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MELVIN CASS V. TREW  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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| MELVIN L. CASS,<br>COMPLAINANT  | Complaint of Discrimination  |
| v.                              | Docket No. YORK 82-22-DM     |
| TREW CORPORATION,<br>RESPONDENT | East Deerfield Quarry & Mill |

DECISION

Appearances: Melvin L. Cass, Buckland, Massachusetts, pro se;  
Lewis A. Whtnet, Jr., Esquire, Easthampton, Massachusetts,  
for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant with the Commission on March 19, 1982, pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was filed pro se after the complainant was advised by MSHA on February 17, 1982, that its investigation of his complaint disclosed no discrimination against him by the respondent.

Respondent filed an answer to the complaint on April 15, 1982, denying any discrimination, and the case was docketed for hearing in Springfield, Massachusetts, on August 3, 1982. The parties were afforded an opportunity to file post-hearing arguments.

Issues

The critical issue presented for adjudication in this case is whether the termination of Mr. Cass from his employment with the respondent was in fact prompted by protected activity under section 105(c)(1) of the Act. Specifically, the crux of the case is whether the refusal by Mr. Cass to perform certain asserted unsafe drilling duties without the assistance of a helper insulated him from termination from his job. Additional issues raised by the parties are identified and discussed 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 CFR 2700.1, et seq.

The Complaint

In his initial complaint filed with MSHA on June 1, 1981, Mr. Cass asserted that on May 20, 1981, he was drilling on a 68 foot face to complete a shot, and that he had several more holes to drill. He was being assisted by a helper. Quarry superintendent Paul Warner reassigned his helper to other duties and instructed him not to help Mr. Cass further. At this time, Mr. Cass had three more holes to drill about three feet from the face, and four "B" holes (Back up holes) to finish. Mr. Cass informed Mr. Warner that it was not safe to drill alone. He then shut down and went to the office. Mr. Warner advised him that he was to drill alone and did not need a helper. Since it was quitting time, Mr. Cass went home.

The complaint states further that when Mr. Cass returned to work on May 21, 1981, and informed Mr. Warner that he was not going to drill alone because he did not believe it was safe, Mr. Warner informed him that if he did not drill alone he was fired, and Mr. Warner gave him until May 28, 1981, to make up his mind. Mr. Cass has not been back to work at the quarry since this time.

Complainant's testimony

Melvin L. Cass testified that since July 26, 1982, he has been employed by the Pine Rest Plantation, a trailer park, doing general construction work. He confirmed that he left the employ of the respondent Trew Corporation on May 21, 1981, and at that time he was employed as a driller, and his salary was approximately \$9.00 per hour, and that he worked a 40-hour week. The mine was a union mine represented by Operating Engineers Local No. 98. He also confirmed that since his termination on May 21, 1981, he has been self-employed as a carpenter restoring an investment home which he purchased, and that he has also "cut wood" for a living.

Mr. Cass testified that he was employed with the respondent for approximately 8-1/2 years as a crushed rock driller. He identified a copy of the written complaint he filed with MSHA on June 1, 1981. He also confirmed that on May 20, 1981, he refused to continue his work as a driller on one of the pit working faces after mine management superintendent Paul Warner informed him that his helper would no longer

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be assigned to assist him in his driller work. Mr. Cass stated that he believed he could not safely perform his duties without a helper. Mr. Cass indicated that his drilling work was being performed at the top of a 68 foot pit face, which was at a slight angle, and that the helper would stand by the side of the drilling truck and assist him in the handling of the 65 pound steel drilling devices stored on a rack on the truck. He would position himself two to three feet from the edge of the face while inserting the steel drill on the truck, and during the actual drilling process he would position himself to the side and in back of the truck away from the drill hammer. Without the aid of a helper he would have to do all of the work himself, and he believed that this exposed him to the danger of slipping over the edge of the face (Tr. 7-17).

Mr. Cass stated that he had worked for a week on the drilling project in question, and that he had drilled some 55 to 60 holes on the "shot" project. He had also drilled some 25 holes at the top of the face during the week, and all of this work was accomplished with the assistance of a helper. The helper was shared with the blasting crew, and at the time his helper was taken away from him he had six more holes to drill to complete his project (Tr. 18-19).

