IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

In the Matter of the Establishment Inspection of:	:	
	:	Case No.
Mar-Jac Poultry, Inc.	:	2:16-MC-004-JCF
1020 Aviation Boulevard	:	
Gainesville, Georgia 30501	:	

REPORT AND RECOMMENDATION

This case is before the Court on the Emergency Motion to Quash Inspection Warrant Under the Occupational Safety and Health Act of 1970 filed by Mar-Jac Poultry, Inc. ("Mar-Jac"). (Doc. 2). The parties appeared before the undersigned for a hearing on Mar-Jac's motion to quash on Wednesday, April 20, 2016. Following the preparation of the transcript from the hearing, the parties submitted briefs consistent with the Court's directions. (*See* Docs. 11, 12 (Secretary's Post Hearing Briefs), Docs. 10, 13 (Mar-Jac's Post-Hearing Briefs)). The matter is now ripe for a decision.

BACKGROUND

The United States Secretary of Labor, acting through the Occupational Safety and Health Administration, ("OSHA"), secured a warrant for an inspection of the facilities of Mar-Jac after a February 3, 2016 incident where a worker suffered first, second, and third-degree burns. (*See* Doc. 1). Mar-Jac asserts the warrant should be quashed.

I. The February 3, 2016 Electrical Burn Accident & Investigation

Mar-Jac operates a poultry processing plant employing more than 1,000 employees in Gainesville, Georgia. On February 3, 2016, Mar-Jac employee Chris Norrell suffered burns requiring hospitalization from an arc-flash that occurred at the plant. (*See* Doc. 1-2, Referral Report). While Norrell was attempting to repair an electrical panel, his screwdriver created an electrical circuit and caused burns to his hand and face. As required by regulations, Mar-Jac informed OSHA of the injury. (*See* Doc. 1-2, Referral Report).

After learning of the injury, OSHA sent a team to inspect Mar-Jac on February 8, 2016, including Compliance Safety And Health Officer ("CSHO") Dawn Bennett, Maria Martinez, who is an Industrial Hygienist, and Kia McCullough, who is the Assistant Area Director for OSHA's Atlanta East Area Office. Mar-Jac took the position that the only proper investigation would be of the accident itself, so it refused to allow anyone other than Ms. Bennett to participate. The accident occurred in a part of the facility that was somewhat isolated from primary areas of activity. In a coarse and indelicate effort to emphasize that Mar-Jac was not consenting to any expansion of the investigation to cover areas of the plant uninvolved with the accident, Mar-Jac's counsel Mr. Washak informed Bennett that the only way she would be allowed to walk through the rest of the facility to make her way to the employee's locker where his tools

were located was if she put a box over her head. Bennett was ultimately allowed to view the tools.

As part of the initial investigation, Mar-Jac provided Bennett with a copy of an "Arc Flash And Ergonomics Program Evaluation" prepared for Mar-Jac by an outside consultant. (*See* Doc. 1-4). On the first day of the inspection, Mar-Jac also provided copies of OSHA 300 forms which are records of accidents and injuries and which must be maintained per regulations. (*See* Doc. 1-3). In seeking the warrant, OSHA identified "multiple other hazards specifically identified by the Poultry [Regional Emphasis Program], including, lacerations and amputations implicating machine guarding hazards, musculoskeletal injuries indicative of ergonomic problems, injuries associated with material handling equipment, eye injuries caused by chemicals or water contaminants during sanitation operations, and injuries caused by slips, trips, and falls." (*See* Application for Inspection Warrant, Doc. 1-1 at 3). The information recorded on these forms will be discussed in greater detail below, where relevant.

II. OSHA's New Regional Emphasis Program For Poultry

In seeking the warrant, rather than relying solely on specific evidence uncovered during the accident investigation, OSHA sought to expand its investigation from the subject matter of the incident to several other areas of inquiry. (See Doc. 1-1 at 18 ("OSHA seeks a warrant based on evidence of

violations . . . and, in the alternative, under expanded inspection authority vested by the [Regional Emphasis Program])).

