, I'm going to try and get some dry clothing" and that he was "going to the top to see if I can get some dry clothing." He then conceded that he did not say anything to Mr. Thomas about going home (Tr. 69-71).

Mr. Chandler confirmed that he saw mine superintendent Smart as he left the mine office to go home on October 16, and believed that Mr. Smart saw him. He confirmed that he did not speak to

Mr. Smart or say anything about going home. Mr. Chandler confirmed that he is a licensed plumber, performs plumbing work on his own, and has worked at that job when he was wet (Tr. 74).

Mr. Chandler stated that except for Mr. Burnett who was terminated, and Mr. Smith, who signed a letter, all of the other miners who left the mine over the "wet clothes" issue were suspended by the respondent with a loss of pay (Tr. 75-76). He confirmed that he was interviewed and questioned on October 17 about why he had left the mine on October 16, and that union and management personnel were present during the interview. He confirmed that he discussed the wet clothing issue and that he came out of the mine because he was wet and cold (Tr. 77-79).

In response to further questions, Mr. Chandler confirmed that when Mr. Thomas spoke to the miners leaving on the man trip on October 16, he told Mr. Thomas that he was wet and cold and wanted some dry clothing (Tr. 82). He confirmed that Mr. Thomas said nothing about working or going home, and that he (Chandler) heard Mr. Rainey make the statement "go to work or go home." Mr. Chandler stated that he heard Mr. Rainey make this statement after he had made a phone call, and he believed that "someone else told him to say this," but he did not know who Mr. Rainey may have called (Tr. 82-85).

Mr. Chandler stated that prior to getting on the cage on October 16, to go underground, "no one said don't get on it or get on it," but that he has been told that when the signal is given "when they run two cages," he is supposed to get on it and go to work (Tr. 86). He was told that miners on another unit who also rode the cage and were wet and cold were allowed to dry their clothes underground on the transformers by their foreman (Tr. 88). He did not know why he failed to say anything to the foreman, mine manager, or superintendent before riding the cage down and being exposed to the rain (Tr. 89-90).

Mr. Chandler confirmed that at the time the miners on his unit decided to leave the mine on October 16, he was not aware that other miners on another unit were allowed to dry their clothes on the transformers, and that he learned about this the next day or so when it was brought out at a union meeting (Tr. 91). He further confirmed that the union would not take the dry clothing issue further to formal arbitration, and he did not know the reason for not doing so and was given no reason by the union (Tr. 92).

Mr. Chandler stated that on October 16, after reaching the bench and transformer area, he and his crew were standing around, and had placed their jackets on the transformer to dry. Several of the miners may have been drinking coffee and eating sandwiches and no one had started to work. Mr. Rainey came to the area, and Mr. Chandler stated that "I just hollered and asked him -- I said

are we going to get any wet (sic) clothing? And, you know, are coveralls down here, or raingear or something to put on? And somebody else asked him something; I don't know who it was" (Tr. 95-100).

Mr. Chandler stated that working in wet clothing would present a safety risk because "handling the electric cable with wet, sloppy clothing you can get electrocuted," and that the wind at the face would be "coming to you which is about 60,000 cubic feet per minute, you're working in air, you get chilled. You can get pneumonia, and you get sick, you're going to miss work" (Tr. 101). He confirmed that he had never previously worked under such conditions, and although he has gotten wet, it was "not sloppy wet like that." He further confirmed that he said nothing to the mine manager or mine superintendent about the hazards which he testified to, and said "I'm sopping wet and just wanted dry clothes. * * * you know, I'm chilled. That's it. That's what I kept asking" (Tr. 102).

In response to a question as to whether he ever asked the mine manager or superintendent for permission to go and change clothes, Mr. Chandler stated as follows (Tr. 102).

> A. We said something to him about going up and getting dry clothing, you know. We'll see if we can get dry clothing on top. That's why we made the effort to go to Carla before I told him. I don't know if they would have let me went back down or not, but if I would have got dry clothing --
>
> Q. What dry clothing would this Carla have given you? What would the mine have had there?
>
> A. Coveralls.

Mr. Chandler confirmed that the minimum amount of air permitted at the face is 3,000 cubic feet, and that 60,000 would be in the main intake. He stated the cable was all high voltage cable which is insulated, and that he will not touch a cable with his bare hands if he is "real wet," and will use gloves, but that he will touch it if he is "a little wet" (Tr. 109). He will not touch a cable with wet boots or if he were standing in water.

William I. Patterson, was called as an adverse witness by the complainant, and he confirmed that he is presently the mine superintendent, and was serving as the general mine manager in October, 1989. He stated that if a miner leaves work early with the permission of management, it is an excused absence. However, if a miner tells the shift mine manager that he needs to leave because he is sick or for family business, the manager has no authority to prevent him from leaving, but the next day, management will determine the reasons for the absence and will deal

with it. If the absence is legitimate, such as a doctor's slip, the leave will be considered to be an excused absence, and not an "early out." An "early out" is charged when there is no proof of sickness or someone leaves with no prior authorization, and the miner would then be subject to a written warning and "progressive steps from there" (Tr. 114-120).

Mr. Patterson confirmed that since Mr. Chandler had no proof of any sickness or injury, or prior authorization to leave the mine pursuant to the respondent's early out policy, he was charged with an unexcused absence on October 16, when he left the mine (Tr. 120-121). Mr. Patterson did not believe that working wet was hazardous, and he confirmed that one can get electrocuted when dry or wet, and that it would possibly be hazardous for someone to stick their hand in an energized power box, but that "our people are all well trained enough not to encounter those situations" (Tr. 121-122).

Mr. Patterson confirmed that he handled the grievances, and he confirmed that Mr. Chandler filed a grievance for 4-1/2 hours of pay for the day he was kept at the mine on October 17, and that the grievance was settled and he was paid for these hours. Mr. Chandler was charged with an unexcused absence on October 16, was not paid for that day, and he did not grieve this action (Tr. 126-127).

Mr. Patterson confirmed that Mr. Rainey telephoned him on October 16, and informed him that "he had an employee who wanted some dry clothing." However, Mr. Rainey interrupted the conversation and said "forget that, here comes the rest of the crew and they all want dry clothing also" (Tr. 128). Mr. Patterson denied that he told Mr. Rainey to instruct the miners to go to work or go home, and he stated that "our management people are trained very well not to make those statements," and he assumed that Mr. Rainey "probably did not state it in that fashion." Mr. Patterson stated that there was no way he could have supplied everyone on the second shift with clothing, and that he instructed Mr. Rainey to tell his men to go to work (Tr. 129, 131).

Mr. Patterson stated that supervisors who have made statements "go to work or go home" have "open themselves up to enable people to go home. * * * That is why our people are trained not to ever make those comments" (Tr. 132). Mr. Patterson denied that he ever suspended Mr. Rainey, but confirmed that he suspended another foreman when he found that miners on his crew were losing from 10 to 25 minutes from work by drinking coffee and eating before starting any work (Tr. 133-134).