Mr. Cass confirmed that on previous occasions when he did not have a helper assigned to him he performed his drilling duties without the helper even though "it wasn't really safe". He did so because "he had to work" and believed that he would be fired if he didn't perform his drilling duties by himself (Tr. 22). He stated that he complained to the pit foreman about having to drill alone, but did not complain to his union representative (Tr. 24).

Mr. Cass confirmed that while he had performed his drilling duties for 8-1/2 years without the assistance of a helper, on May 20 he was drilling in an area where he was out of sight of the shovel operator and the haul truck drivers, and since he was working alone he was concerned that in the event of an emergency no one would be able to see him and come to his assistance (Tr. 25). He believed that if he had a helper, the helper could go and summon assistance (Tr. 26).

Mr. Cass confirmed that when he returned to the mine on May 21, he and Mr. Warner visited the drill site and Mr. Cass still refused to work alone. At that point, Mr. Warner advised him that it was not unsafe, that he had been doing the work for 8-1/2 years, and that a week before when he drilled 25 holes, he did not always have a helper. Mr. Warner then told him that he would have a week "to cool off or I was fired" (Tr. 28). Mr. Cass then informed Mr. Warner that he was going to contact MSHA and file a safety complaint (Tr. 26). After Mr. Cass left work, the drilling work was completed by Mr. Spooner, and later by Mr. Kenny Lemclair (Tr. 35).

Mr. Cass confirmed that he never received an actual notice of discharge or termination from the respondent. He assumed that

since he did not go back to work after the week he was given to "cool off", that he was fired.

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Even though he was aware of his union grievance rights, he opted to file a complaint with MSHA, and filed no grievance (Tr. 42). Mr. Cass stated that he expected MSHA to come to the mine and tell the respondent that he needed a helper for safety reasons. He conceded that MSHA investigated his complaint, issued no violations, and found that he had not been discriminated against (Tr. 43-66; 49).

Mr. Cass explained the operation of the drill rig he was operating, stated that it was equipped with a drill rack which he designed, and he confirmed that he and Mr. Warner had some prior problems over safety gloves and raingear three years prior to the instant complaint, but that those encounters were resolved to his satisfaction (Tr. 54). Mr. Cass also indicated that even if he were to be furnished with a safety belt for use around the drilling rig in question, he would not use it because it would get in the way and restrict his movements around the drill rig. He would prefer a helper (Tr. 55).

On cross-examination, Mr. Cass identified a photograph (exhibit R-1) as the drill rig in question, and he confirmed that for most of his employment period with the respondent for more than eight years he has worked as a driller, but that he has done some driving, welding, and mechanic's work. He explained that his drilling work involves the preparation for blasting trap rock out of the quarry, and he identified a photograph (exhibit R-2) as a fair picture of what the quarry looks like (Tr. 56-58). Mr. Cass indicated that on the day in question in this case he was working in the area marked "A" on the photograph, and the shovel was digging on top of the face shown as "B" on the photograph. He also identified a roadway shown in the photograph as the haul road used by trucks. He also indicated that on May 20, there were two trucks operating on the haul road with a reasonable degree of regularity every seven to eight minutes, and that the shovel operator was on duty all the time while he was drilling (Tr. 62).

Mr. Cass testified that during his drilling operations for Mr. Warner, it was customary for him (Cass) to ask for a helper if he needed one and that "most of the time" over an eight-year period he received one "if I complained enough" (Tr. 62). Mr. Cass confirmed that on May 20, Mr. Warner did not order him to leave work. Since his work shift was at an end, he simply went home. When he returned the next morning, he and Mr. Warner went to the work site and at that time Mr. Warner told him he was to either drill or he wasn't going to work. Mr. Cass made no offers to return to work during the following week because he was in the process of contacting MSHA, and he made no further contacts with Mr. Warner (Tr. 64). He indicated that he filed no formal complaints with his union, although he did have a conversation with the local's business agent, and he had never previously complained to MSHA (Tr. 67). He confirmed that the drill rig had been cited in the past by MSHA during an inspection, and they resulted from his moving the machine while the boom was in an unsafe position and his failure to insure that a safety chain was connected to the machine air hose (Tr. 68).

