NEW YORK LABOR LAW

Construction in New York State has historically been subject to a highly litigious environment. While employees are protected by the New York Workers’ Compensation Law, the legislature has also passed specific statutes broadening the rights of recovery for injured construction workers under certain types of claims. These laws (Labor Laws 200, 241(6) and 240(1)), allow workers to bring suit against property owners and/or their agents, (typically general contractors), for injuries sustained at construction sites. In response to a growing number of cases the commercial insurance industry is reacting aggressively to mitigate their exposures to these scenarios. Underwriters are restricting their exposure significantly by not taking on construction risks in New York, by increasing deductibles dramatically and by raising prices to the point where the cost escalation affects the projects themselves.

This edition of Blueprint focuses on New York Labor Law statutes, recent case law, defenses, carrier response and legislative reform efforts.

LABOR LAW SECTION 240 (1)

Labor Law Section 240(1) imposes absolute liability on owners and general contractors, regardless of the comparative fault of the plaintiff. Once a plaintiff succeeds in establishing a violation of this section, the defendant is essentially defending an inquest on damages. The exposure is especially high when the worker claims that his injuries prevent him from returning to work. Many times, lack of education and/or training renders the worker’s prospects for future employment in other jobs paying similar salaries unlikely. A union worker in their twenties or thirties, earning a high salary with maximum benefits, who asserts claims for large future lost wages and pain and suffering presents the potential for a substantial jury verdict.

The Court of Appeals has ruled that Labor Law Section 240(1) “is to be construed as liberally as may be for the accomplishment of the purpose for which it was framed.” However, the Court held in Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 577 N.Y.S.2d 219, 583 N.E.2d 932 (1991), that Labor Law 240(1) was aimed only at elevation-related hazards and that, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device. As will be discussed, courts have expanded the scope of workplace incidents that meet the criteria of elevation-related hazards.

In Ross v. Curtis-Palmer Hydro-Electric Company, et al. 81 NY2d 494, the Court observed that the required safety devices (scaffolding, hoists, braces, etc.) listed in Labor Law 240(1) – all of which are used in connection with elevation differentials – “evidenced a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site is itself either elevated or is positioned below the level where materials are lowered or hoisted or secured.” The “special hazards” are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. In order to prevail, plaintiffs need to prove only that the statute was violated and that the violation was the proximate cause of injury.
In 2009, the Court of Appeals expanded the scope of elevation-related hazards compensable under Labor Law Section 240(1) to a situation where a worker neither fell nor was struck by a falling object. In *Runner v. New York Stock Exchange*, 13 N.Y.3d 599 (2009), the plaintiff, an employee of a subcontractor, commenced suit against the owner and general contractor for injuries allegedly sustained at the site. The plaintiff and his co-workers had been directed to lower an 800-pound reel of wire down a flight of stairs. To do so, the workers created a makeshift pulley in an effort to slow the descent of the reel down the stairs. One end of a rope was tied to the reel, and the rope was then wrapped around a metal bar that was placed horizontally across a door jamb on the same level as the reel. The other end of the rope was held by the plaintiff and two co-workers, who, in essence, were acting as counterweights. As the reel was lowered down the stairs, its rate of speed increased, causing the plaintiff to be pulled into the metal bar, causing injury.

The court rejected the defense arguments that since the plaintiff did not fall and was not struck by a falling object, his injuries were not gravity related. Instead, the court found that the plaintiff’s injury flowed directly from the application of the force of gravity to the reel of wire and was no different than if the reel had actually struck the plaintiff.

**DEFENSES**

The defenses to a Labor law §240 cause of action are limited. The plaintiff’s own negligence is not considered, unless it can be considered to be the sole proximate cause of the injury. In *Blake v. Neighborhood Housing Services Of New York City, Inc.*, 1 N.Y.3d 280, the Court of Appeals addressed the issue of strict or absolute liability under Labor Law §240(1).

The plaintiff operated his own contracting company and was working alone on a renovation job in a two-family house in the Bronx. The defendant, Neighborhood Housing Services of New York City, Inc. (NHS), a not-for-profit lender, provided low-interest financing to facilitate the project. NHS dispatched a rehabilitation specialist to the premises to assess the scope of work and the amount of the loan. NHS subsequently prepared a work estimate and provided a list of contractors. The plaintiff was hired.

The plaintiff set up an extension ladder that he owned and had used frequently. The plaintiff acknowledged at his deposition that the ladder was steady, had rubber shoes and was in proper working condition.

While performing rust removal on a window, the upper portion of the ladder retracted, causing the plaintiff to sustain injury. The plaintiff sued the homeowner and NHS alleging a violation of Labor Law §240(1). Plaintiff also admitted at his deposition that the ladder was securely placed, not broken or defective and that no one needed to hold the ladder while he was using it. At trial, the plaintiff conceded that he could not identify a defect in the ladder and testified that he was not sure if he had locked the extension clips in place before climbing the ladder.

