

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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March 24, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2016-0232
Petitioner,	:	A.C. No. 12-02295-404287
	:	
v.	:	Docket No. LAKE 2016-0269
	:	A.C. No. 12-02295-404287
	:	
	:	Docket No. LAKE 2016-268
	:	A.C. No. 12-02295-406669
	:	
PEABODY MIDWEST MINING, LLC,	:	
Respondent.	:	Mine: Francisco Underground Pit
	:	

**DECISION DENYING MOTION IN LIMINE**

Before: Judge Moran

These consolidated dockets are before the Court upon petitions for the assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977.<sup>1</sup> The Respondent has filed a Motion in Limine to Preclude the Secretary’s Use of Photographs and Reference to Measurements (“Motion”) and the Secretary filed a response in opposition thereto. For the reasons which follow, Respondent’s Motion is **DENIED**.

**Respondent’s Motion and the Secretary’s Response**

Respondent succinctly expresses its request that the Secretary be precluded “from introducing photographs and measurements with respect to Order Nos. 9036922 and 9036924[,] [b]ecause the Secretary cannot establish the location where the photographs and measurements were taken, [and therefore the] introduction of such evidence would be prejudicial to Peabody.” Motion at 1.

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<sup>1</sup> A motion for approval of settlement has been presented for Docket No. LAKE 2016-268. However, the motion has not yet been approved as the Court has some questions about the motion. Therefore, it is still listed in the caption as one of the dockets to be heard for the hearing scheduled to commence on May 31, 2017.

The Respondent notes that the two orders involved reflect the inspector's allegation that, for Order No. 9036922,<sup>2</sup>

[l]oose coal ribs were observed in 10 entries for a distance of approximately 300 feet on the MMU-002 and MMU-012 active working sections measuring approximately 8 inches to 24 inches in thickness by 5 ½ to 6 feet in height and 30 to 40 feet in length gapped away from the solid pillar approximately 3 to 6 inches with rock dust present behind them[,] [and that for Order No. 9036924,<sup>3</sup> an associated inadequate preshift is alleged concerning] [a] hazardous condition (inadequately supported ribs) [ ] located on the #2 Unit, MMU-002 and MMU-022 active working sections from crosscut #1 to #5 in all entries and crosscuts.

R's Motion at 2.

In support of its motion, Respondent states that some 20 photographs associated with the Order are flawed in that neither the MSHA inspector who took the photos, nor the inspector's supervisor, was able to "identify with *specificity* the location at which each was taken." Motion at 3. (emphasis added). Instead, with respect to the location, each states "all 10 entries in by crosscut #1 to the face on both MMU-002 and MMU-022 active working sections." *Id.* Depositions of the MSHA officials served to reinforce the Respondent's position that "[i]t is unclear how many different areas these photographs depict, or whether these photographs are of different conditions or locations." *Id.* at 5. The Respondent's same objections as to vagueness apply to the measurements listed in Order No. 9036922 — the inspector "could not identify the location of the rib or ribs that gave rise to those measurements." *Id.* at 6.

Because of the above-described evidentiary infirmities, Respondent contends that admission of these items will be "unfairly prejudicial." *Id.* at 7. It asserts that such materials deprive it of the opportunity to defend against these allegations, as without "the specific locations of the photographs or measurements, Peabody cannot meaningfully rebut that evidence or the Secretary's characterization of the condition," and this thwarts its ability to challenge the claim that it engaged in aggravated conduct. *Id.* at 7-8.

The Secretary filed a Response in Opposition to the motion ("Response"), noting, "[t]he photographs included in the December 22, 2015 inspection notes from pages 34 to 52 contain time and date stamps. ... [that] [a]ll of the photographs included are taken on 12/22/15. ... [and

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<sup>2</sup> Order No. 9036922 was issued on December 22, 2015 at 10:00 a.m.