A. The REP

In seeking to expand the warrant, OSHA relied upon the 2015 OSHA Directive CPL 16/08, Regional Emphasis Program for Poultry Processing Facilities ("Poultry REP"). (Doc. 1 at 3). The Poultry REP sets forth its purpose as follows:

> I. Purpose. The purpose of this instruction is to establish a Regional Emphasis Program (REP) to reduce injuries, illnesses and fatalities related to workers' exposures in poultry processing facilities. This REP will provide the administrative authority to evaluate the employers' workplace(s) at all programmed, unprogrammed, or other limited-scope inspections pertaining to poultry processing operations to assure that employees are being properly protected. Area offices will normally conduct inspections for all complaints, formal or non-formal, which contain allegations of potential worker exposure to poultry processing hazards unless there are significant resource implications. In addition and where applicable, all unprogrammed inspections will be expanded to include all areas required by this emphasis program.

(REP, Doc. 1-6, at 4).

Section IX describes how each Area Office, "will develop a list of establishments" to be alphabetized, numbered, then randomly "selected in the order prescribed by the random numbers until the total of establishments selected equals the number of projected inspections for the year." (REP, Doc. 1-6, at 7-8). The REP further provides that

> Since employees are subject to multiple hazards at industries covered by the REP, at all inspections performed under this REP, the injury

> and illness records, including first aid and nursing logs, for the past five years shall be reviewed for trends that may identify a common hazard at the workplace. Where injury and illness trends are identified to have occurred and the industrial hygienist (IH) has the expertise . . . to address the hazards, the inspection shall be expanded to address these hazards.

(*See* REP, Doc. 1-6, at 8).[1]

The following section reinforces the fact that the REP covers more than randomly generated inspections, which are known as programmed inspections. In its "General Procedures," the REP mandates that "[a]ll inspections conducted at poultry processing facilities . . . are covered by this instruction." (REP, Doc. 1-6 at 8). It further directs that "Area Offices will normally conduct an inspection for all complaints, formal or non-formal, which contain allegations of poultry processing hazards unless there are significant resource implications." (*Id.*).

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[1] OSHA invoked the REP in an attempt to expand its inspection to include the hazards the REP identifies as "of particular concern within the poultry processing industry," including "(1) recordkeeping; (2) medical records; (3) ergonomics; (4) process safety management of highly hazardous chemicals; (5) confined spaces; (6) electrical hazards; (7) hazard communication; (8) hexavalent chromium exposure; (9) machine guarding and lockout-tagout procedures; (10) biological hazards; (11) noise hazards; (12) chemical and physical hazards; (13) thermal stress; (14) pedestrian work safety in the truck receiving / shipping areas and / or struck-by hazards; (15) slip, trip, and fall hazards; and (16) toilet and sanitary hazards." (*See* Application for Inspection Warrant, Doc. 1-1 at 6 n.4, *citing* REP, Doc. 1-6 at 9-16). OSHA also asserts "the REP requires inspectors to assess compliance with various standards including employee access to personal protective equipment (PPE)." (*See* Application for Inspection Warrant, Doc. 1-1 at 6 n.4).

Finally, the next section entitled "Inspection Procedures," makes clear that it is OSHA's expectation that "Any inspection activity performed under this [REP] will be conducted as both safety and health comprehensive inspections." (REP, Doc. 1-6, at 9).

B. Area Director Fulcher's Testimony About The REP

At the hearing, testimony was presented from OSHA Area Director, William C. Fulcher, who currently serves as the Area Director for the Atlanta East region. (Hr'g. Tr., Doc. 9 at 92). During his time with OSHA, Fulcher has been involved in over 100 poultry processing plant investigations. (Tr. at 93). He also contributed to the development of the REP. (Tr. at 96). According to Fulcher, one goal of the REP was to identify "common denominator hazards that we need to address on each and every poultry inspection." (Tr. at 97). Fulcher discussed hazards targeted by the REP, and identified some of which he testified could not be identified without an inspection. (*See* Tr. at 100 (hazard communication violations), 101 (hexavalent chromium)).

