Could Your OSHA 300 Logs Lead to a Chemical National Emphasis Program Inspection?

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An appeal pending before the 11th Circuit Court of Appeals (U.S. v. Mar-Jac Poultry, Inc., No. 16-17745, 11th Cir.) reveals a novel approach the federal Occupational Safety and Health Administration (OSHA) is taking to expand inspections resulting from reported injuries or complaints into wall-to-wall inspections conducted under national, regional, and local emphasis programs targeting specific hazards or industries. OSHA has reportedly started conducting inspections under its Chemical National Emphasis, and OSHA’s position as well as the court’s ultimate ruling could affect the way in which these inspections are initiated.

In its filings in the Mar-Jac case, OSHA claims that work-related injuries and illnesses recorded on the employer’s OSHA Form 300 Log provide sufficient evidence to support a warrant for expanding inspections beyond the underlying accident or complaint. In addition OSHA, in support of its warrant application at the lower court, argued that it has the authority to expand an unprogrammed inspection pursuant to a national, regional, and local emphasis program.

For facilities subject to OSHA’s Process Safety Management of Highly Hazardous Chemicals (PSM) Standard, this means that an inspection stemming from an employee injury or complaint could lead to a Chemical NEP inspection even if the facility would not otherwise have been selected for inspection.

The Case at Issue

The controversy stems from an OSHA inspection following an employee injury at a poultry processing center in Gainesville, Georgia. After the employer notified OSHA of the injury, the OSHA area director immediately attempted to expand the inspection beyond the accident area and to conduct a wall-to-wall inspection pursuant to the Regional Emphasis Program for Poultry Processing Facilities in Region IV. The employer denied OSHA entry to conduct the expanded REP inspection, and went so far as to suggest that the OSHA compliance officer wear a box over her head while walking through the facility to ensure that the inspection included only the area where the employee was injured. OSHA secured a warrant to conduct a wall-to-wall inspection pursuant to the Poultry Processing REP, and the employer moved to quash the warrant.

OSHA argued before the District Court that a wall-to-wall inspection was authorized by the REP, which states: “All inspections conducted at poultry processing facilities, either live-kill or further processing operations, are covered by this instruction.” According to OSHA, because the inspection involved a poultry processing facility, the inspection would be conducted in accordance with the REP, and would include an inspection for hazards the REP identifies as of particular concern within the poultry processing industry. Those concerns include recordkeeping, process safety management, machine guarding and lockout/tagout procedures, ergonomics, and a host of other issues, sixteen in all.

The District Court rejected OSHA’s assertion that an accident inspection can automatically be expanded to an...
emphasis program inspection. The court stated, “OSHA labors under the misimpression that the [emphasis program] 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.”

Turning to whether OSHA analysis of Form 300 logs was sufficient evidence to support the necessary finding of probable cause to conduct an expanded inspection, the court noted that OSHA was “confus[ing] exposure to potential hazards with evidence of a possible violation,” as is required by the Supreme Court of the United States in Marshall v. Barlow’s, Inc. (“the issuance of a warrant may be based [] on specific evidence of an existing violation”). In so doing, the Court stated that “Barlow’s makes clear that evidence of violations may provide probable cause... 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.”

Potential Impact on Chemical NEP Inspections

The Chemical NEP contains similar language as the REP at issue in Mar-Jac case. Specifically, the Chemical NEP states:

The following guidelines should be used for all unprogrammed inspection activities related to PSM-covered processes nationwide:

a. Complaint or referral. If a complaint or referral is received relating to a PSM-covered process and it:

- Involves an application of the PSM standard -- the AD shall evaluate the complaint or referral item(s) according to the FOM and conduct an inspection using this instruction. If the complaint or referral item(s) are initiated due to a complaint or referral related to a contractor employer, inspections of both the contractor and host employer should be conducted. Normally, the inspection should be limited to the complaint and referral item(s)/subject(s) and the CHEM NEP dynamic list contractor questions.

- Does not involve an application of the PSM standard (for example, there is a complaint about fall protection hazards in a PSM-covered process) - the inspection or inquiry will normally be limited to the complaint and referral item(s)/subject(s). However, if the facility has not already been inspected using this instruction, a concurrent inspection using this NEP may be conducted at the AD’s discretion.

b. Accidents and Catastrophes. In addition to this instruction’s guidelines, responses to accidents and catastrophes in facilities with PSM-covered processes should follow the guidelines contained in the FOM, and where appropriate, OSHA Instruction CPL 02-00-094, OSHA Response to Significant Events of Potentially Catastrophic Consequences.

When an accident or catastrophe occurs in a facility that contains a PSM-covered process, and it:

- Involves an application of the PSM standard – the inspection will include the accident investigation item(s)/subject(s) and a CHEM NEP inspection using this instruction.

- Does not involve an application of the PSM standard - the inspection will normally be limited to the accident investigation item(s)/subject(s). However, if the facility has not already been inspected using this instruction, a concurrent Chemical NEP inspection using this instruction may be conducted at the AD’s discretion.

Based on these statements, OSHA will likely seek to expand the accident or complaint inspection into a Chemical NEP inspection. Applying the District Court’s reasoning, the employer may resist by denying entry and then moving to quash a warrant obtained by OSHA. At that point, OSHA will likely make two arguments: 1) the Chemical NEP allows OSHA to expand the inspection; and 2) the employer’s OSHA Form 300 Log provides a reasonable basis for suspecting that violations will be found.

In granting Mar-Jac’s motion to quash the administrative warrant, the District Court rejected the first argument that OSHA can expand the inspection by relying solely upon an existing emphasis program. As to the second argument, employers should be prepared to demonstrate why entries on their Form 300 logs do not demonstrate the presence of possible violations of OSHA’s safety standards and the General Duty Clause at the facility.


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