Best's Insurance Law Podcast

Defending Construction Claims Under the New York Labor Law Statutes - Episode #148

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John Czuba: Welcome to *The Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Recommended Insurance Attorneys*.

We're pleased to have with us attorneys Peter Read and Jay Rava, shareholders and co-chairs of the New York Construction and Labor Law Practice Group at Marshall Dennehey Warner Coleman and Goggin law firm.

Peter Read works in the firm's New York City office and has spent his career defending owners and contractors in construction cases involving the New York Labor Law and Industrial Code. A member of the New York Trial Lawyers Association and the New York Bar Association, he has tried cases throughout the city and state with a remarkable rate of success, including a number of defense verdicts.

Jay Rava is a veteran of the insurance and defense litigation industries and has spent the majority of his career defending New York Labor Law matters on behalf of real estate developers, general contractors and subcontractors, from intake through trial.

He organized, staffed, and ran a litigation team dedicated to defending New York Labor Law matters while regional counsel for Harleysville/Nationwide Insurance. Jay is resident in the firm's Westchester office.

Peter and Jay, we're very pleased to have you with us this morning.

Peter Read: Pleased to be with you.

Jay Rava: Thanks for having us, John.

John: Today's topic is defending construction claims under the New York Labor Law statutes. Peter, we'll start the questions with you today. Can you tell us a little bit about the origin of the New York State Labor Laws as they pertain to construction accidents and injuries?

Peter: Sure, that's a good place to start. Today's Labor Law can be legislatively traced back to the first scaffold law, which would be the ancestor of today's Labor Law 240, which was enacted in 1885 in response to concerns over unsafe conditions for employees working at heights.

This concern came about due to widespread newspaper accounts, at the time, of rickety scaffolds and ladders resulting in injuries and deaths in the construction trade.

The original law was based on the common law duty of master/servant so liability lay with employers. This has since been changed through amendments and court decisions to place responsibility to provide a safe workplace on owners and general contractors who are deemed to be in the best position and with the necessary resources to enforce worksite safety.

The original law further recognized the fact that workers, due to their weaker economic condition, were not in a position to insist on safe work practices or conditions.

The scaffold law, throughout its amendments, including the current enactment of Labor Law 240, has never explicitly barred contributory negligence as a defense, but the New York courts have done that through their decisions, beginning in 1948, reasoning that the statute should be interpreted that way if it's to meet its objective.

The modern iteration of the scaffold law is Labor Law Section 240, which was enacted, along with Section 241(6), in the late 1960s. Both sections place responsibility for worksite safety on owners and contractors.

Again, even though it's not expressly stated in either statute, the courts have consistently held, going back to the '40s, that these statutes confer absolute liability and, in the case of 240, contributory negligence on the part of an injured worker is not a defense.

John: Jay, next question for you. What are the three most relevant statutes at play when litigating these types of cases?

Jay: Peter's touched upon two of them. There are three Labor Law Sections 200, 240, and 241 Subsection 6. Labor Law Section 200 is a codification of the common law, duty of an owner or a contractor, to provide a safe workplace to a worker.

There are two categories of cases that are evaluated under Labor Law Section 200. The first involves means and methods of the work. The second involves the condition of the premises.

In order to hold a contractor or owner responsible under 200 in a means and methods case, you have to show that they had notice of an unsafe practice and procedure and the ability to control it. In a condition of the premises case, you need only demonstrate that the owner had notice.

The most widely known law is Section 240, which is commonly called the Scaffold Law. It imposes absolute liability upon owners and contractors, and their agents, for the failure to comply with the statute's provisions regarding the protection of workers from gravity-related risks.

It enumerates various devices that are required. It basically applies to circumstances where workers are subjected to a risk of falling or the risk of an object falling upon them. The only viable defense to these claims is that the plaintiff was the sole approximate cause of his accident. It's a really difficult burden to establish and it's the defense's burden. All appropriate safety equipment has to be available.

The third law is Labor Law Section 241(6), which imposes a non-delegable duty of care on owners, contractors and their agents engaged in construction, excavation and demolition projects. In order to get the benefit of that section, the plaintiff has to plead and prove a violation of a specific conduct regulating provision of the Industrial Code and that the violation was a proximate cause of the accident.

In these cases, under 241(6), the defense does get the benefit of the plaintiff's comparative negligence. Those are the big three statutes that we face.

Jay: Thank you, Jay. Peter, for the purpose of the New York Labor Law, what is the difference between a general contractor and a construction manager?

Peter: The difference between a general contractor and a construction manager is that a general contractor, by definition, is expressly subject to liability under the labor law, whereas a construction manager is mainly subject to liability as an agent of the owner.

The role of a general contractor is fairly straightforward to identify. If you've entered into an agreement to run a construction project and to hire the trades across the board on that project, implicit in the hiring of subcontractors is the authority and the ability to control the work, which is the basis of liability under the labor law.

A construction manager, by contrast, has agreed to manage a construction project but does not hire the trades. Nevertheless, there is usually liability exposure to a construction manager as an agent of the owner.

This agency issue arises most often in the context of the duties of a construction manager because in actual practice on a job site the role of a construction manager is very similar to that of a general contractor in terms of the overall scheduling of the job and coordination between all trades, as to where and when they perform their work.

You can call yourself anything you want, but what you label yourself is not determinative of the issue of liability under the labor law, whether it be general contractor, or construction manager, or something else. Instead, the courts will analyze the role of a construction manager, for instance, through the terms of its contract to determine whether that entity was delegated the supervisory control or authority over the work that's being performed.

Generally, without express limiting language in the contract stating that the construction manager does not assume responsibility for supervising the work or enforcing safety precautions on the job site, there will be a question of fact as to whether a construction manager has undertaken to act as the eyes, ears, and voice, so to speak, of the owner.