Mr. Patterson stated that at the time Mr. Chandler was questioned on October 17, he (Chandler) contended that Mr. Rainey had said "go to work or go home," but Mr. Rainey "flatly denied

it" in the presence of Mr. Chandler (Tr. 142). Mr. Patterson denied that Mr. Rainey had ever been suspended for lying to a superintendent, but confirmed that he had been suspended for other reasons (Tr. 143).

Mr. Patterson stated that Mr. Chandler does not have a bad work record and that Mr. Wisdom is a fine employee. He stated that he is responsible for running the mine, and that it is not out of the ordinary for people to work wet (Tr. 147). He stated that the respondent is not responsible for furnishing dry clothing, but that there have been instances when a miner was allowed to change clothing if he were saturated with oil or chemicals. He confirmed that he did not know how hard it was raining on October 16, and was not paying particular attention to the rain (Tr. 150-152).

Mr. Patterson stated that the union could have taken the issue of dry clothing to arbitration before an arbitrator but chose not to take it beyond the step three suspensions issue when the matter was withdrawn by the union (Tr. 155). Mr. Chandler confirmed that this was the case, and he stated "That's why I'm here. Because the company nor the union has ever given me an answer on wet, sloppy clothing" (Tr. 155). Mr. Patterson confirmed that Mr. Chandler did not ask him for rain gear or to delay the cage on October 16 (Tr. 168).

William M. Simon, shuttle car operator, confirmed that he worked on the same crew with Mr. Chandler on October 16, 1989, and was also suspended for 5 days as a result of the same incident (Tr. 171). He stated that the respondent has furnished him with boots "when we hit water down below" and with raincoats while washing off equipment. He confirmed that he filed for unemployment because of his suspension, and that the State of Illinois, Department of Employment Security found "that there was no misconduct in our part for wanting to get dry clothes," and although he was not paid unemployment, he was given "credit for a waiting week" of unemployment and was not disqualified from receiving such credit (Tr. 172-174, exhibit C-2).

Mr. Simon stated that he has worked in the past while wet, but that the rainfall on October 16, was unusual and that he was "soaked all the way to the skin." He confirmed that he was paid for 5 hours for the time spent at the mine during the interviews of October 17, but that he was charged with an unexcused absence on October 16, and that he was suspended for insubordination, and not for unexcused leave on that day (Tr. 189-190).

Mr. Simon stated that when Mr. Rainey came to the transformer area on October 16, "everybody said well, we want--we'd like some dry clothes." Mr. Rainey left to make a phone call, and when he returned "he said that Bill Patterson wasn't going to send any dry clothes to you, to go work or go home" (Tr. 190).

Mr. Simon stated that given that choice, he decided to go home and not work in wet clothes because he had pneumonia twice during the prior year. He confirmed that he said nothing to Mr. Patterson or to Mr. Rainey about his pneumonia while he was underground (Tr. 191).

Mr. Simon stated that after speaking with Shan Thomas, the mine manager, at the man trip, and informing him that he wanted dry clothes, he and the other miners went to the surface and to Mr. Patterson's and Mr. Smart's offices, but they were not there. He then went to the supply room and asked Carla Lehr if she had dry coveralls and she informed him that she did, but did not know how many. She then left, and after waiting for 10 to 15 minutes for her to return, he took a shower and went home (Tr. 193). Mr. Simon stated that he would have returned to work in his street clothes but could not find anyone to allow him to do this, and he doubted that he would have been permitted to do so (Tr. 192-195). He confirmed that he saw Mr. Patterson in an office on his way out of the mine, but they did not speak to each other (Tr. 196).

On cross-examination, Mr. Simon confirmed that he was in the supply room where raingear is kept before riding the cage underground, and that he did not try to get a foreman to sign it out to him because no foreman was there and he had no time because he had to take the first cage trip. He also confirmed that he had an opportunity to speak with Mr. Patterson before leaving the mine, but did not do so, and that Mr. Patterson made no attempt to speak with him (Tr. 199-200).

In response to further question, Mr. Simon stated that he may have been present when Mr. Rainey spoke to Mr. Chandler after telephoning Mr. Patterson. It was his understanding that Mr. Rainey informed the miners that it was Mr. Patterson who told Mr. Rainey to inform the miners to either go to work or go home. He confirmed that he said nothing to Mr. Rainey about his prior pneumonia, and did not hear Mr. Chandler say anything to Mr. Rainey about his working without raingear. He also did not hear Mr. Chandler make any safety complaints to Mr. Rainey (Tr. 201-203). Mr. Simon stated that he raised the question of his prior pneumonia with management for the first time during his interview on October 17 (Tr. 204). He confirmed that he and the other miners who went home and were suspended filed discrimination complaints with MSHA, "but we lost and they didn't agree with us" (Tr. 205). He stated that he took no further appeal because he did not file it in time (Tr. 205). He confirmed that he knew it was raining before he left the supply room and went to the cage, and that he would probably get wet in the rain. His fear of pneumonia did not prevent him from going out in the rain, because it was "not as bad as my fear of getting fired for not going out there" (Tr. 207).

Lowell D. Wisdom, shuttle car operator, testified that in October, 1989, he was working as a roof bolter, and that he said nothing to Mr. Patterson or Mr. Smart about the rain on that day, and they said nothing to him. He stated that he made several attempts to locate them in the office when he first came to the surface and before showering and going home, but could not find them. He also indicated that he was reluctant to speak to Mr. Smart "because of his practice of punishment and writing people up and everything," but that he would not now hesitate to ask Mr. Patterson if it was necessary for the men to go down the cage in the rain because the "circumstances has changed tremendously since Mr. Patterson has become our superintendent" (Tr. 209-212). He stated that several years ago when he was wet he was allowed to go to the surface to put on overalls and return to work, and that the company has provided him with raingear and boots when he requested them (Tr. 209, 213).

On cross-examination, Mr. Wisdom confirmed that the purpose of the October 17, meeting with management was to explain what had happened the previous day. He identified a copy of his suspension letter, and confirmed that the letter says nothing about wet clothes. He also confirmed that during the time in question there was tension at the mine over the manner in which Mr. Smart was managing the mine, but he did not believe that the "Pittson Strike" which was in progress at that time had anything to do with the situation at the mine (Tr. 214-219).

In response to further questions, Mr. Wisdom stated that he has never engaged in any wildcat strike, and that if he had received "good, dry clothing" on October 16, he would have gone to work (Tr. 219). He stated that his opinion of Mr. Patterson has not changed since October, 1989, but that Mr. Patterson was not in charge of the mine as he is at the present time (Tr. 220). He confirmed that he did not hear Mr. Rainey state that Mr. Patterson instructed him to tell the men to go to work or go home. Mr. Wisdom also confirmed that he never heard Mr. Chandler or Mr. Simon raise any safety questions with Mr. Rainey or indicate that working in wet clothes put them at risk, and that he made no such complaint (Tr. 222).

