SECRETARY OF LABOR, Complainant, v. STERLING PLUMBING GROUP, INC., Respondent.	OSHRC Docket No. 95-580

DECISION

Before: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

There are two issues before us: (1) whether Administrative Law Judge John H. Frye, III erred in finding that the Secretary of Labor failed to establish sufficient probable cause to justify issuance of a search warrant against Respondent, Sterling Plumbing Group, Inc., and (2) if the judge did err, whether the Secretary's representative exceeded the scope of the warrant by seeking to inspect Sterling's OSHA 200 Logs and its written lead compliance program. For the reasons stated below, we find that there was sufficient probable cause to support the warrant and that the Secretary's inspection of Sterling's written lead compliance program and its OSHA 200 Logs did not exceed the warrant's scope.

I.

In November 1994, the Regional Director of the Occupational Safety and Health Administration's ("OSHA") Philadelphia office received a referral from the Pennsylvania Health Department which revealed that some employees of the Sterling Faucet Co. in Morgantown, West Virginia had been found to have blood lead levels above the OSHA medical removal level of 50 μg/dl and as high as 80 μg/dl. The referral was forwarded to OSHA's Charleston, West Virginia area office, which attempted to conduct an inspection of the Sterling facility.

After being denied entry, the Charleston office obtained a search warrant from a U.S. Magistrate. The warrant application included a copy of the letter from the Philadelphia Regional Administrator to the West Virginia Area Director, referencing the Pennsylvania Health Department referral, but it did not include a copy of the referral. Paragraph 6 of the application referenced the missing referral form, stating:

> Part 19 of the referral form (OSHA 90) contains numbered items which describe the alleged hazards. Upon review, I have determined that these conditions constitute probable violations of 29 U.S.C. 654(a) and the safety and health standards enforced pursuant to that section including, but not limited to:
>
> 29 C.F.R. 1910.1025

As a result of an inspection conducted pursuant to the warrant, Sterling was issued two citations. Citation 1 alleged several serious violations of the lead standard at 29 C.F.R. § 1910.1025. Citation 2 alleged several other than serious violations of other lead standards, as well as a violation of 29 C.F.R. § 1904.7 for not making OSHA 200 Logs available for inspection and copying. Total penalties of $6300 were proposed.

Sterling challenged the warrant before the judge on the grounds that the Secretary lacked sufficient "probable cause" to justify issuance of the warrant. The parties subsequently entered into a stipulation in which Sterling agreed to limit its contest to whether probable cause existed to support issuance of the warrant and whether the Secretary exceeded the scope of the warrant by seeking to inspect Respondent's OSHA 200 Logs and

its written lead compliance program. The parties further stipulated that if the warrant and inspection were determined to be valid, the citation and penalties would be affirmed.

Judge Frye found that "the warrant did not set forth probable cause to believe that violations of the Act existed." He noted that the OSHA Philadelphia regional office apparently failed to forward to the Charleston area office a copy of the referral from the Pennsylvania Department of Health. The judge found that, while the elevated blood lead levels were "some evidence" that elevated levels of lead were present in the facility, they were not, in and of themselves, conditions existing at the plant. The judge stated that

> At a minimum, particulars concerning the number of employees involved, the circumstances under which the blood samples were gathered and tested, and some information on conditions existing at the facility should have been gathered.

Based on his probable cause finding, the judge concluded that "the evidence . . . should be excluded insofar as it pertains to penalties which the Secretary seeks to collect." He also found that "it is never proper to suppress evidence which goes to the question of the abatement of violations, as opposed to penalties." He relied on two appellate court decisions: *Trinity Industries v. OSHRC*, 16 F.3d 1455 (6th Cir. 1994), and *Smith Steel Casting v. Brock*, 800 F.2d 1329 (5th Cir. 1986). The judge further concluded that the lack of an OSHA 200 Log, for which the Secretary cited Sterling, had nothing to do with blood lead levels, the condition the warrant authorized the Secretary to investigate, and that a similar argument could be made in regards to the alleged deficiencies in the written lead compliance program. Thus, even if he had found the warrant to be valid, the judge apparently would have found that the search exceeded the scope of the warrant as to those items.

The judge ordered the evidence gathered during the inspection to be suppressed in regards to the penalties and directed the parties "to resolve this case in accord with the terms of their stipulation." While it is not clear what the judge expected the parties to do in accord with his order, it appears that he intended that the citations be affirmed, thereby incurring an abatement requirement, but that the penalties be vacated.

