United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. STURM RUGER & CO., PINE TREE CASTINGS DIVISION, Respondent.	OSHRC Docket Nos. 99-1873 & 99-1874

DECISION

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

These cases center on issues surrounding the validity of a data collection survey by the Secretary of Labor's Occupational Safety and Health Administration ("OSHA") and resulting warrant and inspection of the Pine Tree Casting Division facility of Sturm Ruger & Co. As a result of that inspection, OSHA issued citations for alleged violations of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 ("the Act"). Sturm Ruger has challenged the warrant's validity in several forums. The judicial arenas that have decided the merits of Sturm Ruger's claims -- the U. S. District Court for New Hampshire, and Commission Administrative Law Judges Ann Z. Cook and Michael H. Schoenfeld – have rejected them.

See, e.g., Sturm Ruger & Co. v. United States, 1999 CCH OSHD ¶ 31,783 (Civil No. 98-418-JD, D.N.H., Jan. 22, 1999), *aff'd on other grounds sub nom. Sturm Ruger & Co. v. OSHA*, 186 F.3d 63 (1st Cir. 1999) ("*SR II*").

Before us for review, under section 12(j) of the Act, 29 U.S.C. § 661(j), are the decisions of the two Commission judges. As a preliminary matter, we agree with their dispositions of the invalidity claims before them. There is, however, one invalidity argument raised by Sturm Ruger which has not yet been addressed on the merits. The argument is that the warrant is invalid because the Act did not authorize the Secretary to require Sturm Ruger to report particular information which she received from it, and which she subsequently used in targeting Pine Tree for inspection. We reject that argument for the reasons explained below. Sturm Ruger also contests Judge Cook's rejection of its motions to compel discovery and suppress evidence, and Judge Schoenfeld's quashing of its subpoenas. As discussed below, the judges did not abuse their discretion in disposing of the motions, and we affirm.

I. Background

Pine Tree makes handgun casings, and Sturm Ruger manufactures handguns, in the same overall facility in Newport, New Hampshire. In April 1997, pursuant to its Data Collection Initiative ("DCI"), OSHA selected Sturm Ruger to complete a survey form regarding Pine Tree. The DCI at that time was OSHA's program to "identify particular workplaces experiencing disproportionately high rates of injury and illnesses." *American Trucking Ass'ns v. Reich*, 955 F.Supp. 4, 5 (D.D.C. 1997) ("*American Trucking*").

OSHA's survey form requested summary information on Pine Tree's occupational injuries and illnesses for 1996, from its OSHA Form 200 log. In addition, the survey asked for: (1) the average number of employees who worked at the establishment during 1996; and (2) the total number of hours those employees actually worked. (We will refer to those two

types of information as "hours-worked" information.) The survey form stated that the Act "requires you to participate" in the DCI.[1]

Sturm Ruger corrected the survey form, noting that Pine Tree is properly classified in Standard Industrial Classification ("SIC") "33 - Foundry Castings."[2] Based on Sturm Ruger's response, OSHA calculated Pine Tree's rate of lost and restricted workdays due to injury and illness ("LWDII") for 1996 to be 9.92; OSHA classified Pine Tree in SIC 3324 -- Steel Investment Foundries. As a result, Pine Tree fell within the 99 high-hazard industries on which OSHA decided to focus its nationwide inspection efforts for 1998. See OSHA Instruction CPL-2 98-1, *Interim Plan for Inspection Targeting* ("ITP") (April 10, 1998). Because Pine Tree's LWDII rate exceeded the overall rate of 6.7 for SIC 3324 in 1996, OSHA targeted Pine Tree for inspection. Sturm Ruger's industry (SIC 3484) was not one of the targeted industries.

A. Earlier Warrant Litigation

Pursuant to the ITP, OSHA Compliance Officers ("CO's") James Tobey and Donald DeWees arrived to inspect Pine Tree on June 15, 1998 and presented Sturm Ruger with a letter explaining the basis for the inspection under the 1998 ITP. However, the letter did not mention Pine Tree -- it was addressed merely to Sturm Ruger. When Sturm Ruger's representative, Lynn Merrill, requested a letter addressed to Pine Tree, Tobey penned in Pine Tree's company name on the letter as the specific addressee. Sturm Ruger then asked for 48 hours to consider whether to grant entry. It ultimately decided to deny entry.

On June 30, 1998, OSHA applied for and obtained a warrant to inspect Pine Tree from District Judge Steven J. McAuliffe. *In re: Sturm Ruger & Co., Pine Tree Castings Div.*

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[1] The form also notified establishments that did not respond of the possibility of an on-site records inspection or the issuance of an administrative subpoena.

[2] The survey form stated that OSHA understood that Pine Tree was in SIC 3484 -- Small Arms -- which is Sturm Ruger's classification. *See* Office of Management and Budget, *Standard Industrial Classification Manual* (1987) ("*SIC Manual*"). However, that form invited employers to correct such information.

(D.N.H., June 30, 1998). *See SR II*, 1999 CCH OSHD at p. 46,545. The CO's returned to inspect Pine Tree on July 6, 1998. They presented the warrant, but Sturm Ruger, through Merrill, again refused them entry until she could speak with its counsel. Counsel then forwarded to Merrill a copy of its motion to quash the warrant, which Merrill presented to the CO's, and they left the premises.