Mr. Wisdom stated that he had no idea why his union did not pursue the "dry clothes issue" further, and he produced a newspaper article of November 1, 1989, concerning the wildcat strike (exhibit C-3, Tr. 225). He also confirmed that the union did not pursue his suspension further, and that the union district representative told him that he did not want to take the case to an arbitrator "because the arbitrator might rule against us and fire us" (Tr. 227). Mr. Simon stated that it was his understanding that the "insubordination" which resulted in his suspension was "for refusing to go to work, I guess. And it says for leaving the mine" (Tr. 229). He further explained that he was not suspended for taking an unexcused absence, but that he was

charged with an unexcused absence for October 16, and was not paid for that day. He failed to understand how he could subsequently be suspended for not taking orders on the day that he received no pay. He conceded that assuming he were told by a foreman to go to work, and he instead went home, this would be insubordination, but that "if they didn't pay me, I don't feel like they had any business giving me any orders." He further conceded that he did not work on October 16, but expected to be paid for the 1 hour he was underground before going home, and that "I feel like they would have been more right in issuing me a letter for insubordination had they been paying me" (Tr. 230-231).

Respondent's Testimony and Evidence

William I. Patterson, mine superintendent, testified that he has been employed by the respondent for 17 years and that on October 16, 1989, he was serving as the general mine manager responsible for the underground operation of the mine. He confirmed that the UMWA represents the miners, and that pursuant to contract, the mine has safety committees for dealing with employee safety complaints. A safety committeeman is available for each of the three working shifts at the mine, and he confirmed that he has had dealings with the safety committee numerous times. He confirmed that there was an ongoing strike at the Pittson Coal Company in October, 1989, and that a few of the respondent's miners were given permission, through their union district office, to participate in that strike, and to attend a union "solidarity" rally held on October 15. He stated that as a result of the strike, he "could see a change with some people" at the mine, but not all of them (Tr. 238-243).

Mr. Patterson stated that during the day shift on October 16, while he was underground, he "noticed a lot of dissension among some of the employees" on that shift, and informed superintendent Smart that "things just don't feel right." He was not sure whether this had anything to do with the events of October 16, on the second shift (Tr. 244). He confirmed that he was in the "lamp room" at the beginning of the second shift, knew it was raining, but not how hard, and that he did not see the men get on the cage at the start of the shift. He stated that no one asked him to delay the cage from going underground, and he did not speak with Mr. Chandler at that time, and no one asked him for any raingear (Tr. 246).

Mr. Patterson confirmed that he received a telephone call from unit 3 section foreman Lawrence Rainey from an underground phone on October 16, and Mr. Rainey told him that one of the miners, Dale Burnett, wanted dry clothing and that he had clothes in his basket and wanted dry clothes. Before he could finish the conversation, Mr. Rainey said "forget that--the whole unit wants clothes now" (Tr. 248-249). At that point in time, Mr. Patterson

stated that he realized that there were three working units and some "outby people" underground, comprised of approximately 40 to 45 miners, and although there may have been 8 to 12 pair of winter coveralls which are usually available for people working outside in cold weather, he knew that he could not supply all of the miners and told Mr. Rainey that he did not have clothes on the surface and to order his people to go to work (Tr. 250).

Mr. Patterson stated that he was positive that he did not tell Mr. Rainey to order the men to go to work or go home because "through years of training, our supervisors have been trained that you do not give people options, that you do not say those things" (Tr. 251). Mr. Patterson stated that during the October 17, interviews with the miners who went home the previous day, they were each interviewed separately, and only two of them indicated that Mr. Rainey had said "go to work or go home," and the rest of the individuals said they did not hear Mr. Rainey make such a statement. Those individuals stated that Mr. Rainey informed them that "it was my orders for them to go to work," and Mr. Rainey assured them that he did not make such a statement (Tr. 251-253).

Mr. Patterson stated that the respondent does not furnish dry clothes to miners, and that they have occasion to get wet in the ming during their normal work duties in the mine where water is encountered. He explained that raincoats or boots may be requested when a miner is working under muddy conditions or is working in a wet entry, and that there are 8 to 10 rainsuits available at the mine, and that he would purchase more if needed. He stated that raincoats are different than dry clothes, and that it was his understanding that the miners were asking Mr. Rainey for dry clothes. He stated that "I really don't know what they was asking for because I think most of the people knew that I could not supply dry clothing" and that there was possibly four to five sets of winter overalls available for their use (Tr. 255).

Mr. Patterson stated that he has never supplied dry clothing for anyone who was wet with water, but that persons who have been wet with oil or a chemical would be able to get a pair of coveralls, but he considered these circumstances to be different from a situation where someone is wet from water. He confirmed that the miners are given an unrestricted clothing allowance, and there are no rules against bringing or storing clothes at the mine. He has never had an entire working unit ask for dry clothes during his employment at the mine (Tr. 257).

Mr. Patterson stated that after speaking with Mr. Rainey on October 16, he went to the supply room and confirmed that he did not have enough coveralls. He then informed Carla Lehr, who was on duty, that some employees had requested dry clothing but that he did have them available, and that "if anything else becomes of

this," she was to summon him from a training class which he and Mr. Smart were attending at the mine (Tr. 258). Shortly thereafter, he was summoned out of the class by the surface supervisor, and he went to the supply room and Ms. Lehr informed him that "people had come out of the mine" (Tr. 261). He heard the showers running and surmised "that the men had already got into the shower." He returned to his office and then went to another office which has a view of the exit from the bath house. He then observed Mr. Chandler walking by the doorway to the office, and they did not speak. Mr. Chandler was the first person to leave the mine, and he was subsequently followed by the other miners who left together. Mr. Patterson stated that he was writing down the names of the miners who he recognized, and when asked why he did not speak to Mr. Chandler when he passed by the office, he responded as follows (Tr. 263-264, 266-267):

> A. It was my view that these people had taken their initial stand on what they was going to do. I have given the order to go to work. It's my job to manage the mine. I could not give them all dry clothing. I could not give the whole shift dry clothing. And I had issued an order for them to go to work. They had decided to leave the mine, leave the property. And at this point in time, I felt it better to -- because I felt maybe there was some dissention, maybe the next day in the meeting find out the whole story.
>
> * * * * * * *
>
> Q. -- had you had any other complaints from any other units underground about wet clothing?
>
> A. No, sir.
>
> Q. After these men left, and I assume -- let me not assume anything. Did you try to talk to any of the other men? You said Mr. Chandler left; did you try to talk with any of the other men?
>
> A. No, sir.
>
> Q. As they left?
>
> A. No, sir, I did not.
>
> Q. Did any of them try to talk to you?
>
> A. No, sir.

