UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Office of the
General Counsel

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 92-296
NIEMAND INDUSTRIES, INC.,	:	
Respondent.	:	

ORDER

This case is before the Commission on remand from the United States Court of Appeals for the Eleventh Circuit. *Niemand Indus., Inc. v. Reich*, 73 F.3d 1083 (11th Cir. 1996). In its decision, the court reversed a decision by the Commission finding that Niemand Industries, Inc. ("Niemand") had committed a serious violation of the occupational safety and health standard at 29 C.F.R. § 1910.1000(c) by exposing one of its employees to talc in excess of the levels permitted by the standard. *Niemand Indus., Inc. v. Reich*, 16 BNA OSHC 1947, 1993-95 CCH OSHD ¶ 30,501 (No. 92-296, 1994). The court held that "OSHA may not prosecute a violation on the basis of a measurement technique not provided for in Table Z-3." 73 F.3d at 1085.

The court's decision specifically addressed item 2b of the citation, which alleged that Niemand's employees were exposed to excessive levels of talc. Item 2a of the citation alleged that Niemand's employees who were exposed to excessive levels of talc used unapproved dust masks for protection instead of approved respirators. Item 2c of the citation alleged that when employees were exposed to excessive levels of talc feasible engineering and administrative controls were not used to protect them. Because item 2b, which alleged exposure to excessive levels of talc, must be vacated, it appeared to the Commission that items 2a and 2c, which are predicated on overexposure to talc, must also be vacated.

In an order dated May 28, 1996, we asked the Secretary to address within ten days whether, under the court's decision, items 2a, 2b, and 2c of the citation must be vacated, along with the penalty assessed for those three items. Having received no response, we now vacate items 2a, 2b, and 2c of the citation, which alleged violations of the standards at 29 C.F.R. §§ 1910.134(a)(1), 1910.1000(c), and 1910.1000(e), respectively. We also vacate the penalty of $2,800 assessed for those items.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Velma Montoya
Velma Montoya
Commissioner

Daniel Guttman
Daniel Guttman
Commissioner

Dated: September 4, 1996

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SECRETARY OF LABOR, Complainant, v. NIEMAND INDUSTRIES, INC., Respondent.	OSHRC Docket No. 92-0296

NOTICE OF COMMISSION DECISION

The attached order by the Occupational Safety and Health Review Commission was issued on September 4, 1996. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Date: September 4, 1996

Ray H. Darling, Jr.
Executive Secretary

92-0296

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
NIEMAND INDUSTRY, INC.
Respondent.

OSHRC DOCKET
NO. 92-0296

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 11, 1993. The decision of the Judge will become a final order of the Commission on April 12, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 31, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 11, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0296

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SECRETARY OF LABOR,	:	
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v.	:	OSHRC Docket No. 92-296
NIEMAND INDUSTRIES, INC.,	:	
Respondent.	:	

APPEARANCES:

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U. S. Department of Labor
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For Complainant

Richard F. Kane, Esquire
Blakeney and Alexander
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For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

Respondent, Niemand Industries, Inc., operates a manufacturing plant in Marion, Alabama, where it produces containers and other products for shipment in interstate commerce. The focus of this case is upon employees engaged in respondent's talc department who were allegedly exposed to a hazardous substance (talc) in excess of the permissible exposure limit (PEL) imposed by 29 C.F.R. § 1910.1000 and Table Z-3.

The Secretary's inspection of respondent's facility resulted from a complaint received by the Secretary alleging irregularities in the talc department (Tr. 12, 14). This inspection was conducted on October 30 and 31, 1991, by Valentin Ille, Jr., an industrial hygienist employed by the Occupational Safety and Health Administration (OSHA), who performed both noise and air sampling tests at respondent's establishment. Following this inspection, respondent was issued Serious Citation No. 1, charging it with infractions of 29 C.F.R. § 1910.95 (the noise standard) and 29 C.F.R. § 1910.1000 (air contaminants). Respondent was also issued "Other" Citation No. 2, alleging violation of § 1910.20 for failure to inform its employees of the existence, location and availability of employee exposure records.

Subsequent to the issuance of the original citation, but before the Secretary filed a formal complaint, the Secretary amended Serious Citation No. 1 by deleting items 1a, 1b and 1c (noise). Therefore, these items are no longer in contention. At the hearing, respondent's counsel conceded respondent had not complied with the requirements set forth in "Other" Citation No. 2 and stipulated that, should the court determine a violation of Serious Citation No. 1, item 2, respondent did not contest the charges contained in "Other" Citation No. 2, and this citation would be affirmed by the court without penalty (Tr. 84-85).