II.

A.

When reviewing warrants, in the absence of arbitrariness the courts give great deference to a magistrate's determination of "probable cause." *See, e.g,. Massachusetts v. Upton*, 466 U.S. 727, 732-33 (1984)(deference to magistrate, viewing whether evidence as a whole provided a "substantial basis" to find probable cause); *Trinity Industries, Inc. v. OSHRC*, 16 F.3d at 1459 ("great deference"); *In re Establishment Inspection of Kelly-Springfield Tire Co.*, 13 F.3d 1160, 1165 (7th Cir. 1994) ("clear error"); *Secretary of Labor v. International Matex Tank Terminals-Bayonne*, 928 F.2d 614, 620 (3d Cir. 1991) ("great deference); *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 959 (11th Cir. 1982) ("conclusive in the absence of arbitrariness").

Except under exceptional circumstances not present here, only the facts actually before the magistrate may be considered in determining whether the magistrate's finding of probable cause was proper. *International Matex Tank,* 928 F.2d at 620; *West Point-Pepperell, Inc.,* 689 F.2d at 959.

B.

Probable cause justifying the issuance of a warrant for administrative purposes may be based either on "specific evidence of an existing violation" or "on a showing that 'reasonable legislative or administrative standards for conducting an. . . . inspection are satisfied with respect to a particular [establishment]." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)). Because Sterling was not selected for inspection under an administrative plan, the Commission must determine whether, under *Barlow's* first criteria, the Secretary's showing to the magistrate contained sufficient "specific evidence" of a violation to support a finding of probable cause.

To determine whether a sufficient probable cause showing has been made, courts consider (1) the reliability of the information tendered (including some basis for believing that any complaint was actually made; that the complainant was sincere in his or her assertion that a violation exists, and that the complainant had a plausible basis for entering the complaint), and (2) whether the application was sufficiently specific to inform the magistrate of the substance of the complaint so that he or she could determine whether the alleged conditions, if true, constitute a violation. *Marshall v. Horn Seed Co., Inc.*, 647 F.2d 96, 102-03 (10th Cir. 1981). Administrative probable cause is tested by a standard of reasonableness, requiring the magistrate or judge to balance the need to search against the invasion the search entails. *West Point-Pepperell, Inc.,* 689 F.2d at 957.

We find that there was sufficient probable cause in the warrant application for the magistrate to issue a warrant. First, the warrant application was the result of a referral from a state health department. There is no allegation that the referral did not issue, or that the Pennsylvania Health Department's issuance of the referral was not in the due course of its oversight of health and safety. There is, for example, no allegation that the Department possessed an animus of the sort that might be said to motivate an employee complaint, and that might call for independent inquiry.[1] The essential issue appears to be the failure to provide the magistrate with the actual referral,[2] which was referenced in the warrant request but not appended. Second, while a copy of the referral should have been attached to the warrant application, we find that the application contained sufficiently specific information

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[1]Where a warrant is based on an employee complaint, there exists the possibility that the complaint issued from a malicious employee or group of employees. As a result, before obtaining a warrant based on such a complaint, the Secretary is obligated to present sufficient facts to the magistrate to establish the reliability of the complaint. *In re Establishment Inspection of Kelly-Springfield Tire Co.*, 13 F.3d at 1166.

[2]It appears that the Assistant Area Director intended to attach a copy of the referral but, presumably through some clerical error, instead attached the letter from the regional office explaining the contents of the referral and directing the area office to follow up on the referral.

to enable the magistrate to determine whether, if the facts contained in the referral were true, they were likely to reveal a violative condition.[3]

The description of the referral contained in the letter from the Regional Administrator to the Area Director (which was attached to the warrant application) stated, in pertinent part:

> Our office received a referral from the Pennsylvania Health Department concerning elevated blood lead results for employees working for Sterling Faucet Company, Morgantown, West Virginia. . . ..The blood lead results for a number of employees working for this company exceed the OSHA medical removal level of 50 μg/dl and are as high as 80 μg/dl . . .

While Sterling properly notes that the referral does not *prove* that the lead violations existed at its facility, the referral is sufficiently specific to identify the nature of the violation and the evidence of its existence. Because the application informed the magistrate of the substance of the referral, he had sufficient information to determine whether the alleged conditions, if true, constituted a violation.[4] *Horn Seed Co.* at 103.