Mr. Patterson stated that after Mr. Chandler and the other miners on his unit left the mine on October 16, he and Mr. Smart

met with Mr. Thomas and Mr. Rainey to find out what had occurred. Mr. Rainey explained that he encountered the unit underground at the power center, or transformer, and that some of the men were having coffee and sandwiches, and were drying their coats by laying them on the transformer. Mr. Rainey knew that he (Patterson) had recently suspended a foreman for allowing this to go on, and informed the miners about this action and told them they could not stand around and needed to go to work. One individual, Dale Burnett, asked Mr. Rainey for dry clothes and stated that "I want dry clothes or a ride out." Mr. Rainey then made the phone call and informed the men that he (Patterson) had ordered them to go to work. Rather than going to work, the men got on the man trip and Mr. Thomas arrived on the scene and spoke with them and asked Mr. Rainey about what was going on. Mr. Rainey informed Mr. Thomas that he had instructed the men to go to work, and after Mr. Thomas reminded them that they had been given an order to go to work, "they again said we're leaving. We want dry clothes or whatever, and we're leaving" (Tr. 271). The men then left on the man trip and came to the surface, but the rest of the working shifts, except for unit 3, completed their work shift without incident (Tr. 272).

Mr. Patterson stated that the next day, October 17, he instructed Mr. Thomas to inform the miners on unit 3 who had left the mine the previous day to "step aside" and not enter the cage to go underground and to tell them that "their work assignments for that day was in the front office." The miners were brought to an office and a supervisor was posted to wait with them "so that everyone couldn't start talking and get the same story together" (Tr. 273). Mr. Patterson stated that the purpose of the meeting was to investigate why the men had disobeyed a work order and left the mine the prior day, and that no decision had been made as to any disciplinary action until all of the facts were known. In addition to himself, Mr. Patterson confirmed that Mr. Smart, at least two union committeemen, and human relations representative Dennis Niziolkiewicz, were present during the individual interviews with the miners, and Mr. Rainey was present "during part of it" (Tr. 275). Mr. Chandler was given an opportunity to explain his actions, and apart from the different accounts by two miners as to what Mr. Rainey purportedly told the miners underground on October 16, with respect to the statement "go to work or go home," Mr. Patterson agreed that after hearing the testimony of Mr. Chandler and Mr. Wisdom during the hearing in this case, his recollection and their recollection of the events of October 16, were essentially "pretty close" (Tr. 276).

Mr. Patterson stated that he learned that the remainder of the second shift on October 17, "had wildcatted," either before or after the meeting and interviews began, and that the men on the shift "had pulled an unauthorized work stoppage" and did not go underground. The wildcat strike lasted for 6 days, and the miners were out 6 to 8 days, and it took a court order to get

them back to work (Tr. 279). Mr. Patterson confirmed that none of the men who were interviewed on October 17, mentioned any concern about any safety hazard because of being wet underground, but he did recall that Mr. Simon mentioned something about "a cold or pneumonia" (Tr. 277).

Mr. Patterson stated that the disciplinary suspension decision with respect to Mr. Chandler and the other miners who left the mine on October 16, was a collective decision by himself, Mr. Smart, and Mr. Niziolkiewicz, and he explained the basis for that decision as follows (Tr. 279):

> A. The basis for the decision was the people had acted irresponsibly and had left their place of work and left the mine property with no prior authorizations. They engaged in a group effort of leaving the mine. And some of the information we gathered through the investigation of some of the things that did happen led to the final form of discipline.

Mr. Patterson confirmed that Mr. Burnett was discharged because he played a "big role" in the incident of October 16, and "got the bandwagon rolling in some of his comments of give me dry clothes or a ride out, and carrying on." He also was in trouble over absenteeism, and under these circumstances, he received a much stiffer punishment than the suspensions without pay given Mr. Chandler and the other miners (Tr. 280-281, exhibits R-3 through R-7). Mr. Patterson explained that the failure by Mr. Chandler and the other miners who were suspended to follow his order to go to work on October 16, constituted insubordination. Mr. Patterson also considered the "group exit" from the mine on that day to be an unauthorized work stoppage or strike by each of the individuals who left the mine (Tr. 285).

Mr. Patterson confirmed that Mr. Jim Smith was given a 1 or 2-day suspension after accepting the respondent's offer for a suspension based on his admission of guilt for leaving the mine on October 16, and he signed a letter to this effect. Mr. Chandler and the other miners were given the same opportunity to sign such a letter, but they refused (Tr. 290-296). Mr. Patterson was present during the suspension grievances filed by Mr. Chandler and the other miners and he explained that the grievance concerned the issue of pay for the miners summoned to the office on October 17, and the suspensions. The pay issue was resolved by paying the miners for the time spent during the investigation, and the suspensions were resolved when the union district officials withdrew the grievances. Mr. Patterson confirmed that he became aware of Mr. Chandler's discrimination complaint when he received a copy in the mail several weeks after the grievances were concluded (Tr. 296-298).

Mr. Patterson confirmed that he had the authority to hold the man cage on October 16, before Mr. Chandler and his crew went underground, but that no one requested him to do so, that none of the miners made any requests for raincoats, nor did they inform him that they intended to leave the mine. He confirmed that during his interviews with the miners on October 17, they all informed him that they had left the mine because they were wet (Tr. 302-304).

On cross-examination, Mr. Patterson stated that Mr. Rainey told him that Mr. Chandler's entire working unit wanted dry clothing, and that he (Patterson) instructed Mr. Rainey to inform the men to go to work and that he had no dry clothing (Tr. 307). He confirmed that Mr. Burnett took his discharge to arbitration and it was affirmed by the arbitrator (Tr. 313, exhibit C-4). In response to questions concerning Mr. Rainey's purported statement to "go to work or go home," Mr. Patterson responded as follows (Tr. 330-331):

> * * * but if Rainey told me to go to work or go home, how would you interpret it? Is that a direct order? Or would you say that's two orders?
>
> A. Mr. Chandler, we know through the history of the coal mining and other industries that the orders to go to work or go home have been used down the road in several cases for an individual to sidestep the real cause of the meaning of that. And I think it's been upheld before when people make those statements such as that, it's been upheld that possibly it is an order.
>
> So you yourself knowing this to be a fact, you know, and I only can deal with what Mr. Rainey told me, and hopefully he told me the truth and everybody else the truth that he did not make those statements. He made the statement directly as I said it.
>
> * * * * * * *
>
> Now, lets assume that that was a fact, that Rainey gave them the alternative. What would your view be then on whether or not this was insubordination?
>
> THE WITNESS: If a supervisor gives a man an alternative to go to work or go home, I would probably be forced with no other stand to take but the man was following an order to go home.

Mr. Patterson confirmed that Mr. Chandler and the other miners were not suspended because of unexcused absences, and he explained the respondent's policy concerning "early outs" and unexcused absences (Tr. 341-344).

