CONTINUING LEGAL EDUCATION SEMINAR
NEW YORK CITY

THE DEFENSE ASSOCIATION OF NEW YORK

Labor Law Update – 2017 CLE Materials

This course covers several substantive Labor Law topics and recent case law, as well as hypothetical cases provided by DANY Past President Brian Rayhill.

2.0 CLE Credits in Professional Practice

Monday, September 25, 2017

5:30 PM - **7:30 PM** for the seminar at **199 Church Street**,
State Insurance Fund building / 15th Floor in lower Manhattan

followed by a buffet dinner with wine and beer
at ***THALASSA RESTAURANT*** at **179 Franklin Street, NY, NY 10013**

$75 for DANY Members, $85 for Non-Members

SPEAKERS: Leon R. Kowalski – Managing Attorney with Kowalski & DeVito
Michael J. Pearsall – Senior Trial Attorney with Kowalski & DeVito
Gary A. Rome – Co-managing Partner with Barry, McTiernan & Moore
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Colin Morrissey, Steven R. Dyki and Eileen E. Buholtz

Defense Association of New York -

Labor Law CLE, September 25, 2017

Case Hypotheticals, to be addressed by the panel

Hypothetical #1

The plaintiff was a laborer working at Public Library in New York. A good portion of the construction work was being done at the lower level on the HVAC system. At some point during a morning recess, plaintiff left the lower level to purchase coffee for himself and several coworkers. As he was descending the rear entrance stairs used by both the HVAC laborer's as well as numerous library employees, he traversed the landing on his way to the next set of stairs leading to the lower level. The landing in question was made of terra-cotta tiles one of which was badly scuffed and in disrepair. There was no dispute that the scuffed tile had been present for a significant period of time prior to plaintiff's accident and, thus, constructive notice was a given. As plaintiff negotiated the turn on the landing while holding several cups of coffee in a cardboard coffee carry-type container, the added friction of the scuffed tile caught the sole of his boot and he stumbled, fell to the ground, and sustained multiple injuries.

This particular passageway not only connected the rear delivery entrance of the library to the back stairway, but also served as a conduit for workers and construction material.

Plaintiff based his Labor Law 241(6) claim on the provision of the Industrial Code pertaining to passageways that must be free from tripping hazards and the like.

Question:

Does this case present a true Labor Law 241(6) claim since the tile passageway in question also served as a major conduit for library employees, or does it present a mere property case involving a tripping hazard – or possibly both?

(continued on next page)

Hypothetical #2

The plaintiff was a construction worker employed by a cement contractor. The job in question required a cement foundation to be poured before the structural steel could be put in place. The foundation also had a 4-foot deep trench cut into it to provide room for piping. At the time plaintiff was performing work on the foundation, the piping had been installed and the final coat of cement was being poured onto the foundation floor. The trench was also to be filled in with cement to floor level.

A cement truck is at the construction site and unloads cement through a chute into the basement onto the foundation floor where plaintiff, along with other coworkers, were using squeegees to spread the final layer of cement over the foundation and into the trench. As the cement was being poured onto the foundation, plaintiff, walking backwards is scraping the cement towards him in a backwards motion. As plaintiff approached the trench, he was not looking behind and as a result, fell into the trench. Injuries are claimed during both the fall into the trench and while attempting to climb out of the trench.

Questions:

Is this "accident" of the plaintiff stepping into the trench a height-related accident as defined by Labor Law 240?

In regard to Labor Law 240, was the height differential of 4 feet inconsequential? If not, did this process of pouring cement on a foundation with a trench that needed to be filled with cement come with certain inherent dangers so as to take it out of the ambit of Labor Law 240 scrutiny? From a pragmatic standpoint, if there was in fact a significant height differential, what safety measures can be taken when one cannot fill a trench with cement and cover the trench at the same time?

Is Labor Law 241(6) applicable under the Industrial Code provisions pertaining to open hazards

DANY wishes to thank Past President Brian Rayhill, Esq. for preparing these case hypotheticals

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RECENT DEVELOPMENTS IN THE SOLE PROXIMATE CAUSE DEFENSE TO CLAIMS UNDER LABOR LAW SECTION 240(1)

By: Leon R. Kowalski - Managing Attorney, Kowalski & DeVito
Michael J. Pearsall - Senior Trial Attorney, Kowalski & DeVito

In order to establish a sole proximate cause defense to a section 240(1) case, the defendant must establish (1) that safety devices that would have prevented the accident were readily available at the work site, and although the plaintiff knew he was expected to use them, chose not to do so for no good reason or (2) that he misused an available safety device. Here are some recent cases where the courts have found that sole proximate cause existed or at least a question of sole proximate cause existed.

