



# Appeals Court Clamps Down On OSHA Investigations

Insights

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In a significant victory for employers, a federal appeals court recently limited OSHA's ability to expand accident investigations beyond their original and intended scope. The 11th Circuit's decision in *United States v. Mar-Jac Poultry, Inc.* will immediately aid those employers with operations in Florida, Georgia, and Alabama, but could also be of benefit to employers across the country. What do you need to know about the October 9 decision?

## OSHA Arrives For Inspection, But Wants To See More

An accident at your workplace occurs, and the Occupational Safety and Health Administration (OSHA) comes to investigate. Once at your facility, however, the OSHA representatives tell you they want to expand their inspection to cover your entire facility, top to bottom. What authority does the agency have to expand its inspection, and under what circumstances can it do so? Those are the questions that were presented in the *Mar-Jac* case.

The case began on February 3, 2016, when a Mar-Jac Poultry employee was injured at the company's Georgia processing facility while trying to repair an electrical panel. Because the employee was hospitalized, Mar-Jac reported the injury to OSHA. The agency sent an inspection team to the facility within a few days.

While Mar-Jac was subject to a Regional Emphasis Program (REP) for poultry processing facilities—and thus subject to random inspections based upon neutral selection criteria—OSHA's investigation stemmed only from the accident. During the investigation, OSHA found three potential violations relating to the accident during its limited inspection. Further, after reviewing Mar-Jac's OSHA 300 logs for three years, the agency came to the conclusion that the injuries reported on those logs suggested possible violations of OSHA standards related to ergonomic hazards, biological hazards, struck-by hazards, and more.

Citing these additional factors as a justification, OSHA requested to inspect the entire facility for hazards and not just the area of the accident. Mar-Jac refused to permit an expanded inspection, and OSHA went to court to resolve the dispute.

## OSHA Turns To Court For Authority To Expand Investigation

In March 2016, OSHA sought a warrant from a federal magistrate judge to expand the inspection to Mar-Jac's entire facility, contending that probable cause existed for such an expansion. OSHA had two main arguments to push for a warrant. First, it noted that agency inspectors had personally

witnessed hazards related to the electrical accident, and a review of the OSHA 300 logs showed hazards common to poultry processing facilities, Second, it pointed out that the REP granted it the right to conduct the inspection. The magistrate judge agreed with these arguments and granted the warrant.

But Mar-Jac moved to quash the warrant, and, after an evidentiary hearing, the magistrate judge changed his mind. He determined that probable cause did not exist to expand the scope of the inspection based upon the injuries reported in the OSHA 300 logs, and that and the authority set forth in the REP—permitting a randomized, neutral inspection—did not lead OSHA to select Mar-Jac for an inspection. A federal district judge in Georgia upheld the magistrate judge’s recommendation to quash the warrant, and OSHA appealed the case to the 11th Circuit Court of Appeals.

### **Appeals Court Concludes That No Probable Cause Existed To Expand Scope**

In its October 9 decision, the 11th Circuit affirmed the lower court’s decision to block an expansion of the inspection. There are three important aspects to this decision.

- First, even though the lower court found that OSHA did not have grounds for a warrant based upon the existence of the REP, it is notable that the agency did not appeal this part of the case. In other words, OSHA itself recognized and acknowledged that it does not have grounds to expand an accident-based inspection simply because an employer is subject to an REP or national emphasis program (NEP).
- Second, the 11th Circuit held that “hazards” and “violations” are distinct concepts. OSHA argued that the existence of injuries on the OSHA 300 logs indicated the presence of hazards at the worksite, which in turn indicated the possibility of violations of the OSH Act. The appeals court rejected this argument, holding that it “is simply not the case that the existence of a hazard necessarily establishes a violation.”

In coming to this conclusion, the court noted that, whether proceeding under the General Duty Clause of the OSH Act or under a specific regulation, OSHA must prove more than the mere existence of a hazard to prove that a violation occurred. In the case of the General Duty Clause, OSHA must prove not only that a hazard existed but that the hazard was recognized, that it was likely to cause death or serious physical harm, and that the hazard was preventable. Similarly, in order to prove a violation of a specific regulation, OSHA must prove that the standard applies, that it was violated, that an employee was exposed to the hazard, and that the employer knew of the hazard.

- Finally, and perhaps most importantly, the 11th Circuit held that the existence of recorded injuries on OSHA 300 logs does not *per se* demonstrate that the employer likely violated the OSH Act. The agency argued that the number of injuries recorded in the OSHA 300 logs showed that Mar-Jac was failing to take adequate steps to prevent workplace injuries. The 11th Circuit correctly noted, however, that OSHA 300 logs provide little detail about the cause of the injury, and, thus, the “existence of injuries... does not necessarily mean that the injuries were caused by

OSHA violations, or justify the issuance of an administrative warrant for evidence of OSHA violations.”

Additionally, the 11th Circuit found that whether injuries recorded in OSHA 300 logs can lead to reasonable suspicion to support a warrant based upon the logs is a fact-intensive inquiry because the logs “can be relevant to whether hazards exist.” In the *Mar-Jac* case, however, the court found that the logs did not support such a finding. For example, at this specific worksite, the court found evidence of 25 recorded injuries related to possible ergonomics hazards over the course of three years. In a facility of 1,112 employees, however, this did not create reasonable suspicion that ergonomics violations were likely to exist (but might do so in a much smaller worksite).

### **Takeaways For Employers**

The *Mar-Jac* decision is a significant victory for employers. You should take away three main points from this decision. First, OSHA cannot expand an accident-based inspection simply because you are also subject to an emphasis program. Rather, there must be probable cause for the expansion. Second, the existence of a hazard does not necessarily imply the existence of a violation. Finally, OSHA cannot expand an inspection simply because of injuries recorded in OSHA 300 logs. Rather, OSHA must provide sufficient evidence that the recorded injuries demonstrate not only that hazards exist at the workplace, but that violations are likely to be found as well.

If you are faced with an OSHA request to expand an accident-based inspection, you should contact counsel to determine your legal rights and reevaluate your response in light of this decision. If you have any questions about this case or how it may affect your business, please contact any member of our [Workplace Safety and Catastrophe Management Practice Group](#) or your Fisher Phillips attorney.

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