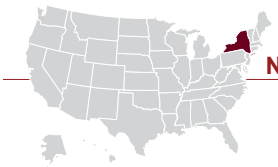

Is It a Labor Law Case?

The First Step to Defending Against Claims of Labor Law Violations Is Determining Whether the Statute Even Applies

By Kristin Keehan

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Allegations that Labor Law § 240(1) was violated can result in costly, drawn-out litigation. Once a complaint alleging a violation of this statute is received, it becomes crucial to not only evaluate defenses to this claimed statutory violation, such as sole proximate cause and recalcitrant worker, but also to evaluate whether the statute is applicable to the case at all. Labor Law § 240(1) has been found inapplicable in cases where the height differential at issue is de minimis, and where the accident itself did not involve an elevation-related risk.

De Minimis Height Differential

New York courts have held that an "elevation-related risk arises only when there is a 'physically significant elevation differential.'" [*Christiansen v. Banacio Construction, Inc.*, 129 A.D.3d 1156, 1158 (3d Dep't 2015), quoting *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599 (2009)]. In order to determine whether a height differential is physically significant, "the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent," must be considered.

An issue arises when ascertaining what precisely constitutes a "physically significant elevation differential." In *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 514-515 (1st Dep't 1991), plaintiff was injured when he slipped and fell backward while attempting to

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step across a trough measuring 18 inches to 36 inches wide and 12 inches deep. In evaluating the plaintiff's Labor Law § 240(1) claim, the 1st Department held:

"Plaintiff contends that there was some elevation-related risk inherent in having to work near the 12-inch trough and that a 'slip and fall, be it only a matter of inches, into a highly caustic substance such as heated industrial oil should…be deemed within section 240(1)'s embrace.' We disagree. While the extent of the elevation differential may not necessarily determine the existence of an elevation-related risk, it is difficult to imagine how plaintiff's proximity to the 12-inch trough could have entailed an elevation-related risk which called for any of the protective devices of types listed in section 240(1)."

The 3rd Department evaluated the question of "physically significant height differential" in *Christiansen v. Banacio Construction, Inc.*, 129 A.D.3d 1156, 1158 (3d Dep't 2015), where plaintiff was injured when a scaffold fell and struck him. The portion of the scaffold that struck the plaintiff was only two feet above plaintiff's head. As such, the court held there was not a "physically significant height differential… and [plaintiff] was not exposed to an elevation-related risk within the ambit of Labor Law § 240(1)."

Recently, in the matter of *Sawczyszyn v. New York University*, 2018 N.Y. Slip Op. 01120, the Appellate Division, 1st Department evaluated this precise issue. In *Sawczyszyn*, plaintiff was allegedly injured while rolling a four-wheeled cart filled with approximately 100 to 200 pounds of materials over an unsecured, makeshift plywood ramp that bridged an approximately five- or six-inch gap between a truck bed to a loading dock. When the subject ramp slipped out of place and landed on the truck bed, the cart descended, pulling on plaintiff's arms and causing injuries. The undisputed vertical distance between the surface of the truck bed to the surface of the dock was approximately 8 to 12 inches. The 1st Department held that, under the circumstances, this vertical height differential of 8 to 12 inches "does not constitute a physically significant elevation differential covered by Labor Law § 240(1)."

Elevation Related Risk

Liability under Labor Law § 240(1) is further dependent on whether the injured worker's task creates an elevation-related risk. That is, the statute's protection "does not encompass any and all perils that may be connected in some tangential way with the effects of gravity, but is limited to…those types of accidents in which the scaffold, hoist, stay, ladder, or other protective device [has] proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." *Mohamed v. City of Watervilet*, 106 A.D.3d 1244 (3d Dep't 2013).

In *Themistocleous v. Whitney Museum of American Art*, 2018 N.Y. Slip Op. 32721(U), plaintiff alleged he was injured when a wrench he was using to break a bolt struck him in the right eye while he was still holding the wrench. Plaintiff claimed that defendants violated Labor Law § 240(1) "because the instability of the scissor lift on which [he] was working contributed to his injury."

The court found that, while plaintiff was working at an elevation when he was injured, "Labor Law § 240(1) [did] not apply, because he did not fall, and nothing fell on him." The court further held that "even assuming the scissor lift was unsteady and its instability contributed to his injury, the lift still prevented him from falling, so the injury did not result from exposure to an elevation related risk or the force of gravity to which Labor Law § 240(1) applies. Nor did his injury arise from an attempt to prevent himself from falling, to which Labor Law § 240(1) also applies."

While an allegation that Labor Law § 240(1) was violated can result in protracted litigation, it simply becomes all the more important to evaluate the statute's applicability from the outset. Reviewing the Bills of Particular and tailoring your deposition questioning to adequately evaluate the claim are crucial in defending against a Labor Law § 240(1) claim. ■

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