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Mr. Cass explained the procedure for drilling and preparing a shot to be fired, and he indicated that the drilling work he was engaged in at the time in question was over a four or five day period. During that time Mr. Teddy Lemclaire was his helper, but he did not have the use of his help during the first part of those days. Even though he needed a helper during this early stage of the drilling, he drilled without Mr. Lemclaire and did not ask for any help (Tr. 74). With regard to his relationship with Mr. Haas, the driller, Mr. Cass testified as follows (Tr. 76-78):

Q. There never was any question raised by Mr. Warner about whether you were cooperating with Mr. Haas?

A. There wasn't a question. I told Paul I wouldn't help Mr. Haas on shots.

Q. You told him you wouldn't help him?

A. Yes.

Q. That, you feel, was a cooperative attitude?

A. That was just the way it was.

Q. You didn't find it too easy to work together with Mr. Haas?

A. No.

Q. I am correct, you did not find it easy to work with him?

A. Correct.

Q. For how long a period did you have this feeling that you couldn't work with him?

A. About the first day he was there.

Q. The first day he was there?

A. Yes.

Q. How long was Mr. Haas there, up until the time you left? Do you know?

A. Two years -- three years?

Q. Two years?

A. Two years, I believe.

Q. He was the blaster and you were the driller.

A. Yes.

Q. During that period of time, you found you couldn't work cooperatively with Mr. Hass, no matter whose fault it was?

A. Right.

Q. Is the answer yes?

A. Yes.

Q. And was that true, pretty much, throughout that two-year period?

A. Well, we never had -- Mr. Warner had us working apart, so we never had much call to get together.

Q. Except with respect to drilling and blasting?

A. No. I usually drilled the holes and he shot them.

Q. If there was any difference as to where holes were to be drilled or the pattern to be drilled, you found it difficult to cooperate with Mr. Haas?

A. No. They marked them and I drilled them. They had another blaster up from Boston. He went and marked a bunch of holes and I drilled them.

Q. Was there anybody else in the quarry crew that you couldn't get along with?

A. No.

Mr. Cass testified that during his tenure as the quarry driller he used the same drill rig. For the first two years, it was without a drill rack, but he fabricated a rack at company expense in the shop with the respondent's consent and he conceded that this was done to help him in his work (Tr. 85). Mr. Cass took the position that he should be the one to determine whether he needs a helper for safety purposes, and even if mine management assessed the situation and found otherwise, he would still not drill alone. He indicated that drillers working on similar union jobs in construction work outside the quarry are required by OSHA regulations to provide a helper or chuck tender for the driller for safety reasons (Tr. 89-91).

Mr. Cass conceded that there were times when he drilled alone without a helper, and indicated that this was true 80 percent of the time (Tr. 93).



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His concern on the day his helper was taken away from him stemmed from the fact that he did not believe he would be within sight of the shovel operator working away from his area. As for the truck drivers going by, he conceded that they could observe him for the time it took them to come and go, but assumed they would be paying attention to their driving. He also indicated that there was no radio on the drill rig, but that he did take a coffee break at 10:30 a.m. in the shop, and then would return to the drill rig to work until lunch. Usually no one would come by to visit the work site unless there was a problem or an inquiry as to how long drilling would take (Tr. 96). He believed he needed a helper to keep him under observation, to go for help in an emergency, and to help him with the drill steel (Tr. 97). He also alluded to annual safety meetings, and conceded that he never brought up the need for an observer while he was drilling (Tr. 100). He further explained his need for a helper as follows (Tr. 101-102):

THE WITNESS: And when you are drilling close to the face, you should have a helper.

JUDGE KOUTRAS: Then, that would be the safety consideration. When you are drilling near the face, you need a helper.

THE WITNESS: Yes.

JUDGE KOUTRAS: But when you are drilling away from the face, when I asked you the hypothetical, you seemed to think that you needed one anyway because in case you got hurt doing something.

THE WITNESS: If nobody could see you.

JUDGE KOUTRAS: If no could see you.

THE WITNESS: You're up, you know, by yourself.

JUDGE KOUTRAS: But if someone had you within their vision --

THE WITNESS: (Interrupting.) Within close, yes. Where they could get to you, like the shovel down underneath you or something like that.

JUDGE KOUTRAS: So I take it if your were at the top of this high wall, up the top of this face, drilling away from the face, a couple of feet let's say; and there is a dozer or a shovel or something working down the pit; and the guy has line of sight vision -- he can observe you; and he is standing there doing all his things that he has to do with his shovel; and occasionally, if he looks

up there, he will see you working the drill, away from the face, you have no problem with that.

THE WITNESS: Yes. Right.

JUDGE KOUTRAS: You have no problem?

