FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

July 13, 2011

SECRETARY OF LABOR, MSHA, on behalf of THURMAN WAYNE PRUITT,	:	TEMPORARY REINSTATEMENT PROCEEDING
Complainant	:	Docket No. KENT 2011-1152-D MADI-CD-2011-08
v.	:	
GRAND EAGLE MINING, INC., Respondent	:	Grand Eagle Prep Plant Mine ID 15-19011

DECISION AND ORDER GRANTING APPLICATION FOR TEMPORARY REINSTATEMENT

Appearances: Jennifer Booth Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary;
Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Melick

This case is before me pursuant to Section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the ("Act"). Grand Eagle Mining Inc., ("Grand Eagle") has requested a hearing on the Secretary's application for temporary reinstatement of Thurman Pruitt filed June 8, 2011, pursuant to Commission Rule 45, 29 C.F.R. § 2700.45. Expedited hearings were thereafter held in Henderson, Kentucky.

Commission Rule 45(d), 29 C.F.R. § 2700.45(d) limits the scope of these proceedings as follows:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

The Commission has further held that it is "not the judge's duty . . . to resolve . . . conflict[s] in testimony at this preliminary stage of proceedings." *Secretary of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). At a temporary reinstatement hearing the judge must determine whether the evidence mustered by the miner to date establishes that his complaint is nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement. *Jim Walter Resources Inc.* 920 F.2d 738 at 744 (11th Cir. 1990). The Circuit Court further stated that the "not frivolously brought" standard is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act. In addition, it is equated with a criteria of "not insubstantial or frivolous" and "not clearly without merit." *Jim Walter Resources Inc.,* 920 F.2d at 745.

In a "Summary of Discrimination Action" form (MSHA Form 2000-124) signed by Mr. Pruitt on April 11, 2011, it is stated as follows:

> Mr. Pruitt feels that he was unfairly treated from an [sic] similar incident that had previously happened to another worker who only got 3 days off and not terminated. He feels that he was terminated because he had turned in a safety issue in the past. He is requesting back pay, overtime, benefits, electrical class he was participating in and have his record cleared.

Complaint of Diesel Fuel Spill

Complainant, Wayne Pruitt, testified that he began working for Grand Eagle on August 18 or August 19, 2008 as a service mechanic. He testified that upon arrival at the mine for his 2 p.m. shift on August 5, 2009 he was told that around noon that day someone had spilled diesel fuel. He estimated that "at least" 3,000 gallons had spilled and that some had run into his work area. The area smelled of diesel fuel and the vapors, enhanced by the heat that day, made him nauseous. The events that followed were described in the following colloquy at hearings:

> Q [By Ms. Thomas] Okay. Let me ask you this. What did Mr. Ferris [Pruitt's foreman] do in response to or, if anything, in response to your questions about the diesel fuel spill?
>
> A [Mr. Pruitt] Oh, his reply was that they put sand down over my work area.
>
> Q Did you go to the work area?
>
> A Yes.
>
> Q And did you see sand?
>
> A Very little.

Tr. 16 L 4- L 12

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Q. [Ms. Thomas] Hold on just a second. Did the sand have any effect that you could appreciate --

A No.

Q -- in terms of the spill?

A None at all. None at all.

Q Okay. And did you tell Mr. Ferris that?

A Yes.

Q And what did he say in response?

A His -- I asked him if there was something else that they were going to do and he --

THE COURT: What did you talk to Mr. Ferris about?

THE WITNESS: This was at 2 o'clock, when I walked over and observed my work area, then I went back and talked to Mr. Ferris.

THE COURT: And what did you say to Mr. Ferris?

THE WITNESS: I asked him what they were going to do to clean that area up, and his reply was, I'll find out. So I did try to go back to work in my work area, and I was over there for about an hour and I was getting sick, and I went back to Mr. Ferris again and I told him that something has to be done because it's making me sick to try to work in this area.

Q (MS. BOOTH THOMAS CONTINUING) And is this the third time that you asked Mr. Ferris about the diesel spill?

A Yes.