Federal Magistrate Judge James R. Muirhead denied Sturm Ruger's motion to quash the Secretary's inspection warrant in an extensive opinion. *SRII,* Report and Recommendation of December 8, 1998, Civ. No. 98-418-JD, *available at* http://www.nhd.uscourts.gov (link to Opinions/Orders and search for "98JM020.WPD"). Likewise, District Judge Joseph A. DiClerico, Jr., reviewed Sturm Ruger's objections to that decision and rejected them in another extensive decision, on January 22, 1999. 1999 CCH OSHD ¶ 31,783. On March 4 of that year, the U. S. Court of Appeals for the First Circuit denied Sturm Ruger's motion to stay the district court's decision pending appeal. *See SR II*, 186 F.3d at 63. OSHA then carried out its inspection, beginning on March 5, 1999. As a result of the inspection, OSHA issued the citations in question here. On August 12, 1999, the First Circuit denied Sturm Ruger's appeal and its motion for declaratory judgment, on the grounds that the company had failed to exhaust its administrative remedies before the Commission. *Id.*

B. Citation Proceedings before OSHRC

After timely contesting the citations, Sturm Ruger moved to compel discovery concerning the DCI, ITP, and the selection of Pine Tree for inspection, and it moved to take the deposition of the "Person Most Knowledgable" about those matters. Former Commission Judge Cook denied the deposition motion as untimely, on March 9, 2000, and she denied the motion to compel discovery by order of March 28, 2000. Sturm Ruger then moved to suppress the evidence obtained during the inspection, again based on the alleged invalidity of the warrant. Judge Cook denied that motion by order of July 5, 2000. Sturm Ruger sought interlocutory review of that order, but the Commission denied its petition,

without prejudice to Sturm Ruger's right to raise the same issues in a petition for discretionary review, following final action on the cases by a Commission judge. *See* 29 C.F.R. § 2200.73(c).

After Judge Cook left the Commission, the cases were reassigned to Commission Judge Michael H. Schoenfeld. Sturm Ruger subpoenaed CO Tobey, two other named OSHA officials whom it says participated in the inspection efforts, and "Persons Most Knowledgeable and Keeper of the Records," for the hearing. In an order dated October 13, 2000, Judge Schoenfeld granted the Secretary's motion to quash those subpoenas, based on Judge Cook's prior orders. Sturm Ruger then entered into the Agreed-upon Submission with the Secretary, settling the merits of the alleged violations, but preserving its objections to the validity of the warrant and the inspections.

C. Related Litigation

Despite the First Circuit's ruling that Sturm Ruger had failed to exhaust its administrative remedies, the company initiated a declaratory judgment action on May 9, 2000, to have OSHA's DCI declared invalid. *Sturm Ruger & Co. v. Secy. of Labor*, 131 F.Supp. 2d 211 (D.D.C., 2001), *aff'd*, 300 F.3d 867 (D. C. Cir. 2002) ("*SR III*"). The court there granted the Secretary's motion to dismiss that action, again based on Sturm Ruger's failure to exhaust administrative remedies before the Commission.

II. Discussion

A. Invalidity Claim Regarding Hours-worked Information

In 1997, Sturm Ruger was the recipient of an OSHA DCI Survey Form, which required employers in high-hazard industries nationwide, including Sturm Ruger's Pine Tree Castings Division, to report the number of employees and the number of hours worked during 1996. Sturm Ruger claims that OSHA could not require reporting of employment numbers and hours-worked information under the DCI at issue, and as a consequence, the subsequent targeting, warrant, and inspection that took place were invalid. Respondent argues that Section 8(c) of the Act requires the promulgation of a substantive recordkeeping

rule "in advance" of the promulgation of any reporting regulation promulgated under Section 24 of the Act. Sturm Ruger relies on the fact that OSHA had no finally promulgated regulation requiring employers to "make and keep" records concerning the number of employees and their hours worked information at the point it issued § 1904.17, which required a surveyed employer to report "the number of workers it employed and number of hours worked by its employees for periods designated in the Survey Form."[3] The rule also

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[3] Section 1904.17 has since been superceded by the now current rule 29 C.F.R. §1904.41 (2003), which took effect on January 1, 2002, as part of a comprehensive revision of OSHA recordkeeping requirements. Set forth below is a summary of rulemaking proceedings from initial proposals in 1996, an interim rule on surveys in 1997, and a final administrative rule comprehensively revising the recordkeeping regulations in 2001.

The Secretary had originally proposed a comprehensive overhaul of the recordkeeping rules, which under the respondent's theory would have avoided the alleged deficiency had it been promulgated as a package of final rules. OSHA, *Occupational Injury and Illness Recording and Reporting Requirements; Notice of Proposed Rule*, 61 Fed. Reg. 4030 (Feb. 2, 1996). Included among the proposed rules was a revision to the Year-End Summary Report rule that would in effect require employers to "make and keep" a record that summarized occupational injuries and illnesses (recorded in the OSHA Injury and Illness Log) but also called for the employer to include information concerning the number of employees and hours worked in each of an employer's establishments. Proposed §1904.6 ("Preparation, certification and posting of the year-end summary"), 61 Fed. Reg. at 4060 (replacing then-existing §1904.5). In addition, a revised survey regulation would require employers to include similar information as to employment numbers and hours worked. Proposed §1904.13 ("Reports by employers"), 61 Fed. Reg. at 4062 (replacing then-existing §§1904.20-22). Presumably, the employment numbers and hours information for the survey authorized under proposed §1904.13 could be derived from the information that would be included in the Year-End Summary authorized under proposed §1904.6.

