IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 2:16-CV-192-WCO-JCF
MAR-JAC POULTRY, INC.,	:	
	:	
Defendant.	:	

ORDER

The captioned case is before the court for consideration of the magistrate judge's report and recommendation ("R&R") dated August 5, 2016, which recommends that the court grant the emergency motion to quash inspection warrant filed by Mar-Jac Poultry, Inc. ("Mar-Jac"). On August 19, 2016, the United States Secretary of Labor, acting through the Occupational Safety and Health Administration ("OSHA"), filed his objections to the R&R. On September 6, 2016, Mar-Jac filed its response to the objections. On September 16, 2016, OSHA filed its reply.

This case concerns a warrant under the Occupational Safety and Health Act of 1979 (the "Act") secured by OSHA for an expanded inspection of the facilities of Mar-Jac after a February 3, 2016 accident where an employee of Mar-Jac suffered

first, second, and third-degree burns.[1] In the R&R, the magistrate judge recommends that the court grant Mar-Jac's motion to quash the warrant for lack of administrative probable cause to expand the accident inspection. The detailed facts and procedural history of this case are fully set forth in the R&R and need not be repeated here. After thoroughly reviewing the record, the court is confident that the magistrate judge has applied the law correctly to the facts of this case.

The issue here is whether it was reasonable to expand the unprogrammed inspection stemming from Mar-Jac's report to OSHA of hospitalization of its employee into a programmed inspection of all hazards targeted by the Regional Emphasis Programs for Poultry Processing Facilities ("REP").[2] "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted warrant." *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 957-58 (11th Cir. 1982). It is not disputed that an administrative search does not

[1] On February 4, 2016, as required by regulations, Mar-Jac reported the hospitalization of the employee resulting from the accident the night before. The accident involved several of the sixteen hazards listed in the Regional Emphasis Programs for Poultry Processing Facilities ("REP"). Following the accident investigation, OSHA obtained a warrant that authorized inspection for all sixteen REP hazards.

[2] As set forth in detail in the R&R, OSHA conducts two types of inspections: programmed and unprogrammed. Programmed inspections are scheduled based upon neutral and/or objective criteria, and worksites are selected according to scheduling plans promulgated in local, regional, and/or national emphasis programs. Unprogrammed inspections are initiated in response to an allegation of a hazardous working condition from an employee or the employer. It is not disputed that Mar-Jac was not the subject of a programmed inspection at the time of the incident.

require "probable cause in the criminal law sense." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978). "For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant 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.*

OSHA first objects to the magistrate judge's conclusion that the REP is not a neutral administrative plan as applied to Mar-Jac. The REP targets sixteen specific hazards that are common to the poultry processing industry and pose the greatest risk to employees. It mandates the expansion of all unprogrammed poultry processor inspections arising from one of the REP hazards to a programmed inspection of all REP hazards. However, the REP permits the Area Director to not expand a particular inspection if OSHA lacks sufficient resources at the time of the incident. More specifically, the REP provides:

> 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 ¶ 1.) The REP offers no guidance on what constitutes "significant resource implications" or how to determine which unprogrammed inspections will be expanded into full inspections when "significant resource implications" are deemed to be present. The REP mandates the expansion "where applicable." Accordingly, the REP vests the discretion in an Area Director to decide if "significant resource implications" exist and then which, if any, inspections will be expanded to comprehensive inspections.

In this regard, OSHA Area Director William C. Fulcher ("Fulcher") testified that he has "the discretion to expand or not expand." (Fulcher Tr. 117.) More specifically, Fulcher testified:

> Q: I mean we're talking about an awful lot of resources to do [a programmed inspection]; is that not correct?
>
> A: That's correct.
>
> . . . .
>
> Q: Okay. So there's one plant to be selected for this fiscal year under this random selection criteria?
>
> A: Uh-huh (affirmative).

. . . .

Q: So because of your resources, one of the unprogrammed inspections or the randomly selected plant is going to be the one that [would have] the REP [inspection done] this year, correct?

A. That's correct.

. . . .

Q: And the program gave you the discretion to decide which one of the poultry processing plants in the unprogrammed inspection to expand; you get to decide?