Shan Thomas, testified that he has been employed by the respondent for 21 years, that he is a shift mine manager, and served as the second shift manager on October 16, 1989. He stated that he rode the man cage underground on that day with the work crews, that it was raining hard, and that no one said anything about waiting for the rain to stop before proceeding underground. After arriving underground, the men left on the mantrip to go to their working units and he waited for the second cage to come down with the rest of the men. He confirmed that everyone, including himself, was wet from the rain, but that no one asked for dry clothing at that time (Tr. 348-351).

Mr. Thomas stated that he proceeded to Mr. Chandler's No. 3 unit area and found that the miners were getting into the mantrip to leave the area. Section foreman Lawrence Rainey informed him that the men were leaving and that he had spoken to Mr. Patterson about the matter and that Mr. Patterson instructed him to instruct the men to go to work. Mr. Thomas then informed the men in the mantrip that they were aware of the fact that they were told to go to work, and he called the No. 5 unit and determined that "everything was running o.k." and that no other miners left the mine. Mr. Thomas confirmed that at no time did Mr. Rainey inform him that anyone on Mr. Chandler's unit had voiced any health or safety complaint, and that after the men left, Mr. Patterson instructed him and Mr. Rainey to come to the surface so that he could find out why the men had left their working area (Tr. 352-354).

Mr. Thomas stated that on October 17, 1989, Mr. Patterson instructed him to inform the miners who left their work area on the previous day to report to his office. Mr. Thomas then went to the man cage and instructed Mr. Chandler and the other seven miners on his crew to stand aside and not get on the man cage, and he informed them that their work assignments for that day "was in the office." At that point in time, the rest of the miners who were waiting to ride the man cage underground went to the lamp room and put up their lamps. Mr. Thomas stated that he gave them direct orders to go to work but they ignored him, and he concluded that their refusal to go to work constituted a strike or work stoppage. Mr. Thomas confirmed that he did not participate in the disciplinary action decision taken against Mr. Chandler and the other seven miners on his working unit (Tr. 354-357).

On cross-examination, Mr. Thomas confirmed that Mr. Rainey told him that he had spoken with Mr. Patterson by telephone on October 16, about the situation underground, and Mr. Thomas considered Mr. Chandler and the other "group" of men on his unit to be "a good bunch to work with" (Tr. 359).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, _____ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence,

circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Mr. Chandler's Protected Activity

It is clear that Mr. Chandler has a right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and that under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him; Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. However, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

It is well settled that the refusal by a miner to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984), aff'd sub nom., Brock v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir. 1985). The reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

In his posthearing submissions in support of his case, Mr. Chandler asserts that on October 16, 1989, "the fact that I was wet and cold caused a dispute to arise involving concern of my health and safety" (letter received January 8, 1991). Mr. Chandler cites a January 22, 1990, decision by a State of Illinois unemployment compensation referee in connection with Mr. Simon's claim for benefits during his 5-day suspension period (Exhibit C-2). The referee found that Mr. Simon and the other miners who left the mine "were not unreasonable in refusing to work in wet clothing in a cold and windy location," and that this refusal "was not misconduct, as the employer's demands were unreasonable." The referee concluded that since the employer did not carry its burden of proof that Mr. Simon's suspension resulted from "misconduct," he was not disqualified under state law from receiving unemployment benefit credits.

Mr. Chandler also cites a September 25, 1984, arbitration award in the case of Peabody Coal Company, Riverking #1 Underground, UMWA Local No. 1670, John Lambert and Sylvester Frisch, Case No. 81-12-84-1445 (Exhibit ALJ-1). Mr. Chandler stated that Mr. Lambert and Mr. Frisch decided to leave the mine early after becoming wet and cold, and that they were charged with an unexcused "early out." Mr. Chandler asserts that "the arbitrator ruled that they were wet, chilled and concerned about their own health, and to some degree, safety, and did not act insubordinately in making their decisions." Mr. Chandler suggests that his case is identical, and that he too was wet and cold on October 16, 1989, and was concerned about his health and safety and did not act insubordinately in making his decision to leave the mine.

In a subsequently filed letter of February 4, 1991, Mr. Chandler enclosed a copy of a West Virginia Law Review article titled "Protected Work Refusals Under Section 105(c)(1) of the Mine Safety and Health Act," 89 W. Va. L. Rev 629 (1987), co-authored by the respondent's counsel Timothy Biddle, and a two-page excerpt from an unidentified source, listing several work refusal decisions, and a discussion of "Four prerequisites

for refusal to work." Mr. Chandler asserts in the letter that he communicated his complaint to his immediate supervisor "Lawrence Raines," but that when he left the mine on October 16, 1989, "I did not know what the law was on Safety & Health disputes," and that he acted in good faith in complaining about a reasonable health and safety concern.

Congress created a unique statutory scheme under section 105(c) of the Mine Act to preserve a miner's right not to be discriminated against for engaging in protected activity. The issues and standards of proofs presented in arbitration proceedings pursuant to collective bargaining agreements, or in state unemployment compensation proceedings brought before adjudicators and referees, are not the same as those presented in discrimination cases adjudicated pursuant to the Mine Act. An employee's rights pursuant to a collective bargaining agreement, or an applicant's qualification or disqualification from receiving unemployment compensation benefits, are different from the statutorily protected safety rights of miners. Accordingly, the weight to be accorded arbitrator's decisions is within the sound discretion of the Commission's trial judge, on a case-by-case basis. Although the judge is not bound by such decisions, he may nonetheless give deference or weight to an arbitrator's "specialized competence" in labor-management matters. See: Chadrick Casebolt v. Falcon Coal Company, Inc., 6 FMSHRC 485, 495 (February 1984); David Hollis v. Consolidation Coal Company, 6 FMSHRC 21, 26-27 (January 1984); Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981).

In the Peabody Coal/Lambert and Frisch arbitration case cited by Mr. Chandler two miners who were specifically assigned to wash down some mine face machinery with a high pressure hose asked management for rainsuits to protect them from getting wet while doing this work. The miners were told that rainsuits were not available, and they were informed that they could use some brattice cloth as make-shift rain ponchos and could use some available "community boots" to protect their feet. They declined to do either, and during the process of washing down the equipment, they got wet and soaked. After advising management that they were wet and cold, the miners left the mine and they were assessed with an "early-out" and given an unexcused absence. They were also docked for pay for the period they were absent.

The issue before the Lambert-Frisch arbitrator was whether or not the brattice make-shift rain gear and community boots offer by management constituted suitable protective safety equipment which the company was required to provide pursuant to Article III, section (m) of the labor/management contract. Management took the position that the miners got wet because they failed to use the make-shift equipment available to them, and the

union took the position that the miners were put in an improper situation and that getting wet was a natural incident to being assigned the job in question.