Q And what did he say this third time to you?

A He told me that they were going to put gravel down in that area.

Q And what did you say in response to Mr. Ferris?

A I said -- I said, Jerry, this gravel is not going to seal these fumes that's already soaked through deep into the ground. I said the sun is pulling these vapors up and I said I cannot work in these conditions and I can't -- you know, I can't for the life of me understand why this company wants to put somebody through those kind of conditions.

Q What did Mr. Ferris say to you?

A He told me again that he would go find out to see what they would do to clean that up

Tr. 16 L 22-Tr. 18 L 13

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THE COURT: What did you say to Mr. Ferris at this point, if they're not going to clean it up?

THE WITNESS: Yeah. I told him if they're not going to clean it up, I said, there's -- there are means that I can use to get this spill cleaned up and he said, what do you mean by that?

Q (MS. BOOTH THOMAS CONTINUING) What did you say in response to that?

A I told him I could call MSHA and report a spill that they did.

Q Did you tell -- so you told Mr. Ferris that you could call MSHA?

A Yes.

Tr. 19 L 15- Tr. 20 L 2

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Q [Ms. Thomas] So after you told Mr. Ferris that you could call MSHA, what did he say in response?

A [Mr. Pruitt] He told me to do what I have to do.

Q And what did you say to him?

A I told him I was going up by the time clock, there's a bulletin board there that has the MSHA 800 number on it.

Tr. 20 L 13-L 19

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Q (MS. BOOTH THOMAS CONTINUING) Okay. What did you do after you had that conversation with Mr. Ferris?

A [Mr. Pruitt] I proceeded to the -- it's like a warehouse area with our time clock, that's where our time clock is, and there's a bulletin board on the wall. I proceeded up there, and I called the 800 MSHA hotline number and reported a spill that the company did not report themselves.

Q Okay. Okay. And where was Mr. Ferris during your telephone conversation with MSHA?

A While I was on the phone I had no idea where he was at.

Q Did you see him soon after you hung up?

A Yes. Yes.

Q Where was he?

A He was right outside the walk door, just a few feet from where I was on the phone, but he was standing outside the door as to where I couldn't see him.

Q Was the door open?

A Yes.

Q What did you say to Mr. Ferris when you saw him standing outside a few feet away from where you had the telephone call?

A Well, when I finished my phone call, when I walked through that doorway, he startled me because he was right there on the other side of the door. I didn't -- I didn't know he was there.

Q What did you say to him?

A I didn't say anything. He said the first word, he told me hold up, Wayne, and I said, yeah, Jerry. He said, did you make your phone call? I said, yes, I did. And he said, well, he said, just hang on right here. He said Mr. Rick Lam, which is the mine superintendent, he said Mr. Rick Lam is on his way over to see you. He wants to have a talk with you.

Q When did Mr. Lam -- did Mr. Lam show up?

A Yes, but when Jerry said that, my reply to Jerry was, am I going to get fired over this? And he said, "I don't know, Old Buck." That was his exact words. He said, we'll find out when Mr. Lam gets here.

Q Okay. When did Mr. Lam arrive after that conversation?

A Maybe three to four minutes.

Q Did you know if Mr. Ferris called Mr. Lam?

A I don't know. You know, he had to, to have talked to him, because Mr. Lam had already known that I had called MSHA.

Q Okay. And what was the first thing Mr. Lam did when he approached you?

A Well, as Mr. Lam entered the parking lot, he was traveling at a pretty accelerated rate of speed, and he come sliding in that parking lot in his truck, you know, locked the brakes up and jumps out like he's ready to fight, you know -- and, you know, I was kind of startled, somebody coming at me. You know, he is rushing towards me and he wanted to know what the hell is going on.

Q And was he directing that to you?

A I assumed that, but I wasn't sure. I didn't make any comment to that statement. And then he said -- he looked at me and asked me directly, Wayne, what's going on here?

Q What did you say in response?

A I told him that they had a diesel fuel spill that they weren't going to clean up, they expected me to work in that, and he interrupted me and he said I run this mine, you know, I'm in charge here, I say what goes here, what goes there, you know. He tried to put fear into me that -- that I done something.