A: I get to decide if I have the resources to expand it.

. . . .

Q: And your office to start with tried to inspect them all, correct, the recorded [amputations or hospitalizations]?

A: No.

Q: So you as the Area Director would make decisions as to which recording of amputations or hospitalizations you would allocate a compliance officer?

A: That's correct.

. . . .

Q: Now, the REP doesn't lay out those rules in it, does it, about which are significant resources and when you'll [convert an unprogrammed inspection into an expanded inspection], that's your discretion?

A: That's me as the manager.

(Fulcher Tr. 113-119.) As Fulcher made clear, because of the limited financial resources, it is not possible to expand all unprogrammed inspections.[3] In fact, Fulcher's testimony indicates that OSHA had anticipated the Area office at issue would conduct one inspection during the fiscal year:

> Q: And didn't Mr. Petermeyer, the Regional Administrator, tell the poultry industry that there would be one per area office? Do you recall that conversation to the poultry industry?
>
> A: I remember that conversation.
>
> . . . .
>
> Q: Okay. But then you've got to decide which one you're going to expand it to?
>
> A: Now, when Mr. Petermeyer said each area office is going to do one, I think you're taking - - you're being very liberal with that overheard conversation.
>
> Q: It wasn't overheard. I was in the audience.

[3] With regard to the programmed inspections, the REP provides, among other things: "Establishments may be selected from the inspection register for inspection in an order that makes efficient use of available resources." (REP ¶ 9.) Consequently, the resources consideration would affect the selection of a programmed inspection as well as the determination to expand an unprogrammed inspection.

> A: Well, when he said one, he did not limit that. I think he was more or less affirming that each area office was going to do one. He didn't just say just one.
>
> Q: Okay. So I just want to make certain, you as the Area Director in the Atlanta East have the discretion to decide if you're going to do one or two or three depending on your resources?
>
> A: That's correct.

(Fulcher Tr. 113, 116.) Finally, Fulcher's testimony indicates that he had selected Mar-Jac to receive the one expanded inspection:

> Q: You're going to do one [expanded inspection], right?
>
> A: We're going to do one.
>
> Q: And you had decided you were going to expand Mar-Jac based upon the unprogrammed inspection to do the REP?
>
> A: The instruction that we were to expand poultry sites and perform an REP inspection.
>
> Q: Correct. But you have - - there is an issue of significant resource implications, correct, in this REP?
>
> A: Yes, I have the discretion that if I don't have the resources I can decide not to.
>
> Q: Okay. But you had made a decision to do one?
>
> A: I had the resources, so I complied with the directive.

> Q: Okay. The question I guess I'm asking, Mr. Fulcher, and I just want to make certain is the fiscal year is going to run through September 30th?
>
> A: Uh-huh (affirmative).
>
> Q: As of now the only unprogrammed poultry processing plant in your area that you've attempted to expand the REP is Mar-Jac?
>
> A: That's correct.

(Fulcher Tr. 115-16.) Fulcher's testimony indicates that he exercised his discretion provided to him by the REP in determining to expand Mar-Jac's inspection. Under these circumstances, the court finds that OSHA has failed to "establish. . . that [Mar-Jac] was selected for inspection pursuant to an application of . . . neutral criteria." *Matter of Trinity Indus., Inc.*, 876 F.2d 1485, 1490 (11th Cir. 1989).

OSHA argues that it applied neutral and objective criteria to select Mar-Jac because the REP mandated expansion of all unprogrammed inspections, and that is the only selection relevant to determining whether there has been a Fourth Amendment violation. OSHA contends that the magistrate judge incorrectly focused on the risk of not expanding an inspection based on the Area Director's determination that the office lacks sufficient resources. The court disagrees. The distinction between "selection" and "non-selection" is a matter of semantics. According to OSHA's use of terminology, the Area Director was required to "de-select" all but one

or two selected establishments.[4] In deciding not to de-select Mar-Jac, the Area Director used his discretion to determine that there were no "significant resource implications." The resource determination was an essential factor in selecting or de-selecting Mar-Jac. However the process is described, the discretion in determining adequate resources[5] tainted the neutrality of Mar-Jac's selection. A significant risk of abuse remains where the decision to expand to a comprehensive inspection is left to a manager's sole discretion. As the magistrate judge properly concluded, "the potential harm posed by allowing an officer in the field to select which investigation deserves expansion is not minimized simply by virtue of the fact that the triggering event which brought OSHA to the business in the first place was the required report of an injury." (R&R 16.)