Fulcher further testified that OSHA's initial response to the report of an injury requiring a hospitalization at the Mar-Jac plant included sending three OSHA employees because of the size of the operation and because the REP "mandates that we do open an inspection like is prescribed in the REP at all

unprogrammed inspections sites that involve poultry processing, and I knew [the OSHA employees] would all be involved in inspection activities." (Tr. at 109).

Fulcher explained that the REP gives him the authority to expand an unprogrammed inspection into an inspection under the REP, so long as he has sufficient resources. (Tr. at 115 (decision to expand investigation subject to whether doing so has significant resource implications)). Ultimately, as Area Director, Fulcher would decide if he had the resources to expand the investigation. (Tr. at 116). Fulcher stated that if his team was "involved actively at Mar-Jac performing a comprehensive inspection with the resources that I plan to use, and another [unprogrammed inspection based on report of an amputation or hospitalization] came in at the same time, I would probably have to decide I do not have the resources, and then if Mar-Jac is completed or wound down enough that I could reallocate those resources, then I would make the same decision again." (Tr. at 118).

DISCUSSION

For OSHA to inspect the premises at Mar-Jac, it needed to secure a warrant. This much is clear from *Marshall v. Barlow's, Inc.*, 436 U.S 307 (1978). In *Barlow's*, the Supreme Court held a legislative scheme unconstitutional for purporting to allow for warrantless searches to inspect "for safety hazards and violations of OSHA regulations." 436 U.S. at 309. In doing so, the Court

recognized that it was well-established that warrantless searches, even of commercial premises, are generally unreasonable. *Id.* at 313.

Yet the Court recognized that an administrative search stands on slightly different footing than a search in a criminal matter: "Probable cause in the criminal law sense is not required." *Id.* at 320. Going further, the Court spelled out two ways in which the Secretary could satisfy probable cause:

> For purposes of an administrative search such as this, probable cause may be based not only on specific evidence of an existing violation, but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."

Id. at 320 (quoting *Camara v. Municipal Court*, 287 U.S. 523, 538 (1969)). To do otherwise would give "almost unbridled discretion upon executive and administrative officers, particularly those in the field." *Id.* at 323.

A few years after the *Barlow's* decision, the Eleventh Circuit applied it in the context of an investigation triggered by an employee complaint, and concluded that an employee complaint did not support a full scope investigation. *See Donovan v. Sarasota Concrete Co.*, 693 Fed. 2d 1061, 1070 (11th Cir. 1982). In *Sarasota Concrete*, a recently discharged employee lodged a series of complaints with OSHA concerning alleged safety defects with the company's cement-mixer trucks. *Id.* at 1063. OSHA relied solely upon information in the complaints in

securing a "warrant authorizing an investigation of [the company's] entire workplace." *Id.*

In reaching that ruling, the court indicated that an employee complaint requires a "more individualized inquiry" than an administrative plan, because "employee complaints lack the administrative and legislative guidelines that ensure the target of the search was not chosen for the purpose of harassment." *Id.* at 1068. The court then concluded that "a complaint inspection must bear an appropriate relationship to the violation alleged in the complaint." *Id.*

The court was clear that its conclusion did not mandate that "a specific complaint may never form the basis of a full scope inspection," as it offered the following observations:

> it is conceivable that a specific violation plus a past pattern of violations may be probable cause for a full scope inspection. In addition, a specific complaint may allege a violation which permeates the workplace so that a full scope inspection is reasonably related to the complaint.

Id. at 1069. Going further, in recognizing that " 'Reasonableness' remains the ultimate standard in evaluating the propriety of an administrative search," the court stated it must "weigh the danger of abuse and intrusiveness against the need for the inspection." *Id.* at 1069-70. In concluding that "the scope of the inspection (the degree of intrusiveness) was not supported by probable cause," the court emphasized that "[n]either OSHA nor the magistrate had any reason to believe that

violations existed throughout [the company's] workplace, and the search had none of the safeguards provided by neutral administrative standards." *Id.* at 1070.