In Scofield v. Avante Contr. Corp., 135 AD3d 929, 2nd Department (2016), the plaintiff was performing heating and ventilation work at the defendant's premises using a six foot A-frame ladder. He successfully used the ladder performing the same task in four other rooms prior to the accident. In the fifth room, the plaintiff encountered two stacks of sheetrock which blocked him from setting up the ladder under the location where he had to work. Accordingly, the plaintiff set up the ladder three to four feet away which required him to reach to the right with his upper body. The ladder tipped to the right and the plaintiff fell to the ground.

Holding: The defendant's motion for summary judgment seeking dismissal of the section 240(1) claim was granted. The court held that the sole proximate cause of the accident was the plaintiff's improper positioning of the ladder and misuse of the ladder.

In Nalvarte v. Long Island University, 153 AD3d 712 (2nd Department 2017) the plaintiff was employed by a subcontractor on a construction project at the defendant, Long Island University. The plaintiff and a coworker were installing sheetrock to create a wall on the first floor of the project. The plaintiff was positioned on the basement level of the building, but was required to install sheetrock in an area located on the first floor through a large opening between the two floors. The plaintiff stacked two Baker scaffolds on top of each other and further placed an A-frame ladder, in the closed position, atop the two scaffolds. The plaintiff claimed that the A-frame ladder could not be opened because the scaffold platform was not wide enough to accommodate the ladder in its opened position. While the plaintiff was applying pressure to screw in a piece of sheetrock, the scaffold fell backwards, causing the plaintiff to fall. The plaintiff commenced this action alleging violations of Labor Law §§ 200, 240(1), and 241(6), as well as common-law negligence. He moved for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240(1).

Holding: The plaintiff's motion for summary judgment was denied because of questions of fact as to whether the plaintiff's actions were the sole proximate cause of the accident. Although the plaintiff met his initial burden with respect to the cause of action alleging a violation of Labor Law § 240(1) by establishing that the ladder and scaffold he used to perform sheet rocking work at an elevation failed to afford him proper protection for the work being performed, and that this failure was a proximate cause of his injuries, the defendant raised a triable issue of fact as to whether the plaintiff's actions were the sole proximate cause of his injuries. Specifically, the defendant raised a triable issue of fact as to whether pipe scaffolds, which were available to the plaintiff, constituted adequate protection for the work that the

plaintiff was performing and, if so, whether the plaintiff, based on his training, prior practice, and common sense, knew or should have known to use pipe scaffolds instead of Baker scaffolds. The defendant also raised a triable issue of fact as to whether the scaffolds alone were adequate for the job, thereby negating any need for the plaintiff to place a closed ladder on top of the scaffolds. Therefore, the defendant submitted evidence that would permit a jury to find that "the plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured".

THE O'BRIEN CASE

In *O'Brien v. Port Authority of New York and New Jersey*, 29 N.Y.3d 27 (2017), the plaintiff was an employee of DCM Erectors (DCM), a subcontractor at the 1 World Trade Center construction site. On the day of the accident, the plaintiff was maintaining two welding machines located on ground level. It had been raining periodically during the course of the day. At approximately 8:00 p.m., the plaintiff headed downstairs to DCM's shanty, which was located one level below ground, to get his rain jacket. He used a temporary exterior metal staircase to descend. He testified at his examination before trial that the metal staircase was wet due to exposure to the elements and that his foot slipped off the tread of the top step causing him to fall down the stairs. The court noted that the plaintiff testified that the stairs were "steep, slippery and smooth on the edges." He also stated that his right hand was on the handrail, but he was unable to hold on because the handrail was wet. The Court of Appeals was faced with the question of whether the First Department of the Appellate Division properly determined that the plaintiff was entitled to summary judgment on liability on his Labor Law §240(1) cause of action[1]. The Court focused on the expert opinions utilized by both sides. In support of his motion, the plaintiff submitted an expert affidavit from a professional engineer and licensed building inspector. The defendants submitted two affidavits from their construction safety expert, who was a licensed professional engineer and a consultant to the construction industry.

