

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

Inspection Warrant/OSHA Enforcement: Federal Appellate Court Addresses Poultry Processing Facility's Motion to Quash



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

12/18/2018

The United States Court of Appeals for the Eleventh Circuit (“Court”) addressed in an October 9th decision a dispute regarding a judicially-issued inspection warrant that the Occupational Safety and Health Administration (“OSHA”) sought in regards to a poultry processing facility (“Mar-Jac”) in the State of Georgia. *See U.S. vs. Mar-Jac Poultry, Inc.* No. 16-17745.

A United States District Court had quashed the inspection warrant and OSHA appealed this decision.

An employee of the Mar-Jac facility was injured at work while attempting to repair an electrical panel using a non-insulated screwdriver. An arc flash is stated to have resulted in severe burns to the employee’s hand and face.

The company reported the electrical accident to OSHA. OSHA sent a team to the facility to make an unprogrammed inspection. This is described as an inspection based upon information received concerning the specific facility.

OSHA requested the inspection of not only those hazards involved in the electrical accident but also the ability to conduct a comprehensive inspection of the entire facility for additional hazards. While the company consented to the inspection of the electrical accident site (and the tools involved), it refused to permit inspection of any additional areas or hazards.

OSHA’s physical inspection of the poultry processing facility (as limited by Mar-Jac) is stated to have identified three potential violations of OSHA standards concerning:

1. electrical safety
2. personal protective equipment, and
3. the guarding of machines and controlling of hazardous energy

The company provided OSHA with a copy of a portion of an evaluation performed by an outside consultant. This evaluation is stated to have criticized the company’s lack of an appropriate program to abate risks to employees from electrical shock. Also provided was the company’s 2013-2015 work-related serious illness and injury logs mandated by federal regulations.

The agency concluded that the OSHA 300 logs suggested violations in six areas stated to be common to poultry processing:

1. recordkeeping issues,
2. ergonomic hazards,
3. biological hazards,
4. chemical hazards,
5. struck-by hazards, and
6. slip, trip, and fall hazards.

The Court also references OSHA's creation of an "emphasis program" for industries that are stated to pose a high risk to workers. The year 2016 was stated to include a Regional Emphasis Program for Poultry Processing Facilities for Region IV (which includes Georgia and seven neighboring states.)

OSHA submitted an application to a federal magistrate judge seeking a judicial warrant to inspect the facility with respect to:

1. three hazards directly implicated by the accident,
2. six hazards implicated by the OSHA logs, and
3. remaining hazards that the Poultry Processing Regional Emphasis Program identified as particular concerns.

The application was stated to be based on two independent grounds:

- Investigators had personally observed hazards relating to the electrical incident
- An inspection of the OSHA logs revealed six hazards common to poultry processing facilities

OSHA asserted that probable cause existed to conduct a comprehensive search of the entire facility for these hazards and the remaining hazards identified in the Regional Emphasis Program. The application also claimed that probable cause existed to support a programmed inspection pursuant to neutral criteria contained in OSHA's Regional Emphasis Program.

The Magistrate granted the application in its entirety and issued a judicial inspection warrant. Mar-Jac filed an emergency motion to quash and the Magistrate issued a Report and Recommendation to the United States District Court recommending that it be granted. The United States District Court adopted the Magistrate Judge's Report and Recommendation and quashed the inspection warrant.

OSHA asserts on appeal that the lower court improperly quashed the inspection warrant with respect to the five hazards (i.e., ergonomic, etc. described by OSHA 300 logs). It argued that ample reasonable suspicion was demonstrated that an inspection with regard to these five hazards would reveal violations and asserted the following errors:

1. While the District Court acknowledged that OSHA was required to show reasonable suspicion of violations, it actually applied a far higher standard by requiring a showing that employees had been injured as the result of a violation of a standard;
2. The lower court misunderstood the terms "hazard" and "violation" and their relation to one another; and
3. The lower court mistakenly suggested that OSHA relied on the mere presence of a reported injury to call for a full investigation of the hazard related to the injury.

The Court states on appeal that the Occupational Safety and Health Act of 1970 does not explicitly require a judicial warrant to conduct the two types of inspections (i.e., programmed inspection or unprogrammed inspection), that unless the employer consents, a judicial warrant is required by the Fourth Amendment of the United States Constitution, citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). However, while

probable cause is necessary to obtain an inspection warrant, it differs from what is required in the criminal sense.

The Court notes that OSHA did not appeal the lower court's rejection of its argument concerning a programmed inspection based upon reasonable administrative standards pursuant to the Regional Emphasis Program. As a result, the Court focuses only on probable cause based upon specific evidence.

The Court holds that a more individualized inquiry is required when examining a warrant for an unprogrammed inspection because of the "increased danger of abuse of discretion and intrusiveness" due to the "lack [of] administrative and legislative guidelines that ensure that the target of the search was not chosen for the purpose of harassment." It states that reasonableness remains the ultimate standard in evaluating the propriety of an administrative search. The scope of such an unprogrammed inspection is required to bear an appropriate relationship to the violation alleged by the evidence.

The Court then addressed what OSHA characterized as three lower court errors:

1. Utilization of Improper Probable Cause Standard (the Court holds that the lower court imposed the correct standard and correctly found that facts set forth by OSHA did not satisfy the reasonable suspicion standard)
2. Distinction Between "Hazard" and "Violation" (noting under either the OSHA general or specific duty clause, a hazard does not itself establish a violation and the lower court did not err in distinguishing between hazards and violations)
3. Application's Evidence of Reasonable Suspicion (previous citations and certain injury reports from the 2014 and 2015 OSHA logs did not provide reasonable suspicion of likely chemical violations to support issuance of warrant to inspect for such violations)

The judgment of the lower court is affirmed.

A copy of the opinion can be found [here](#).