Sarasota Concrete made clear that an administrative search may be appropriate if it is supported by specific evidence or if it is undertaken pursuant to a neutral administrative scheme. In securing the warrant at issue, OSHA invoked both the REP and specific evidence identified in the initial investigation of the accident. Each will be considered below.

I. Does The REP Support The Warrant?

Before determining whether the REP justifies the search set out in the warrant, it is important to state precisely what is at issue. Here, OSHA seeks to expand an unprogrammed inspection triggered by mandatory reporting of an injury into an expanded inspection related to several hazards under the REP. It appears this Court is the first to assess the Poultry REP, but a fairly recent decision from the Southern District of Georgia helps illuminate some of the areas of inquiry which deserve attention.

In that case, OSHA sought to expand an inspection of a poultry facility which had originated with an employee complaint to include "all complaint-related items, all items encompassed by [an Amputation National Emphasis Program] ("NEP") and [a Sanitation Local Emphasis Program] ("LEP")." *In re Crider Poultry, Inc.*, No. MC610-001, 2010 WL 1524571 at *3 (S.D. Ga. Mar. 30, 2010).

OSHA contended that the Sanitation LEP authorized a full inspection of a number of hazards, including (1) lockout/tagout, (2) chemical hazards and personal protective equipment, (3) slips, trips, and falls; (4) prevention of cuts and lacerations, and also (5) prevention of electrical shock. *Id.* at *6.

In *Crider Poultry*, the court focused on the fact that the inquiry started with an employee complaint: "OSHA labors under the misimpression that the NEP and Sanitation LEP can be bootstrapped into an unprogrammed inspection in order to expand the scope of an initial complaint-based search beyond complaint items into a 'comprehensive' search. That it cannot do." *Id.* at *7.

A. Programmed Versus Unprogrammed Inspections

At this juncture it bears emphasizing that the REP purports to allow the expansion of every unprogrammed inspection into an inspection concerning all the areas of inquiry in the REP.[2] A review of the difference between programmed and unprogrammed inspections is helpful. " 'Programmed Inspections are carried out in accordance with criteria based upon accident experience and the number of employees exposed in particular industries.' " *Barlow's Inc.*, 436 U.S. at 321, n.17 (quoting OSHA's Field Operations Manual). Unprogrammed inspections, on the

[2] The parties disagree concerning whether the inspection sought here can fairly be described as "wall-to-wall" or "comprehensive." The precise label applied does not matter, because it is undisputed that the inspection of the plant for conditions related to numerous hazards as contemplated by the REP is substantial and highly intrusive.

other hand, are " '[i]nspections in which alleged hazardous working conditions have been identified at a specific worksite . . . . This type of inspection responds to imminent dangers, fatalities/catastrophes, complaints and referrals.' " *In re Establishment Inspection of Buffalo Recycling Enters., LLC*, No. 10-MC-00072(A)(M), 2011 WL 1118671 at *3 (W.D.N.Y. Mar. 1, 2011) (quoting *Industrial Steel Prods. Co. v. Occupational Safety & Health Admin.*, 845 F.2d 1330, 1332 n.1 (5th Cir. 1988)). Curiously, at the time of the investigation of the subject accident, Mar-Jac could not have been subject to a programmed inspection, as it was not included on the list of poultry plants in the region maintained by OSHA. (Tr. 107-08).

On this front, it bears repeating that on its face the REP directs the expansion of *all* unprogrammed inspections in the Region to encompass all the hazards identified by the REP. In practical terms that means when *any* poultry worker in North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee and Kentucky (Tr. 92-93), has an injury requiring a hospitalization or amputation, the REP calls for the facility to be inspected for all items as "of particular concern within the poultry processing industry," including "(1) recordkeeping; (2) medical records; (3) ergonomics; (4) process safety management of highly hazardous chemicals; (5) confined spaces; (6) electrical hazards; (7) hazard communication; (8) hexavalent chromium exposure; (9)

machine guarding and lockout-tagout procedures; (10) biological hazards; (11) noise hazards; (12) chemical and physical hazards; (13) thermal stress; (14) pedestrian work safety in the truck receiving / shipping areas and / or struck-by hazards; (15) slip, trip, and fall hazards; and (16) toilet and sanitary hazards." (*See* Application for Inspection Warrant, Doc. 1-1 at 6 n.4, *citing* REP, Doc. 1-6 at 9-16).