Holding: The Court found that there were questions of fact as to whether the staircase provided adequate protection. The court noted that the defendants' expert opined that the staircase was designed to allow for outdoor use and to provide necessary traction in inclement weather. He added that additional anti-slip measures were not warranted. The defendant's expert disputed the assertions by the plaintiff's expert that the staircase was worn down or that it was unusually narrow or steep. The Court held that in light of the questions of fact, the plaintiff was not entitled to summary judgment.

[1] The plaintiff moved for summary judgment on his Labor Law 240(1) and Labor 241(6) claims against the defendants, The Port Authority of New York & New Jersey (the owner of the premises) and Tishman Construction Corporation of New York (the general contractor). The Supreme Court denied the cross-motions for summary judgment on the Labor Law § 240(1) claim, finding that there were issues of fact as to whether the temporary staircase provided proper protection. The court, however, granted plaintiff's motion for partial summary judgment on the Labor Law §241(6) claim, based on its determination that there had been a violation of Industrial Code 12 NYCRR § 23-1.7(d). The Appellate Division modified the order, on the law, granting the plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim and denying the plaintiff summary judgment on the Labor Law §241(6) claim. The Court observed that there were conflicting expert opinions as to the adequacy and safety of the staircase, but nonetheless held that it was "undisputed that the staircase, a safety device, malfunctioned or was inadequate to protect plaintiff against the risk of falling". The Court of Appeals modified the order of the Appellate Division by denying Plaintiff's motion insofar as it sought summary judgment on the issue of liability on his section 240(1) claim, holding that there were triable issues of fact that precluded summary judgment.

Analysis: The Court emphasized that if the opinion below can be read to say that a statutory violation occurred merely because the plaintiff fell down the stairs, it does not provide an accurate statement of the law. In emphasizing a well-established theme in Labor Law jurisprudence, the Court stated "the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law §240 (1)". The court distinguished this case from cases involving ladders or scaffolds that collapse or malfunction for no apparent reason where they have applied a presumption that the ladder or scaffolding device was not good enough to afford proper protection.

The majority noted that the dissent emphasized their holding in *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 (1985) (which held that in light of the uncontroverted fact that no safety devices were provided at the worksite, it was error to submit to the jury for their resolution the conflicting expert opinion as to what safety devices, if any, should have been employed). However, the court stated that in contrast to the holding of Zimmer, the experts differed as to the adequacy of the device that was provided.

The Court did note that both of the experts framed their opinions in terms of whether there had been compliance with industry standards and then conceded that such compliance would not, in itself, establish the adequacy of a safety device within the meaning of Labor Law §240(1), however they "did not read the defendants' expert's opinion to be so limited".

"INTEGRAL PART OF THE WORK" DEFENSE TO CLAIMS UNDER LABOR LAW SEC. 241(6)

Labor Law Sec. 241(6) requires that all areas where construction is being performed shall be arranged and operated so as to provide reasonable and adequate protection and safety to persons employed in or frequenting such areas. It further provides that the Commissioner of the Department of Labor may make rules to effectuate these provisions. In order to establish a prima facie violation of Labor Law section 241(6), a plaintiff must establish that a specific safety regulation promulgated by the Commissioner of Labor was violated. These safety regulations are otherwise known as the New York State Industrial Code. See, Ross v. Curtis-Palmer Hydroelectric Co., 81 NY 2nd 494 (2002).

When handling construction cases, we frequently see Labor Law section 241(6) cases which are premised on violations of NYS Industrial Code sections 23-1.7(d) and 23-1.7(e)(1) and (2).

23-1.7(d) states:

> Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

23-1.7(e)(1) and (2) read as follow:

Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Over time, the courts have come to recognize a defense to claims brought under section 241(6), premised on these Industrial Code sections, where the plaintiff's injury arises from an instrumentality caused by the work being performed, and which was an integral part of the work being performed by the plaintiff at the time of the accident. In short, if the plaintiff's injury is caused by the debris or tools being used by the plaintiff or his co-workers at the time of the accident, the courts have held that no violation of the Industrial Code has occurred, and therefore, the plaintiff's claim under Sec. 241(6) must be dismissed.