THE COURT: Wait a second now. Again, I don't want to know your feelings. I want to know what he said.

THE WITNESS: Okay.

Q The judge wants to know what was said to you. Do you recall what Mr. Lam told you when you responded to him about the diesel fuel?

A He told me he would not tolerate anyone turning them in for a violation like they're going to get over this, and then he says that -- after he said that statement he directly backed up and said why didn't you call me first.

Q When he was saying this to you, what was -- was his voice elevated?

A Yes, it was elevated.

Q Was he standing directly in front of you?

A Right in my face.

Q Okay. How far away from you?

A This far, (indicating).

Q And for the Court, we got to kind of give -- for the record we got to give some distance.

A About one foot. Twelve inches, one foot, yeah.

Q And you said he backed up. What did he say when he backed up?

A When he backed away, he asked me why I did not call him first, to give him the first opportunity to make that situation good before I reported it to MSHA.

Q And what did you say in response?

A I told him that this was six hours into my shift, every hour I asked to get something done to resolve that issue in my work area. I told him I was not satisfied at all with the working conditions that they were putting me through working in those diesel fuel fumes, and he let me know that if I would have called him and contacted him that he would have told me that he had already called an emergency spill company to come and clean all of that up.

Q And was that the end of the conversation you had with Mr. Lam?

A Yeah. There was more words to it than that, but I don't exactly remember. There was still some more conversation and he let me know that that area would be cleaned up.

Q Okay. Did he say anything to you in a hostile tone, in a high tone, in a yelling tone?

A Yeah. When he first got there he was yelling, he was letting me know that that was his mine, he run the mine, he calls all the shots, and it was like he was directing towards me that I interfered with his operation and that he wouldn't stand for somebody working like that for him, under him, for him.

Q Was Mr. Ferris standing there --

A Yes, ma'am.

Q -- within earshot of the conversation?

A Yes, ma'am.

Q As a result, did MSHA actually come out to the mine?

A Yes, ma'am.

Q And did they do an investigation, as far as you know?

A As far as I know they did, yeah. They came over and inspected the area where the spill happened and they could see where it got into this drainage ditch and --

Q Okay. But they came in --

A Yeah.

Q -- and did an inspection?

A Yeah.

Q Did the EPA, the Environmental Protection Agency, did they come out to the mine as well?

A Yes, ma'am. They showed up the very next day. There was several involved with those.

Tr. 21 L 14- Tr. 27 L 2

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Q (MS. BOOTH THOMAS CONTINUING) Well, did the EPA actually come in?

A (Mr. Pruitt) They didn't until I notified them. MSHA -- MSHA came out --

THE COURT: I'm sorry. You notified EPA?

THE WITNESS: Yes, sir.

THE COURT: Oh, all right. And when did you do that?

Q (MS. BOOTH THOMAS CONTINUING) Yeah, when did you do that?

A That -- let's see. The night that it happened, excuse me, I came in the following day and I didn't see much that MSHA, I didn't see or hear that MSHA assessed a penalty or a fine or MSHA had done, I didn't see anything MSHA done, nothing.

Tr. 28 L 23- Tr. 29 L 12

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Q [Ms. Booth] Did you have any other interactions with the EPA while you were at work when they were there?

A [Mr. Pruitt] Well, I take that back. There was -- I did call that number, they have a hotline number, and I had to give them my case number or the number they gave me when I made the initial call, and they did tell me there was an investigation going on, and that's about all they could tell me at that time, but after the fact, you know, I could see what took place, what happened, that they did take action and that the material that they hauled to the gob dump was removed, and it cost them several

thousands of dollars.

Tr. 31 L 10 - L 21

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Q (MS. BOOTH THOMAS CONTINUING) Did Mr. Donahue [then Plant Manager] speak with you -- what was your first interaction with Mr. Donahue after the spill?

A There was not any immediate contact with each other until about two weeks after the spill.

Q And what happened? How were you contacted?

A Ed Donahue called me into his office and --

THE COURT: When was that that he called you?

