MondayMonday

240(1): The Beat Goes On

January 18, 2016

The mortgage is due at the end of the month, there are unreimbursed medical expenses to deal with (are there other kinds?) and court deadlines remind us that we should have gone to medical school. So why should we give a damn about the Syrian civil war? It's been going on for over five years between Shia and Sunni Muslims (who can tell the difference) and is killing lots of people. Luckily though, none of them looks like us.

Listen, we're just trying to find some traction here, but let's be honest: The Middle East is a crap-hole; a toilet that has been responsible for more deaths per square inch than any other place on earth. It's given birth to three major religions, all related to one another, that have done nothing but justify the deaths of others in epic proportions, as if human sacrifice were the holy engine of a merciful God. We don't take sides here; they're all to blame. It's a family fist-fight that no one can win, but no one can end.

CBS reported last week that children caught in this Syrian civil war were so malnourished that they were too sick to play. *Too sick to play*. In the land of Abraham, Jesus and Muhammad. Well done gentlemen. No, don't blame us; it won't work anymore. We've been taught by your acolytes and holy men. Behold the lesson learned.

When children can't play, the world is a worthless place. That's just as true in Syria as it is in Newark. Lawyers listen: There is no justice when children can't play and

what justice there is, is worthless. In fact, we don't like it here anymore. This has become a sad place. We don't like living in a world which puts God before children. It makes God look bad. He expects more of us and, in his image, we expect more of Him; a lose-lose situation if we ever heard of one.

Does the world really need another Labor Law 240(1) opinion? Hasn't the Court of Appeals and the Appellate Divisions explained every permutation of such workplace injuries? Isn't enough enough?

No. In *Nazario v. 222 Broadway*, 2016 NY Slip Op 00251 (1st Dep't 1/14/16), Plaintiff, while doing electrical work, fell from an unsecured, wooden A-frame ladder when he received a shock from an exposed wire. AD1 reviews the field in this sub-category. There's *Vukovich*, a fall from an A-frame ladder due to an electrical shock (the ladder remained locked), standing for the proposition, as other cited cases do, that a plaintiff need not show that the safety device (the ladder) was defective, but that it was inadequate to protect him from the fall. While the Court admits that *Blake* requires the successful 240(1) plaintiff to show that the safety device was either absent or inadequate and that this was a proximate cause of the injury, making that *prima facie* transfers the burden. Defendant must then show that there was no statutory violation and that it was plaintiff who was the sole cause of his own injury. The Court's conclusion is that the failure to secure a ladder and ensure that it remains steady while being used is a *prima facie* violation of 240(1), citing cases such as *Kijak* and *Wise*.

So what's the problem? Apparently, it's Justice Tom's concurring opinion, in which he finds the Court's decision in another electrical shock/fall-from-a-ladder case, *DelRosario* (104 A.D.3d 515), split the ADs statewide, deviating from the Court of Appeals as well. According to Justice Tom, there's a question of fact in this case which prevents SJ, but *DelRosario* prevents him from reaching it, *i.e.*, does a worker standing on a perfectly good ladder who falls due to an electrical shock satisfy 240(1)? The majority opinion, he contends, holds defendants liable "absent any proof that the safety device provided was a proximate cause of plaintiff's injuries." To rely solely on the fall from the ladder itself is "conclusory." Prior to *Vukovich* and *DelRosario*, says Justice Tom, all four departments held that the electrical shock/fall from a ladder case merely presented a question of fact, unless the ladder was defective. Why? Because the Court of Appeals in *Blake* said so. Though the majority is "hesitant" to admit the fact, AD1 is now a rogue department in this sub-category.

Is it true? Can *any* device described in 240(1), as Justice Tom asks, "protect against a force capable of knocking a worker from even the best ladder or scaffold"? Is this the end of Rico? Submitted for your approval this corollary: When it comes to Labor Law 240(1), there is no such thing as "enough".