United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR
Complainant,
v.
PERINI CORPORATION
Respondent.

OSHRC DOCKET
NO. 94-2207

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 September 28, 1995. The decision of the Judge will become a final order of the Commission on October 30, 1995 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 October 18, 1995 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
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Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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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.

Date: September 28, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-2207

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 94-2207
PERINI CORPORATION,	:	
Respondent,	:	

Appearances

Laura V. Fargas, Esquire Attorney Solicitor of Labor Washington, D.C. For Complainant	Walter K. McDonough, Esquire Assistant General Counsel Framingham, MA For Respondent

BEFORE: JOHN H. FRYE, III, Judge, OSHRC

DECISION AND ORDER

INTRODUCTION

This case is a result of two citations issued against Perini Corporation ("Perini") by the Secretary of Labor ("Secretary") pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1) ("Act"). The citations -- one serious, the second other-than-serious -- were issued on July 1, 1994, as a result of inspections conducted from June 9 through 23, 1994, at Perini's construction worksite located at 14th and Pennsylvania Avenue in Washington, DC. The total proposed penalty for the two citations was $2,000.00, which was attached to Citation No.1. Prior

to submission of this case, Citation No. 1 was amended from a serious violation to an other-than-serious violation and Perini withdrew their notice of contest, paying the reduced $1,500.00 fine. Citation No. 2, Item 2 has been dropped as part of the parties' agreement to seek judgment based on 27 stipulations. Thus, Citation No. 2, Item 1 is the only violation being considered. That citation involves a violation of 29 C.F.R. § 1926.34(b), and alleges that Perini's worksite contained exits that "were not marked by readily visible signs in all cases where the exit or way to reach it was not immediately visible to the occupants." This violation carries no penalty and is listed as an other-than-serious Violation.

FINDINGS OF FACT

Respondent Perini is a construction corporation which was engaged in a construction project located at Federal Triangle ("Worksite"). Perini employs 200 workers, 51 of which were at the worksite at the time of the inspections. The worksite layout and configuration was continually changing as construction progressed; access areas and exits changed on a daily or weekly basis.[1] During the time of the inspections and for several months previous, exit signs were not provided for the four below-ground levels that constituted the construction site at that time. Additionally, no natural light illuminated the B1-B4 levels,[2] electricity was not yet

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[1] See Joint Stipulation 16 ("configuration ... dynamic and constantly changes"); Secretary of Labor's Brief at 2 (exit locations varied daily, sometimes several times a day).

[2] Joint Stipulation 19.

available for the levels,[3] and light level at the worksite was measured at the time of inspection at 1-2 footcandles.[4] Several subcontractors had informed Perini in writing during the three months prior to the OSHA inspections that they felt the unmarked means of egress from the worksite present dangerous worker conditions.[5]

29 C.F.R. §1926.34(b) : Other-than-serious Citation No. 2, Item 1

The standard allegedly violated by Perini, 29 C.F.R. § 1926.34(b), was adopted in part from the series of 29 C.F.R. § 1910 standards, in order to be applied specifically to the construction industry.[6] Many of the standards codified under 1926 had previously been recognized as applicable to the construction industry, but were scattered throughout the labor regulations. In 1979,[7] partially at the request of the industry itself, OSHA codified all such

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[3] Joint Stipulations 4 and 18 (worksite was in early stages of construction and no power system had yet been put in place for levels B1-B4).

[4] Joint Stipulations 20. A footcandle is defined as "the amount of illumination generated by one candle over one square foot, also termed 'one lumen.'" Websters New Collegiate Dictionary ____ (___ ed. 1977). Note that 29 C.F.R. § 1926.56 Table D-3 requires a minimum of 5 footcandles at construction worksites in general work areas and a minimum of 3 footcandles in accessways.

[5] JX-1 ("compliance with OSHA 1926.34 ... in serious question"; "...measures should be taken to correct this problem in a timely fashion"); JX-2 ("adequate means of egress ... not available"); JX-3 ("means of egress ... severely impaired" creating "serious safety concern"; "means of egress as a serious safety concern"); JX-4 ("confusion exists as how to enter and exit the job"; "In an emergency situation and if a site evacuation would become necessary, the workers would not have the directions to make a rapid and safe exit"; "immediate attention ... [is] necessary to prevent a possible serious situation").

[6] 53 Fed. Reg. 35083 (1993) (to be codified at 29 C.F.R. § 1926).