THE WITNESS: Not as long as I am in visual contact.

JUDGE KOUTRAS: With him?

THE WITNESS: Or with somebody.

JUDGE KOUTRAS: Is this some kind of company rule, policy, or what?

THE WITNESS: I don't know. About what, taking a helper away or what?

JUDGE KOUTRAS: No, working in an isolated area or being out of sight of someone.

THE WITNESS: No. This is the first time it ever happened on this shot. Usually, I am within sight of somebody or there is somebody working right beside me, close by. This was the first.

#### Respondent's testimony

Paul H. Warner, respondent's materials superintendent and president testified that his job responsibilities include the complete control and operation of the quarry in question. He has worked at the quarry since 1972 and was placed in charge of the operation in 1975. Mr. Warner stated that on May 20, 1981, he directed Tom Haas, a blaster, to go to the area where Mr. Cass was working and to ask him when his drilling work would be completed so that blasting operations could begin. Mr. Haas reported that Mr. Cass would not speak to him and wouldn't "give him the time of day". Mr. Warner indicated further that Mr. Haas and Mr. Cass had not gotten along for two years, that they both had a "communications problem", and that this situation had caused him some management problems. To alleviate the problem he attempted to keep them physically separated in order "to keep the peace". However, since blasters and drillers normally work as a team, Mr. Warner indicated that maintaining such separation was not always possible (Tr. 103-106).

Mr. Warner testified that on the afternoon of May 20, he personally went to the area where Mr. Cass was working and asked him why he did not respond to Mr. Haas after he (Warner) had sent him there to inquire

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as to when the drilling work would be completed. Mr. Cass informed him that he did not speak to Mr. Haas, and in effect told him that the shot would be ready when he finished drilling the remaining holes (Tr. 108). After observing the work that was required at the drill site, Mr. Warner decided that Mr. Cass did not need the helper who was with him and instructed the helper (Mr. Lemclair) to get into his pickup truck so that he could transport him away from the drill site (Tr. 107). Mr. Warner stated that he told Mr. Cass that he saw no reason why he needed a helper and that "this was the last time we were going to be playing games" (Tr. 109). Mr. Warner explained that Mr. Haas and Mr. Cass had been at odds with each other over their respective duties and responsibilities, that Mr. Cass had previously indicated a desire to work as a truck driver rather than a driller, that he once threatened to quit over a misunderstanding about the company supplying him with some work gloves, and that while he considered Mr. Cass to be a good driller, he repeatedly caused him problems over his lack of cooperation with Mr. Haas and his refusal to speak to him (Tr. 110-111). Mr. Warner was also concerned about disparaging remarks made by Mr. Cass about Mr. Haas to other employees when Mr. Haas was not present (Tr. 113), and he explained his problems with Mr. Cass as follows (Tr. 117-118):

A. I had many problems with the blaster, Tom Haas, coming to me and saying that the driller would not work with him. To give you the particular days they happened on would be a bit difficult, but it was a repeated -- they just would not work together. Or he would not work with the blaster, I should say.

Q. Is it true that the continued over most of the two year period?

A. Yes. In fact, that is why we went to marking the holes, because at the point where we were marking them, we were using an experimental blasting machine -- well, experimental to us -- and the fellow that was operating it explained to us that it was particularly critical in that instance to drill precisely where the holes were supposed to be drilled, so we mark the holes at that time.

Q. You couldn't get a communication going between Mr. Haas and Mr. Cass with respect to the location of the holes, so you had to have them painted on the rock?

A. Yes.

Mr. Warner testified that on the morning of May 21, the day after his conversation with Mr. Cass at the drill site, he told Mr. Cass that "we were a little hot-headed" the previous day and that he wanted to go with him to the drill site so that Mr. Cass could clarify why he believed he needed a helper. Mr. Cass advised him that he would need a helper

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"every place in the f . . . ing quarry from now on", and that Mr. Cass alluded to the fact that the union contract required this. Mr. Warner indicated that Mr. Cass was confused and that the contract does not require such a helper (Tr. 115). Mr. Warner then stated as follows (Tr. 115-116):

The conversation did not last too long when I heard that. I told him, at that point, that he in effect had pulled my jock long enough and that until he got his head back on his shoulders, squared away where it belonged, and could start working with the blaster like he should, that he was all done as far as I was concerned; and I don't remember if it was then or if it was down as he was leaving, but I told him that he had a week from Friday -- he had until the twenty-ninth to think it over and let me know.

