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Eleventh Circuit Limits OSHA's Ability to Use OSHA Form 300 Logs to Obtain an Inspection Search Warrant

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On October 9, 2018, the United States Court of Appeals for the Eleventh Circuit upheld a district court's order quashing an Occupational Safety and Health Administration (OSHA) inspection warrant. OSHA unsuccessfully challenged the district court's finding that the agency lacked administrative probable cause based on injuries noted on a company's OSHA Form 300 logs. While the decision is unpublished, its sound reasoning may impair OSHA's ability to rely upon 300 logs as the basis for obtaining an administrative search warrant. *United States v. Mar-Jac Poultry, Inc., No. 16-17745.*

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Factual Background

The genesis of this case was an employee injury and hospitalization. An employee at the Mar-Jac poultry processing facility received severe burns from an arc flash as he tried to repair an electrical panel with an uninsulated screwdriver. OSHA initiated an inspection after receiving the report of the employee injury. The inspectors arrived and requested to perform a comprehensive inspection of the entire facility for additional hazards. The company objected but permitted a limited inspection of the accident site, wherein OSHA found violations.

OSHA also requested the facility's 300 logs during the inspection. After reviewing the logs, OSHA concluded that there were violations in six different areas common to poultry facilities. These categories of concern were also categories listed in the Region IV Regional Emphasis Program (REP) for Poultry Processing Facilities. OSHA sought an administrative search warrant and claimed that it had probable cause to conduct a comprehensive inspection because if there were injuries noted on the 300 logs, there had to be violations.

The magistrate judge initially granted OSHA's request for a warrant. After an emergency motion to quash, the magistrate judge reversed the decision and recommended that the motion to quash be granted. The district court adopted that recommendation on two grounds: (1) that OSHA failed to demonstrate probable cause that violations existed based on the 300 logs; and (2) that, under the REP, OSHA failed to prove that the facility was selected on the basis of neutral criteria. OSHA decided to appeal the decision to the Eleventh Circuit instead of seeking a new, limited warrant.

The Appeal

OSHA raised three issues on appeal. First, the agency asserted that the district court erred by requiring OSHA to show that employees had been injured as a result of violations. Second, it stated that the district court conflated the terms "hazard" and "violation" and their relation to one another. Third, OSHA claimed that the district court incorrectly found that OSHA relied on the mere presence of a reported injury to initiate a wall-to-wall inspection.

Interestingly, OSHA abandoned its argument that the REP entitled the agency to expand the inspection. At oral argument, one judge spent most of OSHA's time expressing concern about how the REP would give the agency unbridled discretion to expand an accident inspection into a full-blown programmed inspection. While the government's counsel tried to evade the issue by conceding OSHA abandoned this issue on the appeal, the judge would not relent. "I'm just one of these curious judges," he said, and demanded that OSHA point to a place in the REP that "bridles" the agency's discretion.

Another judge quizzed OSHA about its argument on using 300 logs as evidence of a violation. "Context matters," he said. He presented OSHA with a hypothetical. In a company with 10,000 employees and 8 million hours worked per year, is one slip-and-fall recorded on the 300 log sufficient to get a warrant? The government's attorney tried to avoid answering, asserting the hypothetical was not the case before the court. This, however, appeared to anger the judge. "I know it's not!" The judge said his point is that human behavior is not perfect and that people will make mistakes. In light of that, is it OSHA's position that one injury recorded on a 300 log is sufficient to obtain administrative probable cause for a warrant? The government attorney dissembled with a meandering "it depends" response.

The Eleventh Circuit's Decision

The Eleventh Circuit held that OSHA did not establish probable cause that a violation had occurred or was occurring at the facility under the "reasonable suspicion" test. The district court used the correct standard and did not impose an additional burden on OSHA.

Additionally, the appellate court rejected OSHA's argument that the district court conflated "hazard" and "violation." It swatted away the government's two-step argument: (1) every entry on the 300 logs showed the existence of a hazard; and (2) because there was a hazard, there is likely a violation to be found. "The existence of a 'hazard' does not necessarily establish the existence of a 'violation,'" wrote Judge Steele for the court. "It is simply not the case that the existence of a hazard necessarily establishes a violation."

The government then cited to the General Duty Clause, also known as Section 5(a)(1) of the Occupational Safety and Health Act (OSH Act), as evidence of its "all hazards are violations" theory. The court deconstructed this argument by reciting the multiple elements the government must establish to prove a violation of either the General Duty Clause or a specific OSHA standard. In either case, the court wrote that "a hazard does not itself establish a violation."

The court also held that the 300 logs did not support reasonable suspicion that there was a violation. The court deftly pointed out that the 300 logs record injuries, not violations, and that the recordkeeping regulation at Section 1904.0 in Title 29 of the Code of Federal Regulations specifically says that by recording the injury, an employer is not necessarily saying it was at fault. The vague descriptions of the employee injuries did not create the reasonable suspicion required to show that the facility was engaged in violations of the Act. The 300 logs showed no common thread among the injuries. Because the 300 logs did not support reasonable suspicion, the district court correctly quashed the warrant.

OSHA attempted to use the information in the company's 300 logs on its face as justification for a wall-to-wall inspection of the facility, because in OSHA's opinion, if there is an injury, there has to be a violation. The Eleventh Circuit makes clear what every employer already knows: just because there is an injury does not mean there was a violation, and the one-line descriptions required on 300 logs do not on their own show that a company is breaking the law. There must be some other indication to create reasonable suspicion that the employer is violating the act.

Key Takeaways

This decision serves as an emphatic rejection of OSHA's "all hazards are violations" mentality. For years, if not decades, the agency has conflated the mere presence of a hazard with the existence of a violation. The court acknowledged that the presence of a hazard might be a violation, but insisted there must be a deeper correlation than a few entries on a 300 log before courts should grant OSHA a search warrant. The entries are just dots, and there are too few to connect to reach a conclusion that a violation exists in the workplace. But as noted in the concurrence, had there been many more dots (recordkeeping entries), and had the injury descriptions been more detailed, the dots could have been connected to give rise to reasonable suspicion and thus a wall-to-wall warrant.

The government's express abandonment of its reliance on the REP seems to be a tacit admission that bootstrapping a REP onto an accident investigation in an attempt to expand its scope to a complete wall-to-wall inspection was ill conceived

Mar-Jac picked its battle carefully. It consented to the accident inspection, as it knew OSHA could easily obtain a

warrant to inspect the accident based primarily on the employer's report to OSHA, but it drew the line when OSHA wanted to expand the limits to a wall-to-wall inspection. Employers that find themselves in similar situations, especially those under the Eleventh Circuit's jurisdiction (Florida, Georgia, and Alabama) may want to carefully consider the *Mar-Jac* approach of consenting to an accident inspection but requesting an administrative search warrant should OSHA wish to search for violations around the rest of the facility or worksite.