However, events unfolded that led the Secretary to undertake piecemeal implementation. First, while the proposed rules were pending, the Secretary revised her survey documents to include requests for information on the number of employees and hours worked. In turn, certain employer representatives successfully obtained an injunction enjoining the surveys on the ground that the Secretary had not promulgated the requisite final regulation that would authorize the Secretary to seek such information in her surveys to employers. *American Trucking, supra*. The court found that the Secretary was obligated to engage in notice-and-comment rulemaking (soliciting and evaluating public comments) and to promulgate a final

required a report of requested information from injury and illness records that employers are required to create and maintain under 29 C.F.R. part 1904. Sturm Ruger claims that in the absence of a regulation requiring the creation of OSHA records containing employment numbers and hours worked, the Secretary lacks the authority to require reports of hours-worked information.[4] Stated conversely, under Respondent's theory, had the Secretary

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rule authorizing the Secretary to submit to employers survey requests for such information, in compliance with §24(e) of the Act. Relying upon the 1996 notice of proposed rulemaking (and the public comments received in response), the Secretary promptly responded by promulgating §1904.17 as a final rule in lieu of the proposed §1904.13 on employer surveys. OSHA, *Reporting Occupational Injury and Illness Data to OSHA; Final Rule*, 62 Fed. Reg. 6434 (February 11, 1997). (It is this regulation that undergirds the instant case and presents the issue under review.) OSHA eventually did promulgate a comprehensive revision of the recordkeeping and reporting rules. OSHA, *Occupational Injury and Illness Recording and Reporting Requirements; Final Rule*, 66 Fed. Reg. 5916 (Jan. 19, 2001) (codified in part at 29 C.F.R. pt. 1904, effective Jan 1, 2002). The Year-End Summary (renamed Annual Summary) Report, originally proposed as §1904.6, was (and remains so) codified in §1904.32. It requires that the OSHA annual summary of injuries and deaths, derived from the OSHA 300 Log, include information on the number of employees and hours worked. The employer surveys rule, originally proposed as §1904.13, and promulgated in 1997 as §1904.17, was revised and recodified (and remains so) as §1904.41, and still retains the requirement that employers report the number of workers employed and their number of hours worked.

According to Sturm Ruger, the newly revised regulations cure the defect it sees in the previous ones, because now the regulations, by first requiring employers to enter hours-worked information on the annual OSHA summary form, "'require employers to create and maintain the DCI Survey data' regarding the number of employees and the hours they worked for each establishment." *SR III*, 300 F.3d at 871 n.4 (quoting Sturm Ruger's brief in that case). *See* 29 C.F.R. §§ 1904.32, 33 (2003)). *See also Eastern Bridge, LLC v. Chao*, 320 F.3d 84, 88 (1st Cir. 2003).

[4] Sturm Ruger relies on sections 8(c)(1), (2), and 24(e) of the Act. Section 8(c)(1) provides:

> Each employer shall make, keep and preserve, and make available to the Secretary . . . such records regarding his activities relating to this Act as the Secretary . . . may prescribe by regulation as necessary or appropriate for the enforcement of this Act . . . .

promulgated a separate, record making and keeping rule, the requisite statutory conditions would have been satisfied to sustain the survey, the warrant, and the inspection.

We think Respondent's argument is not well founded for several reasons. First, to accept Sturm Ruger's interpretation would impose upon employers an illogical and needless burden to generate a separate set of records when they already have access to hours-worked information in records such as payroll records. This would contravene congressional policy manifested in section 8(d) of the Act to obtain information "with a minimum burden upon employers." Second, Sturm Ruger does not in any way dispute that §1904.17 was determined by the Secretary, under §8(c) and §24(e), to be necessary and appropriate for the enforcement of the Act, for developing occupational accident- and illness-related information, and for carrying out her responsibilities under §24. The Respondent does not question the relevance of the employment numbers and work-hours information in the collection, compilation and analysis of occupational safety and health statistics. Nor does it question either the Secretary's reliance upon existing records as a source of such information or the Secretary's decision (as stated in the DCI) to permit employers to submit numerical estimates if the information was not readily derivable from existing records.[5] Thus, Sturm

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Section 8(c)(2) provides that the Secretary "shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries, and illnesses other than minor injuries[.]" Section 24(e) states: "On the basis of the records made and kept pursuant to section 8(c) of this Act, employers shall file such reports with the Secretary as he shall prescribe by regulation, as necessary to carry out his functions under this Act."

[5] In the 1996 Notice of Proposed Rulemaking ("NPR"), *supra* note 3, and the 1997 Notice of Final Rule ("NFR"), *supra* note 3, promulgating §1910.17, the Secretary explained both the relevance and the availability of hours-worked and employment numbers information. In the NPR, for example, the Secretary found that "[i]nformation on annual average employment and total hours worked can be obtained from payroll and other company records, and is often available from other reports required by the government, such as unemployment insurance and workers' compensation reports." 61 Fed. Reg. at 4037. The Secretary also noted that "[f]or some employers, the added burden will be negligible because of their participation in the BLS Annual Survey of Occupational Injuries and Illnesses which already requires a

Ruger has provided no basis by which to conclude that the Secretary was required to promulgate a regulation requiring employers to "make and keep" hours-worked information as a prerequisite for requiring employers to report that data under section 24(e). *See Louisiana Chemical Association v. Bingham*, 550 F. Supp. 1136, 1138-40 (W.D. La. 1982), *aff'd per curiam*, 731 F.2d 280 (5th Cir. 1984). In short, the DCI was not unlawful.[6]

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compilation of this information." *Id.* Similarly, in the NFR, the Secretary reemphasized that "[e]mployment figures are critical to OSHA's ability to evaluate the injury and illness data" (62 Fed. Reg. at 6437), and noted:

> The information on employment and hours worked by employees is generally easy to obtain from payroll systems for employees who are paid on an hourly basis, and can be estimated for salaried employees. . . . In many cases, the employment and hours worked data are already being reported to unemployment insurance and workers' compensation agencies and can easily be transferred to the OSHA survey form.

