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OWNERS AND CONSTRUCTION CONTRACTORS GAIN NEW INCENTIVE FOR EMPLOYEE SAFETY TRAINING

On December 21, 2004, the New York Court of Appeals decided in *Cahill v. Triborough Bridge and Tunnel Authority* that an employee who is injured solely by reason of his failure to follow his/her employer's safety instructions can be foreclosed from recovering under New York Labor Law section 240(1).[1] This ruling presents a possible avenue of avoiding liability under this section of the Labor Law.

Building owners, construction contractors and other employers who have had workers injured by reason of incidents involving ladders, scaffolds, and similar devices have rightly learned to beware of section 240(1) liability. The provision has come to be viewed as imposing absolute liability when a worker is injured while working on and around the equipment covered by the provision.

In the *Cahill* case, the worker was injured when he fell while climbing with a safety belt and lanyard. The employee, however, did not have the lanyard attached to a lifeline but instead was using a "position hook" on the belt that was intended to secure him while working stationary in a particular location. Contrary to the employer's policy, the worker attached, removed, and re-attached the position hook as he climbed, but on the last sequence, he did not secure the hook and he fell. The proof showed that the employer had provided a man-lift, which was not readily available because it was in use elsewhere, but, in addition, the employer had installed vertical life lines that would protect against a fall. One of these vertical safety lines was 10 feet from where the employee chose to climb.

The trial court granted summary judgment for the worker when he sued, rejecting the employer's "recalcitrant worker" defense, and the Appellate Division affirmed that decision. The New York Court of Appeals reversed. The recalcitrant worker defense had been rejected because the proof did not show that the worker had disobeyed an "immediate" instruction in how to use the safety equipment. The proof established that the worker had been trained on a regular basis according to the employer's safety program, and that his supervisor had corrected him within a month to six weeks prior to the accident for not using safety equipment properly.

The Court of Appeals noted that Labor Law 240(1) created absolute, or strict, liability in two ways: the duty to provide safe working conditions may not be delegated, and the employee's own negligence does not constitute a defense. The Court went on to say that the plaintiff must show that there was a failure to meet the statute's mandate, that is, to provide the appropriate safety equipment, and when the employee was solely responsible by reason of his own actions, there is no violation of the employer's duty.

The Court explained how this plaintiff could be deemed "recalcitrant." He had received specific instructions in use of the equipment and disregarded them. The passage of time did not require a different result. But the Court further explained that, apart from this worker's recalcitrant nature, there was evidence that the employer could demonstrate that appropriate safety equipment had been made available, that the employee knew that he was supposed to use this gear and that he knew how to use it, and, nevertheless chose not to. In these circumstances, the Court stated, a jury could conclude that there was no statutory violation.

The *Cahill* case was returned to the trial court for resolution. It may be tried, or it may be settled. The significance of the Court of Appeals opinion is that the Court is outlining the factors which an employer may rely upon to defend an action brought under Labor Law §240(1).

It goes without saying that to avoid liability, the employer needs to provide the proper safety equipment. Often, the equipment provided by the employer is not unsafe, as in the *Cahill* case , but, rather, one or more employees have not used the equipment in the proper manner. Employers should focus on training both supervisors and workers, so that supervisors will correct improper employee use of safety equipment, and employees will know what they are expected to do. Equally important is appropriate documentation by the employer that training has been conducted and that individual employees have been the recipients of that training.

Employers should also consider how to incorporate safety correction into the employer's disciplinary policy. The employer would have powerful evidence at trial if the employer could show that workers were warned about safety infractions, the warning was documented, and subsequent violations resulted in more severe action, including suspension, or termination of employment, in proper circumstances. Furthermore, the employer should be able to offer evidence that such a progressive discipline policy was in place and has been followed for all employees, not just a particular plaintiff.

Labor Law §240(1) can result in judgments of several hundred thousands of dollars, or even judgments that total in a million or more dollars. Protection against these claims should begin with a thoughtful plan for each job the employer undertakes. The plan must provide for use of the right equipment, training in use of this equipment, and consistent enforcement of the employer's safety requirements.

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(Footnote)

[1] The pertinent provision of Labor Law Section 240(1) provides as follows:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."