

COURT OF APPEALS DECLARES THAT THE INDUSTRIAL CODE SHOULD BE INTERPRETED "SENSIBLY"

St. Louis v. Town of North Elba
(Court of Appeals March 31, 2011)

Violations of the Industrial Code, alleged in support of a claim under Labor Law § 241(6), are to be read with common sense and not restrictively. A violation of the Industrial Code can be found where a similar piece of equipment, not specifically mentioned in the regulation alleged to have been violated, is used for an activity protected by the Industrial Code.

In *St. Louis*, plaintiff was injured when he was assisting a work crew that was constructing a drainage pipeline. The crew was constructing the pipe by welding together twenty-foot sections of pipe. A front-end loader with a hydraulic-operated clamshell bucket attachment was used to lift sections of the pipe four feet off the ground and hold sections of the pipe in place in the jaws of the clamshell during the welding process. Suspending one end of the pipe section in the air during the welding allowed the crew to reach the underside of the jointed sections. Plaintiff was injured when he began hitting a welded seam with a hammer to remove excess metal after a crew member had finished welding two sections of pipe

together. The jaws of the clamshell bucket suddenly opened and released the pipe, pinning plaintiff to the ground and injuring his legs and feet. Normally, the crew constructing the drainage pipe used chains to secure loads in the clamshell bucket but at the time of the accident there was no chain, rope or any other safety device to prevent the pipe from falling if the machine malfunctioned.

Plaintiff's allegations under Labor Law § 241(6) relied on Industrial Code § 23-9.4(e) which requires that loads handled by power shovels and backhoes be suspended from the bucket or bucket arm by means of wire rope. Defendant moved for summary judgment to dismiss plaintiff's claims under Labor Law § 241(6) and argued that Section 23-9.4(e) only applied to power shovels and backhoes and could not be extended to include front-end loaders like the one involved in plaintiff's accident. Since the regulation did not specifically mention front-end loaders, it could not apply to plaintiff's accident. In upholding the denial of defendant's motion for summary judgment,

the Court of Appeals held that Subpart 23-9 applied to power-operated heavy equipment or machinery used in construction and that this extended to front-end loaders being used to construct a drainage pipeline. The Court also held that Section 23-9.4(e) was enacted to protect workers against unsecured loads falling and that the same danger existed for workers whether the unsecured load was attached to a power shovel, backhoe, or front-end loader. The Court of Appeals further held that the Industrial Code should be sensibly interpreted and that interpretation of the Industrial Code should take into account the function of a piece of equipment and not simply the name of the piece of equipment used.

PRACTICE POINTER: When a plaintiff has alleged an Industrial Code violation in support of his/her claims under Labor Law § 241(6), it is important to look at the purpose of the particular section alleged and not just its specific requirements or language. If a plaintiff's accident would fall into the overall purpose of the section alleged to be violated, it will most likely be found to be applicable.

JUST BECAUSE SOMEONE FALLS FROM A SCAFFOLD DOES NOT MEAN THEY FELL BECAUSE OF THE SCAFFOLD

Harris v. Eastman Kodak Company
(4th Dep't April 29, 2011)

To establish a violation of Labor Law § 240(1), a plaintiff must establish that the scaffold or other elevation-related safety device somehow failed or was inadequate. A simple fall does not establish liability.

Plaintiff was injured when he fell from a scaffold that was equipped with wheels. The accident occurred while plaintiff was removing a pipe that was attached to and ran parallel with the ceiling of the building where he was working. Plaintiff cut through a bracket that suspended the pipe, the pipe fell, and plaintiff alleged on paper that the scaffold shifted or moved to the right, causing him to fall 10 feet. The Fourth Department held that plaintiff's motion for summary judgment was properly denied because it was undisputed that the scaffold neither collapsed nor tipped. Plaintiff testified at his deposition that the pipe did not strike him and that he did not know if the scaffold moved or shifted, despite his prior allegations. In upholding the denial of

plaintiff's motion for summary judgment, the Fourth Department held that the record did not establish that the pipe struck the scaffold or whether the scaffold was equipped with a safety railing. Accordingly, plaintiff could not establish that there was any violation of Labor Law §§ 240(1) or Labor Law 241(6).

