$1,375,000 RECOVERY – LABOR LAW SEC. 240 (1) – FAILURE TO PROVIDE FALL PROTECTION – PLAINTIFF FALLS 30 FEET, STRIKING GROUND FACE-FIRST – FACIAL FRACTURES HEAL WITHOUT SIGNIFICANT COSMETIC DEFORMITY – ANKLE FRACTURE – DIPLOPIA.

Bronx County, NY

This action involved a 25-year-old plaintiff laborer who was engaged in placing rebar in a trough at the perimeter of the top floors of a building under construction. He contended that the defendants, owner and general contractor, failed to provide fall protection as is required by Sec. 240 (1) of the Labor Law of the Sate of New York. The plaintiff contended that, as a result, he fell approximately 30 feet, striking the ground face first. The plaintiff suffered nasal and orbital fractures that healed without significant cosmetic deficits. The defendant denied that fall protection is used in such jobs in the industry.

The plaintiff, who did not suffer cognitive deficits, maintained that the injury has left him with double vision upon a downward gaze and that he will permanently be unable to work at heights. The plaintiff also contended that he sustained an ankle fracture that will cause some permanent pain and restriction.

The plaintiff related that as he was placing the rebar, his pant leg got caught on a vertical bar causing him to trip and fall off the edge of the building. The plaintiff maintained that the defendants provided no fall protection system or device as mandated by the statute.

The defendant would have pointed out that since a worker is on the top floor, and must work around the perimeter of the building under construction, there would, as a practical matter, be no means of tying off the worker and still provide the dexterity of movement that was necessary to properly do the job. The plaintiff countered that the absolute liability provisions of Sec. 240 (1) require the use of some form of fall protection device or system and that, even if accurate, the defendant's reliance on custom in the industry should not be accepted. The plaintiff would have further maintained that there was any number of feasible means to provide such fall protection.

The plaintiff's experts would have contended that, as an example, exterior netting could have been employed. The defendants would have contended that netting is only used to prevent objects from falling to the ground below and is not strong enough to stop a person from falling. The plaintiff also maintained that a series of scaffolds could have been placed around the exterior of the building. The plaintiff further contended that a harnessing system could have been employed to which a worker could attach a safety line. The plaintiff would have also pointed out that the next trade working on the job site are masons and that they are provided a safety belt and harness system and argued that the workers doing the plaintiff's job should have been provided with that protection as well.

The plaintiff fell approximately 30 feet to the ground below, striking while prone. The plaintiff suffered fractures to the orbit and nasal fractures and underwent surgery. The plaintiff maintained that although miraculously he avoided any noticeable cosmetic or cognitive deficit, he was left with double vision when he looks downward. The plaintiff maintained that such a condition precludes him from returning to work at heights and the plaintiff's vocational expert would have discussed the limitations facing the plaintiff. The plaintiff also maintained that the fractured ankle will permanently cause pain and some difficulties ambulating long distances and upon changes in weather.

The defendant's expert would have contended that, based upon a sporadic work history, there was an insufficient basis to conclude that the plaintiff will probably earn less because of the incident.

The case settled during the pendency of motions for summary judgment for $1,375,000.

REFERENCE

Plaintiff's construction safety expert: Kathleen Hopkins from Red Bank, NJ. Defendant's expert engineer: Bernard Lorenz, P.E. from Edison, NJ.

Gordon vs. CS Melrose Site, CLLC, et al. Index no. 8562/2007; 9-09.

Attorneys for plaintiff: Jay W. Dankner of Dankner & Milstein, New York, NY and Charles H. Nugent, Jr. in Marlton, NJ.

COMMENTARY

The plaintiff was able to achieve a very significant settlement, notwithstanding the evidence that he was left with virtually no cosmetic deficit from the facial fractures and despite the fact that although the plaintiff contended that the continuing diplopia upon a downward gaze prevents him from returning to working at heights, the plaintiff's claim of economic damages was very vulnerable because of a sporadic work history. The highly traumatic nature of the incident in which the plaintiff fell some 30 feet, striking his face, clearly provided the plaintiff with a significant amount of leverage because of the anticipated jury reaction. Regarding liability, it was undisputed that the plaintiff was not provided fall protection. The plaintiff argued on the motion for summary judgment on liability that the absolute liability provisions of Sec. 240 (1) mandate such protection and maintained that the provisions of the statute should clearly be given greater weight than the position of the defendant that the custom and usage in the industry calls for such workers to complete their tasks without such fall protection.