For example, in Alvia v. Teman Electrical Contractors, 287 AD2nd 421,731 NY S 2nd 462 (2nd Dept., 2001), the court dismissed the plaintiff's 241(6) clamed based on a violation of 23-1.7(e)(2) finding that the plywood over which the plaintiff fell while he was carrying plywood was not "debris" nor "scattered materials" but was the material he was using in the actual task he was performing.

In Tucker v. Tishman Construction of New York, 36 AD 3rd 417, 828 NYS 2nd 311 (1st Dept. 2007), the court affirmed the dismissal of the plaintiff's 241(6) claim where he allegedly tripped over a piece of rebar, which the court held as an integral part of the work he was performing at the time of the accident, and which was not debris, scattered tools or materials, and, not a violation of Industrial Code Sec. 23-1.7(e)(1) and (2).

In Debowski v. City of New York, 3 Misc. 3rd 1109 (A) 787 NYS 2nd 677 (Kings County 2004), the court dismissed the plaintiff's claims under Sec. 241(6) where he claimed he was caused to slip and fall as a result of an accumulation and water and mud on the planks of the sidewalk edge where he was working. The court dismissed the case noting that the brick pointing work that the plaintiff and his co-workers were performing at the time of the accident included making mortar by blending concrete mix and water and carrying the mortar across the sidewalk bridge. As such, the water and mud were not "foreign substances" as contemplated under Sec. 23-1.7(d), which prohibits slipping hazards; but, instead, a normal and integral part of the brick pointing operation.

In Galazka v. WSP One Liberty Plaza Co., LLC, 55 AD3rd 789, 865 NY 2nd 689 (2nd Dept. 2008), the court dismissed the plaintiff's claims under Sec. 241(6) based upon Sec. 23-1.7(d) and (e)(2) inasmuch as the wet plastic and asbestos fibers that the plaintiff slipped on was an integral part of the asbestos removal project on which he was working. The court held that the wet plastic and the asbestos fibers were not "foreign substances" as defined by Sec. 23-1.7(d), nor "debris" within the meaning in Sec. 23-1.7(e)(2). See also, Kowalik v. Lipschutz, 2011 NY Slip Op 01242 (2nd Dept., 2011)-plaintiff's 241(6) claim dismissed where he slipped on sawdust created by the saw the plaintiff had been "using all day".

More recently, the court applied the integral part of the work defense in a case where the plaintiff, a tile setter, allegedly was injured while working on a project to construct a 30–story condominium building. The plaintiff alleges that he slipped and fell on unsecured rosin paper placed on a three-step interior pool staircase. The defendants also established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 241(6) cause of action, premised upon a violation of 12 NYCRR 23–1.7(d) by establishing that the protective rosin paper upon which the plaintiff slipped was an integral part of the tile work and did not constitute a "foreign substance" within the meaning of 12 NYCRR 23–1.7(d). See, Lopez v. Edge 11211, LLC, 150 AD3d 1214 (2nd Department, 2017).

In Rajkumar v. Budd Contracting Corp., 77 AD3d 595 (1st Dept., 2010), the court held that brown construction paper used to protect a finished floor did not constitute a violation of the Industrial Code as it was an integral part of the renovation project. See, also Johnson v. 923 Fifth Ave Condominium, 102 AD3d 592 (1st Dept., 2013) where the plaintiff tripped over a piece of plywood that had been purposefully laid over the sidewalk to protect it and constituted an integral part of the work.

CLE materials continue on the next page

STEP ONE IN DEFENDING A LABOR LAW CASE. HAS THE STATUTE BEEN VIOLATED?

A. Introduction.

Too often to mention, defendants fail to attempt to prove and/or fail to argue that plaintiff's case should be dismissed, or that there is a question of fact which would prevent the granting of summary judgment to plaintiff based upon the simple, but important proposition that the statute had not been violated. Oftentimes, a defendant may attempt to argue that a sole proximate cause defense exists under the facts at bar. However, if one can prove that the statute was not violated, the issue of proximate cause is rendered moot given the fact that a defendant will prevail on a motion for summary judgment to dismiss the Labor Law 240(1) claim.