PRACTICE POINTER: To prove a case under Labor Law § 240(1), a plaintiff must develop proof that there was a failure of a safety device that caused an accident. Testimony that the plaintiff is not sure how the accident happened is insufficient. It should be noted that the defendant in this case cross-moved for summary judgment but failed to file a cross appeal from the trial court's denial of its motion, which meant that the portion of the trial court's order denying defendant's cross-motion was not properly before the Appellate Division. Based on the Court's decision, the defendant may have prevailed on a cross appeal.

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**WHEN IS A FORKLIFT NOT A FORKLIFT?
ANSWER: WHEN IT'S BEING USED AS A SCAFFOLD**

Kuhn v. Camelot Association, Inc.
(4th Dep't March 25, 2011)

Liability under Labor Law § 240(1) can be established when alternative means are used to reach overhead work levels and that alternative method fails, causing injury.

Plaintiff was injured when he was working on the roof of a building owned by defendant. Plaintiff stepped from the roof onto an elevated platform attached to a forklift which then tipped over causing plaintiff to fall to the ground. The Fourth Department affirmed the trial court's grant of partial summary judgment to plaintiff on his Labor Law § 240(1) claim. Defendant argued that plaintiff should have used a ladder instead of the forklift to get to the roof of the building but failed to present any evidence that plaintiff had been instructed to use a ladder or that he knew he should have used a ladder based on his prior experience. In support of his motion, plaintiff provided testimony that the forklift provided at the jobsite had been used to transport workers and materials. In addition, plaintiff's foremen observed, facilitated and participated in the use of the forklift to transport workers. At the time of the accident, one of the foremen, who had

worked out of the forklift at an elevated height before the accident, placed the forklift next to the roof and was operating the forklift at the time of the accident. Another foreman was on the roof with plaintiff when he used the forklift to get down from the roof. The Fourth Department held that plaintiff was not the sole proximate cause of his accident because the forklift was provided by his employers and plaintiff's supervisors approved its use as an alternative safety device for transporting personnel.

PRACTICE POINTER: Liability is almost assured if an allegation of a violation of Labor Law § 240(1) is based on the improper use of a piece of equipment as an alternative height-related safety device. To properly defend such a case, the employer's ratification of such an alternative method must be fully investigated and developed.

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LIABILITY UNDER LABOR LAW § 240(1) WILL NOT EXIST ONCE A PREVIOUSLY-HOISTED OBJECT HAS BEEN RELEASED

Mueller v. PSEG Power New York, Inc.
(3d Dep't April 14, 2011)

It is well-settled that Labor Law § 240(1) applies to materials that are being hoisted. However, it does not apply to injuries caused by those same materials once the hoisting has been completed.

At the time of the accident, plaintiff was disassembling, stacking and storing steel slab forms used to mold concrete walls and pads when they were poured. A crane would lift the forms from a flatbed truck and move them 50 feet so the forms could be disassembled for storage. At the time of the accident, the crane removed two forms from the truck that were fastened together and weighed approximately 1,305 pounds. It set the forms on the ground in a trench next to a concrete pad. The forms were to be leaned against the concrete pad until they could be taken apart and stored. Scrap wood was to

be placed between the forms and the concrete pad to protect both surfaces. Plaintiff noticed that the forms were backwards which would prevent the removal of the clamp attaching the forms to the crane. He signaled to the crane operator who lifted the forms and spun them around into the correct position. Plaintiff and another worker held the forms while the clamps were removed. After the clamps were removed, the crane boom began to swing away and the crane cable snagged the forms, lifting them approximately 6 to 8 inches off the ground before dropping the forms against plaintiff's leg.

The Third Department held that the trial court properly dismissed plaintiff's claim under Labor Law § 240(1). For this section to apply, a plaintiff must show more than simply that

an object fell causing his injury. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute. In this case, the forms were not being hoisted at the time of the accident. The forms only left the ground because they were accidentally snagged by the crane and were not purposefully hoisted. The Third Department concluded that it would be illogical to hold defendant liable for failing to utilize or properly attach a protective hoisting device when no further hoisting of the forms was contemplated. The failure to keep the cable attached until the forms were stabilized created a general workplace hazard and not an elevation-related hazard contemplated by Labor Law § 240(1).

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