Id. at 6441.

Even if hours-worked figures were *not* available to a particular employer, the DCI Survey Form did not require the employer to generate them. It expressly stated that where either the number of employees or the actual number of hours worked "is not available," the employer "can estimate it." A worksheet for estimating both of those numbers was provided on the form. Employers were simply required to provide OSHA with readily available, summary employment numbers (and information taken directly from required injury and illness records) by return mail.

[6] Sturm Ruger argues that even if § 1904.17 authorized the Secretary to obtain hours-worked information from employers, it cannot be construed to require reporting by separate establishments of the same employer. We reject that argument for the same basic reasons as Judge DiClerico. 1999 CCH OSHD at p. 46,457 ("part 1904 is replete with requirements created on a per establishment basis, [so] the information requirements of section 1904.17(a) logically would require information to be provided on a per establishment basis as well.") We agree with the Secretary's interpretation of her authority in that regard. We further note that the former § 1904.20(b) (which was in effect during the time of the DCI request through the time of the alleged violations here) stated that a purpose of statistical reporting of occupational injuries and illnesses under section 24 of the Act is to "produce adequate estimates for most four-digit Standard Industrial Classification (SIC) industries in manufacturing . . . ." Pine Tree was in a different industry from Sturm Ruger as a whole, under the SIC system.

We find nothing to the contrary in *American Trucking*. The shortcoming that the court identified in enjoining the 1995 OSHA survey forms that requested worker numbers and hours worked was the failure of the Secretary to have in place a requisite, final regulation prescribing such survey information. As the court succinctly stated, "OSHA has attempted to accomplish its data collection by a device that avoids the rulemaking process, thereby silencing any industry opposition and saving it the cost, delay, and uncertainty associated with such proceedings." *Id.* at 7. The Secretary filled that regulatory void shortly after the court's decision by issuing §1904.17 as an outgrowth of the informal rulemaking initiated by the 1996 recordkeeping NPR. The NPR proposal to authorize such surveys, together with the public comments received in response, and the findings and determinations published in the final rule, overcame the objection that the Secretary had taken action "without observance of procedure required by law." 5 U.S.C. §706(2)(D), cited at 955 F. Supp. at 7.[7]

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[7] Our disposition here is also consistent with how courts have viewed the Secretary's use of subpoenas to obtain similar information. Courts routinely enforce OSHA subpoenas for hours-worked information. *E.g., Dole v. Trinity Indus*. 904 F.2d 867, 872-74 (3d Cir. 1990) (OSHA subpoena for LWDI information enforced for purpose of determining whether full-scope inspection was warranted, even during limited investigation of specific safety complaint); *Union Packing*, 714 F.2d 838, 840 (8th Cir. 1983) (Act "authorizes the use of the subpoena power, independent of an inspection of the premises, to obtain records the company is required to maintain under section 657(c) as well as other standard records which are necessary to compute the lost workday injury rate.") Here, as in *Union Packing,* OSHA sought LWDII information from an employer in a high-hazard industry, in order to determine whether the employer's LWDII rate exceeded the average for that industry. Also, there as here, OSHA's neutral plan made such employers a priority for inspection. The Eighth Circuit enforced OSHA's subpoena for the information, which it termed a "minimal intrusion." *Id.* at 842. "Because Union Packing Company's records were sought based on the neutral criteria that the company was a member of a high hazard industry, the evils the Supreme Court sought to guard against in *Barlow's* are simply not present." *Id.* at 841-42. *See also Reich v. Sturm Ruger & Co. ("SR I")*, 903 F.Supp. 239, 246 (D.N.H. 1995) (expressly approving portion of OSHA subpoena for voluminous "documents which the Company is not required to maintain," as part of ergonomics investigation), *aff'd*, 84 F.3d 1 (lst Cir.), *cert. denied*, 519 U.S. 991 (1996).

Even if Sturm Ruger's argument were correct, we would not suppress the evidence that OSHA obtained under the warrant on that basis in these particular cases. Evidence gathered pursuant to a warrant will not be suppressed if the warrant was executed in good faith -- even if the warrant later is invalidated. *United States v. Leon*, 468 U.S. 897, 918-28 (1984). *See also*, *e.g., Sanders Lead Co.,* 15 BNA OSHC 1640, 1651, 1991-93 CCH OSHD ¶ 29,260, p. 40,270 (No. 87-260, 1992) (applying *Leon* to OSHA warrants). Objective good faith has been found where, as here, the employer's pre-inspection challenges to a warrant had been rejected in court. *Trinity Indus. v. OSHRC*, 16 F.3d 1455, 1462 (6th Cir. 1994); *Donovan v. Federal Clearing Die Casting Co.*, 695 F.2d 1020, 1022-25 (7th Cir. 1982) (same).