The following items of Serious Citation No. 1 remain at issue:

Item 2a

> 29 CFR 1910.134(a)(1): When effective engineering controls were not feasible or while they were being instituted, appropriate respirators were not used pursuant to the requirement of this section:
>
> (a) Employees in the Talc department were wearing the 3M 8500 disposable dust mask, this mask is not a NIOSH approved dust mask.

Item 2b

> 29 CFR 1910.1000(c): Employees were exposed to materials in excess of the 8-hour time-weighted average limit listed for those materials in Table Z-3 of Subpart 2, 29 CFR 1910.1000:

(a) Two employees in the Talc department were exposed to talc concentrations while mixing and packing. The mixer/blender was exposed to talc dust at the time-weighted average (TWA) of 7.05 milligrams of talc per cubic meter of air breathed. Sampling was done on 10/30/91 for a total of 396 minutes. This is 2.35 times above the present permissible exposure level (PEL) of 3 mg 1M3 [*sic*].

(b) The packer was exposed to talc dust at the TWA of 4.98 mg1 M3 [*sic*]. Sampling was done on 10/31/91 for a total of 409 minutes. This is 1.6 times above the present PEL.

Item 2c

29 CFR 1910.1000(e): Feasible administrative or engineering controls were not determined and implemented to reduce employee exposures:

(a) Talc department - Mixer/Blender

(b) Packing talc bottles

The existing ventilation design appeared inadequate. In addition work practices such as using air pressure hose for cleaning should be prohibited. Disposible [*sic*] of empty talc bags should be done in a ventilated enclosure.

The threshold question in this case is whether the Secretary's evidence supports a conclusion that two employees engaged in respondent's talc operation were exposed to toxic material (talc)[1] in excess of the permissible exposure limit mandated in the cited standard. The answer to this question requires an examination of the methodology followed by Ille in conducting the air sampling tests and consideration of other matters raised by respondent at the hearing and in its posthearing brief.

Ille holds a Bachelor of Science degree in electrical engineering and was trained as an industrial hygienist while serving in the Air Force where he practiced this profession for four years (Tr. 11). In 1976 he was employed by OSHA in this capacity and over the years

[1] The fact that talc is a hazardous substance is not disputed by respondent (Tr. 19).

attained the position of senior industrial hygienist. During his employment with OSHA,[2] he took numerous courses at the agency's institute and in 1991 was certified as a fully qualified professional by the American Industrial Hygienist Association. *Id.* Ille has the necessary credentials and displayed his professional competence during the course of his testimony at the hearing. He is considered to be a fully qualified industrial hygienist and competent to render expert testimony in the case.

Ille held an opening conference with Richard Luskin, respondent's comptroller, and Richard Conti, respondent's manager. He explained the purpose of his visit and made a walk-around tour of respondent's plant in the company of Luskin (Tr. 14, 17). Upon visiting the talc department, Ille noted that the operations conducted in this area created a "dusty environment" (Tr. 26). The following day Ille returned to conduct air sampling in respondent's talc department (Tr. 17).

In his testimony, Ille described the sequence of events which occurred in the talc department. Fifty-pound bags of talc were delivered to the area and placed on a platform where employees cut open the bags and dumped the contents into a mixer/blender machine. The talc was then processed through the machine and funneled into bottles which were moving under the machine on a conveyor belt. The bottles were capped and then packed into boxes by respondent's employees who used an air hose to blow off the talc that accumulated on the bottles and inside the boxes (Tr. 26). Ille identified three potential sources of excess exposure to dust. The first potential source occurred when the talc was dumped into the mixer/blender and created a cloud of dust. Although there was an exhaust hood above this operation which sucked up some of the dust, Ille believed this device was ineffective to fully protect employees (Tr. 26). The second source of excess dust occurred when the empty bags were deflated and discarded. This procedure caused the residue dust to leave the bag and escape into the atmosphere (Tr. 27). The third potential source for excess exposure occurred when the employees packing the bottles into boxes used an air hose to blow off the talc which had accumulated on the bottles and in the boxes (Tr. 28-29).

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[2] At the time of the hearing, Ille had left the agency and is currently employed by the Navy Department in Long Beach, California (Tr. 10).

