CONSTRUCTION RISK MANAGEMENT REPORTER

ERNSTROM & DRESTE LLP

ContrACT

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Notify Insurance Carriers "As soon as practicable"

BY TIMOTHY D. BOLDT

In New York, contractors, as a general rule, forfeit the right to insurance coverage by failing to provide notice of an occurrence, in accordance with the terms of an insurance policy. Although there are exceptions to this rule, including good faith belief in non-liability, contractors face a significant uphill battle in obtaining a favorable court order directing an insurance company to defend and indemnify. As such, it is important to be cognizant of all potential sources of coverage, including policies reachable as an additional insured. It is equally important to be familiar with the notice provisions of insurance policies and to have company policies in place to ensure compliance.

Most insurance agreements do not include specific deadlines for providing notice of an occurrence. Instead, insurance agreements, including typical commercial general liability policies, often require insured contractors to provide notice of any occurrence that may give rise to a claim as soon as practicable. In 2007, a New York appellate court determined that a nine month delay in providing notice was

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New York Court of Appeals Reinvigorates Debate on Scope of Scaffold Law

BY JOHN W. DRESTE

New York's Court of Appeals has ruled that New York's scaffold law may apply to injuries that are a direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential, whether or not the case involves a "falling worker" or "falling object." The ruling in *Runner v. N.Y. Stock Exchange*, 13 N.Y.3d 599, (2009), stems the tide of case law that had been restricting the scope of the scaffold law. Courts that previously examined the kind of elevation-related risk that the statute contemplates, and whether injuries were merely the result of the "ordinary dangers" of a construction site, may now choose to err on the side of liability.

In *Runner,* a worker suffered amputation of several fingers while using a makeshift pulley to lower a heavy reel of wire down a small stairway separating two levels of a split-level hallway. The jerry-rigged pulley was nothing more than a rope looped around a steel bar placed in a doorway. Unfortunately, the weight of the wire proved too-much for both method and man, causing the plaintiff's hands to be drawn into the bar, resulting in the traumatic hand injuries. The worker did not fall down the stairs, nor did anything fall from a height onto the worker. New York's highest court ruled that the scaffold law applied to this set of facts, finding that: "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential."

The Court observed that pulleys, among other specifically listed devises, are among those that, by statute, must be "placed and operated as to give proper protection" to workers.

The Court in *Runner* was faced with the dilemma of differentiating its own recent trend toward limiting expansion of the scaffold law, and prior opinions that had seemingly established that the law extended to "fallen worker" and "fallen object" cases. The Court reiterated what it considered to be the established governing rule that:

> Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder, or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*.

In *Runner*, because the heavy reel of wire being lowered down stairs, and the resulting harm, flowed directly from the application of the force of gravity to that object, the scaffold law applied. Further, the elevation differential could not be ruled as *de minimis*, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of the relatively short descent. The Court adopted

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New York Warn Act

BY MATTHEW D. BROWN

The New York State Worker Adjustment and Retraining Notification Act (the NY WARN Act) requires employers to provide 90 days advance notice to employees and other designated officials prior to a mass layoff, plant closing, or covered reduction in hours that affects 25 or more employees. The New York Department of Labor has issued revised regulations under the NY WARN Act, that make it more likely that seasonal or temporary construction employees will be covered by the Act. An employer in violation of the NY WARN Act is subject to a civil penalty of not more than $500 for each day of the employer's violation, and is liable for back-pay and benefits to each employee who did not receive the proper notice, up to a maximum of 60 days.

Who is Covered?

Employers with 50 or more employees in New York. All employees, other than part-time employees, are counted, including employees on temporary layoff with a reasonable expectation of recall. Employers with 50 or more employees – including part-time employees – who collectively work more than 2,000 or more hours per week are also subject to the NY WARN Act. Therefore, most general contractors will likely be covered by the Act.

What Does The Act Require?

The NY WARN Act requires that 90 days prior to a "mass layoff" or other defined employment loss, the employer provide written notice to the affected employees and other specific officials. Because there are specific requirements for the contents of such notice and to whom it must be given, it is advisable to work with counsel in preparing and serving any notice under the NY WARN Act.

What Triggers the Notice Requirements?

Certain employment losses will trigger the NY WARN Act notice requirements, such as a "Mass Layoff," which is a reduction in the contractor's work-force that results in an employment loss at a single site of employment during any 30-day period for 25 employees, excluding part-time employees, as long as it constitutes at least 33% of the employees at the site. Other things that will trigger the Act's requirements are a plant closing, which is a permanent or temporary shutdown of a single site of employment resulting in employment-loss during any 30-day period for 25 or more employees. Thus, laying off employees after the completion of a specific project could potentially constitute a "plant closing" under the Act.