The Commission, as noted, must grant great deference to a magistrate's finding that the warrant application contained sufficient evidence of a violative condition to establish probable cause for a warrant. Especially considering the seriousness of the potential health hazard to employees posed by overexposure to lead, we find no basis for concluding that the magistrate clearly erred and we defer to his finding of probable cause.

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[3]Boilerplate language that a complaint has been received and that the Secretary has grounds to believe that violations exist is not sufficient evidence to establish probable cause. *Weyerhaeuser v. Marshall*, 592 F.2d 373, 378 (7th Cir. 1979). Rather, the magistrate should be informed as to the source of the complaint, and whatever underlying facts and surrounding circumstances the complainant provided to OSHA. *Horn Seed Co., Inc.,* 647 F.2d at 103.

[4]Under 29 C.F.R. § 1910.1025(k)(1)(i)(D), employers are required to remove from areas containing airborne lead any employee whose blood lead levels exceed 50 μg/dl. *Sanders Lead Co.*, 17 BNA OSHC 1197, 1200, 1993-1995 CCH OSHD ¶ 30,740, p. 42,692 (No.87-260, 1995)

We are hard pressed to understand the principle asserted by our dissenting colleague. Our colleague agrees that under longstanding precedent the magistrate's finding should be considered conclusive as long as it is not arbitrary, and she does not appear to dispute that the test of arbitrariness is the reliability and specificity of the grounds relied on by the magistrate. She expressly acknowledges that a referral from the Pennsylvania Department of Health is "inherently reliable" and does not suggest that the referral was insufficiently specific. Indeed she concedes that, had that document been appended to the warrant application, the magistrate would have been justified in issuing the warrant. She contends, nonetheless, that *Barlow's* requirement for "*specific evidence*" is not met here and that the majority is treating a "mere hearsay assertion by the Secretary that such evidence exists as having the same inherent *reliability* as the evidence itself, a considerable leap of faith that this Commissioner is unwilling to take" (emphasis added). Accordingly, absent attachment of the underlying referral, she would require some additional showing on which the magistrate could base an "independent" determination of probable cause. She concludes that the application as presented afforded the magistrate "no specific evidence" on which to base the warrant.

Thus, while our dissenting colleague implies that the magistrate's finding falls short on the specificity test, she actually seems to be questioning its reliability. In her view, a sworn statement to a magistrate by an OSHA Assistant Area Director to the effect that a referral had been received from a specifically named and concededly reliable source is not sufficiently reliable to support a warrant. Indeed, as she has not pointed to any basis in the record to question the reliability of the statement, our colleague appears to be finding that such an averment is unreliable *per se*. In short, our dissenting colleague is substituting her opinion about the veracity or reliability of

OSHA officials for the conclusions of the magistrate, a substitution under the circumstances of this case that we are unwilling to make.[5]

C.

The Secretary also cited Respondent for failing to properly maintain the OSHA 200 Log,[6] as required by 29 C.F.R. § 1904.7, and for various deficiencies in its written lead compliance program, as required under various subparts of 29 C.F.R. § 1910.1025(e)(3). The judge found that the Secretary exceeded the scope of the warrant by asking Respondent to produce the OSHA 200 Log. According to the judge, it was not obvious how the log was relevant to the elevated blood lead levels of employees, which was the condition the warrant authorized the Secretary to investigate. Similarly, the judge found that the warrant did not authorize the Secretary to investigate Respondent's written lead compliance programs.

We disagree. Elevated blood lead levels above 50 μg/100g[7] are an "illness" that must be recorded on the OSHA 200 Log. *Johnson Controls*, 15 BNA OSHC 2132, 2143, 1991-93 CCH OSHD ¶ 29,953, p.40,973 (No. 89-2614, 1993). The warrant application specifically noted that some Sterling employees had blood lead levels above 50 μg/dl and the warrant specifically authorized the Secretary to inspect

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[5]Commissioner Guttman notes that there is a presumption that administrative agencies, such as OSHA, act within the law and perform their duties properly and in good faith. *Mullins v. United States Department of Energy,* 50 F.3d 990, 993 (Fed. Cir. 1995); *Blinder, Robinson & Co. v. United States Securities and Exchange Commission,* 748 F.2d 1415*,* 1418 (10th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

[6]The OSHA 200 Log lists each recordable injury and illness and is maintained on an annual basis.