If the answer to that question is yes, then the construction manager is an agent of the owner and is subject to liability under the labor law. The seminal case on that issue is *Walls versus Turner Construction*.

John: Jay, what do you see as the best approach in defending these claims?

Jay: These are difficult claims for defendants. The best way to start is to do an early investigation, get witness statements early on, make sure that you've sequestered any instrumentalities involved. If you can get sworn statements, photographs, that's always ideal.

You have to focus, as a defense attorney, on defeating liability, transferring risk, and reducing damages. The next element is obtaining all relevant contracts. If you're the general contractor, you want to get all the subcontracts involved. If you're a subcontractor, you want to evaluate your contracts to see what obligations you may owe to a general contractor or an ownership entity.

Each of these entities, including the owners, should have opportunities for risk transfer. If they do, they need to make those tenders early on in the litigation or pre suit to best protect their economic interests. That's your first step in trying to transfer risk.

After that, there's the opportunity to bring third party actions for any common law claims or contractual claims that you have against parties that may be responsible or that may owe you indemnity by contract.

You've got to then evaluate the claims of the plaintiff. You want to see which of these statutory schemes are at play. Is it an absolute liability circumstance? Do you have to try to work on getting yourself a sole approximate cause defense? Is it a situation that falls under one of the sections covered by 241(6)? Do you have comparative negligence as an opportunity for a defense?

Once you get into the thick of the litigation, you're also focusing on reducing damages. You have to take a very detailed deposition of the plaintiff. You want complete pre- and post-incident medical histories.

You have to consider, at this point, engaging appropriate medical experts to reduce those damages claims. It's important to engage experts who are recognized in their field to counter the surgeons and treaters that the plaintiffs will have on their side.

One of the other things you're going to do is seek the assistance of an expert in construction site safety or in a particular activity ongoing at the time. That will give you a good opportunity to either seek to defeat the plaintiff's claims or to enforce claims that you may have against other contractors on the site.

It's a three pronged approach. It requires that you commence defending all aspects of the action immediately.

John: Peter, how do the Industrial Code Rules impact the litigation?

Peter: Labor Law 241(6) was designed to be integrated with Part 23 of the New York Industrial Code. The Industrial Code is a set of rules and regulations that are promulgated by the Department of Labor. They set forth specific safety requirements that apply to construction, demolition and excavation work.

Usually a violation of a rule or regulation, even OSHA regulations, results merely in some evidence of negligence in making out a case but not negligence per se. That's not the case with the New York Industrial Code because by operation of Labor Law 241(6), a violation of a sufficiently specific Industrial Code rule is negligence per se.

To put it another way, the Industrial Code is the basis for a claim under Labor Law 241(6). Any claim under that section must be predicated on proof of an Industrial Code violation and proof that the violation was the proximate cause of the accident.

The caveat to that is that in order to make out a claim under 241(6) based on the Industrial Code, there must be a violation of an Industrial Code section which contains a sufficiently specific safety directive. For instance, take Section 23 1.5, entitled "General Responsibilities of Employers." That section states merely that all worksites shall be operated and equipped, etc., so as to provide adequate protection for the safety of all workers.

This has been held as a matter of law to be too general, and therefore insufficient, to support a claim under Labor Law 241(6) but generally, the code contains many sections with very specific directives.

For example, just randomly, Section 1.22, governing platforms at a job site, requires that platforms must be constructed with planks of at least two inches thick.

Obviously, if you have an accident on a worksite where a worker falls through a platform and it's determined after the fact that the platform planks were only an inch and a half thick, you've got a clear violation of that section of the Industrial Code. Therefore, you've got a cause of action under Labor Law Section 241(6).

John: Thank you, Peter. Jay, our final question for you. Have you employed any creative methods or strategies in defending these types of claims?

Jay: We have. I'll predicate this by saying that there's no substitute to being incredibly detailed in your investigation and in your discovery depositions. We've had cases where we've used experts creatively and effectively.

In one instance, we had a case where a plaintiff claimed that the spreader on his ladder broke, which caused it to fall, and tip over, and for him to be injured by that. We engaged an expert who was a former design engineer for a well-known ladder company. He tried to recreate the plaintiff's accident in the same manner. He did it while taking a video.

He stood on the same make and model of ladder. He had a colleague strike the spreaders while he was on it, striking them both off of the ladder. Despite the absence of the spreaders, the ladder had been designed to sustain that sort of defect. It was still standing.

It showed that there was a real question as to whether the accident could have occurred as the plaintiff claimed.

We've used investigations and surveillance as ways to show that plaintiffs were more active than they claimed to be. This is often the case because these cases, in New York, take a good deal of time to develop. It's rare that somebody literally sits inside and simply goes back and forth to treatment.

The other thing that people are doing in virtually every personal injury litigation case today is using social media. Facebook posts, Instagram posts, are a way to show that the plaintiff's activities are more extensive than they claim or their character is less than stellar.

Another source of information that is sometimes overlooked is workers' compensation decisions. You may find in a settlement with workers' compensation that the plaintiff has made a representation that his future medical costs are $10,000 whereas the experts in the case that he's bringing against you in state court are claiming that he's got hundreds of thousands of dollars in future medical costs.

You have to try to dig for every piece of information available to you and then try to use that in litigation to benefit yourself on liability and on damages.

John: Thank you both very much for joining us today.

Peter: Thank you John. I appreciate the opportunity. Thank you.

Jay: Thanks for having me.

John: That was attorneys Peter Read and Jay Rava, shareholders and co-chairs of the New York Construction and Labor Law Practice Group at Marshall Dennehey Warner Coleman and Goggin law firm.

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