Q. Did you require him not to work in that ensuing week, or was that discussed?

A. Nothing was discussed. He left very upset, demanding I give him the phone number of the local MSHA authorities, which I did. He said he would contact them and he would be talking to the Union, and that was the last I saw of him.

Q. That was after you told him that he had until the twenty-ninth to get his act together?

A. Yes, sir.

Q. Now, as a consequence of his request, you gave him the local number of MSHA?

A. Yes, sir.

And, at Tr. 118:

Q. At any time between the twenty-first and the twenty-ninth of May, did Mr. Cass come to you and ask for his job back?

A. No.

Q. At any time during that period, did he communicate with you in any effort to resolve the problem?

A. Directly?

Q. Yes.

A. No.

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Mr. Warner confirmed that MSHA conducted an investigation at the quarry in response to the complaint filed by Mr. Cass, and that he and other workers were interviewed. MSHA's inquiry and observations at the quarry lasted some three days, but no citations for safety infractions were issued (Tr. 116-117).

In response to further questions, Mr. Warner indicated that drilling near the face of the wall takes place for every shot, and that Mr. Cass had never been concerned about drilling near the face. Mr. Warner indicated that a helper would not be necessary at this location because the driller would be visible (Tr. 128). Mr. Warner also confirmed that Mr. Cass may have been disgruntled over the fact that he wanted to drive a truck, but he also indicated that Mr. Cass never asked to be assigned as a truck driver (Tr. 130-132).

Mr. Warner testified that Mr. Cass had never filed any safety complaints because of the lack of any helper, and he also confirmed that the respondent has published safety procedures and regulations (Tr. 135). However, he indicated that there is no policy concerning employees being kept under observation while performing work and he indicated that there are ten persons working at the quarry (Tr. 136-137).

Mr. Warner confirmed that the mine is a union mine, but that it does not have a safety committee. However, he did indicate that there is an employee representative at the mine and he identified him as Alonzo Spooner. Mr. Spooner would walkaround with MSHA inspectors and Mr. Warner assumed that employees would report safety problems to Mr. Spooner (Tr. 138). He is not aware of any complaints ever filed by Mr. Spooner with MSHA on behalf of Mr. Cass (Tr. 139), and Mr. Warner indicated that he has never fired, suspended, or disciplined any employees during his tenure as quarry superintendent, and if he did so an employee could file a grievance (Tr. 140-141).

In response to questions as to whether Mr. Cass was actually discharged, Mr. Warner responded as follows (Tr. 141-142):

JUDGE KOUTRAS: Now, when he opted not to come back after you told him to cool off a little bit, did you, in fact, fire him? Was he terminated? What do you consider -- how would you classify what happened? Would you consider him to be fired -- discharged; and if so, for what reason?

THE WITNESS: I guess I'm not certain what the word would be. The way it was in my mind, I like to feel like I bend over backwards to try to get along with people.

I felt like I bent over backwards too many times, and that's why I told him to stop pulling

my jock and everything, to get his head squared away, and when he could do that, to come back to work.

JUDGE KOUTRAS: Apparently, he has never done that?

THE WITNESS: He never communicated anything other than to go to the Mine Safety and to the Union.

JUDGE KOUTRAS: How did you separate him from the payroll? Is there a record someplace of his personnel folder? What if I were an employer now, and I come to you for a reference. What would you tell me; he was fired, he quit, resigned?

THE WITNESS: I guess he fired himself is what he did. He refused to work. He left.

JUDGE KOUTRAS: Is refusal to work grounds for discharging any of your employees out there?

THE WITNESS: Well --

JUDGE KOUTRAS: Have you ever had this happen before?

THE WITNESS: No, sir, I have not had this happen before.

Alonzo Spooner, employed by the respondent as a truck driver, confirmed that on May 20, 1981, he was the union safety representative at the quarry. He stated that at that time Mr. Cass told him that he had to have a helper, and when he advised him that the union contract did not provide for a helper, Mr. Cass indicated that he would contact the local union representative. Mr. Spooner stated that when he was employed as quarry foreman helpers were assigned to Mr. Cass when he needed them. He also indicated that helpers were assigned to assist drillers, but when they were not needed the driller would work alone and would be paid more money (Tr. 148-151).