The jury found that the ladder used by the plaintiff was constructed and operated to give proper protection to the plaintiff. The Court concluded that the evidence leads to the “inescapable conclusion that the accident happened not because the ladder malfunctioned or was improperly placed, but solely because of plaintiff’s own negligence in the way he used it.”
The Court of Appeals noted that defenses to Labor Law 240(1) claims have been watered down by the courts, not the legislature. More specifically, the court re-emphasized that neither it nor the legislature have ever suggested that an owner or general contractor should be treated as an insurer after having furnished a safe workplace. If, however, the plaintiff’s actions constitute culpable conduct, it will not exonerate a defendant if Labor Law Section 240(1) has been violated.

Essentially, the Court of Appeals in *Blake* v. *NHS* has reiterated its prior decisions and highlighted that there can be no liability under §240(1) where there is no violation and the worker’s actions are the “sole proximate cause” of his accident. To find otherwise would be to make an owner and/or a general contractor who has complied with the safety regulations into an insurer and that is not what the legislature intended. Instead, the legislature has enacted “no-fault” workers’ compensation to address workers’ injuries where the worker is entirely at fault and there has been no Labor Law violation.

The recalcitrant worker defense is available as a bar to §240(1) liability in those situations where the plaintiff has affirmatively refused to follow direct instructions. The Court of Appeals in *Cahill* v. Triborough Bridge and Tunnel Authority, 4 N.Y.3d 35 (2004) expanded this defense, which is not contained in any statute and is predicated upon the idea that the statutory protection does not extend to workers when adequate and safe equipment is made available to them but they refuse to use it. Prior to the court’s decision in *Cahill*, owners or general contractors had to prove that directions regarding safety devices were provided to workers almost contemporaneously with the workers’ accident.

In *Cahill*, the court held that the giving of the instruction or direction and any lapse of time between same will not undermine the “recalcitrant worker” defense in and of itself. In *Cahill*, the plaintiff was instructed to use his safety harness and lanyard weeks before the incident occurred. No specific direction was given to the plaintiff on the date of the incident. Then, while ascending a “form” without utilizing his available safety harness, the plaintiff fell approximately 10 to 15 feet to the ground. The Court of Appeals held that the plaintiff’s failure to utilize the available safety devices, when taken in conjunction with the fact that he ignored the direction issued weeks earlier by a supervisor, meant that he met the definition of a recalcitrant worker. As set forth in *Blake*, where the plaintiff’s recalcitrant acts constitute the “sole proximate cause of the accident,” they dismissed the plaintiff’s Labor Law §240(1) cause of action.

This is a particularly noteworthy decision as contractors and owners who have properly provided safety equipment to their workers on site and issued proper directions will actually be afforded the now meaningful protection of the recalcitrant worker defense.

Labor Law 240(1) is by far the most controversial and litigated statute which creates liability for an owner/general contractor in a construction setting.
LABOR LAW SECTION 200

Labor Law 200 is a codification of the common law duty to provide workers with a safe place to work. The statute applies to all forms of work in New York State, including factory settings, mercantile establishments, office settings and other work sites.

The duty imposed by the statute is no different or greater in scope than the applicable principles of common law of negligence. Therefore, what is reasonable under all of the particular circumstances that gave rise to the plaintiff’s alleged injury will determine whether the defendant owner or general contractor acted negligently.

It has also been recognized that an owner or general contractor will not be held liable under Section 200 of the Labor Law if the plaintiff’s injuries were caused by a defective or dangerous condition which arises from the subcontractor’s own method and manner of performing the work. *Lombardi v. Stout*, 80 N.Y.2d 290, 590 N.Y.S.2d 55.

The common law duty owed by a landowner to laborers will not give rise to liability unless the property owner has either constructive or actual knowledge of the dangerous condition.

When applied to construction accidents, Section 200 imposes a duty upon owners or general contractors to provide construction workers with a safe place to work. The most significant difference between Section 200 and the other sections of the Labor Law discussed here is that liability under Section 200 can only be established if the defendant had control over the work site. Conversely, Sections 240(1) and 241(6) impose a vicarious responsibility upon owners and general contractors whether they supervise and/or control the work at the site or delegate these responsibilities to others.

LABOR LAW SECTION 241(6)

Section 241(6) imposes the ultimate responsibility for compliance with all statutory duties upon owners, contractors and their agents. If subcontractors are retained to perform the actual work, the owner and its agents will nonetheless be found vicariously liable, even if it did not directly control the means or methods of the work. While Labor Law defendants may ultimately be able to shift responsibility for any injuries caused by violations of Section 241(6) to sub-contractors, the actual tort feasors, by contractual or common law indemnification, it is the owner and its agents that will be held liable to the injured plaintiff in the first instance. The reasoning being that construction work has been deemed to be inherently dangerous; therefore, it is the owners and their contractors who must stand liable for any injuries caused by this ultra-hazardous activity.