The Lambert-Frisch arbitrator found that the company had to do more than provide make-shift equipment, and that pursuant to the contract provision in question, the company was required to make available to employees, who are assigned washing duties, protective rain gear and over boots that adequately protect them from getting wet. In assessing a grievance penalty, the arbitrator concluded that the miners who left the mine took some responsibility for their action and knew that their unauthorized leaving would be charged as an unexcused absence or worse. Under the circumstances, the arbitrator denied their requests for pay during the time they were absent from work. However, after finding that there was never any direct confrontation between the miners and management about their leaving the mine, and after commenting that the miners "were wet, chilled, concerned about their own health, and to some degree, safety," the arbitrator concluded that they did not act insubordinately in making their decision to leave, and he ordered that the unexcused "early-out" be removed from their records.

I find that the facts presented in the aforementioned arbitration decision cited by Mr. Chandler are distinguishable from the facts in his instant discrimination case. The case before the arbitrator concerned a direct challenge and interpretation of a wage agreement provision requiring the mine operator to furnish protective clothing to miners under certain specific work assignment conditions, and the arbitrator's finding that the miners were not insubordinate was based on a lack of any evidence of any "confrontation" with management. Even so, the arbitrator held the miners accountable for leaving work without authorization. In Mr. Chandler's case, the union did not pursue any "dry clothes" contractual dispute, there is no evidence that Mr. Chandler's work assignments would have otherwise exposed him to any wet mine conditions, and his leaving the mine early did result in a "confrontation" with management. Under the circumstances, I have given little weight to the arbitration decision in question.

I have given no weight to the state unemployment compensation referee's finding that Mr. Simon was not disqualified from eligibility for receiving unemployment compensation during his 5-day suspension period. As stated earlier, the issues presented in state unemployment compensation proceedings are different from those litigated pursuant to the anti-discrimination provisions of the Mine Act. I take note of the fact that the referee's finding in Mr. Simon's case was based on his conclusion that the mine operator had not established any "misconduct" on the part of Mr. Simon. Mr. Chandler's suspension was based on "insubordination," and not "misconduct."

At the hearing in this case, Mr. Chandler submitted a copy of the arbitration decision of November 6, 1989, denying Mr. Burnett's discharge grievance. The decision reflects that foreman Rainey, mine manager Thomas, and mine superintendent Patterson appeared at the grievance hearing on behalf of the respondent, and that Mr. Simon, Mr. Wisdom, and three of the other suspended miners appeared on behalf of Mr. Burnett. Mr. Chandler's name is not included among those who appeared.

In sustaining Mr. Burnett's discharge, the arbitrator found that he and "the other crew members were guilty of refusing a direct order to go to work" by foreman Rainey (Exhibit C-4, Finding #1, pg. 4). The arbitrator also found that Mr. Burnett's telling Mr. Rainey that he wanted dry clothes or a ride out "set up a confrontation situation with Management in the form of giving an ultimatum to Management," and that "this occurred after the issuance of the direct order by Mr. Rainey" (Exhibit C-4, Finding #2, pg. 4). The arbitrator also stated as follows at page 6 of his decision:

> We are well aware that mining coal is dangerous, hard work and conditions are often undesirable. Getting wet in a mine or working wet is one of those uncomfortable situations and we are not unsympathetic to any miner, Union or Management, under such circumstances. The Arbitrator has worked in extremely uncomfortable conditions, both in heavy industry and in military service. However, most assuredly Management cannot be blamed for a 50 or 100 year rainstorm (as described by the Union) which got employees wet before going into the mine. Mr. Burnett and the rest of the crew acted in defiance of Management's right to operate its facilities. The other employees at the mine worked.

Safety Complaints

There is no evidence that Mr. Chandler or any of the other miners on his unit made or communicated any health or safety complaints to foreman Rainey or to any other member of mine management on October 16, 1989, when they requested dry clothes, or before leaving the mine. Although Mr. Chandler stated in his complaint that he was protecting his "health and safety rights" when he made his request for dry clothes, that he "got soaked completely" while walking from the supply building to the man cage, and that he was "very cold" when he arrived underground, he did not contend that these conditions constituted any health or safety hazards, nor did he assert that he communicated any such concerns to his foreman or any other members of mine management. Indeed, the record establishes that while Mr. Chandler had ample opportunity to communicate any safety or health concerns to the section foreman, mine manager, and mine superintendent, he did not do so.

Shuttle car operator Simon, who testified that he had a previous case of pneumonia, confirmed that he raised no safety issue with the section foreman or mine superintendent before leaving the mine on October 16, 1989, and he conceded that he did not hear Mr. Chandler make any safety complaints. Shuttle car operator Wisdom confirmed that he made no safety complaints on October 16, and he confirmed that he never heard Mr. Simon or Mr. Chandler raise any safety questions with the section foreman or indicate that working in wet clothes placed them at risk. The Burnett arbitration decision is totally devoid of any references to any safety complaints or safety issues raised by the miners in connection with their mine exit of October 16, 1989.

Mr. Chandler's belated claim that working in wet clothes posed a hazard to him was raised for the first time at the hearing, when he testified that his wet clothes presented a possible electrocution hazard if he were to handle electric cable "with wet sloppy clothing," and that he could get "chilled, catch pneumonia, and get sick and miss work" if he were working in the face area where there was 60,000 cubic feet of air per minute (Tr. 101). Mr. Chandler had not previously mentioned these safety or health concerns in his prior MSHA or Commission complaints. Further, at the hearing, Mr. Chandler conceded that at no time did he mention these asserted hazards to foreman Rainey, mine manager Thomas, or superintendent Patterson, and that he simply stated that he was "sopping wet and just wanted dry clothes" (Tr. 102).

Having viewed Mr. Chandler during the course of the hearing, particularly with respect to the manner in which he handled himself in presenting his pro se case, he impressed me as a rather astute individual. In his posthearing letter received February 4, 1991, Mr. Chandler asserts that he communicated his complaint to foreman Rainey, that he acted in good faith in complaining about a reasonable health and safety concern, and that when he left the mine on October 16, 1989, he was ignorant of the law concerning safety and health disputes. Mr. Chandler's arguments are rejected. I believe that Mr. Chandler realized too late during the hearing that any viable claim of discrimination pursuant to the Mine Act with respect to a protected work refusal must be based on a bona-fide and sincere showing of a health or safety hazard. On the facts here presented, I cannot conclude that Mr. Chandler has made such a showing, and I find his belated claims to be less than candid and lacking in credibility.

Even if I were to accept Mr. Chandler's assertions concerning his belated claims of hazards associated with working in wet clothes, there is absolutely no evidence that he ever communicated these concerns to mine management, even though he had more than an ample opportunity to do so. It has consistently been held that a miner has a duty and obligation to communicate any

safety complaints to mine management in order to afford management with a reasonable opportunity to address them. See: Secretary of Labor ex rel. Paul Sedgmer et al. v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097.