If this sounds like a massive undertaking that could be beyond the agency's capability, it may be because expanding all unprogrammed inspections to cover all the hazards identified by the REP ***is*** beyond the agency's capability. The relevant agency decisionmaker, in this case Atlanta East Area Director Mr. Fulcher, has a sizeable, yet undefined, way to avoid expanding a particular inspection to cover all the REP hazards. The REP anticipates that all unprogrammed inspections are to be expanded, "**unless there are significant resource implications.**" (REP, Doc. 1-6, at 8 (emphasis supplied)). Yet the REP offers absolutely no guidance on several obvious questions. Which resources? How does one determine whether a resource implication is significant? How does the manager decide? Fulcher stated plainly that the REP offers him absolutely no guidance in determining whether to expand an unprogrammed inspection:

> Q: The REP doesn't lay out those rules in it, does it, about which are significant resources and when you'll [convert an unprogrammed inspection into an expanded inspection], that's your discretion?

A: **That's me as the manager.**

(Tr. at 119 (emphasis supplied)).

It has been recognized that "Unprogrammed inspections are not initiated by neutral criteria, and could become tools of harassment." *Matter of Samsonite Corp.*, 756 F.Supp. 498, 499 (D.Colo. 1991). Indeed, in *Sarasota Concrete* the court observed that full scope inspections can be of significant intrusiveness and last for a period of weeks. 693 F.2d at 1069 n.9.

Under these circumstances, reliance on an REP that vests unbridled and completely undefined discretion in a manager to decide which, if any, inspections are expanded to comprehensive inspections falls squarely in the "unbridled discretion" identified as problematic by the Supreme Court in *Barlow's*. On this point it is worth noting that in establishing the warrant requirement -- *Barlow's* -- and invalidating a warrant based solely on an employee complaint -- *Sarasota Concrete* -- courts focus on the *risk* of abuse and do not require a showing of bad faith or an improper motive on the part of the government entity seeking the search.

B. Employee Complaint Versus An OSHA-Mandated Report

In seeking to rely upon the REP to expand the investigation, OSHA attempts to distinguish *Sarasota Concrete* and *Crider* because the initial report of the injury in the present case was mandated by a regulation, and was not the result of an

employee complaint. While it is true that many cases have noted the risk of abuse is amplified where the underlying source of the initial report is from an employee, this alone is not enough to command a conclusion that *any* mandated report can automatically trigger a comprehensive inspection. Instead, determining whether the desired expansion is reasonable requires an examination of the risks of abuse posed by the REP. This is not to say required injury reporting could never be part of a neutral administrative scheme[3] containing provisions for expanding unprogrammed inspections. Cases finding administrative actions inappropriate tend to identify the risk of abuse as coming from either an employee complaint, unbridled discretion, or some combination of both.

Yet the absence of one disfavored component (employee complaint) does not mean the other (unbridled discretion) may be ignored. For example, in considering a program mandating the expansion of employee-triggered complaints when certain objective criteria were met, one court rejected OSHA's contention

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[3] For example, a scheme where injuries subject to mandatory reporting were randomly selected for expansion or prioritized for expansion on the basis of some objectively verifiable measure of past violations would present a different question. OSHA has submitted testimony tending to show that Mar-Jac's injury rates exceed industry norms (Tr. at 60-66), but nothing in Fulcher's testimony suggests that information of that nature played any role in his decision to expand the investigation and the REP does not address this kind of evidence, either. (*See* Tr. 109 (Fulcher sent three employees to initial inspection due to size of facility because he was going to expand investigation pursuant to the REP)).

that that the presence of the objective factors neutralized the risk of unfairness created by the entire investigation being triggered by an employee complaint:

> But, the invasion is no less arbitrary simply because the OSHA official himself cannot inject his own arbitrariness into the process. If the employee who files the complaint intends to harass or retaliate against his employer, the full-scope investigation by a government official has been prompted not by neutral factors, but by a person with an improper motive. Unless it can be shown that OSHA officials act from improper motives more often than employees, the harm to be avoided is exactly the same whether the source is an OSHA official or an employee. And the harm would, in fact, be greater if it could be shown that employees more often than OSHA officials act vindictively or unjustifiably.