It does not matter if the layoffs are spread out over several days or weeks. Instead, employment losses over a 90-day period are totaled to determine whether the NY WARN Act is triggered. Thus, an employer should look forward and back 90 days to assess whether layoffs trigger or will trigger the NY WARN Act notice requirements.

Because "mass layoffs" or "plant closings" are defined as job losses at a "single site of employment", what constitutes a single site of employment is important to contractors with workers at many different sites at the same time. Under the New York regulations, separate sites may be considered a single site of employment if they are in reasonable geographic proximity, are used by the employer for the same purpose, and share the same staff or equipment. Also, employees whose primary duties require travel from point to point, who are out-stationed, or whose primary duties involve work outside any of the employer's regular employment sites are counted as working at the site to which they are assigned as their home base, from which their work is assigned, or to which they report.

To avoid having several different construction sites deemed a "single site of employment" contractors should to the extent possible: not regularly share employees between concurrent projects; have separate management at each site with operational control for that project (including hiring and firing); not share equipment between concurrent projects; and not have employees regularly report to a central office.

What can be done to avoid the requirements of the NY WARN Act for seasonal employees or employees hired for a specific project?

Ensure that seasonal employees are properly informed of their status. Employers

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unreasonable. In February 2010, the same appellate court narrowed the window even further holding that a three month delay is also unreasonable. *Lehigh Construction Corp. v. Lexington Insurance Company*, 70 A.D.3d 1430 (4th Dept. 2010) involved a construction worker who fell from a height in January 2004. The construction company did not believe that it was responsible for the injury and did not put its insurance carriers on notice. Three years later the injured worker started a lawsuit. The construction company, still believing that it was not responsible for the injury, did not notify the insurer until three months after being served with the summons and complaint. As an excuse for the delay, the construction company argued that it was only a pass through defendant and that it reasonably believed that it was not the responsible party. The appellate court, relying on its 2007 decision, held against the contractor stating that "as a matter of law, plaintiff's assumption that other parties would bear the ultimate responsibility for…[the injured worker's] injuries is an insufficient excuse for failing to provide Lexington with timely notice of the fact that the underlying action had been commenced."

Lehigh Construction is a good reminder to make prompt and thorough evaluations of every incident that could give rise to a claim. Contractors should determine whether a claim could, in any reasonable way be asserted against it. If the answer is yes, then all insurers should be put on notice. Any failure to provide notice "as soon as practicable" puts a contractor at risk of being denied coverage. E&D

Deadlines Approaching for Complying with DEC Regulations

BY THOMAS K. O'GARA

The New York State Department of Environmental Conversation (DEC) enacted regulations last year concerning best available retrofit technology (BART) for heavy duty diesel vehicles. The regulations stem from a 2006 statute which mandated that all heavy duty vehicles used on certain state projects be retired, replaced or retrofitted in order to reduce particulate emissions. The 2006 statute called for a phase-in compliance requirement with 100% compliance mandated by December 31, 2010.

The previous phases of the DEC regulations were not enforced because contractors were not told how to comply with the 2006 statute until July, 2009. Although it is unclear how the DEC will treat the deadlines set forth in the 2006 law, contractors should expect the DEC to now enforce its reporting requirements.

The DEC considers a heavy duty vehicle to be any on and off-road vehicle powered by diesel fuel that has a gross vehicle weight of greater than 8,500 lbs, subject to certain exceptions. The regulations also mandate that contractors submit inventory reports of their fleets and the fleets of their subcontractors and suppliers.

While the enforcement of these regulations may be uncertain, contractors can start complying by creating an inventory of their fleet. Inventory forms can be found on the DEC's website. Once an inventory is created, contact the DEC to determine how the regulations will be enforced and the most practical way to comply. Contractors must be aware of these upcoming deadlines as it may seriously affect construction projects with various state agencies. E&D

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this rationale to differentiate *Toefer v. Long Island R.R.*, 4 N.Y.3d 399, (2005), which involved falls by workers from flat-bed trucks.

In *Toefer*, two workers were using wooden pry-bars to off-load steel beams from a flat-bed truck. In the course of that operation, the wooden pry-bar snapped back and hit one of the workers in the head, causing him to tumble from the flat-bed and sustain injuries that rendered him a paraplegic. The Court found that the injury "horrendous as it is, is not attributable to the sort of the elevation-related risk" that the scaffold law was meant to address. The Court rejected the argument that a hoist (also one of the devices listed in the statute) should have been used instead of wooden pry-bars, because the scaffold law is arguably implicated "only because the worker fell from the truck's trailer to the ground." The Court observed that:

> The purpose of hoist here would not have been to prevent Casey [worker] from falling; it would have been to prevent the beams themselves from doing damage. But Casey [worker] was not injured by a beam, or by any falling object; the object that struck him inexplicably flew at him either upwards or horizontally.