While Sturm Ruger raised before the magistrate the question of whether data could be collected on a per-establishment basis as opposed to employer-wide, there is no indication on this record that Sturm Ruger raised the specific hours-worked argument at issue here until after OSHA's inspection had taken place. That inspection was conducted only after Sturm Ruger's many arguments in support of its motion to quash the warrant were fully considered and rejected by the district court, and after the First Circuit denied Sturm Ruger's motion to stay the inspection. The warrant application here was detailed and factually accurate. Thus, we find that as in *Trinity*, the Secretary relied in objectively reasonable good faith on a facially valid warrant in conducting the inspection, and thus the good faith exception to the exclusionary rule applies.[8]

B. Discovery Motions

In attempting to prove its affirmative defenses that the Secretary's inspection resulted from vindictive prosecution and was unreasonable in other ways, Sturm Ruger sought to compel the Secretary to respond to interrogatories and requests for production of documents

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[8] In light of our disposition of this issue, we need not address whether Judge Cook correctly found that Sturm Ruger had waived its right to object to the DCI Survey by submitting the requested information.

on those subjects. "To compel discovery on a vindictive prosecution claim, a defendant must show a colorable basis for the claim. A colorable basis is some evidence tending to show the essential elements of the claim." *United States v. Benson*, 941 F.2d 598, 605 (7th Cir. 1991) (quoting *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990)). *See also United States v. Schmucker*, 815 F.2d 413, 418 (6th Cir. 1987); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). *Cf., e.g., United States v. Lanoue*, 137 F.3d 656, 665 (1st Cir. 1998) ("generally where a defendant can point to specific facts that raise a likelihood of vindictiveness a district court must grant an evidentiary hearing on the issue," with the opportunity for discovery).

Judge Cook found that Sturm Ruger offered nothing to show that the inspection was motivated by vindictiveness toward Sturm Ruger. Such a showing is a necessary element of the defense. *E.g., Lanoue*, 137 F.3d at 664 (proponent must present evidence showing actual vindictiveness, or "sufficient likelihood" to warrant presumption of vindictiveness). Judge Muirhead found that Sturm Ruger's position on vindictive prosecution flies in the face of the undisputed facts asserted in the warrant affidavit. Slip op. at 17-20. Sturm Ruger does not explain where it believes Judge Muirhead and Judge Cook erred. We agree with the reasoning of the two judges.

Sturm Ruger also sought discovery on whether the search was unreasonable because OSHA's inspection was not conducted pursuant to a neutral administrative plan, as required for nonconsensual, programmed inspections under *Barlow's*. Judge Cook rejected the discovery motion in this regard, because Sturm Ruger failed to allege or proffer evidence that the district court's approval of the inspection warrant was based on false representations to the court. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978) (to mandate evidentiary hearing into basis of warrant application, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth . . . accompanied by an offer of proof" showing that no probable cause existed for search). *See, e.g., Brock v. Brooks Woolen Co.*, 782 F.2d 1066, 1068-69 (1st Cir. 1986) (applying *Franks* to OSHA warrant). *Tri-State Steel Constr., Inc.*, 15

BNA OSHC 1903, 1917, 1991-93 CCH OSHD ¶ 29,852, pp. 40,740-41 (No. 89-2611, 1992) (consolidated) (same; discovery denied where allegations and offer of proof did not meet *Franks* standards), *aff'd*, 26 F.3d 173 (D.C. Cir. 1994), *cert. denied*, 514 U.S. 1015 (1995).

In an attempt to claim a deliberate or reckless falsehood in the warrant application, Sturm Ruger alleges on review that OSHA's warrant application "misstated the grounds for classifying an 'establishment' under the SIC Manual, and but for such misstatement it would have been clear that 'Pine Tree' should not have been targeted as a separate establishment." Judge DiClerico, however, gave a detailed explanation of why Pine Tree properly is considered a separate establishment under OSHA's criteria. 1999 CCH OSHD at pp. 46,549-50.[9] Sturm Ruger does not explain where it thinks Judge DiClerico is mistaken, and we agree with his analysis. Furthermore, Sturm Ruger has not disputed the statement in OSHA's warrant affidavit that "during a previous inspection of Sturm Ruger, the company took the position that Pine Tree Castings was a separate entity." We also note, as stated above, that Sturm Ruger corrected OSHA's survey form here to show that Pine Tree was in SIC "33 -- Foundry Castings," rather than Sturm Ruger's classification. Sturm Ruger can hardly expect to receive a *Franks* hearing on OSHA's treatment of Pine Tree as a separate establishment in these circumstances.

Sturm Ruger's other relevant claim in support of discovery is that OSHA's June 15, 1998 letter was altered to include Pine Tree as addressee, and was submitted with the warrant application with that alteration. We agree with Judge Muirhead that in the circumstances, that

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[9] The term "establishment," under which OSHA analyzed Pine Tree, is defined as follows.

> A single physical location where business is conducted or where services or industrial operations are performed. (For example: A factory, mill, store, hotel, restaurant, movie theater, farm, ranch, bank, sales office, warehouse, or central administrative office.) Where distinctly separate activities are performed at a single physical location (such as contract construction activities operated from the same physical location as a lumber yard), each activity shall be treated as a separate establishment.

discrepancy is inconsequential. Slip op. at 17-18.[10] In sum, the rulings by Judge Cook denying Sturm Ruger's motion for discovery are affirmed.

We affirm Judge Cook's denial of Sturm Ruger's Motion to Take Deposition of the "Person Most Knowledgable" for the same reasons. That motion merely sought the same information as Sturm Ruger's other discovery motions. Sturm Ruger presented no evidence that the district court's approval of the warrant was based on false representations to the court. Sturm Ruger, therefore, failed to present a case supporting its motion. In any event, the motion was made one day before the end of the discovery period, contrary to prehearing instructions given by the judge. In these circumstances, Sturm Ruger has failed to show an abuse of discretion by the judge.

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29 C.F.R. § 1904.12(g)(1).

[10] Sturm Ruger further argues that it is entitled to discovery regardless of *Franks*, because it is challenging not merely the veracity of the warrant application, to which *Franks* applies, but also the validity of the ITP and DCI, to which *Franks* does not apply. However, the various validity issues that Sturm Ruger has raised in these cases are matters of law. They turn on what the Constitution, the Act, and the Secretary's regulations require. Sturm Ruger has shown no basis for discovery on those matters of law.