Trinity Indus., Inc. v. Occupational Safety & Health Review Comm'n, 16 F.3d 1455, 1464 (6th Cir. 1994). Conversely, the potential harm posed by allowing an officer in the field to select which investigation deserves expansion is not minimized simply by virtue of the fact that the triggering event which brought OSHA to the business in the first place was the required reporting of an injury rather than an employee complaint.

Simply put, the mere fact that the initial inquiry was triggered here by a mandated reporting requirement rather than by an employee complaint does not make the desired expansion of the search reasonable. Even once the risk of abuse when the employee complaint is removed from the inquiry, a significant risk of abuse remains where the decision to expand to a comprehensive inspection is left solely to a manager with unbridled discretion. Accordingly, the undersigned

concludes that the warrant should be quashed to the extent it depends on the REP to expand the areas of inquiry beyond the initial inspection.

II. Does The Secretary's Specific Evidence Support The Warrant?

In seeking the warrant, OSHA presented evidence concerning other hazards presumably present at Mar-Jac in an attempt to justify expansion of the investigation to other areas of inquiry.

A. Information Related To The Accident Investigation

OSHA contends the accident investigation brought to light "specific evidence of three of the hazards listed in the REP because of the underlying accident." (Doc. 11 at 3). On this point, OSHA offered the testimony of CSHO Dawn Bennett who testified that the underlying injury involved an ill-equipped employee undertaking an attempted repair to a circuit breaker which was not properly part of a "lock-out/tagout (LOTO) or arc flash program." (Doc. 11 at 5 (citing Tr. at 45-47)). OSHA contends that the investigation suggests that it "has reason to suspect violations of three hazards identified on the REP, including: (1) Mar-Jac's lack of a LOTO program; (2) employees' exposure to electrical hazards; and (3) employee's failure to wear personal protective equipment (PPE)." (Doc. 11 at 5).

On reply, Mar-Jac contends that "[t]he Secretary admits that OSHA had no specific evidence upon which to base the expansion of its inspection." (Doc. 13 at

10). At least as it relates to the facts unearthed in connection with the investigation of the accident itself, this contention misses the mark. In connection with the investigation, Mar-Jac provided OSHA with a consultant's report which was critical of its lack of a LOTO program. (Doc. 1-4). In addition, CSHO Bennett points to evidence that the injured worker did not have appropriate personal protective equipment when doing the repair. Moreover, the accident showed that the subject circuit breaker was installed improperly, thereby exposing the injured worker to an electrical hazard. Thus, as it relates to these specific areas of inquiry implicated by the investigation of the accident, probable cause exists to expand the investigation to other areas of the plant. *See Sarasota Concrete*, 693 F.2d at 1069 ("a specific complaint may allege a violation which permeates the workplace so that a full scope inspection is reasonably related to the complaint").

B. OSHA 300 Logs

In attempting to expand the investigation to other hazards identified by the REP, OSHA highlights information reflected on OSHA 300 forms documenting work-related injuries leading to medical treatment or days lost from work. OSHA asserts the logs show "Possible Violations of Six Hazards." (Doc. 11 at 5). In doing so, OSHA contends evidence from the logs supports "possible violation of OSHA recordkeeping requirements" consisting of underreporting and inaccurate recordkeeping, (Doc. 11 at 5-6); evidence of "possible ergonomic issues from

repeated motion," (Doc. 11 at 6-7); worker exposure to possible biological hazards, (Doc. 11 at 7-8); possible struck-by hazards, (Doc. 11 at 9); and, evidence of exposure to slip, trip, and fall hazards, (Doc. 11 at 8).

