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First and Second Departments Differ on Issue of Workers Injured While on Break or Entering/Exiting a Construction Site, New York Law Journal

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The decisions out of the First and Second Departments are split when the facts involve a worker who is injured while legitimately on a construction site but outside regular working hours (e.g., when a worker is injured while on a lunch break, waiting for operations to commence, or after the workday ends).

All contractors and owners and their agents … in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect … for the performance of such labor, scaffolding, hoists, stays, ladders … and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

In essence, this statute imposes absolute liability upon owners and contractors and their agents for failing to protect workers from elevation-related hazards while employed on a construction site that proximately causes injury to the worker. See Wilinski v. 334 East 92nd Housing Dev. Fund, 18 N.Y.3d 1, 3 (2001); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 500-01 (1993). The purpose of §240 is to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility. It is well-settled that §240(1) is to be construed liberally in order to accomplish the purpose for which it is framed. Once it has been determined that the work being performed is afforded the protection of Labor Law §240(1), the inquiry is whether there is a violation of same. Thus, the threshold issue is whether the injury-producing work is an enumerated activity.

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In the First Department, injuries sustained by a worker who is not performing work duties or that occur outside regular working hours are protected by §240(1). Indeed, the First Department follows the premise that "[r]ather than isolating the moment of a plaintiff's injury, the general context of the work is what should be taken into account." Hoyos v. NY-1095 Ave. of the AMs., 156 A.D.3d 491, 495 (1st Dep't 2017). In Hoyos, a painter was injured after he fell off an elevated loading dock at the start of his work day while waiting to sign in and obtain security clearance to enter the building. The First Department held that the painter was engaged in an enumerated activity within the meaning of Labor Law §240(1). Specifically, the court stated "[a]lthough the owner seeks to remove plaintiff from the protections of Labor Law §240(1) on the basis that plaintiff was not 'working' at the time of the accident and he was in street clothes, those facts do not dictate whether an injury is within or without the protections of the Scaffold Law." Id. at 493. Instead, "[s]ince plaintiff's painting assignment related to a construction/renovation project within the building, plaintiff was unquestionably engaged in an enumerated activity within the meaning of Labor Law §240(1)." Id.

Likewise, in Amante v. Pavarini McGovern, 127 A.D.3d 516 (1st Dep't 2015), a worker was injured when he fell into an excavation pit after he crossed the job site upon arriving early for work and entered through an open gate. The First Department held that this was an elevation-related hazard covered by Labor Law §240(1). In Alarcon v. UCAN White Plains Hous. Dev. Fund Corp., 100 A.D.3d 431 (1st Dep't 2012), a laborer was injured at a construction site after his pants got caught on a piece of scaffold pipe causing him to lose his balance and fall 3½ stories. The laborer was walking to the fourth floor to gather his street clothes after quarrelling with his supervisor and told to leave the job site. The First Department held "the fact that plaintiff was in the process of exiting the job site did not remove him from the protections of Labor Law §240." Id. at 432. Also, in Morales v. Spring Scaffolding, 24 A.D.3d 42 (1st Dep't 2012), a worker hired to build a sidewalk bridge during a building façade repair was injured after the parapet wall of the bridge collapsed causing him to fall 8 feet. At the time of the incident, the worker had been sitting on the sidewalk bridge eating lunch. Id. at 44. The First Department held that Labor Law §240(1) applied to the accident as the sidewalk bridge was used by the façade repair workers as a staging area, for storing equipment and mixing cement, and as an entryway onto the scaffolding. Id. at 48.

In stark contrast is the Second Department. The Second Department has held that injuries sustained at a time when a worker is not performing work duties or occurs outside regular work hours are not protected by Labor Law §240(1). Unlike the First Department, the Second Department focuses on when the injury occurred and the type of work being performed (if any) that conceivably could be considered an enumerated activity covered by §240.

For example, in Feinberg v. Sans, 115 A.D.3d 705 (2d Dep't 2014), a worker fell to his death from the roof of a five-story building more than an hour and a half after he had completed his work for the day. The Second Department held that "the decedent was not engaged in any of the enumerated activities protected under Labor Law §240(1) … at the time of his fall" as "the accident occurred at 7:00 p.m., long after the decedent and his coworkers had completed their work for the day." Id. at 706. In Simon v. Granite Building 2, 114 A.D.3d 749 (2d Dep't 2014), a worker hired to hang wallpaper in a newly constructed office building was injured while entering a job site before performing any work for the day. The worker was injured when he jumped from a vehicle that was falling approximately 32 feet off an elevated parking garage. Id. at 752. The Second Department held that at the time of the incident, the worker was not engaged in an enumerated activity (wallpapering) protected under Labor Law §240(1) and that "the accident occurred before the plaintiff … had begun any work that conceivably could have been covered under these sections of the Labor Law …" Id. at 753.

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