B. Analysis.

Obviously one must first cite to the statute which will serve as the basis for the defense. Section 240(1) of the Labor Law, in relevant part states:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to persons so employed."[1]

[1] McKinney's Labor Law Section 240(1)

Clearly, under anyone's reading of New York law, if a defendant can prove that no violation of the statute occurred plaintiff's cause of action should be dismissed as a matter of law.

A close examination of the well established decisional guidelines defining a defendant's entitlement to summary judgment, as to dismissing the cause action based upon an alleged violation of Section 240(1) of the Labor Law, is predicated upon an initial analysis that requires a determination as to whether or not plaintiff has proven a violation of the statute, or in contrast, whether a defendant has proven that no violation occurred.[2] In granting a motion to dismiss a Labor Law Section 240(1) claim in a recent decision, the *Scofield* Court noted that to recover on a Labor Law Section 240(1) claim "a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident."[3] The *Scofield Court* also noted that in circumstances where "there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery" under Section 240(1) of the Labor Law.[4]

Illustrative of the rule of law presented herein, the Second Department had considered the implications of Section 240(1) of the Labor Law under

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[2] *See Berg v. Albany Ladder Co., 10 N.Y.3d 902, 903-904 (2008); Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280, 283-292 (2003); Karwski v. Grolier Club of City of New York, 184 A.D.3d 865, 865-866 (2d Dep't 2016); Scofield v. Avante Contracting Corp., 135 A.D.3d 929, 929 (2d Dep't 2016); Hugo v. Sarantakos, 108 A.D.3d 744, 744-745 (2d Dep't 2013); Estes-Rivas v. W20012/15 CPW Realty, Inc., 104 A.D.3d 802, 802-804 (2d Dep't 2013); Gaspar v. Pace Univ., 101 A.D.3d 1073, 1074 (2d Dep't 2012); Allan v. DHL Express (USA), Inc., 99 A.D.3d 828, 833 (2d Dep't 2012); Treu v. Cappelletti, 71 A.D.3d 994, 995-996 (2d Dep't 2010); Cherry v. Time Warner, Inc., 66 A.D.3d 233, 236 (1st Dep't 2009); Plass v. Solotoff, 5 A.D.3d 365, 365-367 (2d Dep't 2004).*

[3] *Scofield v. Avante Contracting Corp., 135 A.D.3d at 929 (citation omitted).*

[4] *Id. (citations omitted).*

circumstances in which a wooden plank had not been secured to a scaffold.[5] Plaintiff stepped on an overlapping section of the unsecured plank, causing the worker to fall to the ground. *See id. at 997*. Upon considering the long-standing Labor Law analysis for elevation related risks, the Second Department again noted that "to succeed on a cause of action alleging a violation of Labor Law §240(1), a plaintiff must establish a violation of the statute **and** that such violation was a proximate cause of his or her resulting injuries." [6] The Second Department also ruled that whenever "there is no statutory violation, **or** where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)."[7]

Thus, from these decisional guidelines it is clear that defense counsel should first and foremost attempt to prove that no statutory violation existed. Clearly, such proof would require a dismissal of plaintiff's cause of action and there will be no need to analyze whether a sole proximate cause defense is viable. This is an important distinction because a sole proximate cause defense may result in a question of fact for the jury to decide while proof that no statutory violation occurred will result in the granting of dispositive motion in the absence of contrary evidence submitted in appropriate form.

One should note that the Court of Appeals as well as the First Department and the Second Department, have all clearly created an initial two prong test to determine whether or not a plaintiff may prevail on a claim for liability under Section

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[5] *See Treu v. Cappellitti, 71 A.D.3d at 996-997*.
[6] *Id. citing Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d at 287; Plass v. Solotoff, 5 A.D.3d 365, 366 (2d Dep't 2004)*. (*emphasis added)*.
[7] *Id. (citation omitted) (emphasis added)*.

240(1) of the Labor Law.[8] That is, initially, plaintiff must prove that there was a statutory violation.[9] Thereafter, assuming that there is proof of a statutory violation, one can then address the issue of whether or not the violation was a proximate cause of plaintiff's accident or if a sole proximate cause defense has been properly raised through admissible evidence.[10]

C. <u>Three Case Studies</u>.

1. <u>Failing to bring an available harness on site</u>.