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[4] The court notes Mar-Jac's assertion that subjecting every single employer who comes to OSHA's attention to a comprehensive inspection without "some measure of individualized suspicion" is unconstitutional. In *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-41 (2000), where the Indiana police had established a checkpoint program for the purpose of interdicting illegal narcotics, the Supreme Court held: "We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exception to the general rule that a seizure must be accompanied by some measure of individualized suspicion." *Id.*

[5] The court does not dispute OSHA's authority to set enforcement priorities and its discretion to allocate resources as long as they are not arbitrary and are based on neutral factors. In addition, the court rejects OSHA's contention that a determination of adequacy of resources involves no subjective factors. Although the budget numbers on the spreadsheet may be objective, the allocation and prioritization of those numbers involve subjective analysis.

OSHA next points out that other courts have found that the prioritization of OSHA resources, including decisions as to the ordering of expanded inspections, does not affect the neutrality of the selection criteria employed. The courts have held that as long as the selection is neutral, the precise ordering of inspections to maximize OSHA resources "casts no shadow on the plan's neutrality." *Indus. Steel Prods. Co., Inc. v. OSHA*, 845 F.2d 1330, 1334 (5th Cir. 1985). In those cases, the courts first required OSHA to establish that selections were based on a specific, neutral plan designed to protect the greatest number of employees exposed to the greatest risks to health on the job and that plants were appropriately selected for inspection under the plan's neutral criteria. For example, employers were ranked on a "worst-first" basis and, within the "worst" industry, employers were then ranked alphabetically according to county. *Matter of Trinity Industries, Inc.*, 876 F.2d 1485, 1491-92 (11th Cir. 1989). In addition, the courts noted that although "[w]ithin an inspection cycle, companies are inspected in an order that makes most efficient use of OSHA's resources[, w]ith only limited exceptions, each inspection cycle [was required to] be completed before a new cycle is begun." *Id*. at 1491. See also *Donovan v. Trinity Industries, Inc.*, 824 F.2d 634, 636 (8th Cir. 1987). One court explained that since "[a]ll firms within a cycle will be inspected in the space of several months in any case . . . , [r]earranging

their order within the cycle is not discriminatory." *Industrial Steel Products Co., Inc.*, 845 F.2d at 1334. In this case, however, the prioritization of OSHA resources directly affects the selection process and not just the ordering of expanded inspections.[6] The determination of resource implications affects the neutrality of the selection criteria employed. Here, OSHA has failed to establish that the initial selection was based on a specific, neutral plan designed to protect the greatest number of employees exposed to the greatest risks to health on the job.

OSHA next objects to the magistrate judge's conclusion that OSHA does not have probable cause to expand the inspection based on specific evidence of suspected violations. OSHA argues that the magistrate judge incorrectly applied a stringent probable cause showing of "evidence of possible violation" instead of a "reasonable suspicion of violation." "[T]he evidence of a specific violation required to establish administrative probable cause, while less than that needed to show a probability of a violation, must at least show that the proposed inspection is based upon a reasonable

[6] This is unlike the prioritization of resources under the selection process for programmed inspections provided in section 9 of the REP. With regard to the programmed inspections, the REP provides, among other things: "Establishments will be selected in the order prescribed by the random numbers until the total of establishments selected equals the number of projected inspections for the year. The resulting list shall constitute the program inspection register. Establishments may be selected from the inspection register for inspection in an order that makes efficient use of available resources." (REP ¶ 9.) Consequently, the resources consideration affects the order of inspection but not the initial selection process.

belief that a violation has been or is being committed . . . . This requirement is met by a showing of specific evidence sufficient to support a reasonable suspicion of a violation." *West Point Pepperell, Inc.*, 689 F.2d at 958. *See also Matter of Samsonite Corp.*, 756 F. Supp. 498, 500 (D. Colo. 1991) (holding that "[a]ll OSHA must show is some plausible basis for believing that a violation is likely to be found").