[7] 44 Fed. Reg. 8577 (1979) (to be codified to 29 C.F.R.§ 1926).

recognized construction standards together in one section, in order to limit confusion for citations issued using the § 1910 general industry standards. The § 1926.34(b) violation, however, is a provision newly recognized as applicable to the construction industry, and therefore creates a case of first impression necessitating the construing of terms used in the standard. Perini suggests that the Secretary has misapplied § 1926.34(b) to Perini because the workers present at the worksite did not "occupy" the area in the sense the word is used in the standard.[8] Both parties have agreed to 27 Joint Stipulations in which they state that "[i]f the standard was legally applicable to its operations in that the Project was 'occupied' for the purposes of the standard, Respondent was in violation of 29 C.F.R. § 1926.34(b) regarding employee accessibility to exits."[9] Perini agrees in the Joint Stipulation that "[i]n the event the standard is found to apply to the Project, the parties stipulate that Respondent's employees and the employees of other construction contractors ... were exposed to the hazard of impaired access to worksite egress created by the violation of 29 C.F.R. § 1926.34(b).[10] Further, the parties stipulated that "[i]n the event the standard is found to apply, ... the parties stipulate that Respondent had *knowledge* of the conditions which led to the citation for violation of 29 C.F.R. § 1926.34(b)."[11] Additionally, the parties have agreed that if the standard applies, Perini's violation of 29 C.F.R. § 1926.34(b)

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[8] See Joint Stipulation 26 ("Respondent ... maintain[s] ... that the cited standard was inapplicable ... because the Project was not 'occupied' within the meaning of 29 C.F.R. § 1926.34(a)") But note that the standard for which Perini was cited is 29 C.F.R. § 1926.34(*b*), thus the term "occupied" must be construed from that standard.

[9] Joint Stipulation 6.

[10] Joint Stipulation 22.

[11] Joint Stipulation 23 (emphasis added).

should be considered "an *other-than-serious* violation."[12] The Secretary has recommended that no penalty be imposed on Perini after considering the following factors: (1) the size of the business;[13] (2) the gravity of the violation; (3) the good faith of the employer; and (4) the prior history of violations.[14] In return, Perini has waived all of its defenses, including that of infeasibility.[15] Thus, the point of contention between Perini and Secretary is whether at the time of the OSHA inspection, the worksite constituted an "occupied" building for the purposes of applying 29 C.F.R. § 1926.34. No employer has yet challenged the correct interpretation of the term "occupied" under the standard; thus, this case will provide the official interpretation of § 1926.34.

DISCUSSION

The Secretary points to Chevron v. NRDC, 467 U.S. 837, 843-45 (1984), insisting that pursuant to its holding, newly-adopted statutory provisions must be interpreted according to their plain meaning.[16] Under Chevron, statutory language is to be understood in its usual, most well-known and widely-accepted meaning.

In the alternative, the Secretary explains that where the meaning of the statutory language

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12 Joint Stipulation 25 (emphasis added).

13 Note that Perini has been in the construction industry for approximately 100 years.

14 No evidence was provided regarding Perini's past violation history.

15 Joint Stipulation 26.

16 Secretary's Brief at 5-6.

is not plain on its face, the Secretary's *reasonable construction* of his own regulation merits Commission deference.[17] The Secretary further insists that this is true even if a competing interpretation is equally reasonable, or even more reasonable.[18] Further, the Secretary states that such deference extends even if such statutory interpretation is announced for the first time during litigation.[19]

The Secretary proposes that the term "occupied" is clear both on its face and in the context of the § 1926 construction industry regulations. In the alternative, should the Commission find the term ambiguous, the Secretary insists that the agency's interpretation of its own standard is reasonable and merits deference,[20] so long as such interpretation is not "plainly erroneous" or inconsistent with the regulation.[21]

The Secretary claims that where workers are "in" or "at" a construction site, the egress standards of § 1926.34 apply, supporting this interpretation with a dictionary definition of

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[17] Secretary's Brief at 6 (citing Martin v. OSHRC, 499 U.S. 144 (1991); Whirlpool v. Marshall, 445 U.S. 1, 9, 11 (1980)); CF&I, 111 S. Ct., 1171, 1175-79 (1991); Ohio Mfr's Ass'n v. City of Akron, 801 F.2d 824, 833-34 (6th Cir. 1986).

[18] Secretary's Brief at 6 (citing CF&I, 111 S. Ct. at 1174-79); see also Chevron, 467 U.S. at 843-45; Udall v. Tallman, 380 U.S. 1, 16 (1965).

[19] Secretary's Brief at 6 (citing CF&I, 111 S. Ct. at 1179).

[20] Secretary's Brief at 10 (citing Lukhard v. Reed, 481 U.S. 368, 376 n.3, 378 (1987); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 227-28, 233, 240-241 (1986); Young v. Comm. Nutrition Inst., 476 U.S. 974, 977-82 (1986); FDIC v. Phila. Gear Crop., 476 U.S. 426, 439 (1986); Hillsborough County Fl. v. Automated Medical Lab., Inc., 471 U.S. 707, 714-15 (1985).