THE WITNESS: This was about two weeks after the spill.

Q Was it during your shift?

A Yes. During my -- at the beginning of my shift.

Q Did he come and get you? Where were you?

A Yes. I was -- we have a pre-shift meeting where the man comes out. Like I said, I start work at 2 o'clock. Usually ten minutes until 2:00 the foreman will start telling everybody where to go, directing people, you're on this and you're on that.

Q Okay. And did Mr. Donahue come to you during that time?

A Yes, ma'am. Well, it was after -- after we disbursed to go relieve the day shift operators, that's when Mr. Donahue, he was out there at that time and he called me away from everybody, Wayne, I need to see you in my office.

Q Okay. And was anybody with you? Did anybody go with you?

A No, ma'am. I was by myself.

Q Okay. And what happened in the office? What did Mr. Donahue say to you when you first got into the office?

A Okay. Well, the office is a small mobile home trailer. There's only like three -- three offices. There's a plant manager, the secretaries, and the foremen all share one office. It's a small, little mobile home unit. And as I went into Ed's office at the end of the trailer he left the door open and when I -- he told me to have a seat. So I sat down, and he just looked me point blank in the eye and said -- said, Mr. Pruitt, he said in the future he said if you ever call MSHA and report this company for a violation again you will suffer the consequences.

Q And what did you say in response?

A My reply was instantly, Ed, you can't speak to me that way. You can't do that.

Q What did he say to you?

A He told me he could speak to me any way that he chose and as he was getting up out of his chair and walking around his desk towards me he again told me, I'm

celling you, looked me right in my eye and he said, I'm telling you, he said, if you turn this company in again to MSHA for any reason you will, he exaggerated, (indicating), you will suffer the consequences.

Q And where were you when he said that?

A I was sitting in a chair in front of his desk.

Q And where was he?

A He was walking around his desk.

Q And how far was he away from you when he started pointing and saying you will suffer the consequences?

A Four feet.

Q Okay.

A Four to five feet.

Q Did he use any vulgar language towards you?

A Yeah.

Q What did he say?

A At that time he was approaching me, and he reached onto his side and grabbed his cell phone, and he slams his cell phone down on that desk corner right there in front of me. I mean, slammed it down hard, (indicating). And he said there's a telephone, he said, I dare you to call fucking MSHA. That was his term right there.

Q And what did you say in response?

A I was nervous, and I told him again, I said, Ed, I'm not listening to this type of talk from you. I don't have to. I said if you're going to -- I said if you have anything else to say to me, I said, I want a witness. And he told -- he hollered for Jayma. She is his --

Q Who is Jayma?

A -- secretary. Jayma Jackson is his secretary. Her office is right around from his, there's a little bathroom area and then there's her office. There's no doors on her office, and she could hear every word that we were saying.

Q Well, she was within earshot?

A Yes, ma'am. Yes, ma'am. Definitely. Well, he called for her.

Q Did she come?

A And I said no. Just as soon as he hollered for her, I said no. I said she is a salaried personnel. I said I want a witness with me right now if you're going to talk to me in this tone of voice, I said I want someone hourly. She did not come in there.

Q Okay.

A So I knew she could hear, because he --

Q Well, let's talk about --

A Okay.

Q -- what happened after you said you wanted an hourly person. What did he say?

A Well, he slammed -- he picked his phone up and, like I said, tried to get as close to me as he could on the edge of that desk and pointing at it, I dare you, I dare you, you want me to dial the damn number for you? I dare you to call MSHA and tell them how I'm talking to you right now. I got up. I had to squeeze between him and the chair I was in to walk out the door. I said I'm through with this conversation, Ed Donahue. If you've got anything else to say about this matter with me I'll be right back with one of my employees, one of the hourly guys as a witness, because I'm not listening to this type of conversation from you.

Q Did you have any more conversations with Mr. Donahue about the diesel spill?

A No, nothing. That was done.

Tr. 34 L 25 - Tr. 39 L 18

This testimony was not disputed at hearings and clearly evidences that Mr. Pruitt engaged in protected activity and that mine management showed animus toward Pruitt's protected activity.