The Court of Appeals has made it clear that a violation of Section 241 subdivisions 1-5 will not only impose vicarious liability upon owners and contractors, it results in absolute liability, since these provisions contain positive commands within the four corners of the statute. Section 241(6), however, is not a self-contained provision because it does not specify any standards to be complied with. Instead, subdivision 6 refers the rule making authority to enhance the purpose of the statute to the Industrial Commissioner. Therefore, this section does not result in absolute liability and comparative negligence is a proper defense under Section 241(6). *Long v. Forest-Fehlhaber*, 55 N.Y.2d 157, 448 N.Y.S.2d 132.

In *Ross v. Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494, 601 N.Y.S.2d 49, 618 N.E.2d 82, the Court of Appeals explained that Labor Law Section 241(6) differs from Section 200, (a codification of the common law) since it does impose liability on all owners and contractors even if they do not exercise control over the work being performed. The
difference between these two provisions, however, hinges upon the plaintiff's ability to plead and prove that the defendant violated a specific standard of care set forth in 12 N.Y.C.R.R. 23, commonly referred to as the Industrial Code.

In the Ross case, the court recognized that there are many provisions within the Industrial Code which use generalized language to convey a requirement that the owner and/or contractor act in a safe manner. An example is Rule 23-1.25(d), which requires “all persons engaged in welding or frame cutting operations shall be provided where necessary with proper scaffolds installed and used in compliance with this part.” The court concluded that these types of provisions containing generalized language such as “adequate”, “effective” and “proper” are not sufficient to give rise to a triable claim for damages under Section 241(6). Only those rules contained within 12 N.Y.C.R.R. 23 which require a specific standard of conduct are adequate to support a valid 241(6) claim. An example of such specific, or concrete, standards of conduct are 23-1.7 “overhead protection shall consist of tightly laid sound planks at least 2 inches thick full size, tightly laid 3/4 inch exterior grade plywood or other material of equivalent strength.” Reliance upon nonspecific regulatory provisions or generalized statements contained in Rule 23 is insufficient to support a 241(6) cause of action.

Since OSHA is more detailed than the Industrial Code and has been updated to keep pace with technological changes in the construction industry, there are many instances where owners and contractors are in full compliance with Rule 23, but in violation of an OSHA provision. Because a Labor Law 241(6) cause of action requires a specific Rule 23 violation, there will be instances where a defendant may be negligent, and in fact may have violated an OSHA provision but will not be liable under a violation of 241(6) since there was no 12 N.Y.C.R.R. 23 standard of conduct violated. A violation of an OSHA provision alone is not sufficient to set forth a 241(6) cause of action. There is not a specific Rule 23 standard for every negligent construction practice.

**DEFENDANT IS EITHER AN OWNER/AGENT OR CONTRACTOR**

The scope of Section 241(6) regarding identifying owners/agents or their contractors is identical to Section 240 of the Labor Law. See, *Allen v. Cloutier*, 44 N.Y.2d 290, 405 N.Y.S.2d 630. Owners are those who have fee title to the property as well as grantor’s of easements. *Philips v. Eastman Kodak*, 204 A.D.2d 979, 613 N.Y.S.2d 68. When an owner transfers title to a municipality under an IDA financing arrangement, the municipality will generally not be considered the owner since the transaction is considered nothing more than a financial funding agreement, but the party who initiates the construction project will nonetheless be considered an owner. See, *Vigliotti v. Executive Land*, 186 A.D.2d 646, 588 N.Y.S.2d 430. Where the owner of the property leases the entire premises to another and relinquishes control under the terms of the lease, and the work which gives rise to the plaintiff’s injury does not benefit the lessor at all, the owner will nonetheless be held responsible. *Gordon v. Eastern Railway*, 82 N.Y.2d 555, 606 N.Y.S.2d 127. An owner who has authority to direct and control the work does not have to actually exercise this authority. The statute imposes liability upon owners regardless of whether they actually exercise control or not. It is the right to control the work that is determinative.
TYPES OF WORK COVERED BY SECTION 241(6)

The work being performed must be in the nature of construction work or the demolition of a building or structure, or excavation. Construction of roads, including the resurfacing and/or painting of the roads, is also covered under Section 241(6). The statute applies to renovation and/or installation of equipment which alters or repairs a building or structure, but does not apply to routine maintenance. Although Section 240(1), as will be discussed, does not cover excavation work, Section 241(6) does.

PERSONS PROTECTED BY SECTION 241(6)

The plaintiff must be a member of the protected class (construction worker, persons permitted or suffered to work on a construction site or a worker who is lawfully frequenting the construction site) in order to receive the protection of the statute. Pedestrians or passersby are not protected.