Sturm Ruger analogizes the Secretary's targeting policy to criminal "profiling." Under that policy, police may stop, question, and frisk a person who fits a sufficient criminal "profile," such as that of a drug courier; but absent probable cause for arrest, they may not perform a full search of the suspect's property. *E.g., Florida v. Royer*, 460 U.S. 491, 499 (1983). The short answer is that the Supreme Court has authorized the Secretary to inspect, without traditional probable cause to believe a violation has been committed, where the inspection is based on a general administrative plan derived from neutral sources (such as injury and illness statistics). *See Barlow's*.

C. Motion to Suppress Evidence

Judge Cook rejected Sturm Ruger's motion to suppress the evidence obtained pursuant to the warrant. For the reasons discussed above, we reject several of the grounds for that motion -- the claimed invalidity of the DCI and ITP, the alleged vindictive prosecution, and alleged improper targeting of Pine Tree as a separate establishment. However, Sturm Ruger raises a further argument – essentially, that traditional probable cause was required because the ITP focused on such a small pool of employers. We see no merit to this argument.

As mentioned (n. 10), the Supreme Court has held that for purposes of an administrative search such as an OSHA inspection, "probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on . . . a general administrative plan . . . derived from neutral sources . . . ." *Barlow's*, 436 U.S. at 320-21.[11] The 99 high-hazard industries on which the ITP focused included about 3300 employers nationwide -- 48 were in New Hampshire. OSHA eliminated from that list those establishments that: (1) had below-average LWDII rates for those industries; (2) had less than 60 employees; and (3) had a comprehensive OSHA inspection within the last three years. Thus, the pool of targeted employers in New Hampshire was reduced to less than 30.

Sturm Ruger argues that the ITP narrowed down the employer groups it targeted so much that the inspection plan no longer was random and neutral, as required for administrative probable cause. On that issue, Judge Cook found:

> Respondent's argument overlooks that the ITP was a national program that used objective criteria to identify inspection targets. That it led to a small number of potential targets in a state the size of New Hampshire is neither surprising nor an indication of bias. Most importantly, it left no discretion with field investigators in the selection process. The courts have found similar

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[11] *See also Griffin v. Wisconsin*, 483 U.S. 868 (1987) ("we have arguably come to permit an exception to" traditional probable cause "for administrative search warrants . . . ."). *Cf. Donovan v. Dewey*, 452 U.S. 594, 601 (1981) (warrants are required where statute "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search") (citing *Barlow's*, 436 U.S. at 323).

> OSHA plans sufficiently neutral when no discretion was left to the regional office.[12] . . . I find Respondent's argument unpersuasive and also note that Respondent has again not made the showing required before matters beyond the warrant application can be considered.

Similarly, Judge Muirhead found that OSHA's selection criteria "support a finding that the Interim Plan is reasonable, and do not make the warrant unconstitutional." Slip op. at 22. Judge DiClerico echoed Judge Muirhead's view of the ITP criteria. 1999 CCH OSHD at p. 46,551.We reject Sturm Ruger's argument for the same reasons.

As a further ground for suppressing evidence, Sturm Ruger argues that courts have prohibited OSHA from conducting wall-to-wall inspections on the basis of "site-specific" information, such as the LWDII data used here, unless that information justifies the wall-to-wall search. However, the decisions it cites merely hold that where an inspection is made pursuant to a complaint of specific violative conditions in an establishment, a wall-to-wall inspection is not warranted unless it would be reasonable under a neutral administrative plan. *E.g., Trinity*, 16 F.3d at 1460. *See also Irving v. United States*, 162 F.3d 154 (1st Cir. 1998), *cert. denied*, 528 U.S. 812 (1999) (citing *Trinity*). By contrast, here OSHA is proceeding based on a nationwide administrative plan with numeric and other standard criteria that leave no discretion to its officers as to when and where to inspect. OSHA is not proceeding based on information about specific violative conditions in an establishment.

Judges Muirhead, DiClerico, and Cook each ruled that a wall-to-wall inspection was appropriate here. Judge Muirhead noted that the warrant application did not mention any specific injury or illness revealed by Sturm Ruger's records, or the location within the plant where any of them occurred. Slip op. at 29. Further, he could not discern any appropriate limitation from reviewing the OSHA Form 200's. *Id.* Judge DiClerico noted that the

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[12] Judge Cook cited *In re: Trinity Indus., Inc.*, 898 F.2d 1049, 1051 (5th Cir. 1990); *Donovan v. Enterp. Foundry, Inc.*, 751 F.2d 30, 33 (1st Cir. 1984); *Donovan v. Hackney, Inc.*, 769 F.2d 650, 652 (10th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986); *Erie Bottling Corp. v. Donovan*, 539 F.Supp. 600, 605 (W.D.Pa. 1982).

warrant's scope was supported by *In re: Cerro Copper Prods. Co*., 752 F.2d 280, 283 (7th Cir. 1985) (wall-to-wall inspection by OSHA was justified, following employee complaint, where establishment is "high-hazard workplace in a high-hazard industry," no wall-to-wall health inspection had occurred within three years, such inspection would conserve OSHA's resources, and there was no evidence that complainant was harassing employer). *See* 1999 CCH OSHD at p. 46,552. We can find no basis for disagreeing with the disposition of this issue by any of the three judges.