Report of Low Power on Loader

Pruitt testified that in May or June 2010, he changed jobs and became a loader operator. Sometime during September 2010 he was operating the No. 731 loader which did not have "full power." The events that followed were described by Pruitt at hearings in the following colloquy:

[Mr. Pruitt] The 731 loader had power issues. It wasn't up to full power that it could function properly.

Q And how long had you been operating it where it wasn't up to full power?

A It was a couple of weeks that all three of us loader operators were running this particular loader. We have a pre-shift safety checklist that we check off and we write remarks on there as to any problems that you could be having with that equipment, and we were all writing low power, you know.

Q All three shifts?

A Yes, ma'am.

Q All three operators --

A Yes.

Q -- wrote low power on their pre-shift?

A Yes, ma'am.

Q And on that day what happened? Can you tell the Court what happened with your work refusal?

A Okay. I was on second shift. It was sometime towards the middle of my shift. I

was taking a bucket of breaker rock, it comes out of the breaker, back up to the hill to work the stockpile. As I was climbing the incline of the hill before I crested the top I was just barely -- barely moving, just barely able to proceed up the hill and then the loader just stalled out and died. And when it died I slammed on the brakes. The brakes held the equipment. They're a hydraulic brake system.

Q Okay.

A And there's an accumulator on those loaders to give you just a little bit of power when the motor is not running. You only have two or three times you can push that brake pedal before there's no brakes at all.

Q And did you call anyone about the loader at that point?

A Yes, ma'am. I contacted my immediate foreman, Rob Edwards.

Q Okay. Now, I want to be clear so the Court can understand. At this point Jerry Ferris is not your immediate foreman; is that right?

A Right. Jerry Ferris had left and now Rob Edwards was my immediate foreman.

THE COURT: Well, now, left the company?

THE WITNESS: Well, he still worked for the company. He is at a different location.

THE COURT: Different mine site?

THE WITNESS: Different site.

Q (MS. BOOTH THOMAS CONTINUING) And did you tell Mr. Edwards about the problem with the loader?

A Yes, ma'am. I told Rob.

Q What did you say to him?

A We have a two-way FM radio, company radio, as we refer to it. I contacted Rob on the company radio and told him my situation, the loader stalled out on me on the hill, it's frightening me, scaring me, and that I was going to park the loader and tag it out, it was unsafe.

Q And what did Mr. Edwards say to you?

A He told me there was nothing wrong with that loader.

Q And what did you say to him in response?

A I told him, yes, there is, it just stalled out on me, there's no power.

Q What did he do in response to that?

A I told him that I was going to park that loader, I was going to put a tag on it, do not operate, and there were two additional loaders parked over there not in use, I was going to get one of the other loaders and go back and perform my job.

THE COURT: Is that what you told him, that you were getting another loader?

THE WITNESS: Yeah, because the one I was on was unsafe, I was refusing to operate that equipment.

THE COURT: How did you get it to the parking position if it had stalled out on you?

THE WITNESS: I had a load on the bucket when it stalled out and I was up on the hill. From the point I was at to once I climbed the hill and dumped that load, it's downhill all of the way.

THE COURT: Well, where did it stall out?

THE WITNESS: It stalled out going up the hill.

THE COURT: With a load?

THE WITNESS: With a load.

THE COURT: So you dumped the load at that point?

THE WITNESS: Yes.

THE COURT: And you were able to operate it at that point?

THE WITNESS: Yes. Yeah, it was low power It would function okay without a load, and the whole 2 route I had after dumping that bucket was downhill.

Q (MS. BOOTH THOMAS CONTINUING) And that was without a load?

A That was without a load, correct.

Q So your concerns were going up the hill with a load?

A Yes, ma'am.

Q Okay. And what did Mr. Edwards say to you when you told him that you were going to tag this equipment out?

A He told me that he had called Tim Ball, the safety director, and explained the situation at hand with him. They have a policy of, you know, if –

Q And when you say "they," you mean the operator?