Seven employees were engaged in the foregoing operations. Ille decided to conduct air sampling tests with respect to four of these employees whom he considered to be overexposed to talc.

Using the gravimetric method and a PEL of 3 mg/m3 (milligrams per cubic meter), Ille tested these employees over a period of approximately 400 minutes by placing air pumps and filters within their breathing zones. The results of these tests reflect an overexposure of two employees (a blender and a packer) (Exhs. C-1, C-2; Tr. 39-30).

It is significant to note that respondent employed an independent consultant, ERG Environmental, Inc., to conduct air sampling in the talc department on September 27, 1991, approximately one month before OSHA's inspection. The sampling was performed by William David Yates, an industrial hygienist, who also used the gravimetric method but tested for total nuisance dust (as opposed to talc) and used a PEL of 15 mg/m^3. Yates tested over a 90-minute period, and his test results were well below the PEL specified for total nuisance dust (Exh. R-1).

Did the Secretary Use an Acceptable Method to Determine Overexposure?

Respondent contends that the method used by Ille, which is described in the record as the "gravimetric method," does not comport with the method prescribed in Table Z-3 for determining an overexposure to talc. Respondent correctly notes that the table expresses the PEL for talc in terms of "millions of particles per cubic foot of air" (mppcf) to be measured "based on impinger samples counted by light-field techniques" and sets the limit at 20 mppcf. This method contemplates a microscopic count of particles by the analyzing laboratory, whereas the gravimetric method relies upon an increase in filter weight expressed in milligrams per cubic meter.

Respondent argues with some persuasion that Table Z-3 requires the Secretary to apply a particle count method in its assessment of talc exposure since this is the only method reflected in the table for that particular substance. This argument is bolstered by the fact that other substances listed in the table have PELs expressed in both particle counts and

milligrams per cubic meter (*e.g.*, "nuisance dust - respirable" is expressed as 15 mppcf and 5 mg/m^3). Since the table reflects no conversion between the two methods for talc, respondent urges the Secretary used the wrong method for testing and has failed to establish an overexposure to talc. At first blush respondent's argument seems plausible but, upon consideration of other circumstances reflected in the record, it is concluded that the method employed by Ille is an acceptable alternative method for determining overexposure to talc.

Before conducting the test, Ille consulted the OSHA reference manual and determined that the current methodology for testing talc was the "gravimetric technique, using a cyclone[3] . . . with a flow rate of 1.7 liters per minute." Since this method did not coincide with the method referred to in Table Z-3, Ille telephoned the OSHA laboratory in Salt Lake City, sought their advice, and was informed the gravimetric method was an acceptable alternative technique. He was further advised the conversion factor when using this method was three milligrams per cubic meter[4] (Tr. 109-113). This circumstance without additional support, would not, however, be sufficient to ratify the Secretary's position in this case.

As previously noted, respondent employed a consultant, William Yates, to conduct tests in the talc department approximately one month before the Secretary's inspection. Yates holds a Bachelor of Science degree in health services and has taken graduate studies in industrial hygiene (Tr. 196). He has practiced as an industrial hygienist since 1979 (Tr. 197) and, although he is not a certified industrial hygienist (Tr. 202), he appeared to be a competent professional during the course of his testimony. Yates used the same methodology (gravimetric) as that employed by Ille except that he tested for total dust (both respirable and nonrespirable) and did not use a cyclone (Tr. 199) since he wished to consider "a worst case scenerio" [*sic*] (Tr. 207). In any event, Yates used milligrams per cubic meter of air to determine the PEL in evaluating his test results (Tr. 197), which was consistent with that used by Ille. Under examination by the court, Yates admitted that he

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[3] This device removes the nonrespirable particles from exposure to the filter.

[4] This conversion factor is also specified in the Secretary's proposed changes to Table Z-3 found at 53 Fed. Reg. 20,960 (June 7, 1988).

was unfamiliar with the particle count method specified in Table Z-3 (Tr. 211) and agreed with Ille that a PEL measured at three milligrams per cubic meter was acceptable when using the method employed by both industrial hygienists in this case (Tr. 215-216). Accordingly, this court concludes the Secretary in this case used an acceptable alternative method to determine an overexposure to talc.

Did the Secretary Follow Recognized Procedures In Conducting the Samples?