D. Decision to Quash Subpoenas

Sturm Ruger argues that Judge Schoenfeld erred in quashing its subpoenas to various OSHA officials. It argues that under the ITP, inspectors must verify in advance that the "establishment" is covered. Sturm Ruger seeks to question the subpoenaed officials about their determinations -- if any -- on that issue. Again, however, under *Franks,* Sturm Ruger would have to allege that the warrant application contained "deliberate falsehood" or "reckless disregard for the truth," and proffer supporting evidence, in order to mandate the inquiry it seeks. Sturm Ruger has not proffered evidence that supports its allegations. Therefore, we see no reason to overturn Judge Schoenfeld's ruling.[13]

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[13] Sturm Ruger further asserts that the subpoenas were proper because the persons subpoenaed were knowledgeable about whether the proposed penalties were appropriate. However, Judge Schoenfeld correctly rejected Sturm Ruger's grounds for requesting the subpoenas, which were the same grounds that Judge Cook previously had rejected. Then Sturm Ruger agreed on the penalty amounts, in its settlement agreement with the Secretary on the merits, following Judge Schoenfeld's subpoena ruling. That agreement preserved for our review only "the alleged illegality of" the DCI, ITP, warrant, and inspection of Pine Tree. To the extent that Sturm Ruger may be seeking subpoenas to establish any other claim, it waived that right in the settlement agreement. We further note that Sturm Ruger did not petition for review of the penalties it agreed to, nor are they within the briefing notice.

III. Conclusion

Accordingly, we reject Sturm Ruger's arguments as to the alleged illegality of OSHA's DCI, ITP, warrant, and inspection of Pine Tree. We affirm Judge Schoenfeld's decisions disposing of the merits of these cases according to the settlement agreement between the parties.

SO ORDERED.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

/s/
Thomasina V. Rogers
Commissioner

Dated: May 6, 2004

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket 99-1873
STRUM & RUGER CO., INC., PINE TREE CASTINGS DIVISION, Respondent,	:	

Appearances:

Christine T. Eskilson, Esquire
Office of the Solicitor
U.S. Department of Labor
Boston, Massachusetts
For the Complainant

Richard D. Wayne, Esquire
Debra Dyleski-Najjar, Esquire
Hinckley, Allen & Snyder, LLP
Boston, Massachusetts,
For the Respondent

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Background and Summary of Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"). From June 15,1999 through July 6, 1999, the Occupational Safety and Health Administration ("OSHA") visited Respondent's work site in Newport, New Hampshire. As a result of the inspection, OSHA issued a citation to Respondent on September 2, 1999, alleging various violations of safety standards appearing in Title 29 of the Code of Federal Regulations ("CFR."). Respondent timely contested the citations. Following litigation before the Commission and the

federal Courts regarding the validity of the search warrant and resulting inspection, the parties have agreed to have this matter submitted for decision pursuant to Rule 61, 20 C.F.R. § 2200.61.

The long and protracted procedural history of this case has been summarized in numerous documents, pleadings, orders and the like. It need not be repeated once again here.

Jurisdiction

It is undisputed that at all relevant times Respondent has been an employer engaged in the manufacture of handguns. Respondent handles goods or materials which have moved in interstate commerce. Respondent sells its products in interstate commerce. I find as fact that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act. Accordingly, the Occupational Safety and Health Review Commission ("the Commission") has jurisdiction over the parties and the subject matter.

The search warrant and the inspection.

Respondent's premises were selected for inspection by OSHA under its Interim Targeting Plan and pursuant to a search warrant issued by the United States District Court for the District of New Hampshire on June 30, 1998. The validity of both the underlying warrant and the resulting inspection has been litigated since that time in numerous guises in several fora.

It is the law of this case that both the warrant and resulting inspection are valid.[1]

Findings of Fact and Conclusions of Law

The Agreed Upon Submission of the parties is accepted and the facts agreed upon therein are adopted in their entirety. Based upon that submission the following findings are made as to each alleged violation.

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[1] By authorization of the Administrative Law Judge and with the agreement of the parties, Respondent has submitted a proffer regarding its arguments challenging the validity of the warrant and the inspection. They are thus preserved for the record.

1. Citation 1, Item 1, an alleged violation of § 5(a)(1) of the Act is AFFIRMED as stated in the Agreed Upon Submission. A civil penalty of $1,000 is assessed therefore.

2. Citation 1, Item 2 is amended so as to allege three instances of a violation of 29 CFR § 1910.23(c) and as amended in the Agreed Upon Submission. it is AFFIRMED. A penalty of $2,250.00 is assessed therefor.

3. Citation 1, Item 3 is VACATED.

4. Citation 1, Item 4a, an alleged violation of 29 CFR § 1910.146(d)(3)(v) is AFFIRMED as stated in the Agreed Upon Submission.

5. Citation 1, Items 4b, 4c, 4d and 4e, are amended so as to allege as Item 4b a violation of 29 CFR § 1910.146(f) and, as amended, is AFFIRMED as stated in the Agreed Upon Submission.. A penalty of $3,000.00 is appropriate for Items 4a and 4b together.

6. Citation 1, Item 5, an alleged violation of 29 CFR § 1910.147(c)(4)(i) is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $1,250.00 is appropriate for Item 5.

7. Citation 1, Item 6, an alleged violation of 29 CFR § 1910.147(c)(5)(i) is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $1,000.00 is appropriate for Item 6.

8. Citation 1, Item 7, an alleged violation of 29 CFR § 1910.212(a)(1) is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $1,000.00 is appropriate.

9. Citation 1, Item 8, an alleged violation of 29 CFR § 1910.219(c)(3) is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $750.00 is appropriate.

10. Citation 1, Item 9, an alleged violation of 29 CFR § 1910.219(i)(2) is VACATED.

11. Citation 1, Item 10, an alleged violation of 29 CFR § 1910.303(g)(2)(i) is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $1,250.00 is appropriate.

