

Construction & Surety Law Newsletter

A publication of the Torts, Insurance and Compensation Law Section
of the New York State Bar Association

Summary of Decisions and Statutes

LABOR LAW §§ 200, 240, 241

37-1. A boilermaker died from alleged asbestos exposure, and his estate claimed that the project owners and a general contractor should be held vicariously liable under Labor Law § 241(6) for subcontractors' violations of Industrial Code Part 12 air contamination rules. The Court of Appeals affirmed the dismissal of the claim. The language and history of Part 12 regulations indicate they cannot provide a basis for liability under 241(6) unless they are specifically incorporated into Part 23 regulations, which are expressly promulgated under 241(6). *Nostrom v. A.W. Chesterton Company*, 15 N.Y.3d 502, 914 N.Y.S.2d 725 (2010).

37-2. A claim under Labor Law § 240(1) was properly dismissed where the injury was caused by a scaffold moving under the impetus of one of its motors and was not the direct consequence of the application of the force of gravity to an object or worker. The worker was injured while repainting a bridge, when his hand was trapped between the scaffold and the leg of the bridge, as the scaffold was ascending. *Gasques v. New York*, 15 N.Y.3d 869, 910 N.Y.S.2d 415 (2010).

37-3. In a 3-2 decision, the majority of a First Department panel found an issue of fact as to whether the collapse of permanent stairs was foreseeable, so as to give rise to liability under Labor Law § 240(1). Notably, the two-judge dissent contended that the majority misread 240(1) by requiring an injured worker to demonstrate that an injury was foreseeable where the claim is premised on a collapsing permanent structure. *Vasquez v. Urbahn Associates, Inc.*, 79 A.D.3d 493, 918 N.Y.S.2d 1 (1st Dep't 2010).

37-4. The fact that an employer provides a safety monitoring system approved by OSHA guidelines does not necessarily establish that the monitoring system constitutes a safety device within the meaning of Labor Law § 240(1). An employee was assigned the task of warning workers when they were approaching a roof edge or other fall hazard. The injured worker, who was warned by the monitor before he fell from the roof, was not provided with a safety device within the meaning of 240(1) because the monitor did not provide physical support similar to the statutory enumerated devices under this section. *Miranda v. Norstar Building Corporation*, 79 A.D.3d 42, 909 N.Y.S.2d 802 (3d Dep't 2010).

37-5. Where a worker is injured while engaging in activities located at a distance from the construction site and the activities are necessary and incidental to the work occurring at the site, the accident may still fall within the purview of Labor Law § 240(1). The trial court improperly dismissed a claim under 240(1) where the worker was injured when he fell while climbing down the top of a cement truck parked 100 feet away from the construction site. *D'Alto v. 22-24 129th St., LLC*, 76 A.D.3d 503, 906 N.Y.S.2d 79 (2d Dep't 2010).

PREVAILING WAGES

37-6. A divided Court of Appeals held that the prevailing wage law mandate of Labor Law § 220(2) is inapplicable to: (i) charter schools generally because they are nonpublic entities relative to the four categories of public entities (the state, a public benefit corporation, a municipal corporation, or a commission appointed pursuant to law) identified in 220(2); (ii) charter agreements, under which a state agency licenses



a charter school, because they are not public works contracts involving construction or renovation; and (iii) charter school facilities and renovation contracts where they are not “on behalf of” a public entity. *Matter of New York Charter School Association v. Smith*, 15 N.Y.3d 403, 914 N.Y.S.2d 696 (2010). See, *Prevailing Wages 35-20, Construction & Surety Law Newsletter* (Fall 2009).

PUBLIC CONTRACTS

37-7. Section 137 of the State Finance Law requires a prime contractor to issue a payment bond guaranteeing prompt payment of moneys due laborers, material suppliers, and subcontractors on public works projects. The doctrine of equitable subrogation permits the nominal obligee of the payment bond (i.e., the project owner) to recover from the surety payments made directly to subcontractors in settlement of their mechanics’ lien claims. Such payments must have been made either under compulsion or for the protection of some interest of the payee, and to discharge an existing liability. *Travelers Casualty and Surety Company v. Dormitory Authority—State of New York*, 735 F. Supp. 2d 42 (S.D.N.Y. 2010).

37-8. The Department of Environmental Conservation exceeded its regulatory authority under the Diesel Emissions Reduction Act (“DERA”), which mandates that diesel-powered heavy-duty vehicles operated “on behalf of” a state agency must use low-sulphur diesel fuel and be retrofitted with emission-reducing technology, by defining “on behalf of” in 6 NYCRR Part 248 as essentially including any contractor or subcontractor doing business with a state agency. After reviewing common usage and other statutes’ usage of the phrase “on behalf of,” the explicit language of other statutes imposing diesel retrofitting requirements on contractors and subcontractors, and DERA’s legislative and regulatory history, the court held that “on behalf of” in Part 248 means contractors which have a direct, prime agency relationship with a state entity, but not subcontractors. *Riccelli Enterprises, Inc. v. New York State Department of Environmental Conservation*, 30 Misc.3d 573, 915 N.Y.S.2d 439 (Sup. Ct., Onondaga Co. 2010).

STATUTES

37-9. Chapter 418 of the Laws of 2010—adds a new Article 25-B to the Labor Law, entitled “The New York State Construction Industry Fair Play Act,” to combat employee misclassification and payroll fraud by employers in the construction industry. Effective October 26, 2010.

37-10. Chapter 433 of the Laws of 2010—adds a new Article 6 to the Environmental Conservation Law, entitled “State Smart Growth Public Infrastructure Policy Act,” which requires state infrastructure agencies to fund infrastructure in a manner consistent with smart growth criteria. Effective September 30, 2010.

37-11. Chapter 469 of the Laws of 2010—amends Section 103 of the General Municipal Law to permit joint bidding of the public work and the utility interference work associated with the City of New York’s water tunnel capital program. Such joint bidding is otherwise prohibited by the New York Court of Appeals decision in *Diamond Asphalt Corp. v. Sander*, 92 N.Y.2d 244 (1998) (see, *Public Contracts 25-12, Construction & Surety Law Newsletter* (Spring 1999)). Effective August 31, 2010, and expiring December 31, 2014.

37-12. Chapter 523 of the Laws of 2010—amends Section 1735 of the Public Authorities Law to permit subcontractors to elect withholding and escrow remedies provided by the New York City School Construction Authority or mechanics’ lien remedies, but not both, in resolving payment claims against general contractors on SCA projects. Effective September 13, 2010.

37-13. Chapter 552 of the Laws of 2010—amends Section 375 of the Executive Law to direct the State Fire Prevention and Building Code Council to study and report on standardization of state and local building codes and permit processes to facilitate installation of solar and wind energy generating systems. Effective October 20, 2010.

37-14. Chapter 560 of the Laws of 2010—amends the Energy Law to update the State Energy Conservation Construction Code to comply with requirements of the American Recovery And Reinvestment Act of 2009. Effective January 1, 2011.

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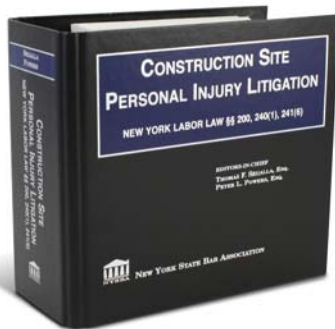
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Key Benefits

- Understand the statutory causes of action under N.Y. Labor Law §§ 200, 240(1) and 241(6)
- Be able to handle a construction site litigation case with confidence
- Understand the insurance implications between the parties involved

Perhaps no single scheme of statutory causes of action has initiated more debate between plaintiff's bar and its supporters and the defense bar than that promulgated under New York Labor Law §§ 200, 240(1) and 241(6).

The liability of various parties involved in a construction project—including owners, architects, engineers, other design professionals, general or prime contractors and employees—generates frequent disputes concerning the responsibilities of these parties. The authors discuss ways to minimize exposure to liability through careful attention to contract and insurance provisions.

The 2010 revision updates case and statutory law, with emphasis on recent developments in this area of practice.

*Discount good until September 15, 2011.

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