

**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).<sup>1</sup>

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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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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.