On this point, each side incorrectly claims the other has conceded the issue. OSHA says that "[Mar-Jac] effectively concedes that the [OSHA 300] Logs provide specific evidence of the hazards." (Doc. 12 at 10). For its part, Mar-Jac contends that OSHA "admits that [it] had no specific evidence upon which to base the expansion of its inspection." (Doc. 13 at 10).

Each side's position has flaws. Mar-Jac ignores the fact that the initial investigation unearthed evidence of potential violations relating to LOTO, electrical and personal protective equipment. (*See* Bennett Aff., Doc. 1-5, at ¶ 10; McCollough Aff., Doc. 1-8 at ¶ 8 (incomplete OSHA 300 forms)). In addition it overlooks or discounts testimony from OSHA Industrial Hygienist Marcia Martinez who reviewed OSHA 300 logs from Mar-Jac and found deficiencies on OSHA 300 logs suggesting an OSHA standard had been violated. (Tr. at 87; McCollough Aff., Doc. 1-8 at ¶ 8 (incomplete OSHA 300 forms)).

For its part, OSHA's approach here confuses exposure to potential hazards with evidence of a possible violation. Perhaps this is because the REP is written in terms of exposure to hazards. (*See* REP, Doc. 1-6 at 4). *Barlow's* makes clear that evidence of *violations* may provide probable cause. *See Barlow's*, 436 U.S. at 320

("the issuance of a warrant may be based [] on specific evidence of an existing violation"); *see Sarasota Concrete*, 693 F.2d at 1069 ("a specific complaint may allege a violation which permeates the workplace so that a full scope inspection is reasonably related to the complaint").

Here, for the remaining areas of inquiry, OSHA has identified *hazards*, not possible violations. But not all hazards are the result of a violation. Some of these hazards identified by OSHA, such as slip, trip, or fall hazards, are present in any facility. As Mar-Jac accurately points out, slipping, tripping, and falling are *hazards*; a failure to wear slip resistant footwear or to provide mats in a wet area may amount to a violation. Similarly, the presence of a "struck-by hazard" (*see* Tr. at 72 (worker struck by pallet jack in debone area)) and "possible ergonomic issues" (*see* Tr. at 67 (tendomyopathy in rehang), 68 (tendonitis injuries on cone line and debone area)) does not provide any specific evidence of a possible violation. It may be true that enough injuries of a certain type could support a finding of probable cause to inspect an entire facility for a specific violation, but OSHA's presentation on this point falls well short of that mark.

OSHA protests that Mar-Jac's position fails to account for the fact that the investigation in *Crider Poultry* was expanded based on information gleaned, in part, from OSHA 300 forms. In that case, in connection with an investigation the officer "observed several violations during his inspections, and discovered other

potentially unsafe amputation and crushing hazards through his inspection of OSHA 300 logs." *In re Crider Poultry*, 2010 WL at 1524571 at *5. The problem for OSHA on this point is that the court in *Crider Poultry* did not differentiate between the observed violations and the potentially unsafe hazards encountered. Here, the undersigned's ruling takes into account testimony concerning possible violations relating to LOTO, electrical, personal protective equipment and recordkeeping (*See* Bennett Aff., Doc. 1-5 at ¶ 10; McCollough Aff., Doc. 1-8 at ¶ 8 (incomplete OSHA 300 forms)). But nothing in *Crider Poultry* supports a conclusion that the mere presence of a reported injury on an OSHA 300 form supports a full scale investigation of the hazard related to that injury.

CONCLUSION

The undersigned finds the warrant was improvidently granted, and therefore it is **RECOMMENDED** that Mar-Jac's motion to quash (Doc. 2) be **GRANTED**. OSHA may seek a new warrant that falls within the framework set out above.

SO RECOMMENDED this 5th day of August, 2016.

/s/ *J. CLAY FULLER*
J. CLAY FULLER
United States Magistrate Judge