A No. The company tells us that -- I've not seen a written policy, but I guess it's a verbal policy. They've told us that if you deem something unsafe that if your foreman thinks it is safe that they will get a second opinion. Okay. The second opinion was a phone call to Tim Ball relating to him the issue. My foreman never came and looked at that loader. Tim Ball never came.

THE COURT: What was his position?

THE WITNESS: Tim Ball is the safety director.

THE COURT: Safety director?

THE WITNESS: Yeah.

THE COURT: All right.

Q (MS. BOOTH THOMAS CONTINUING) Did Mr. Ball come and look at the loader?

A No, ma'am. No, ma'am. He -- Mr. Rob Edwards conferred with Tim Ball over the telephone, because that's the statement Rob had made to me, I called Tim Ball, Tim Ball said it's safe to run, he agreed with me, it's safe to run, you run that equipment.

Q And did you run the equipment?

A No, ma'am. No.

Q What did you do?

A I parked the loader, I put a tag on it, do not operate, and I got on another loader.

Q Did you complete your job that day?

A Yes, ma'am.

Q Okay. And did you speak with Mr. Edwards and Mr. Rick Lam the following day?

A Yes, ma'am. At the beginning of the shift.

Q Okay. And what did -- how did that conversation start?

A It started like I said earlier, kind of the same deal, we all meet out there before shift, and when we were disbursing Rick Lam was there with Rob Edwards, and Rick Lam said, Wayne, I need to see you a minute. There's a small conference room right there behind the time clock wall, and they walked into that conference room, Rob Edwards, Rick Lam, and myself.

Q Okay. And what was -- what did Mr. Lam say to you?

A Well, as we got in and sat down in that room Rob Edwards and Rick Lam sat facing -- facing me. Rob never made any comments. Rick Lam, the first question that he asked me was why I was refusing to do my job.

Q And what did you say?

A I said I did not refuse to do my job, I said I deemed a piece of equipment unsafe to operate and I got on another piece of equipment and done my job.

Q And what did he say to that?

A He got up out of his chair and walked towards me and he said I will -- he started pointing his finger. He said I won't tolerate a man not wanting to do his job. He said I run this mine, this is my mine. He said I've heard this story before from you. He said this is my mine. He said if a man is not doing his job he said I'll fire him on the spot.

Q How far away was he standing from you when he -- when he said that?

A Two feet.

Q Okay. And were you sitting in a chair?

A I was sitting down and he was pointing his finger at me, (indicating).

Q Did you say anything in response to what he said to you?

A I was confused. I said wait a minute, I turned a piece of equipment in as unsafe to operate. You know, I have that right to do that, and you're wanting to turn this around, Mr. Lam, and directing me that I refused to do my job. And he said you did refuse to do your job. When your foreman puts you on, assigns you a piece of equipment and you refuse to run that equipment, he said you refuse to do your job. And he said, like I told you, I won't tolerate that, I will fire a man for not -- for refusing to do his job. And he was in a loud tone of voice.

Q Okay. Did you say anything in response to that?

A Yeah. I kept saying, Mr. Lam, the equipment was unsafe. You know, I'm told by you, by the safety director, by my foreman if you think a piece of equipment is unsafe

you park it, you tag it out. I was doing what I've been trained in my safety training to do.

Q Did Mr. Lam tell you that piece of equipment was being looked at or being considered for repairs? What did he say?

A At that time he said I have a Wayne Supply man on his way.

Q Well, hold on. Wayne Supply man?

A They're a mechanic, Caterpillar. It's a Caterpillar dealer/mechanic. He said I have a Caterpillar serviceman on the way and he's got a laptop computer. And after Mr. Lam told me that the Caterpillar man was on the way and he said you better hope they find something wrong with that equipment. And that was all that was said. You know, that was the end of the conversation. As I left the room they were out there getting the codes off of the -- the loader had like three injectors that wasn't working. It was low power.

Q Did you see that yourself, the codes --

A Yes.

Q -- from the --

A Well, I didn't actually see the codes on the computer. I seen the computer screen and I heard

what they -- what they said, that there was three injectors not working on that loader.