[21] Secretary's Brief at 10 citing CF&I, 111 S. Ct. at 1175-79; Chevron, 467 U.S. at 843-45; Udall, 380 U.S. at 16; Martin v. Pav-Saver Mfg. Co., 933 F.2d 528, 531 (7th Cir. 1991); Texas E. Prods. Pipeline Co. v. OSHRC, 827 F.2d 46, 48 (7th Cir. 1987).

"occupied" as "to [be] fill[ed] up."[22] Using this definition, the Secretary insists that "occupied" does not imply any sort of legal status as Perini proposes.[23] However, note that the first accepted definition of "occupied" relies on the theory of "residence" or "possession,"[24] which supports Perini's legal interpretation of "occupied."[25] Perini argues that the term occupied must be construed to mean "legally occupied" in the sense that those in the building are employees of the official legal titleholder, the one to whom the certificate of occupancy has been issued.[26] Perini argues that because the new construction industry standards codified in § 1926 in 1993 were incorporated from § 1910 general industry standards, this court must refer to § 1910 for context in interpreting the §1926 standards.[27] Perini then suggests that this court look to § 1910.36(b)(4) for context of the Secretary's § 1926.34(b) exit marking citation. Perini suggests that § 1910.36(b)(4) distinguishes between "occupied" and "unoccupied." Perini claims that since § 1910.36(b)(4) requires buildings to be "arranged and maintained as to provide free and unobstructed egress from all parts of the building ... at all times *when it is occupied,*" (emphasis added), OSHA implicitly meant to distinguish between occupation and non-occupation. Thus, Perini argues that a legal definition of occupant must be used, and therefore the standard does not

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22 Secretary's Brief at 7 citing Websters New Collegiate Dictionary ___ (__ed. 1977).

23 Secretary's Brief at 7.

24 Secretary's Brief at 7 citing Websters New Collegiate Dictionary ____ (___ed. 1977).

25 Perini's Brief at 1.

26 Perini's Pre-Hearing Statement at 2.

27 Perini's Brief at 4.

apply. Perini states, "where a standard, by its terms, states that it applies when a special condition exists, the converse must be true -- that the standard does not apply when the condition does *not* exist."[28]

This Court finds that the Secretary's definition of "occupied" must be upheld. Perini's argument that § 1910.36(b)(4) provides the basis for § 1926.34(b) is incorrect. Rather, Appendix A to § 1926 which correlates former §1910 standards with the new § 1926 codification, clearly shows that §1926.34(b) was based on §1910.37(q)(1), which contains exactly the same wording. No OSHRC cases have ever construed the term "occupied" as used in § 1910.37(q)(1) as a legal term. In fact, none of the cases have even considered if the term "occupied" should be applied in any sense other than the sense of "being in or at or filling up,"[29] that is the common understanding of the term. This clear common dictionary definition of "occupied" in both §1910.37(q)(1) and §1926.34(b) is clear on its face, and must, under Chevron, be accepted as being used in its most widely-accepted meaning. The reasoning behind the OSH Act also supports such common reading of "occupied," considering that the standard in question was postulated to protect "general industry" workers originally, and later construction industry

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[28] Perini's Brief at 4 n.2 (citing National Fire Protection Associate Life Safety Code § 1-6 which contains language on occupancy similar to that found in 29 C.F.R. § 1910).

[29] See e.g., Smith and Co., Inc.,1 BNA OSHC 1325 (Rev. Comm. 1973); New Hampshire Provision Co., Inc., 1 BNA OSHC 3071 (Rev. Comm. 1974); Anesi Packing Co., 2 BNA OSHC 3010 (Rev. Comm. 1974); Chicago and North Western Transportation Co., 5 BNA OSHC 1121 (Rev. Comm. 1977); Boyd G. Heminger, Inc., 5 BNA OSHC 1695 (Rev. Comm. 1977); Winn-Dixie Atlanta, Inc., Store No. 1810, 6 BNA OSHC 1625 (Rev. Comm. 1978); Westinghouse Broadcast..., 7 BNA OSHC 2158 (Rev. Comm. 1980); Wolf Auto Sales, Inc., 9 BNA OSHC 1947 (Rev. Comm. 1981); Spot-Bilt, Inc., 11 BNA OSHC 1998 (Rev. Comm. 1984); Pymm Thermometer Corp., 13 BNA OSHC 2059 (Rev. Comm. 1984).

workers. Thus, the term "worker" should be deemed interchangeable with the term "occupant," whereby workers when in the place of business are said to be occupants of it. To define "occupied" any other way would defeat the central purpose of the Act.