Mr. Spooner testified that Mr. Cass had never complained to him that the lack of a helper presented a safety problem, and that his concern was whether a helper was required under the union contract (Tr. 151). Mr. Spooner stated that he did not agree that Mr. Cass needed a helper and that when Mr. Cass left he (Spooner) was assigned to finish the drilling work. He finished it alone without a helper and did not believe it presented any safety hazards. He had no problem in finishing the drilling and did not believe he was in jeopardy (Tr. 152-153).

### Findings and Conclusions

As indicated earlier, the issue in this case is whether complainant Cass' refusal to perform his assigned drilling duties on May 21, 1981, is protected by section 105(c) of the Act. Refusal 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, if the belief is a reasonable one, and if the reason for the refusal to work is communicated to the mine operator. 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); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982); Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

It seems clear to me in this case that Mr. Cass was not fired or suspended from his job for exercising any protected safety rights. I believe that his frustration over his inability to get along with the blaster, Mr. Haas, coupled with a possible rejection by Mr. Warner of his efforts to become a truck driver, led Mr. Cass on a course of confrontation with Mr. Warner, the quarry superintendent. Mr. Warner was obviously pushed to the brink, his patience had worn thin, and when Mr. Cass made the remark that he would need a helper everywhere on the mine site, Mr. Warner made the management decision that he no longer would have a helper. When Mr. Cass would not accept this decision, he was given the opportunity to think it over, and Mr. Warner left the door open for Mr. Cass to return to work. However, rather than returning to his job, Mr. Cass opted to pursue his complaint over the lack of a helper with MSHA. In these circumstances, I conclude and find that Mr. Cass abandoned his job voluntarily and that this was of his own doing.

Having viewed all of the witnesses on the stand during the course of the hearing, I conclude that mine management, in the person of quarry superintendent Warner, treated Mr. Cass fairly and that Mr. Warner tried to mediate the differences between Mr. Haas and Mr. Cass. Further, Mr. Warner considered Mr. Cass to be a good worker and driller, accommodated him on more than one occasion when he requested certain safety equipment, allowed him to modify his drilling rig at company expense in order to make his job easier, and on at least one occasion Mr. Warner talked Mr. Cass out of quitting his job.

Mr. Cass conceded that prior to his leaving his job, he filed no complaints with MSHA or with his union safety representative over any safety hazards connected with his drilling without a helper. Here, his concern was over his assertion that the location where he was required to drill isolated him from others working in the pit, and that they would be unable to come to his assistance in the event of an emergency. However, his testimony establishes that trucks passed by his drilling location on a regular and routine basis, and that his regular routine included a coffee

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break in the morning and time out for lunch. Although one would expect the drivers to pay attention to their driving, Mr. Cass conceded that they would have him in sight as they drove by his drill rig. Given all of these circumstances, I doubt very much that Mr. Cass would not be seen by anyone in the event of an emergency during the time he was expected to drill the remaining six holes to complete his work project.

The record in this case reflects that Mr. Cass had performed similar drilling duties for some eight years, most of the time without the assistance of a helper. Further, respondent has established that during this period of time, mine management accommodated Mr. Cass with a helper whenever one could be spared from other assignments. As a matter of fact, Mr. Cass was provided with a helper for most of the week leading up to the day he decided to leave his job, and at that time he had six holes left to drill to complete the project.

I reject the assertion by Mr. Cass that he needed a helper for safety reasons and that the lack of such a helper placed him in such a hazardous situation that he could not safely do his job. I accept Mr. Warner's testimony that the lack of a helper was not a safety hazard. His testimony, which I find credible, is supported by the testimony of union safety representative Spooner. He finished the project left undone when Mr. Cass left his job, and he did it without a helper and with no exposure to any safety hazards.

I also believe that Mr. Cass' insistence on a helper stemmed from an erroneous assumption on his part that the union contract required the assignment of a helper. In addition, I believe that he was also influenced by some OSHA regulation which he claimed required that an observer or helper be assigned to a driller on general construction projects. All of these assumptions, which proved to be inapplicable in this case, obviously contributed to Mr. Cass' belief that he was entitled to a helper simply because he wanted one, regardless of any management decisions to the contrary.

#### Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the respondent did not discriminate against Mr. Cass, and that his rights under the Act have not been violated. Accordingly, his discrimination complaint IS DISMISSED.

George A. Koutras  
Administrative Law Judge