[7]We note that the μg/100g and μ/dl are essentially the same unit of measure. *See* Appendix A to § 1910.1025- *Substance Data Sheet for Occupational Exposure to Lead* at ¶ II(B)(3).

all "materials" bearing on the alleged lead problem.[8] Thus, contrary to the judge's decision, we conclude that the warrant was sufficiently broad to include the Log, which could have contained information that revealed lead related illness and, therefore, provided evidence revealing the extent and duration of employee lead exposure.

The presence or absence of an adequate written lead compliance program also was relevant to whether the high employee blood lead levels were related to workplace conditions and work practices. The warrant authorized the Secretary to inspect "materials" relevant to the referral. Certainly, the OSHA 200 Log and the written lead compliance program constitute "materials." Indeed, it would seem to be illogical to conclude that an examination of an employer's lead compliance program and employee medical records that could reveal lead related illnesses is beyond the scope of a warrant to inspect for lead exposure levels at the workplace.[9]

Accordingly, the judge's decision is set aside. In accordance with the parties' stipulation, the citations are affirmed and the proposed penalties of $6300 are assessed.

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[8]Referencing the Pennsylvania Health Department referral, which cited high employee blood lead levels, the warrant stated that:

> . . . .the inspection shall extend to all pertinent conditions, structures, machines, apparatus, devices, equipment, *materials*, and all other things therein (including processes, controls and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees, and whether this employer is complying with the Occupational Safety and Health Standards promulgated under the Act and the rules, regulations and orders issued pursuant to the Act.

(Emphasis added).

[9]Because we find that the warrant was valid and that the inspection did not exceed the scope of the warrant, we do not address whether the judge erred in suppressing the evidence only as to the penalty.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: March 11, 1997

MONTOYA, Commissioner, dissenting:

Unlike the majority, I believe the judge correctly found the warrant by which the Secretary inspected Sterling's plumbing fixtures manufacturing operation to be invalid.

By affidavit of December 14, 1994, Ibtsam S. Barazi, OSHA's Assistant Area Director for Health in Charleston, West Virginia, applied for a warrant to inspect Sterling's facility on Route 7 in Morgantown. In paragraph 5 of the application, Mr. Barazi states that the Pennsylvania Health Department referred a report of unsafe and unhealthful conditions at this worksite to OSHA's Region III office in Philadelphia. Paragraph 5 ends with the statement that "[a] copy of the referral is attached hereto and made a part hereof as Exhibit A." What is actually attached as "Exhibit A," however, is a brief internal cover memo from OSHA's Region III office in Philadelphia by which the Pennsylvania referral was apparently forwarded to OSHA's Area Director in Charleston "for appropriate action." While this OSHA memo does represent that the referral includes evidence that "a number" of Sterling's employees had blood lead levels in excess of OSHA's medical removal level, the memo says nothing as to the type of hazards present, the exact number of exposed employees, or even Sterling's exact location. And, of course, this memo is an internal OSHA document, which, at best, constitutes a hearsay assurance that OSHA possesses specific evidence that Sterling's employees had blood lead levels in excess of OSHA's medical removal level. In paragraph 6, Mr. Barazi goes on to state that he has reviewed Pennsylvania's OSHA 90 referral form, and that, based on the hazards described in part 19 of the form, he has "determined that these conditions constitute probable violations" of the lead standard at 29 C.F.R. § 1910.1025. Reading paragraphs 5 and 6 of the warrant application together, it can hardly be denied that Mr. Barazi intended this Pennsylvania Health Department OSHA 90 form to be attached as "Exhibit A," and I have no particular reason to doubt that the correct exhibit would have established probable cause for this warrant. However, the warrant application -- as submitted -- was supported only by summary assertions in

Mr. Barazi's boilerplate affidavit, and the above described OSHA cover memo. Nonetheless, the District Court for the Northern District of West Virginia issued a warrant, pursuant to which an inspection was conducted.

