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Foreseeability and Elevation-Related Risk Under Labor Law §240(1): Recent New York Decision Clarifies When a Shattering Object Is Not a "Falling Object"

By: Emily Schierhorst

A recent decision out of New York County Court clarifies that not every hazard or danger encountered in a construction zone falls within the scope of Labor Law §240(1) as to render the owner or contractor liable for an injured worker's damages. Courts have expressly held 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 [a] required safety device." *Misseritti v. Mark IV Const. Co., Inc*., 86 N.Y.2d 487, 490 (1995).Although the breadth of what hazards are encompassed by Labor Law 240(1) are seemingly continually expanded upon, the principles set by the Court of Appeals are beautifully detailed in a recent decision out of New York County by Honorable Hasa A. Kingo in *Suljio Alibasic v Port Authority of New York and New Jersey et al. 156991/2021*.

The plaintiff, an employee of third-party defendant JWK, was injured while in the process of removing an interior glass panel from a wall with a co-worker. When the glass panel became stuck, the plaintiff's co-worker used a saw to free it. As they lifted the panel up, approximately one foot from the ground, it shattered, resulting in glass falling on and around Plaintiff. Under controlling case precedent, a panel being held at essentially the same height as the workers does not constitute a falling object under Labor Law 240(1).

The extraordinary protections of §240(1) extend only to a narrow class of special hazards, and do "not encompass any and all perils that may be connected in some tangential way with the effects of gravity." *Parrino v. Rauert*, 208 A.D.3d 672 [2d Dep't 2022]; *see also Nieves v. Five Boro A.C. & Refir. Corp.,* 93 N.Y.2d 914 [1999]. Application of § 240 (1) is limited to injuries occasioned by elevation-related hazards "where protective devices are called for. . . . because of a difference between the elevation level of the required work and a lower level". *See Rocovich v Consolidated Edison Co.,* 78 NY2d 509, 583 N.E.2d 932, 577 N.Y.S.2d 219 [1991]. Vitally, the proximate cause must stem from a failure or a lack of a safety device, the presence or functionality of which would have prevented the accident.

Here, the glass panel was essentially at floor level when it shattered. The panel was not suspended or hoisted, nor did it fall from any height *causing* it to shatter. The glass panel did not break from any force of gravity or from the process in which it was being moved.

Critically, the panel did not require securing or hoisting within the meaning of the statute. In fact, securing the object would defeat the entire purpose of the task at hand.

The Court focuses on a point of importance, in that Plaintiff and his co-worker had removed two other glass panels in a similar fashion immediately prior to the accident, demonstrating that the method of removal was not inherently unsafe or dependent on the use of hoisting equipment. Rather it was a task routinely performed using manual techniques, a fact further supported by the testimony of JWK. The hazard did not arise from a force of gravity but from a condition attributable to the panel itself such as stress or material weakness. In his own testimony, the plaintiff stated that the panel simply shattered for unexplainable reasons. He did not testify that the panel dropped.

At first glance, this fact pattern lends itself to the belief that 240(1) would apply, so much so that the plaintiff moved for summary judgment solely on 240(1). However, when each element is broken down and applied as the statutory and caselaw framework requires, it becomes clear that the accident is not one encompassed by the strong protections of Labor Law 240(1).

Accordingly, Judge Kingo highlighted each of these deficiencies in denying plaintiffs motion for summary and granting those of defendant and third-party defendants. Additionally, the plaintiff's causes of action for Labor Law 241(6) were dismissed as he failed to identify an applicable and sufficient Industrial Code violation that proximately caused his accident. The plaintiff further conceded that that there was no claim in Labor Law 200 as there was no notice of any defective or dangerous condition.

This case is a reminder to employers and insurers in New York's complex construction industry that a careful analysis of the proximate cause of injury, foreseeability of that cause, and what a falling object is and isn't, are integral to the analysis of a Labor Law 240(1) claim.