Q What does that mean?

A Each cylinder, you know, each motor --

Q In layman's terms. Yeah.

A A motor has so many pistons. On a diesel motor each piston has a fuel injector that sends fuel specifically for that cylinder. There was three cylinders that were not getting any diesel fuel, and that's like you took three pistons away from that engine. And I never heard an apology from them, I never heard them say, yeah, you were right, Wayne, you know, thanks for being safe. You know, I never heard nothing like that. I never heard another comment. I was just thankful that they did find something and Mr. Lam didn't fire me.

Tr. 42 L 11- Tr. 51 L 14

This testimony was not disputed at hearings and clearly establishes that Mr. Pruitt engaged in protected activity and that both his then-foreman Rob Edwards, and Operations Manager Rick Lam, showed animus toward this protected activity.

Report of Gob Truck With Two Lights Out

Pruitt testified that sometime during the month of February or March 2011, he reported to safety Director Tim Ball that two lights were out on the gob truck. Following this report, Ball

reportedly "made them park the truck until it was fixed." The following day Edwards told Pruitt that he had gotten in trouble "royally" over the issue. There is no evidence that Edwards knew that Pruitt had reported the condition to Ball. In any event, it is clear that Pruitt engaged in protected activity by reporting the condition to Ball. Pruitt was subsequently discharged by Grand Eagle on March 31, 2011. A letter informing him of his discharge dated April 1, 2011 reads as follows:

> Dear Mr. Pruitt,
>
> This letter is to inform you that your employment with Grand Eagle Prep Plant has been terminated, effective 3/31/2011. This action was taken due to a history of unsafe work activity. On January 14, 2011, you were suspended for three days due to unsafe work acts. On March 31, 2011, you were again observed engaging in unsafe work acts and subsequently suspended.
>
> For this reason, we have no choice but to discharge you immediately. You will be notified in a separate letter from the Human Resources Department of your COBRA rights and eligibility.
>
> Sincerely,
>
> Richard Lam
>
> Operations Manager

Pruitt acknowledged that in January 2011 he had backed a 988 Caterpillar loader into the tail roller of the stacker and received a three-day suspension for that accident. The testimony of current Plant Manager Dwight Son that the resulting repairs cost $30,000 is not disputed. Pruitt also acknowledges that on March 31, 2011 he was violating company safety rules by working on one of the belts without locking and tagging it out. He further acknowledges that he was also then violating company policy by working on the belt some 20 feet above the ground without fall protection. It is not disputed that Mr. Son was told by an MSHA official that Pruitt's failure to lock and tag out the belt before working on it and his failure to wear fall protection would have resulted in a "section 104(d)" closure order.

Pruitt claims however that his discharge was the result of disparate treatment in that other miners at this facility had similar incidents and were not discharged. In this regard he cited incidents by miners Randy Toms, Carroll Simmons, Shane Stone and Michael Crick. While the Complainant would have the burden at hearings on the merits to prove disparate treatment, his representations under oath of such treatment may be considered in determining that the complaint herein was not frivolously brought, the standard applicable in these proceedings.

In concluding that Pruitt's complaint herein was not frivolously brought, I give significant weight to the evidence, undisputed at hearings, that Pruitt engaged in a number of protected activities, that Respondent showed animus toward several of those activities and that there was a

close connection in time, about one month or less, between his last alleged protected activity and his March 31, 2011 discharge.

While Respondent appears to assert that its discharge of Pruitt was based on his unprotected activities and may at hearings on the merits prove that assertion (the person who could provide the best evidence in this regard i.e. the person who actually discharged Mr. Pruitt, did not testify)and I find that Respondent's evidence at these hearings is not sufficient to demonstrate that Pruitt's complaint herein was frivolously brought.

ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Grand Eagle Mining Inc., is directed to immediately reinstate Wayne Pruitt to the same or equivalent job at the Grand Eagle Prep Plant at the same rate of pay and with the same benefits he had at the time of his discharge on March 31, 2011

Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution:(By Certified Mail, and Email)

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/to