12. Citation 2, Item 1, an alleged violation of 29 CFR § 1910.37(q)(5) is VACATED.

13. Citation 2, Item 2, an alleged violation of 29 CFR § 1910.146(c)(2) is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $0.00 is appropriate.

14. Citation 2, Item 3, an alleged violation of 29 CFR § 1910.184(e)(1) is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $0.00 is appropriate.

15. Citation 2, Item 4, an alleged violation of 29 CFR § 1910.212(a)(4) is VACATED.

16. Citation 2, item 5, an alleged violation of 29 CFR § 1910.242(b) is VACATED.

17. Citation 2, Item 6, an alleged violation of 29 CFR § 1910.303(f) is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $0.00 is appropriate

18. Citation 2, Item 7, an alleged violation of 29 CFR § 1910.303(g)(2)(ii) is VACATED.

19. Citation 2, Item 8, an alleged violation of 29 CFR § 1910.1200(f)(5)(i) is VACATED.

All findings of fact and conclusions of law necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

Citations 1 and 2, as modified above are AFFIRMED. Civil penalties as identified above are assessed.

/s/
Michael H. Schoenfeld
Judge, OSHRC

Dated: December 29, 2000
Washington, D.C.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket 99-1874
STRUM & RUGER CO., INC., PINE TREE CASTINGS DIVISION, Respondent,	:	

Appearances:

Christine T. Eskilson, Esquire
Office of the Solicitor
U.S. Department of Labor
Boston, Massachusetts
For the Complainant

Richard D. Wayne, Esq.
Debra Dyleski-Najjar, Esq,
Hinckley, Allen & Snyder, LLP
Boston, Massachusetts,
For the Respondent

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Background and Summary of Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"). From March 5,1999 through May 6, 1999, the Occupational Safety and Health Administration ("OSHA") visited Respondent's work site in Newport, New Hampshire. As a result of the inspection, OSHA issued a citation to Respondent on September 2, 1999, alleging violations

of noise and toxic exposure standards appearing in Title 29 of the Code of Federal Regulations ("CFR."). Respondent timely contested the citations. Following litigation before the Commission and the federal Courts regarding the validity of the search warrant and resulting inspection, the parties have agreed to have this matter submitted for decision pursuant to Rule 61, 20 C.F.R. § 2200.61.

The long and protracted procedural history of this case has been summarized in numerous documents, pleadings, orders and the like. It need not be repeated once again here.

Jurisdiction

It is undisputed that at all relevant times Respondent has been an employer engaged in the manufacture of handguns. Respondent handles goods or materials which have moved in interstate commerce. Respondent sells its products in interstate commerce. I find as fact that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act. Accordingly, the Occupational Safety and Health Review Commission ("the Commission") has jurisdiction over the parties and the subject matter.

The search warrant and the inspection.

Respondent's premises were selected for inspection by OSHA under its Interim Targeting Plan and pursuant to a search warrant issued by the United States District Court for the District of New Hampshire on June 30, 1998. The validity of both the underlying warrant and the resulting inspection has been litigated since that time in numerous guises in several fora.

It is the law of this case that both the warrant and resulting inspection are valid.[1]

[1] By authorization of the Administrative Law Judge and with the agreement of the parties, Respondent has submitted a proffer regarding its arguments challenging the validity of the warrant and the inspection. They are thus preserved for the record.

Findings of Fact and Conclusions of Law

The Agreed Upon Submission of the parties is accepted and the facts agreed upon therein are adopted in their entirety. Based upon that submission the following findings are made as to each alleged violation.

1. Citation 1, Item 1, an alleged violation of 29 CFR § 1910.94(d)(9)(vii) is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $1,000.00 is appropriate.

2. Citation 1, Item 2, an alleged violation of 29 CFR § 1910.95(b)(1) is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $1,250.00 is appropriate.

3. Citation 1, Item 3(a), an alleged violation of 29 CFR § 1910.134(g)(1)(i)(A), is VACATED.

4. Citation 1, Item 3(b), an alleged violation of 29 CFR §1910.1000(c), is AFFIRMED as stated in the Agreed Upon Submission.

5. Citation 1, Item 3(c), an alleged violation of 29 CFR §1910.1000(e), is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $1,250 .00 is appropriate for Items 3(b) and 3(c) combined.

6. Citation 1, Items 4(a) and (b), are amended to be Item 4, an alleged violation of 29 CFR §1910.1200(f)(5). Item 4, as amended, is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $1,000 .00 is appropriate.

7. Citation 2, Item 1, an alleged violation of 29 CFR § 1910.1025(d)(2) is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $ 0.00 is appropriate.

8. Citation 2, Item 2, an alleged violation of 29 CFR § 1910.1025(l)(1)(i) is amended to 29 CFR § 1910.1025(l) and, as amended, is AFFIRMED as stated in the Agreed Upon Submission. A penalty of $0.00 is appropriate.

9. Citation 2, Item 3, an alleged violation of 29 CFR §1910.1025(l)(2)(i), is VACATED.

10. Citation 2, Item 4, an alleged violation of 29 CFR §1910.1200(h), is AFFIRMED as as to instance b and VACATED as to instance a as stated in the Agreed Upon Submission. A penalty of $0.00 is appropriate.

All findings of fact and conclusions of law necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

Citations 1 and 2, as modified above are AFFIRMED. Civil penalties as identified above are assessed.

/s/
Michael H. Schoenfeld
Judge, OSHRC

Dated: December 19, 2000
Washington, D.C.