



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

One Lafayette Centre  
1120 20th Street, N.W. — 9th Floor  
Washington, DC 20036-3419

PHONE:  
COM (202) 606-5100  
FTS (202) 606-5100

FAX:  
COM (202) 606-5050  
FTS (202) 606-5050

SECRETARY OF LABOR  
Complainant,

v.

FLUIDICS/POOLE & KENT JOINT VENTURE  
Respondent.

OSHRC DOCKET  
NO. 92-2231

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 July 16, 1993. The decision of the Judge will become a final order of the Commission on August 16, 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 August 5, 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  
1120 20th St. N.W., Suite 980  
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.  
Executive Secretary

Date: July 16, 1993

DOCKET NO. 92-2231

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Ave., N.W.  
Washington, D.C. 20210

Marshall H. Harris, Esq.  
Regional Solicitor  
Office of the Solicitor, U.S. DOL  
14480 Gateway Building  
3535 Market Street  
Philadelphia, PA 19104

James F. Sassaman, Director of  
Safety  
GBCA  
P.O. Box 15959  
36 South 18th Street  
Philadelphia, PA 19103

Irving Sommer  
Chief Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
One Lafayette Centre  
1120 20th St. N.W., Suite 990  
Washington, DC 20036 3419

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SECRETARY OF LABOR,

Complainant,

v.

FLUIDICS, INC./THE POOLE &  
 KENT COMPANY, AJV,

Respondent.

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Docket No. 92-2231

Appearances:

Richard T. Buchanan, Esq.  
 U.S. Department of Labor  
 Philadelphia, Pa.  
 For Complainant

James F. Sassaman  
 36 South 18th Street  
 Philadelphia, Pa.  
 For Respondent

Before: Administrative Law Judge Irving Sommer

**DECISION AND ORDER**

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 et seq., (the Act), to review citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Following an inspection of the Respondent's business site at 1032 Black Rock Road, Colledgeville, Pa., the Secretary of Labor issued two citations charging a serious violation of the standard at 29 C.F.R. 1926.300(b)(1), and an other than serious violation of the standard at 29 C.F.R. 1926.352(d).

A hearing was held in Philadelphia, Pennsylvania. No jurisdictional issues are in dispute, the parties having pleaded sufficient facts to establish that the Respondent is subject to the Act and the Commission has jurisdiction of the parties and of the subject matter.

### DISCUSSION

#### Alleged Violation of 29 C.F.R. 1926.300(b)(1)-Serious Citation no. 1, item 1

The standard at 1926.300(b)(1) states:

(b) Guarding. (1) When power operated tools are designed to accommodate guards, they shall be equipped with such guards when in use.

The Secretary alleges that a respondent employee used a hand grinder with a fiber blade with the guard removed exposing him to injury such as cuts, etc. The compliance officer testified that on April 30, 1992 he observed a group of respondent employees doing duct work, and upon closer observation noted a grinder on the floor which had no guard. He spoke to Mr. Consorte, a steamfitter doing the work who identified the grinder as his, stating he had removed the guard the previous day to be able to work in close quarters, and that he had used it on April 30 without re-installing the guard. The compliance officer testified that the use of the grinder without the guard subjected the employee to the hazard of being struck in the face by flying material off the blade causing possible cuts and lacerations to that area as well as eye injuries, and as such was a serious violation of the standard. He stated that the violation was obvious and in full view of the respondent's foreman working in the general area, who knew or should have known of the violation. Conforte testified that he had used the grinder on April 29 without the guard since he was working in close quarters, but he had not used it on April 30. The question which presents itself is which version of the facts is the truthful one. I have had the opportunity of observing the witnesses upon the stand and to weigh accordingly the credibility of their testimony. The compliance officer testified in a frank and convincing manner and appeared to be truthful and his testimony was sufficient to make out a prima facie case. Consorte did not impress me with the credibility of his testimony which fluctuated and lacked the definiteness

associated with truth. I believe that his testimony that he had not used the grinder on April 30 was made to serve his best interests and that of his employer, and I reject it- I believe his initial statement to the compliance officer on the very day he was questioned (April 30) reflecting its use without a guard is the true picture of what happened therein. I find that Consorte used the grinder without a guard, subjecting himself to possible serious injuries, and that the respondent's foreman knew or should have known of such hazard. The totality of the evidence establishes a violation of 1926.300(b)(1). Under all the existing facts and circumstances, a penalty of \$375 for said violation is consistent with the criteria set forth in section 17(j) of the Act.

**Alleged Violation of 29 C.F.R. 352(d)-Other than Serious Citation no. 2, item 1**

The standard at 1926.352(d) provides:

**Fire prevention. (d) Suitable fire extinguishing equipment shall be immediately available in the work area and shall be maintained in a state of readiness for instant use.**

The Secretary alleges that the respondent violated this standard in that "Suitable fire extinguishing equipment was not immediately available in the work areas where welding, cutting or sweating was being performed."

The compliance officer testified he observed a respondent employee "sweating the joints of a pipe in the ceiling." He further observed that there was no fire extinguishing equipment for approximately 30 feet in either direction from where the work was being performed. He further testified that the employee stated he usually had a fire extinguisher in his tool basket, but it was not there at that time. During the discussion, another employee standing there went down the hall "quite a distance and made a right turn into, I believe it was a room, and -- to procure a fire extinguisher." The compliance officer says he spoke at "least a minute" to the employee doing the soldering and no extinguisher was brought. He left and upon his return (he did not say how much later), there was one there. Paskill, the employee doing the soldering testified that Abbott, the other employee at the scene went for the extinguisher and got one in "no more than 15 seconds, ten, 15 seconds." The standard requires that such equipment be "immediately available", and be maintained for instant use". The common meaning of immediate and instant implies "no delay whatsoever,

as between request and response." American Heritage Dictionary of the English Language. New College Edition, 1976, Houghton Mifflin Co., p. 658.

The standard in simple terms means what it says - it is obvious to any reasonable person that fire fighting equipment to stem an incipient fire and prevent injury must be at hand as soon as a fire occurs. In the instant case it is obvious such was not available instantly. The compliance officer testified that the employees were subject to the hazard of burns should their clothing or the surrounding debris ignite. The hazard was openly visible to the respondent's foreman who was in the area. The preponderance of the credible evidence demonstrates the respondent violated the standard at 1926.352(d). No penalty was assessed.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law inconsistent with this decision are denied.

### **ORDER**

Based upon the Findings of Fact, Conclusions of Law, and the entire record, it is hereby ORDERED:

1. Citation no. 1, item 1 is AFFIRMED as a serious violation of 29 C.F.R. 1926.300(b)(1) with a penalty of \$375 assessed.
2. Citation no. 2, item 1 is AFFIRMED as a non serious violation of 29 C.F.R. 1926.352(d) with no penalty assessed.

  
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IRVING SOMMER  
Judge

DATED:

Washington, D.C.