In Secretary of Labor ex rel. Paul Sedgmer, Jr., et al., v. Consolidation Coal Company, supra, the Commission affirmed a Judge's dismissal of a complaint filed by several miners who received a suspension with intent to discharge after concluding that the mine operator had a good faith belief that the complaining miners had engaged in a work slowdown. The disciplinary action taken by the operator was based on its conclusion that the suspended miners had engaged in a slowdown and had violated a number of employee conduct rules governing insubordination and participation in a work stoppage or slowdown. In addressing the issue as to whether or not the miners conduct (operating equipment at a slow speed) was predicated on a reasonable, good faith belief that it would have been unsafe to operate it at a greater speed, the Commission accepted the judge's finding discrediting one of the miner's assertion that he raised safety concerns prior to the incident which precipitated the disciplinary action. The Commission observed that none of the other complainants raised any safety concerns with mine management before, during, or after, the conduct in question. In affirming the judge's dismissal of the case, the Commission stated as follows at 8 FMSHRC 309, with respect to the failure by the complaining miners to communicate any safety concerns to management:

> While such communications are not only expected, in ordinary course, in work refusal situations, their absence also lends weight to the conclusion that the disagreement here as to operating speed did not have a sound basis in safety concerns. (Citing Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397 (June 1984).

In Miller v. FMSHRC, supra, the Seventh Circuit Court of Appeals upheld a Commission Judge's dismissal of a discrimination complaint involving a section foreman's refusal to start up a longwall mining machine which he believed was in an unsafe condition. The miner took no steps to report his refusal to start the machine to his supervisor, and in holding that the work refusal was not protected activity, the court stated as follows at 687 F.2d 196:

* * * * * * *

> Thinking our way as best we can into the minds of the Senators and Representatives who voted for the 1977 amendments, we can imagine them wanting to allow miners to complain freely about the conditions of safety and health in the mine without having to worry about retaliation if the complaint was later determined to have been frivolous yet at the same time not wanting to render mine operators powerless to deal with miners who, simply by alleging a hazard to safety and health, claim a privilege to walk off the job without notice. We are unwilling to impress on a statute that does not explicitly entitle miners to stop work a construction that would make it impossible to maintain discipline in the mines.

As the complainant in this case, Mr. Chandler has the burden of establishing by a preponderance of the evidence that he made and communicated any safety complaints to mine management, that management knew or had reason to know about the complaints, and that the adverse action (suspension) which followed was the result of the complaints and therefore discriminatory. In short, Mr. Chandler must establish a connection between the complaints and his suspension. See: Sandra Cantrell v. Gilbert Industrial, 4 FMSHRC 1164 (June 1982); Alvin Ritchie v. Kodak Mining Company, Inc., 9 FMSHRC 744 (April 1987); Eddie D. Johnson v. Scotts Branch Mine, 9 FMSHRC 1851 (November 1987); Robert L. Tarvin v. Jim Walter Resources, Inc., 10 FMSHRC 305 (March 1988); Connie Mullins v. Clinchfield Coal Company, 11 FMSHRC 1948 (October 1989). I cannot conclude that Mr. Chandler has established such a connection.

The Work Refusal

After careful review and consideration of all of the evidence and testimony in this case, I cannot conclude that Mr. Chandler had a reasonable, good faith belief on October 16, 1989, that to work in wet clothes constituted a health or safety hazard, when he refused his foreman's directive to go to work, and opted instead to leave the mine. The record establishes that Mr. Chandler and the rest of his working unit were dry when they arrived for work, and got wet when they left the shelter of the supply room and walked to the man cage in an unusual downpour of rain. Mr. Chandler conceded that he could have remained at the supply building, rather than walk in the rain to the man cage, or he could have asked the foreman to hold the cage until the rain ended. He did neither. Even though he was in close proximity to the supply room where some rain gear was stored, Mr. Chandler conceded that he made no attempts to ask anyone for rain gear before walking out in the rain. Although the entire working shift, consisting of three working units, were also exposed to

the soaking rain and got wet, there is no evidence that any of these other units asked for dry clothing, and they went to work without incident.

Although Mr. Chandler claimed that the respondent, as a matter of practice in the past, routinely supplied dry clothing to employees, the evidence shows otherwise. What the company did supply was extra coveralls if an employee were exposed to oils or other contaminants, or rain gear and boots to those employees who were assigned work which would expose them to getting wet, or to employees who were expected to work in wet and muddy mine areas. I find no evidence that the respondent was obligated to otherwise furnish employees dry clothing or wearing apparel upon request. Under the union contract, the respondent was required to furnish safety equipment, but not personal wearing apparel such as clothing, shoes, boots where worn as part of normal footwear, hats, belts, and gloves. Instead, each employee, including Mr. Chandler, receives an annual clothing allowance of $150 to spend at their discretion. Mr. Chandler confirmed that he does not keep an extra set of work clothes at the mine, but does keep some items of personal clothing there.

Mr. Chandler confirmed that he would not expect the respondent to furnish him with a top coat, gloves, and ear muffs to keep him warm if he were working in 15 degree temperature, but he believed that working in wet clothes was a different situation (Tr. 165). He further conceded that he would not expect the respondent to furnish him dry items of work clothes such as a shirt, overalls, and underwear, but would expect the respondent to furnish him with coveralls.

Mr. Chandler testified that if he were furnished dry coveralls, he would have removed all of his wet clothing and worked only in his coveralls (Tr. 103). He confirmed that he has worked under wet mine conditions in the past, and had gotten wet while working, but not "sopping wet." He stated that he would only want a full change of dry clothes if he were "sopping wet" and that the degree of wetness would make a difference (Tr. 64).

Although I sympathize with Mr. Chandler's desire to perform his work in comfort and with dry clothing, based on all of the testimony and evidence adduced in this case, I conclude and find that at most, Mr. Chandler has established that working in "wet, sloppy, clothing" presented an uncomfortable working condition, rather than a working condition that presented any real safety or health hazard. As noted earlier by the arbitrator in rejecting Mr. Burnett's grievance, "getting wet in a mine or working wet is one of those uncomfortable situations and we are not unsympathetic to any miner, Union or Management, under such circumstances." In addition, the Commission recently held that discomfort is not a hazard justifying a protected work refusal.

See: Paula Price v. Monterey Coal Co., 12 FMSHRC 1505 (August 1990), where the Commission stated as follows at 12 FMSHRC 1515:

> 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.

In the final analysis, I am not persuaded that the "dry clothing" dispute which culminated in the group work refusal and exit from the mine by Mr. Chandler and the rest of the miners on his working unit had anything to do with any bona fide safety or health concerns. As noted earlier, there is no evidence that Mr. Chandler or any of the other miners who testified in this proceeding ever raised any safety concerns or registered any safety complaints in connection with their wet condition, and there is no evidence that any health or safety issue was raised in the Burnett grievance. I believe that the dispute, which the evidence strongly suggests was instigated by Mr. Burnett, and which came about during a period of mine tension and labor unrest because of the ongoing Pittston strike, was based on a somewhat tenuous belief by the miners that the respondent had some duty or obligation to provide them with dry clothing before requiring them to go to work. Their requests, which management found unreasonable and impossible to fulfill, soon escalated into a full-blown work refusal and group exit from the mine, followed by a wildcat strike by the entire work force which shut down the mine and forced the respondent to obtain a court injunction to return the miners to work.