<sup>3</sup> Order No. 9036924 was issued at 10 a.m. on December 23, 2015, the day after Order No. 9036922 was issued. It is unclear whether Order No. 9036922's reference to the loose coal ribs in 10 entries for a "distance of approximately 300 feet on the MMU-002 and MMU-012 active working sections" and the inadequate preshift exam alleged in Order No. 9036924 "located on the #2 Unit, MMU-002 and MMU-022 active working sections from crosscut #1 to #5 in all entries and crosscuts" relate to exactly the same areas. For example, it is unclear whether the reference to MMU-012 and MMU-022 is a typographical error.

that] [t]he measurements in the notes are consistent with the measurements expressed in the body of Order 9036922.” Response at 1-2. Perhaps more importantly, though not a direct response to the issue in the motion, the Secretary contends that “[t]he exact location of each photo and measurements would not change whether Respondent violated 30 C.F.R. §75.202(a).” *Id.* at 2.

Speaking to the particulars of the motion, the Secretary notes that the “Respondent will have an opportunity to cross examine the [inspector] about his photographs and measurements [and that] [t]he exact location of the photographs and measurements goes to weight and credibility of the evidence.” *Id.* at 3. The Secretary also filed a Memorandum of Law in support of its Response (“Memorandum”). That document notes that, per the inspector’s notes pertaining to the location and photographs, they pertain to “[a]ll 10 entries in by crosscut #1 to the face on the MMU-002 and MMU-022 active working section.” Memorandum at 2. The Secretary also, in effect, maintains that, assuming the infirmities alleged by the Respondent, “[t]he probative value of the photographs and measurements outweigh the prejudicial effect of the evidence on Respondent.” *Id.* at 3. The Secretary further points out that the photos are each date- and time-stamped, that the inspector was only at the Francisco Underground Pit that day, that they were taken in the MMU-002 and MMU-022 active working section, and that the inspectors were with mine personnel during the times the photos were taken. *Id.* at 2, 5. Finally, assuming that the shortcomings asserted by the Respondent are established, such information goes to the weight, as opposed to the admissibility, of such evidence. *Id.* at 7.

## Discussion

Although the Respondent has raised the specter of prejudice, the Court does not agree that it is presently “real and substantial” as the Respondent has suggested. Motion at 7. The protection provided against such potential prejudice is through the weight afforded to such evidence, a determination which cannot be made until all the evidence has been received concerning the photographs and the measurements. Thus, it is premature to speak of “actual prejudice.”<sup>4</sup> The Court, while agreeing with the broad principle cited by the Respondent that “[a] party is prejudiced when it is deprived the opportunity to defend against an allegation,” notes that Peabody Midwest will have a full opportunity to defend against the Orders. Motion at 7. This includes the opportunity to present such evidence as may establish that little weight should be afforded to the challenged photographs and measurements. If Respondent can establish that the “the absence of the specific locations of where the photographs and measurements were taken” deprives it of “the opportunity to meaningfully defend against the use of the photographs and measurements,” the weight afforded such evidence will be slight.<sup>5</sup> Motion at 8. *See, e.g., Black Beauty Coal*, 33 FMSHRC 1482, 1490 (June 2011).

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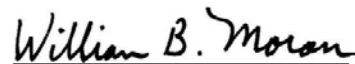
<sup>4</sup> The Respondent acknowledges this in its motion, citing *Long Branch Energy*. *Long Branch Energy* 34 FMSHRC 1984, 1993 (Aug. 2012); Motion at 7.

<sup>5</sup> Accordingly, while the principle cited by the Respondent in *Cumberland Coal Resources*, 32 FMSHRC 442, 449 (May 2010), is correct, Peabody Midwest will have a fair and full opportunity to defend against the alleged violations.

The Court concludes that, on balance, the Secretary has the better of the argument in that, assuming the foundations can be properly laid for the introduction of the measurements and photographs, the objections raised by the Respondent more properly go to the weight of such evidence, not to admissibility. In reviewing the motion and the response, the Court contemplated a number of questions it would have about these evidentiary matters, but it will initially leave it to the able counsel to raise such points during the hearing.

**WHEREFORE**, the Respondent's Motion in Limine is **DENIED**.

**SO ORDERED.**

  
William B. Moran  
Administrative Law Judge

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