Plaintiff fell from an exterior extension ladder. The ladder was comprised of two sections. It was uncontroverted that the ladder hinged between the 14th and 15th rungs. This caused plaintiff to fall 14 ½ feet. Very serious injuries were incurred.

During discovery the defendant was able to produce the actual harness that plaintiff had brought to the job site. Plaintiff identified the harness and even the bag which housed the harness. He admitted that as the lead mechanic on the crew it was his decision whether to wear the harness or not.

The harness had a six foot lanyard. Counsel for plaintiff and his expert never noted that there was a 3 ½ foot extension on the harness. Retaining a

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[8] *See Berg v. Albany Ladder Co., 10 N.Y.3d 902, 903-904 (2008); Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280, 283-292 (2003); Karwski v. Grolier Club of City of New York, 184 A.D.3d 865, 865-866 (2d Dep't 2016); Scofield v. Avante Contracting Corp., 135 A.D.3d 929, 929 (2d Dep't 2016); Hugo v. Sarantakos, 108 A.D.3d 744, 744-745 (2d Dep't 2013); Estes-Rivas v. W20012/15 CPW Realty, Inc., 104 A.D.3d 802, 802-804 (2d Dep't 2013); Gaspar v. Pace Univ., 101 A.D.3d 1073, 1074 (2d Dep't 2012); Allan v. DHL Express (USA), Inc., 99 A.D.3d 828, 833 (2d Dep't 2012); Treu v. Cappelletti, 71 A.D.3d 994, 995-996 (2d Dep't 2010); Cherry v. Time Warner, Inc., 66 A.D.3d 233, 236 (1st Dep't 2009); Plass v. Solotoff, 5 A.D.3d 365, 365-367 (2d Dep't 2004).*

[9] *See id*.

[10] *See id*.

very knowledgeable expert can be critical when raising a technical defense to the statute.

At plaintiff's deposition, the following testimony was adduced:

"Q. Was there any physical obstruction which prevented you from tying off the lanyard to the top of the ladder on the day of the accident?

A. No."

Other witnesses confirmed that plaintiff could have tied off to the top of the ladder. Through expert analysis, the defendant set forth proof that plaintiff could have tied off to the top of the ladder.

Other testimony established that plaintiff could not articulate a good reason why he had not utilized his harness and tied off his lanyard. It is also important to note that plaintiff admitted that he knew of the availability of his harness at the time of the accident, and it was his intentional decision to eschew the use of the available proper protection.

By the time this matter reached the settlement stage, counsel for plaintiff conceded that the Labor Law 240(1) cause of action would be dismissed. The defense successfully argued that under these facts, because plaintiff was provided with a safety harness that would have provided adequate and proper protection, no statutory violation existed.

2. Failure to use an available harness to reach a work area.

Under this fact scenario, plaintiff was working on a two person scaffold. His partner remained on the scaffold without incident. Both workers, who were demolishing the ceiling, had been provided with harnesses.

The plaintiff was required to reach the corner of the ceiling closest to one end of the working platform. He removed his harness in order to climb on top of the ceiling he had started to demolish. Not surprisingly, when he began to demolish the corner of the ceiling, the corner as well as the area upon which plaintiff was standing collapsed. Plaintiff fell over 20 feet sustaining significant injuries.

The defendants produced their job superintendent. The job superintendent testified that the scaffold upon which plaintiff had been working did not fall to the ground as a result of the accident. The witness also testified that plaintiff's co employee was uninjured, the scaffold was used to complete the job without repairs, adjustments, or incident, and the scaffold met all OSHA and other safety codes. In essence the defense presented evidence that the scaffold afforded plaintiff proper protection.

At plaintiff's deposition, it was established that the harness and lanyard were in good working order. Plaintiff admitted that he knew that he should have been tied off at all times. When questioned as to why he decided to leave the safety of the scaffold to perform his work plaintiff stated that it was "just a little easier" to reach the corner without standing on the scaffold. Plaintiff never established that he could not have performed his work from the scaffold. Without further proof the defense was able to argue that no statutory violation existed as a matter of law.

3. <u>The emergency doctrine does not offer a proper excuse for failing to use available proper protection</u>.

In this case, an ironworker ran to assist his crew members. Plaintiff was the foreman for the crew. He had been outside the cordoned off perimeter

when he heard two employees yell for help. His crew members had begun to lose control of a window that they were attempting to install on the 18th floor.