Perhaps the best parsing of § 1937(q)(1), the precursor of § 1926.34(b), occurred in Westinghouse Broadcasting Co., Inc., 7 OSHC 2158 (Rev. Comm. 1980), which presented a similar problem to Perini's. At Westinghouse's radio studio, a particular area had a very confusing means of egress.[30] The testimony showed that placement of a sign on the door leading to the egress would "eliminate guessing and assure safe egress for employees who might panic in emergencies."[31] By associating a violation of § 1910.37(q)(1) with the above language, the Commission clearly was equating "employee" with "occupant," as an alternate descriptive noun. Further, the Commission upheld the citation for § 1910.37(q)(1) based on the danger to employees who were occupants. Thus, it seems that the use of the word "occupant" in both § 1910.37(q)(1) and § 1926.34(b) is purposeful for drawing a distinction between employees or construction workers who are occupying or in the space from which they must exit from those who are not within the space. By limiting the standard's application to "occupants," therefore, OSHA purposefully attempted to eliminate confusion as to whom the standard protected.[32]

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[30] Westinghouse Broadcasting Co., Inc., 7 BNA OSHC 2158, 2169 (Rev. Comm. 1980) (describing egress as unmarked corridor that "winds its way around ... kind of [like] a maze").

[31] Id.

[32] For example, neither § 1910.37(q)(1) nor § 1926.34(b) would protect workers from dangers associated with exiting a room if they would never be potential occupants of the room. But See Boyd G. Heminger, Inc., 5 BNA OSHC 1695, 1695-96 (Rev. Comm. 1977)(digest)(holding that company violated § 1910.37(q)(1) even where room lacking exit signs

Perini also argues that the Secretary has overstepped his bounds and has attempted a rulemaking without proper notice and comment. Pointing to the adoption of § 1926.34(b) from the general industry standards, Perini argues that this provision cannot be interpreted differently than its source in the general industry standards. Perini notes that in promulgating § 1926.34(b) without notice and comment, the Secretary stated that the new provision did not change existing rights and obligations or establish new ones.[33] This argument is, of necessity, based on the premise that interpreting the term "occupant" to include construction workers constitutes a different interpretation than that which obtains under the general industry standards. Because this premise is false, this argument must fail.

The Secretary's second argument points to the fact that though the § 1926 series of construction standards contains no definition of occupied, they were based in part on the National Fire Protection Association ("NFPA") Life Safety Code. Quoting § 5-2.1.1.3 of the Life Safety Code, the Secretary defines occupancy as any time a building is "open to or accessible to the public or at any other time it is occupied by more than 10 persons."[34] Looking at the plain meaning, the Secretary interprets the NFPA definition to refer to the physical presence of persons, including in this case, employees. There is no question that this Court will

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"was used exclusively to store tools and equipment not actively being used for construction, and that ... building was kept locked at all times except for approximately 30 minutes each day when it was *opened for workers to obtain tools and equipment*)(emphasis added). The Commission determined that even workers who spent as little as 30 minutes in the hazardous area were considered "occupants" and thereby protected under the standard.

[33]*See* 58 *Fed. Reg.* 35077, June 30, 1993.

[34] Secretary's Brief at 8 citing NFPA - 101 (1994).

accept the NFPA definition of "occupied" as applicable to Perini, noting the existence of at least 51 Perini employees on the jobsite, that easily places it within the NFPA guideline of ten occupants. The Secretary stresses that if the term "occupied" under § 1926.34 is not construed to include construction workers, the essence of the standard will be imperiled, rendering it meaningless for those persons it was created to protect. Thus, the Secretary claims that this definition of "occupied" is consistent with the purpose of the Act in general.

Perini also argues that the standard is incongruous, in that it would require Perini to arrange for a temporary lighting system in order to install exit signs while the project was still under construction.[35] Perini and Secretary stipulate that "until ... Project's permanent power system may be used for visible, lighted exit signs, respondent would be required to install and maintain portable signs to meet ... requirements of ... standard."[36] However, this consideration is not relevant to the proper interpretation of the term"occupant." It would appear that the purpose of the standard may well be to require just such a result.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 652(5) ("Act").

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[35] Joint Stipulation 21 and JS-24 (discussing industry practice and claiming no knowledge of use of *illuminated signs* before "permanent power system and ... final exit signs are available for use").

[36] Joint Stipulation 21.

2. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c).

Citation 2, Item 1

3. Respondent was in other-than-serious violation of the standard set out at 29 C.F.R. § 1926.34(b). A penalty of $00 is appropriate.

ORDER

1. Citation 2, Item 1 is affirmed as an other-than-serious violation of the Act.

2. A total civil penalty of $00 is assessed.

JOHN H. FRYE, III
Judge, OSHRC

Dated: SEP 21 1995
Washington, D.C.