In conducting the air sampling tests, Ille used the procedures and techniques outlined in the agency's reference manuals. The pumps used to obtain the air samples were pre-calibrated and post-calibrated. The filters used in the cassettes were weighed before testing and were desiccated[5] and weighed after the tests were completed. Ille set the flow rate on the pumps at 1.7 liters per minute and monitored the pumps throughout the procedure to insure the flow rate was maintained. He took appropriate steps to safeguard the cassettes and filters to assure the integrity of the samples. He recorded the times when the filters were placed upon each employee and when they were removed. The precise procedures utilized by Ille are detailed in his testimony (Tr. 34-60) and are recorded on his air sampling worksheets (Exhs. C-1, C-2). This court concludes Ille substantially followed prescribed procedures in conducting the air samples under the gravimetric method. Any deviations which may have occurred were insignificant and would not materially alter the results obtained.

Were the Secretary's Samples Flawed by Sabotage?

At the hearing and in its posthearing brief, respondent argues the evidence supports a conclusion that the blender (William Huckabee) may have sabotaged the test results by intentionally saturating his cassette with excessive talc. This assertion is based upon the testimony of Richard Luskin who accompanied Ille during the testing procedures. Luskin

[5] A method used to remove the moisture from the exposed filter.

testified Ille did not closely monitor the employees wearing the pumps and cassettes throughout the entire time of the tests (Tr. 184). According to Luskin, after placing the testing devices on the employees in the talc department, Ille left that department and did not return for "an hour to an hour and a half" (Tr. 186), at which time the blender had a "pile of talc" on his cassette (Tr 187). He brought this situation to Ille's attention and asked Ille "if it could be sabotaged, if that was normal, and he said he didn't think it would make any difference." *Id.* While Luskin recognized it was "normal" for the blender to have "talc on his clothes," he did not believe the buildup of talc on the blender's cassette was a normal occurrence and believed the employee had intentionally attempted to sabotage the test. It is significant to note, however, that Luskin did not discuss this circumstance with the involved employee (*Id.*,) nor did he make any attempt to persuade Ille to abort the test on this basis.

Ille had some recollection of the circumstances concerning the buildup of talc on the blender's cassette but was rather vague on the details. His written report makes no mention of this occurrence, and it was his testimony that if he had considered the event significant, he "certainly would have put it in [his] report" (Tr. 172-173). He did recall having a general discussion with Luskin concerning the possibility of sabotage but dismissed this possibility as remote because an employee attempting to sabotage would have to "take apart" the cassette which "is not that easy." He believed deliberate sabotage was beyond the comprehension of "most people" (Tr. 173) and did not occur in this case.

In support of its sabotage argument, respondent also points to the divergence of test results between the samples conducted in the morning and those obtained in the afternoon. Ille tested the blender for a period of 235 minutes in the morning with a net sample weight gain of 3.926 mgs. In the afternoon, the test ran for 152 minutes with a net sample weight of 1.826. Based upon the data collected, Ille determined this employee was exposed to a time-weighted average of 7.06 mg/m^3 (Exh. C-1). The amount of talc collected during the morning sampling is more than twice that obtained in the afternoon (Tr. 175), and this fact lends strong support to respondent's theory that the blender may have attempted to

sabotage the sample.[6] The court stops short, however, of making a specific finding in this regard since the evidence presented is insufficient to tip the scales in respondent's favor.

The Secretary's case does not depend entirely upon the test results obtained in the case of the blender. Ille also tested Luredia Smith, a packer in the talc department, whose test results reflect an overexposure to talc (Exh. C-2). This employee was tested over a period of 405 minutes (245 minutes in the morning and 160 minutes in the afternoon) with net sample weights of 1.805 in the morning and 2.184 in the afternoon. The time-weighted average for this employee reveals an exposure of 4.89 mg/m^3, well above the PEL for talc (Exh. C-1, pg. 2). There is nothing in the record to support a conclusion that the test results with respect to this employee were compromised by sabotage. On the contrary, the weight gain on the filter in the morning (1.805 mgs.) approximates the weight gain in the afternoon (2.184) and does not suggest any attempt at "foul play."

In summary, this court finds the Secretary has established at least one of respondent's employees was exposed to talc in excess of the PEL with no indication that sabotage played any part in the results.

Did Respondent Have Knowledge of the Violative Condition?

Respondent asserts it lacked knowledge that its employees in the talc department were overexposed to a hazardous substance. This argument is based solely upon the test results obtained by Yates which reflect these employees were not overexposed to "nuisance dust" at the time Yates conducted his test. The question presented is whether respondent, in reliance upon these results, can claim it lacked knowledge of a violative condition.