Plaintiff admitted at his deposition that he not only knew that he must always tie off after entering an open perimeter area, but that as a foreman he had so instructed his crew. His "good reason" for not tying off was based upon his desire to save his men from falling out the window and to protect the public from a large panel of glass that would have fallen over 180 feet.

As soon as plaintiff reached the struggling co workers he grabbed onto the glass panel. At that juncture the two co workers let go of the panel. Plaintiff and the panel both fell out the 18th floor of the building being constructed. No safety netting existed at the time. Although plaintiff landed (face down) a few floors below due to an alcove built into the exterior wall, devastating injuries were incurred.

Neither plaintiff nor the defendants could cite to any case in which an emergency doctrine analysis was adopted to satisfy the "good reason" exception to failing to utilize available proper protection. The court held that at best there was a question of fact as to whether the statute applied. Plaintiff defeated the defendants' motion for summary judgment on the basis of arguing that at least one witness had testified that there was no readily available tie off point. It was obvious that the court could not disregard that testimony, but otherwise would have dismissed plaintiff's Labor Law 240 claim.

D. <u>Conclusion</u>.

Each Labor Law case that is assigned to defense counsel should be critically examined to determine if a defense can be established under which it can be

proven that no statutory violation existed. A defendant is not required to afford a plaintiff with more than one form of adequate protection. Thus, if it can be proven that the statute was not violated, a defense that far too often is not even considered, a defendant will be successful in dismissing plaintiff's Labor Law 240 claim.

It is also important to educate the claims professional as to the potential defense. This should be effectuated as early as possible in the case in order to obtain approval to retain an expert when necessary, in order to locate and interview appropriate witnesses, and in order to preserve any evidence which may assist with establish the defense.

By: Gary A. Rome - Co-Managing Partner, Barry, McTiernan & Moore

CLE materials continue on the next page

DEFENDING A LABOR LAW CASE- PRE-TRIAL CONSIDERATIONS

Christopher M. Hart

Managing Attorney - Labor Law Unit

Nationwide Trial Division -Long Island Office

INTAKE

- Counsel and all parties
- Venue
- Case Stage
- Client
- Claims

INVESTIGATION

- Claims
- CLIENT
- Scene
- Co-Workers
- Surveillance
- Criminal/ISO
- Social Media

IDENTIFY ALL IMPEDIMENTS TO RESOLUTION TODAY

- Injuries/Medicals
- Liability
- Parties
- Counsel
- Revisit Continuously

DISCOVERY RESOURCES

- Engage experts early
- Revisit social media
- Worker’s Compensation
- Union Records
- Experts
- Medical Review

RISK TRANSFER

BURLINGTON v. NYC TRANSIT AUTHORITY et. al.

June 6, 2017

FACTS:

An MTA Employee falls from an elevated platform while attempting to avoid an explosion. The explosion occurred when Burlington insured BSI was doing demolition/excavation and made contact with a live electrical wire. All claims against BSI were dismissed in the underlying action as the wire they made contact with should have been de-electrified by the party seeking coverage as an additional insured.

ENDORSEMENTS

- Pre- 2004- Additional insured coverage extended for liabilitiy ARISING OUT OF your ongoing operations. This would include any injury to the named insured's employee.
- Post 2004- Coverage extended only with respect to liability for bodily injury . . . Caused in whole or in party by your acts or omissions or the acts or omissions of those acting on your behalf.
- Pre-Burlington the courts did not draw much of a distinction between caused by and arising out of.

HOLDING

- Distinction between “caused in whole or in part” and “arising out of.”
- AI coverage only for acts proximately caused by the insured
- No AI coverage stems from “but for” causation alone.

IMPACT

- Distinction between the more narrow “caused by” and “arising out of” endorsements
- No AI coverage if the primary insured isn’t negligent.
- No automatic coverage for accidents involving prime insured’s employees.
- Evolving Issues- Duty to Defend v/ Indemnify, “Insured Contracts”, More of a focus on contractual indemnity.
- Can coverage now be limited to named insured’s share?

“Liability exists precisely where there is fault. . . That the policy extends coverage to an additional insured ‘only with respect to liability’ establishes that the ‘caused, in whole or in part, by’ language limits coverage for damages resulting from [named insureds] negligence. . . .