STATUTORY DEFENSES – 1-2 FAMILY OWNER EXEMPTION

The statute itself grants an exemption to owners of one and two family dwellings who contract for but do not control the work. Therefore, if a plaintiff is injured while in the course of performing construction work at a one to two family premises, there can be no 241(6) liability imposed upon the owners. If the owner hires a contractor who in turn hires a subcontractor, an injured employee of the subcontractor will not be able to set forth a viable 241(6) claim against the owner of the property but will be able to bring a 241(6) claim against the contractor since the exemption from liability only applies to owners and not contractors.

If, however, the plaintiff can establish that the defendant owner of the one and two family home actually supervised the method and manner of work, or controlled the work site, the exemption from liability will be lost.

Comparative negligence is a defense to Section 241(6) cause of action since a violation of this provision requires reference to the industrial commissioners standards of conduct set forth in 12 N.Y.C.R.R. 23

WHAT COVERAGE ARE IMPACTED BY THE VARIOUS LABOR LAW STATUTES?

The impact of these cases are focused on Commercial General Liability and related Excess or Umbrella Liability placements. This makes sense in light of the fact that these policies typically protect against claims arising out of the Legal Liability of the policyholder and the various statutes imposing legal liability.

As a result, the thousands of cases that we have seen over the last few years have had a major impact on the profitability of these coverages for insurance companies as they had not anticipated the sheer size of the cost when they priced their
products. This is now having a dramatic impact on how carriers view construction liability in New York. They are taking a number of actions to try to address the situation. Ultimately, costs will be borne by all policyholders in New York unless the underlying statutes are addressed by the legislature. Willis is working with a number of organizations to push for reform and we outline these efforts below. Until there is some type of reform, we expect the rising costs to have an impact on not just insurance but ultimately construction costs.

**WHAT IS THE CARRIER RESPONSE?**

Changes we’ve seen in the NY construction insurance marketplace in 2012 pursuant to Labor Law:

**PRACTICE POLICIES**
- 10-20% premium increases
- Minimum Primary GL limits increased to $2M/$4M/$4M, with some carriers requiring $5M/$10M/$10M
- Many smaller placements have been forced to be placed in the wholesale market to get coverage

**OCIPs**
- Maximum OCIP rates have increased to almost double of what we were seeing last year
- Standard Primary GL limits of $2M/$4M/$4M are no longer acceptable for an attachment point for lead Umbrella/Excess Carriers
- Initially, the required limits increased to $3M/$5M/$5M then quickly increased to $5M/$10M/$10M
- Most carriers can provide $3M/$5M/$5M but have difficulty getting the reinsurance support to quote $5M/$10M/$10M
- Buffer quotes can fill gaps but can be very expensive and few carriers are offering
- Deductibles increased from $250K WC/$500K GL to $500K WC and $750K to $2M for GL

**CCIPs**
- CCIP rates haven’t increased at the same rate as stand-alone OCIPs. Some contractors are still putting all their projects under their rolling programs which can drive down the overall program rate.
- Carriers are typically more willing to write CCIPs and the rates tend to be better than OCIPs, but this advantage could shift in New York at upcoming renewals given the developments and increased concern over New York Labor Law.

**THERE IS HOPE**

Labor Law Scaffold Reform Bill (S.6816/A.2835) calls for the plaintiff’s comparative negligence to be taken into account. This is currently supported by the New York governor and the New York City mayor. In addition, we’ve become active participants on the Labor Law Reform Task Force and are working with the Real Estate Development Board of New York (REBNY), general contractors, carriers and M/WBE subcontractors to push reform. Efforts involve quantifying the adverse effect of Labor Law on insurance rates, project costs and municipal costs. Supporters are also scheduling a lobby day with state legislators in support of the Bill and gearing up for a spring 2013 vote on the Bill.
CONCLUSION

Willis is intimately familiar with all viable defenses to New York Labor Law claims and develops loss control procedures focused on mitigating the number of gravity-related incidents for our clients. We have also handled over 5,000 Labor Law claims in the past 10 years and achieved favorable results ranging from defense verdicts to defeating Labor Law motions outright. We have a vast experience in dealing with all aspects of New York Labor Law 240(1) as well as the other components 241(6) and 200. We encourage aggressive investigative and claim handling techniques that will mitigate the client’s overall exposure to these claims. We have already developed a panel of Construction Oriented Defense Counsel that deal exclusively with defending Labor Law claims. At this point the New York Labor Laws have had a significant impact on construction owners and contractors and we encourage all firms working or thinking of working in New York to seek assistance early in the process to make sure all alternatives are examined.

DISCLAIMER

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CONTACTS

For additional information on the topics discussed in this issue, or any others for which our Construction Practice might provide assistance, or to read prior issues of Blueprint, please visit our website at willis.com.

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