There is no dispute in the record that the substance being processed by the employees in question was talc, a recognized hazardous substance. Both Ille and Yates noted in their respective testimony that the process conducted in the talc department created a dusty environment (Tr. 26, 217). This condition should place a reasonably prudent

[6] Ille attempted to explain this discrepancy on the basis that more work was performed by the blender in the morning, but this is mere speculation and was not supported by credible evidence (Tr. 174-175).

employer on notice that its employees may be overexposed to a hazardous substance. Indeed, respondent had taken some steps to guard against this possibility. Employees in this department were wearing disposable dust masks, which indicates an awareness by respondent of their potential exposure to a hazardous substance. Likewise, respondent had some semblance of a ventilation system in place above the blender/mixture machine to diminish the exposure of employees working in that area to the dust created when the raw talc was dumped into the machine, further reflecting an awareness by respondent of the need to protect employees. It is abundantly clear that respondent was well aware of the potential for exposure even before Yates conducted his tests.

The Secretary argues that Yates' results should have no bearing on the outcome since he tested for nuisance dust, not talc, and the duration of his tests were too short to guarantee reliable results.[7] The court has considered this argument, which may have merit, but believes this issue can be resolved on another basis.

The principal reason for rejection of respondent's knowledge contention must be based upon a consideration of all circumstances. Starting with the premise that employees in the talc department would inevitably be exposed to some level of exposure to talc, the respondent had a continuing obligation to closely monitor this situation and take effective steps to recognize and then minimize the overexposure of its employees. Respondent offered no evidence at the hearing to establish that the day selected for Yates' testing was typical. It is reasonable to assume that exposure to talc would vary from day to day depending upon the amount of talc processed, the speed of the process, and the amount of time spent by each employee at particular locations. Such variables cannot be finally resolved on the basis of a single test conducted in the manner which respondent employed in this case. Respondent's reliance upon Yates' results was misplaced, and this one event cannot serve as a basis for respondent's claim that it lacked knowledge of the violative condition.

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[7] Yates conceded in his testimony that his 90-minute sample was less reliable than would be achieved over a full 8-hour period (Tr. 220).

The Remaining Charges

Having determined that employees were overexposed to talc and that the Secretary has established a violation as charged in Serious Citation No. 1, item 2b, it is now necessary to consider the charges raised in Serious Citation No. 1, items 2a and 2c.

Item 2a charges a violation of 29 C.F.R. § 1910.134(a)(1), as a result of respondent's alleged failure to supply appropriate respirators to employees working in the talc department. Ille observed employees in this department wearing 3M 8500 Series disposable masks which were not NIOSH-approved for the conditions existing in this area. Labels on the masks, together with labels on the shipping box in which they were received, reflected that these masks were not intended for industrial use or for protection against toxic substances (Tr. 31-32). Ille's testimony in this regard went unchallenged by respondent, and this item will be affirmed.

Item 2c alleges a violation of § 1910.1000(e) resulting from respondent's failure to implement engineering controls to protect employees working at the blender machine and in the packing operation from an overexposure to talc dust. Above the blender machine, Ille observed an exhaust system which could serve as an adequate engineering control with only slight modification. It was his opinion the existing system was inadequate to effectively remove the dust generated in this area, but that this situation could be corrected by increasing the size of the hood and installing a more powerful electric motor to run the fan (Tr. 75-76). The excess dust generated when empty bags are compressed for disposal could also be controlled by using a container device hooked into the exhaust system (Tr. 77). Ille testified there were no existing engineering controls to protect the packers from the dust generated when compressed air hoses were used to blow off the bottles in the packing operation. This situation could be easily rectified by substituting a vacuum system to accomplish this task (Tr. 78). Respondent offered no evidence to challenge Ille's testimony concerning these matters, and Serious Citation No. 1, item 2c, will be affirmed.

The Secretary proposes a total penalty of $2,800 for items 2a, 2b, and 2c. Upon review of the matters specified in section 17(j) of the Act, the Secretary's proposal is considered appropriate and a penalty of $2,800 will be assessed.

The foregoing constitutes the findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

It is hereby ORDERED:

(1) Serious Citation No. 1, items 2a, 2b, and 2c, are affirmed and a penalty of $2,800 is assessed.

(2) "Other" Citation No. 2 is affirmed with no penalty assessed.

EDWIN G. SALYERS
Judge

Date: March 4, 1993