Mr. Chandler agreed that the union could have pursued arbitration to seek redress of the dry clothing issue, but that it did not do so. Mr. Chandler was obviously unhappy with the union's decision not to pursue the matter further when he stated "That's why I'm here. Because the company nor the union has ever given me an answer on wet, sloppy clothing" (Tr. 155). In this context, and in the absence of any evidence of discrimination within the parameters of section 105(c) of the Mine Act, I am of the view that such disputes are best left to the union/management collective bargaining and grievance processes. It is not my function, nor is it within my jurisdiction, to mediate or arbitrate such disputes under the aegis of the Mine Act.

The Respondent's Motivation for Mr. Chandler's Suspension

The respondent's policy and guidelines concerning "Early Out" (employees leaving work shift early), dated August 29 and September 15, 1989, state as follows:

> [E]mployees are expected to work their full shift unless prior authorization has been granted by management. Unauthorized early outs will subject employees to disciplinary action up to and including discharge. Disciplinary action will be determined on a case by case basis. (Exhibit R-1).
>
> Employee's leaving work early without notifying management, who participate in any group exits, claim sickness to avoid work assignments, or participate in a concerted effort to leave work early may be disciplined up to and including discharge under the relevant provisions of the Wage Agreement. (Exhibit R-1-A).

The respondent's credible and unrebutted testimony establishes that Mr. Chandler was suspended for insubordination and for leaving the mine as part of a group exit prior to the end of his regular work shift. Mr. Chandler's suggestion that Mr. Thomas gave him permission to leave the mine is rejected. Mr. Chandler conceded that Mr. Thomas said nothing to him about leaving the mine, and I find no support for Mr. Chandler's conclusion that Mr. Thomas authorized him to leave the mine before his normal work shift ended. As for the insubordination charge, I find that the evidence clearly supports a conclusion that Mr. Chandler refused a direct order by foreman Rainey to go to work, and that this conduct by Mr. Chandler constitutes insubordination.

In the course of the hearing, and in his posthearing letter received January 8, 1991, Mr. Chandler argued that he was not insubordinate because foreman Rainey gave him the option of going to work or going home, and he opted to go home. Mr. Chandler testified that after he requested dry clothing, Mr. Rainey made a phone call, and when he finished the call, Mr. Chandler claims he heard Mr. Rainey make the statement "go to work or go home," but he believed that someone else instructed him to make that statement (Tr. 82-85). Mr. Chandler had earlier testified that "the words he caught" from Mr. Rainey were "go to work or go home" (Tr. 18). Mr. Wisdom testified that he did not hear Mr. Rainey make the statement, and Mr. Simon testified that he may have been present when Mr. Rainey spoke with Mr. Chandler, and that it was his understanding that Mr. Rainey informed the working unit that Mr. Patterson had instructed him to tell the men to go to work or go home (Tr. 201-203; 221).

Superintendent Patterson denied that he ever instructed Mr. Rainey to give Mr. Chandler and the other miners an option to go to work or go home, and he indicated that such a statement was contrary to years of supervisory training and instructions that such options are never given. Mr. Patterson confirmed that Mr. Rainey denied making such statements. Although Mr. Patterson's testimony in this regard is hearsay, I find it credible and relevant and it is admissible. See: Secretary of Labor v. Kenney Richardson, 3 FMSHRC 8, 12 n. 7 (January 1981), aff'd 689 F.2d 632 (6th Cir. 1982), cert. denied, 77 L.Ed.2d 299 (1983); Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-1137 (May 1984). I also take note of the following findings of the arbitrator in Mr. Burnett's grievance case (Exhibit C-4, pg. 4):

1. Dale Burnett and other crew members were guilty of refusing a direct order to go to work which was issued by Foreman Lawrence Raines (sic) at the power center.

2. Dale Burnett's telling Lawrence Raines (sic) (at the power center) that he wanted dry clothes or a ride out set up a confrontation situation with Management in the form of giving an ultimatum to Management. It is important to note that this occurred after the issuance of the direct order by Mr. Raines (sic). Mr. Rainey told Mr. Burnett in the presence of the crew that he didn't have the authority to get him dry clothes but he could get him a ride out. (Emphasis added).

After careful consideration of all of the testimony and evidence, I find Mr. Chandler's testimony with respect to the purported "work or go home" option by Mr. Rainey to be unreliable and less than credible. Mr. Wisdom did not hear the statement attributed to Mr. Rainey, and Mr. Simon's testimony is too equivocal and speculative, and there is no indication that Mr. Simon personally heard the statement. There is no evidence that Mr. Chandler, Mr. Simon, or Mr. Wisdom said anything to mine manager Thomas about going home, even though they had an opportunity to do so when he met them at the man trip as they were leaving the section to go to the surface (Tr. 70-71). Mr. Thomas testified credibly that he reminded Mr. Chandler and the other men in the man trip that they had been instructed to go to work, and the Burnett arbitrator found that the crew refused a direct order by Mr. Rainey to go to work, and that Mr. Burnett's request for dry clothing or a ride out of the mine came after Mr. Rainey had issued his direct order. Having viewed Mr. Patterson in the course of his testimony, he impressed me as a credible and straightforward witness, and taking into account Mr. Wisdom's favorable opinion of Mr. Patterson as a superintendent, I believe that Mr. Patterson testified truthfully when he denied that he ever instructed Mr. Rainey to give Mr. Chandler and the other

miners an option "to go to work or go home," and when he testified that Mr. Rainey denied ever making such a statement.

I find no evidentiary support for Mr. Chandler's contention that his 5-day suspension was the result of management's intention to retaliate against him for any health or safety efforts on behalf of himself and other employees. Nor do I find any evidence of any disparate treatment of Mr. Chandler. With the exception of Mr. Burnett, who was dealt with more severely because of his work record, and Mr. Smith who willingly took a 1-day suspension (an option also available to Mr. Chandler), all of the remaining miners on Mr. Chandler's work crew who refused to go to work and left the mine received the same 5-day suspension as Mr. Chandler.

On the basis of the foregoing findings and conclusions, I conclude and find that mine management suspended Mr. Chandler for a violation of a company rule against leaving work early without authorization, and for insubordination for refusing a direct work order given to him by his foreman. I further find and conclude that management had good and sufficient business and disciplinary reasons for suspending Mr. Chandler, and that the suspension was justified. See: Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982); Paula Price v. Monterey Coal Co., 12 FMSHRC 1505 (August 1990); Secretary of Labor/Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 51 (D.C. Cir. 1983).

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge