Out to Lunch: §240 Rule in Four Departments Is More Nuanced Than Meets the Eye | New York Law Journal

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Two authors recently averred in this publication that the First and Second Departments had split on the question of whether Labor Law §240, commonly but misleading known as the Scaffold Law, could apply when a worker was injured "while legitimately on a construction site" but while going to or coming from lunch or engaged in some similar activity. Megan E. Yllanes and Andrew L. Richards, *First and Second Departments Differ on Issue of Workers Injured While on Break or Entering/Exiting a Construction Site*, NYLJ (April 15, 2019). As they saw it, "injuries sustained by a worker who is not performing work duties or that occur outside regular working hours" were "protected by §240(1)" in the First Department. In "stark contrast," they wrote, "[t]he 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)."

Such is one way of reading the case law. However, I personally believe the so-called split is largely in the eye of the beholder and the rule in both departments—indeed, in all four departments—is more nuanced. That the plaintiff was injured while on his or her way to lunch should not of itself be disqualifying in any department in light of the governing Court of Appeals' rulings. However, the situation can change, in any department, when we add *additional* facts including, for example, that the injury

occurred off-site, outside of working hours, or after completion of the covered work.

The Court of Appeals' Rulings

Essentially, when one asks whether the plaintiff's or decedent's work fell within the ambit of Labor Law §240, one may be asking one of two questions: (1) whether the project as a whole was "altering," "repairing" or any of the other expressly enumerated activities listed in the statute, or (2) whether the subject accident's relation to the covered activity was such as to entitle the worker to the protection of the statute at the time of the subject event.

The Court of Appeals has notably addressed the second question, what we might call the nexus issue, four times in the last 20 years: in *Martinez v. City of New York*, 93 N.Y.2d 322 (1999), *Prats v. Port Authority of New York and New Jersey*, 100 N.Y.2d 878 (2003), *Beehner v. Eckerd*, 3 N.Y.3d 751 (2004) and *O'Brien v. Port Authority of New York and New Jersey*, 29 N.Y.3d 27 (2017). Those rulings collectively create the landscape, and shape the vernacular, which govern the nexus issue. And, while the Court of Appeals has never had occasion to squarely address whether a "covered worker" is also entitled to the protection of the statute when he or she crosses the construction site on the way to or from lunch, those four rulings, particularly the most recent (in *O'Brien*), strongly suggest the answer.

The first decision, in *Martinez*, involved a worker who "fell from a height while performing asbestos inspection work in a school building ..." 93 N.Y.2d at 324. Although "inspecting" is not an enumerated activity within the statute's scope, the plaintiff-worker urged he was entitled to the statute's protection because his work was a necessary prelude to any asbestos removal work. The court rejected that thesis, stating that "the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.'" Id. at 326. Here, such was not the case inasmuch as "plaintiff's work as an environmental inspector during phase one was merely investigatory ... was to terminate prior to the actual commencement of any subsequent asbestos removal work ... and any future repair work would not even be conducted by Kaselaan, plaintiff's supervisor, but by some other entity." Id.

In the second case, *Prats*, the plaintiff's employer had been retained to perform work that "involved cleaning, repairing and rehabilitating air handling units" in several buildings in the World Trade Center Complex. 100 N.Y.2d at 878. There was no doubt that the contracted work as a whole fell within the ambit of the statute inasmuch as some of the air handling units were built into the walls and plaintiff's employer was required "to level floors, lay concrete and rebuild walls." Id. However, plaintiff was not doing any of that construction-type work at the moment he was injured. Rather, plaintiff's co-worker was up on a ladder, "inspecting and putting the finishing touches" on one of the air handling units. Id. at 882. Plaintiff himself was climbing the ladder to pass the co-worker a wrench when the ladder slid out. Id. at 880.

The *Prats* court reasoned that it was "neither pragmatic nor consistent with the spirt of the statute to isolate the moment of injury and ignore the general context of the work." Id. at 882. The governing consideration was that plaintiff "was a member of a team that undertook an enumerated activity under a construction contract." Id. Contrasting the case before it with the situation in *Martinez*, the *Prats* court observed that *Martinez* involved inspection work that "was to end before any

asbestos removal would begin." Id. Here, "the work here did not fall into a separate phase easily distinguishable from other parts of the larger construction project" and "[t]he inspections were ongoing and contemporaneous with the other work that formed part of a single contract." Id. at 881.

Beehner, the next in the series of high court rulings, also arose from repair of an air handling unit, albeit a single such unit in the defendant's store. But the wrinkle was that the plaintiff-worker had actually finished effecting repairs. He then went back up to the building's roof in order to obtain the serial and model numbers of the machine, information he needed to complete his paperwork, and fell while descending from the roof. The court ruled that while "[w]e will not 'isolate the moment of injury'" (quoting *Prats*), "the statute does not cover an injury occurring after an enumerated activity is complete" and "as in *Martinez*, there is a bright line separating the enumerated and nonenumerated work." 3 N.Y.3d at 752.

In *O'Brien*, the most recent of the four Court of Appeals' rulings, there was no doubt that the project as a whole fell within the statute's scope. Plaintiff was working as an operating engineer at the World Trade Center Freedom Tower construction site. However, plaintiff was not performing covered work, or any work, at the moment he was injured. Rather, "[i]t had been raining periodically during the day" and plaintiff, who was "maintaining two welding machines located on ground level at the site," "headed downstairs to [his employer's] shanty, one level below ground, to get his rain jacket." 29 N.Y.3d at 30. Plaintiff descended by means of a "temporary exterior metal staircase," "the metal staircase was wet due to exposure to the elements," and plaintiff slipped and "fell down the stairs, sustaining injuries." Id.

The First Department and thereafter the Court of Appeals each split on the question of whether the plaintiff was entitled to summary judgment. The Appellate Division held by 4 to 1 vote that plaintiff was entitled to partial summary judgment inasmuch as "[a] plaintiff is entitled to partial summary judgment on a section 240(1) claim where, as here, stairs prove inadequate to shield him against harm resulting from the force of gravity, and his injuries are at least in part attributable to the defendants' failure to take mandated safety measures to protect him against an elevation-related risk." 131 A.D.3d at 825. The Court of Appeals then ruled by 4 to 3 vote that plaintiff was not entitled to partial summary judgment because there were "questions of fact as to whether the staircase provided adequate protection." 29 N.Y.3d at 27.

However, the point for present purposes is that none of the 12 appellate judges in *O'Brien* in any way questioned whether the statute applied to a worker who slipped on a temporary staircase while in the process of retrieving his rain jacket. Even though the defendants had argued in the Appellate Division that Labor Law §240 was inapplicable because "the subject temporary staircase ... was simply being used by the plaintiff as a means of passage to get to a lower level at the construction site in order to get a raincoat" and was therefore "not a Labor Law §240(1) safety device," that argument was rejected out of hand ... I suggest because, by this juncture roughly a decade after *Prats*, it was now settled and familiar law that it is "neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work." *Prats*, 100 N.Y.2d at 882.

In the wake of *Prats* and the other above-cited Court of Appeals rulings, the nexus issue concerning whether the plaintiff's relation to the covered work entitles him or her to the protections of Labor Law §240 essentially turns on whether plaintiff "was a member of a team" hired to perform enumerated work (as in *Prats*, and also

O'Brien) or whether plaintiff's work was instead part of a "separate phase easily distinguishable" from the covered work (as in *Martinez*). And, unless going or coming from lunch is significantly different than retrieving a rain jacket, which I do not think is the case, a worker who is hired to perform enumerated work is also entitled to the statute's protection while crossing the work site on the way to or from lunch.

However, one must also be mindful that there is, per *Beehner*, a "bright line" of demarcation "after an enumerated activity is complete." *Beehner*, 3 N.Y.2d at 752. Does that mean that statute's coverage stops when the work *for that day* is complete and the injury occurs outside of the actual work hours? The Court of Appeals has yet to address that question. In *Beehner*, the entire job, which consisted of the repair of a single air conditioner, had been completed.

It should also be appreciated that *Prats* and *O'Brien* both involved on-site accidents. Thus, in *O'Brien*, the hazard which precipitated the accident, the wet temporary staircase, was a true construction-site hazard within the purview and under the control of the entities that controlled the site. Just as importantly, while it happened that the plaintiff in *O'Brien* was in the process of retrieving his rain jacket when he fell, he could have just as well been descending the stairway to fetch a tool or for some like reason.

This is not to say that an *O'Brien*-type accident would *necessarily* fall beyond the bounds of the statute if the accident occurred just beyond the worksite (*D'Alto v. 22-24 129th St.*, 76 A.D.3d 503 (2d Dep't 2010)) or, for that matter, if it occurred at some off-site location where workers were, for example, assembling pre-fabricating components to be used at the construction site. *Gerrish v. 56 Leonard*, 147 A.D.3d 511 (1st Dep't 2017), aff'd 30 N.Y.3d 1125 (2018). However, those were not the facts in *O'Brien* and such would present a different case.

The Appellate Division's 'Lunch' Rulings

In light of *Prats* and the other Court of Appeals' rulings discussed above, it is hardly surprising that the First, Third and Fourth Departments have all squarely held that the protections of Labor Law §240 apply when a worker performing covered work is injured on site while going to or coming from lunch. *Morales v. Spring Scaffolding*, 24 A.D.3d 42, 48 (1st Dep't 2005) (the statute applied irrespective of whether "plaintiff was still on his lunch break or had finished lunch" inasmuch as the sidewalk bridge which partially collapsed "was used by the façade repair workers as a staging area, for storing equipment and mixing cement and as an entryway onto the scaffolding"); *Kouros v. State of New York*, 288 A.D.2d 566, 567 (3d Dep't 2001) (where the scaffold collapsed as plaintiff and his co-workers were in the process of "leaving the work area ... to go on their lunch break"); *Falsitta v. Metropolitan Life Insurance Company*, 279 A.D.2d 879, 879-80 (3d Dep't 2001) (holding there was an issue of fact as to the *manner* in which the accident occurred, but not doubting that Labor Law §240 *could* apply even though plaintiff himself claimed that the subject hoist had fallen as he was "returning to the ground floor to have his lunch"); *Reale v. H.B.S.A. Industries, Incorporated*, 233 A.D.2d 923, 924 (4th Dep't 1996) (noting, parenthetically, that the plaintiff, who fell from a "concrete block wall," sustained his accident "[w]hile on his way to lunch").

The same result occurred in cases in which the worker was injured on site while engaged in some similar diversion, or while arriving or leaving the work site. E.g.,

Hoyos v. NY-1095 Avenue of the Americas, 156 A.D.3d 491 (1st Dep't 2017) ("[t]he fact that plaintiff was in the *process of entering the building*, but had not yet physically begun painting is not a basis to deny summary judgment") (Although *Hoyos* was decided by 3 to 2 vote, the dissenters did not take issue with the principle that the statute applies even if plaintiff was injured on-site while going to or from lunch. Rather, they would have distinguished the *Morales* line of cases on the ground that those cases involved accidents that "took place at the work site." They also felt that the subject accident was not caused by an elevation-related hazard.); *Amante v. Pavarini McGovern*, 127 A.D.3d 516, 516 (1st Dep't 2015) (where "[t]he accident occurred as plaintiff crossed the job site *upon arriving early for work*" and then fell into an excavation pit); *Alarcon v. Ucan White Plains Housing Development Fund*, 100 A.D.3d 431, 431-32 (1st Dep't 2012) ("the fact that plaintiff *was in the process of exiting the job site* did not remove him from the protections of Labor Law §240"); *Reinhart v. The Long Island Lighting Co.*, 91 A.D.2d 571, 571 (1st Dep't 1982) (where the plaintiffs sustained injury *while discussing "a payroll and timesheet problem*," although "these plaintiffs seem not to have been directly involved in the business of plumbing, for which they had been employed, at the time of the accident ... they were employed, and they were not interlopers, and the scaffold was defective"); *Swedenhjelm v. Safeway Steel Products*, 19 A.D.3d 1004, 1004 (4th Dep't 2005) (where plaintiff left work, and then returned, *in order to attend "a computer training class*," and was injured when he returned); see also *Sweeting v. Board of Cooperative Education Services*, 83 A.D.2d 103, 105 (4th Dep't 1981) (noting, in passing, that decedent was *on his way "to take a coffee break*" when he was electrocuted).

Although the Yllanes/Richards article posits that the Second Department rule is in "stark contrast" with that of the First Department, I would suggest that the contrast is more apparent than real, and stems in part from an overly broad construction of the Second Department's ruling in *Keenan v. Just Kids Learning Center*, 297 A.D.2d 708, 708 (2d Dep't 2002). The court there said that "the defendants established their prima facie entitlement to summary judgment by submitting evidence demonstrating that the plaintiff was injured while on a lunch break, and that he was not engaged in the type of activity covered under Labor Law §240(1)." Yllanes and Richards construe that as meaning that plaintiff "was not engaged in the type of activity covered under Labor Law §240(1)" *because* he was "injured while on a lunch break." In *Morales*, the First Department interpreted the *Keenan* ruling the same way, but then proceeded to reject what it perceived as the ruling therein.

Yet, while one could not know this from the opinion in *Keenan* (since it relates virtually none of the facts of the case), the problem there was not merely that plaintiff was injured during his lunch break but also that, at least according to the defendants' appellate brief, the plaintiff had spent that entire morning working on a different project (construction of a new roof over the new addition to the subject building) rather than on the defendant's project (which entailed repair of an existent roof). What is more, the Second Department had no problem just a few years later applying Labor Law §240's sister statute, Labor Law §241(6), to an accident that occurred when the plaintiff-electrician "slipped and fell on a stairway in the building while on his lunch break." *Brown v. Brause Plaza*, 19 A.D.3d 626, 627-28 (2d Dep't 2005).

That aside, the ruling in *Keenan* preceded the Court of Appeals' ruling in *Prats* (i.e., that it is "neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury"). Accordingly, to the extent that the Second Department *actually*

meant that it was dispositive that the plaintiff was having lunch at the moment he was injured—and for the reasons already stated that is far from clear—any such holding was surely overruled by *Prats* and the still more recent decision in *O'Brien*.

The other decisions which Yllanes and Roberts see as evidence of a distinctly different Second Department rule turned on facts that could have rendered application of Labor Law §240 problematic in any department. In *Ferenczi v. Port Authority of New York and New Jersey*, 34 A.D.3d 722 (2d Dep't 2006), wherein the plaintiff drove away at the end of the work day and then returned to retrieve his cell phone, the plaintiff ran into the "bright line" of *Beehner*, supra, which the Second Department there construed as applying not merely to after the completion of the entire job (as in *Beehner*) but also to completion of the day's work. The *Ferenczi* court wrote that "[w]hile we are not to 'isolate the moment of injury'" (citing *Prats*), "we conclude, under the circumstances presented, that the injury occurred after the completion of any work that conceivably could have been covered under Labor Law §240(1)" (citing *Beehner*). By comparison, the First Department deemed the statute inapplicable in *Andrade v. Triborough Bridge & Tunnel Authority*, 51 A.D.3d 517, 517 (1st Dep't 2008), wherein there was "no dispute that at the time of the accident plaintiff had completed his work ..."

In *Feinberg v. Sanz*, 115 A.D.3d 705, 706-07 (2d Dep't 2014), which Yllanes and Richards also deem inconsistent with the "Lunch Counts Too" rulings in the other departments, the court stressed that "the accident occurred at approximately 7:00 p.m., long after the decedent and his coworkers had completed their work for the day," citing *Beehner*, amongst other cases.

Conclusion

One could construe the Second Department's rulings in *Keenan*, *Ferenczi* and *Feinberg* as collectively holding that Labor Law §240 does not apply to accidents which occur during or on the way to or from lunch, in which event the Second Department's rule would dramatically differ from that applied in the other three departments. However, I think the better construction is that *Ferenczi* and *Feinberg* involved after-hours accidents that thus implicated the *Beehner* "bright line" of completion, whereas *Keenan* was a pre-*Prats* ruling that was likely not to have been intended to be read as broadly as some have construed it.

Be that as it may, irrespective of whether the Second Department ever meant to say that an injury which befalls a worker while coming from or going to lunch is for that reason beyond the scope of Labor Law §240 (which I doubt), it is difficult to reconcile that construction of the statute with the *O'Brien* ruling that the statute could (and did) apply to a worker who was injured while retrieving his rain jacket. It is also difficult to understand how that narrow view of the statute—essentially, that the worker accepts the risk of unsafe elevation hazards whenever he or she deviates from the assigned task in order to have lunch, take a coffee break, or go to the restroom—with the legislature's intent to place ultimate responsibility for site safety on the owner and general contractor "instead of on workers, who 'are scarcely in a position to protect themselves from accident.'" *Balbuena v. IDR Realty*, 6 N.Y.3d 338, 358 (2006), quoting *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 520 (1985), quoting *Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 318 (1948).

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