

Eleventh Circuit Limits OSHA's Authority to Conduct Wall-to-Wall Inspections

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In *U.S. v. Mar-Jac Poultry, Inc.*,¹ the U.S. Court of Appeals for the Eleventh Circuit held that OSHA may not expand the scope of an injury-based inspection to a facility-wide inspection merely based on the employer's OSHA 300 injury and illness logs. Although *Mar-Jac* may only be relevant to the Eleventh Circuit states, Alabama, Florida and Georgia, employers nationwide should note this decision when defending against wall-to-wall inspections by OSHA.

In *Mar-Jac*, an employee was hospitalized after he was injured while working on an electrical matter. The employer reported the incident as required under OSHA regulations. During the subsequent OSHA inspection, the investigators requested an inspection of not only the alleged electrical hazards involved in the incident, but also inspection of the entire facility for additional hazards. The employer permitted inspection related to the incident but refused to allow inspection of any additional areas or hazards.

In its application for a judicial warrant, OSHA contended that probable cause existed to conduct a comprehensive search of the entire facility because the investigators had personally observed hazards relating to the electrical incident, and a review of OSHA 300 logs allegedly revealed six hazards common to poultry processing facilities.² The employer filed a motion to quash the warrant. A magistrate judge recommended that the employer's motion should be granted. The recommendation was adopted by U.S. District Court and employer's motion was granted. The Eleventh Circuit affirmed.

The appellate court stated that for a warrant to issue OSHA was required to "at least show that the proposed inspection is based upon a reasonable belief that a violation has been or is being committed" and that this requirement needed "a showing of specific evidence sufficient to support a reasonable suspicion of a violation." The court found that employer's 300 logs offered by OSHA were insufficient evidence to support a reasonable suspicion of a violation. Thus, there was no probable cause to justify a facility-wide inspection.

Specifically, the court noted that the existence of a hazard does not necessarily establish the existence of a violation. And, a violation needed to be established by reasonable suspicion in a warrant application. In turn, the court explained that the OSHA logs reveal work-related injuries not violations. The existence of injuries does not mean that an OSHA standard was violated. Further, the court analyzed the employer's 300 logs and did not find any "pattern" of injuries to support reasonable suspicion. For example, the court held that in the employer's workforce of more than 1100 employees, 25 "musculoskeletal illnesses" over a three-year period did not show a pattern as to location of the body part that was injured or any pattern as to the department where the injuries occurred, and therefore did not satisfy the reasonable suspicion requirement.

Employer Takeaway: *Mar-Jac* is significant for employers in that it limits OSHA's authority to expand an injury-based inspection to a wall-to-wall inspection based on the employer's OSHA 300 injury and illness logs. However, *Mar-Jac* should not be interpreted to mean that injury and illness logs

can never be sufficient evidence for a warrant. Indeed, under this case, a pattern of injuries such as facility-wide or department-wide recurring injuries of a specific type to a specific body-part, could have been sufficient to create reasonable suspicion to justify a warrant. In light of *Mar-Jac*, employers may benefit from regularly monitoring the injury logs to identify any patterns that may support a wall-to-wall inspection and then working towards addressing those issues.

¹ No. 16-17745, 2018 WL 4896339 (11th Cir. October 9, 2018).

² Not relevant to this note, OSHA also contended that probable cause existed to support a comprehensive inspection pursuant to Regional Emphasis Program for poultry processing facilities.