In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978), the Supreme Court held that the Secretary can establish probable cause for the issuance of an administrative warrant by presenting "specific evidence of an existing violation." The *only* evidence of an existing violation referred to in the Secretary's warrant application was contained in Pennsylvania Health Department's referral, and that referral was *not* provided. Instead, the Secretary's warrant application was supported only by his own assertions that specific evidence of existing violations does exist. In *Donovan v. Federal Clearing Die Casting Co*., 655 F.2d 793, 797 (7th Cir. 1981), the Seventh Circuit Court of Appeals quashed a warrant, saying that "[a] magistrate must be presented with facts upon which he can exercise the independent judgement required of him." In *Weyerhauser v. Marshall,* 592 F.2d 373, 378 (7th Cir. 1979), the same court quashed a warrant on the grounds that an application based on mere boilerplate statements by the Secretary, that he had received a complaint and determined that there were reasonable grounds to believe that violations existed, had reduced the magistrate to a "rubber stamp." The court also noted that "the very purpose of a warrant is to have the probable cause determination made by a detached judicial officer rather than by a perhaps overzealous law enforcement agency." *Id*. In *Marshall v. Horn Seed Co.,* 647 F.2d 96 (10th Cir. 1981), the Tenth Circuit Court of Appeals quashed a warrant, even though the application included an affidavit detailing complaints of various violations. The court concluded that the Secretary should have attached a copy of the complaint, and also specified the steps taken to verify its contents.

In concluding that the warrant here is not valid, I am mindful of the standard of review established by such decisions as *West Point-Pepperell, Inc. v. Donovan,* 689 F.2d 950, 959 (11th Cir. 1982) (the magistrate's findings should be considered

conclusive so long as they are not arbitrary), *Secretary of Labor v. Midwest Instruments Co.*, 900 F.2d 1150, 1154 (7th Cir. 1990) (evidence supporting the warrant application need only establish a "reasonable suspicion of a violation"), and *In re Establishment Inspection of Kelly-Springfield Tire Co.*, 13 F.3d 1160, 1165 (7th Cir. 1994) (magistrate will only be reversed for "clear error"). I agree with the majority that Pennsylvania Health Department is an inherently reliable source. Therefore, had Mr. Barazi supported his warrant application with a referral from this agency, it would have been unnecessary for the Secretary to demonstrate that she had investigated the referral to determine it's validity. However, *Barlow's* requires the Secretary to provide specific evidence of an existing violation. The majority has entirely ignored this requirement by treating a mere hearsay assertion by the Secretary that such evidence exists as having the same inherent reliability as the evidence itself, a considerable leap of faith that this Commissioner is unwilling to take. Repeating the words of the *Weyerhauser v. Marshall* court, "the very purpose of a warrant is to have the probable cause determination made by a detached judicial officer rather than by a perhaps overzealous law enforcement agency." 592 F.2d 373, 378. Again, the Secretary presented only an internal OSHA cover memorandum to the District Court magistrate who ruled on this warrant application.[10] With no specific evidence upon which the magistrate could have made an *independent* probable cause determination, I can only conclude that his decision to issue this warrant was arbitrary and clearly erroneous.

I also agree with Judge Frye's decision that the proof gathered pursuant to this invalid warrant should only be suppressed for penalty purposes, thereby allowing the

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[10]The scope of our review of the magistrate's decision is limited to the materials upon which the magistrate actually decided the warrant application. Therefore, once the warrant was executed, the Secretary could not have cured Mr. Barazi's error by making the Pennsylvania referral available to Judge Frye, who first reviewed Sterling's challenge to the validity of this warrant, or to the Commission.

Secretary to use the same evidence to seek an order of abatement. The Commission has determined that the exclusionary rule applies to its proceedings. *Sanders Lead Co.*, 15 BNA OSHC 1640,1651, 1991-93 CCH OSHD ¶ 29,690, p. 40,270 (No. 87-0260,1992). While the Circuit Courts have agreed, they have also said that the good faith exception must be liberally applied when considering orders of abatement. *Trinity Industries v. OSHRC*, 16 F.3d 1455, 1462 (6th Cir. 1994); *Smith Steel Casting v. Brock,* 800 F.2d 1329, 1334 (5th Cir. 1896). As I have already indicated, the invalidity of this warrant likely was not due to the failure of the Secretary to acquire evidence sufficient to establish administrative probable cause. Rather it was due to an apparent clerical mistake on the part of personnel at OSHA's Charleston Area Office, a mistake that was compounded by the District Court magistrate who issued the warrant. Considering that the Secretary did perform this inspection pursuant to the warrant, and that Sterling has not challenged the citations on their merits, I think it quite correct that the evidence gathered pursuant to the warrant should be available to the Secretary for purposes of obtaining an order of abatement.

The judge did not resolve the abatement issues, presumably because the stipulation filed by the parties did not allow for his conclusion that while the warrant was invalid, the evidence gathered would only be suppressed for penalty purposes. I would therefore remand this case for further proceedings consistent with my dissent.

/s/
Velma Montoya
Commissioner

Dated: March 11, 1997