The "reasonable suspicion" requirement cannot be satisfied by OSHA's evidence in the REP of the industry-wide hazards allegedly prevalent in the poultry industry.[7] In addition, OSHA may not rely on a report of specific, limited violations to supply the element of probable cause required to support a comprehensive investigation of an employer's workplace. OSHA offered the testimony of Compliance Safety and Health Officer Dawn Bennett, who testified that the underlying injury involved an ill-equipped employee's undertaking an attempted repair to a circuit breaker that was not properly part of a "lock-out/tagout (LOTO) or arc flash program." (Bennett Tr. 45-47.) In addition, OSHA Industrial Hygienist Marcia Martinez, who reviewed OSHA form 300 logs from Mar-Jac, testified that

[7] Mar-Jac also contests the REP's conclusion that the poultry industry is rife with OSHA violations. Mar-Jac states, for example, that the total recordable poultry processing illness and injury rate for 2014 was 4.3 cases per 100 full-time workers (per year), while injury rates for state and local government workers during the comparable period were 5.0 cases per 100 full-time workers.

there were deficiencies on OSHA form 300 logs suggesting an OSHA standard had been violated. (Martinez Tr. 87.) The magistrate judge properly concluded that OSHA has probable cause to inspect Mar-Jac for four of the sixteen hazards in the REP because of the underlying accident (i.e., lack of proper LOTO program, employee's exposure to electrical hazards, employee's failure to wear personal protective equipment (PPE), and recordkeeping violations).

Contrary to OSHA's argument, OSHA form 300 logs do not support a reasonable suspicion of additional violations. OSHA form 300 requires covered employers to record work-related injuries and illnesses including the name of the employee, date of injury or illness, where the event occurred, information describing the injury or illness, the classification of the case (i.e., death, days away from work, etc.), number of days away from work, and whether it was an injury or specified illness. OSHA form 300 does not require the employer to detail the cause of the injury or illness. The fact that an injury or illness is recordable does not show that it was the result of a violation of an OSHA standard. Not all hazards are the result of a violation. As the magistrate judge correctly concluded, "the mere presence of a reported injury on an OSHA 300 form [does not] support a full scale investigation of the hazard related to that injury." (R&R 21.)

OSHA asserts that the magistrate judge failed to conduct the requisite balancing test to determine the reasonableness of the expanded inspection. In *West Point-Pepperell*, the Eleventh Circuit held: "[A] showing of administrative probable cause must satisfy the basic purpose of the Fourth Amendment, which is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. In the context of administrative searches, this principle requires that persons not be subject to the unbridled discretion of executive and administrative officers, particularly those in the field, as to when to search and whom to search." *West Point Pepperell, Inc.*, 689 F.2d at 958 (internal quotations and citations omitted). With respect to the search at issue, the court finds that Mar-Jac was subjected to the discretion of the Area Director. In addition, although OSHA insists that the inspection at issue is not a wall-to-wall or comprehensive inspection, the language in both the warrant application and the REP indicates that the inspection would be comprehensive. It would include all sixteen hazards targeted by the REP and would be conducted for purposes related to both safety and health issues.[8] Under these circumstances, the court cannot conclude that "a valid public interest justifies the

[8] Mar-Jac points out that it had undergone an extensive, four-month-long prior inspection in 2009.

intrusion contemplated." *Id.* at 957-58. Such a comprehensive inspection is not warranted by the circumstances of this case.

Accordingly, the R&R [14] is hereby **APPROVED and ADOPTED** as the order of this court. For the reasons set forth above as well as those set forth in the R&R, the court hereby **GRANTS** Mar-Jac's motion to quash [2]. OSHA may seek a new warrant that falls within the framework set out in the R&R.

IT IS SO ORDERED, this 2nd day of November, 2016.

s/*William C. O'Kelley*
WILLIAM C. O'KELLEY
Senior United States District Judge