The Court in *Runner* failed to explain whether the injured worker in *Toefer* would have been entitled to recover had he ***not*** fallen from the truck, but had only suffered a head injury from the pry-bar. Or, what if the steel beam had fallen from the truck, while still causing the pry-bar to fly into the worker? The use of that pry-bar was no less of a jerry-rigged system for unloading the steel beams (as opposed to the use of a hoist) then was the pulley system that was put to use in *Runner*. Conversely, would the injured worker in *Runner* have been covered by the scaffold law if he, instead of having his hands being pulled into the bar portion of the pulley system, had fallen down the stairs? The Court intimated that the stairs themselves were not particularly high (it appears there were 4 steps), but more important, falling down existing stairs can only be seen as a type of usual and ordinary danger at a construction site.

While the Court appears to state that focus may still be on whether or not an enumerated safety device could have made a difference to an outcome, a likely outcome of *Runner* may be that courts increasingly refuse to entertain defenses to the scaffold law's strict liability whenever "the force of gravity" may arguably have had a role in causing injury. E&D

Updated A312 Payment Bond

BY MONIQUE F. MAZZA

Recent amendments to the AIA A312 Payment Bond significantly change the time-period that a surety has to respond to a claim and the repercussions for failing to timely respond. Sureties now have 15 more days to respond to a claim under the A312 Payment Bond and untimely responses do not constitute a waiver of defenses to the claim. The changes are in large part, a response to recent case law which held that a surety's failure to respond within 45 days to an A312 Payment Bond claim constituted a waiver of all defenses to the claim. The changes also appear to address practical problems that sureties sometimes have with investigating and responding to bond claims within 45 days. AIA, *AIA Bond Form Commentary and Comparison*, 4 (AIA 2010).

Under § 6.1 of the former A312 Payment Bond, sureties had to "[s]end an answer to the Claimant, with a copy to the Owner, within 45 days after receipt of the Claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed." The bond was silent on repercussions for failure to timely respond.

Section 7.1 of the new A312 Payment Bond gives sureties 60 days to answer bond claims and section 7.3 provides that failure to respond within 60 days "shall not be deemed to constitute a waiver of defenses the Surety or Contractor may have or acquire as to a Claim, except as to undisputed amounts for which the Surety and Claimant have reached agreement." However, section 7.3 also gives claimants the right to seek attorneys' fees stating "If, however, the Surety fails to discharge its obligations under Section 7.1 or Section 7.2, the Surety shall indemnify the Claimant for the reasonable attorneys' fees the Claimant incurs thereafter to recover any sums found to be due and owing to the Claimant." This new language results in a quantum shift in exposure to sureties and their principals for attorneys' fees.

In light of the changes to the A312 Payment Bond, sureties and contractors must take extreme care to quickly and thoroughly identify "undisputed" sums due and identify the basis for challenging any amounts that are disputed, or risk having fees shifted to the surety/contractor for pursuit of all sums claimed. E&D

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Nell M. Hurley, of counsel, joined E&D in February, bringing with her significant construction and surety law experience. Admitted to practice in New York since 1985, Ms. Hurley represents contractors, owners/developers and sureties. Her practice includes all aspects of contract drafting, review and negotiation, claims analysis and all phases of state and federal court litigation and arbitration.

Matthew D. Brown, has joined E&D as an associate after nearly seven years as a municipal attorney for the City of Rochester. In his previous employment Mr. Brown handled employment matters including disability discrimination, racial discrimination, sexual harassment, and wage and hour claims, as well as civil rights issues, contract disputes, commercial claims, design professional claims, property tax assessment, complex multi-party asbestos, and personal injury litigation in both federal and state courts. A 1996 graduate of Georgetown University Law Center, Mr. Brown served three years as an attorney in the U.S. Army JAG Corps.

Thomas K. O'Gara has joined the firm as an associate. A 2009 *cum laude* graduate of Albany Law School, Mr. O'Gara was the winner of the Karen C. McGovern Senior Prize Trials and the recipient of the Judge Merle Nahum Fogg, Jr. '45 Moot Court Prize.

This newsletter is intended purely as a resource guide for its readers. It is not intended to provide specific legal advice. Laws vary substantially from State to State. You should always retain and consult knowledgeable counsel with respect to any specific legal inquiries or concerns. No information provided in this newsletter shall create an attorney-client relationship.

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are not required to give notice if the layoff is of seasonal employees or results from the completion of a particular project and the affected employees were hired with the understanding that their employment was limited in duration to either the season or the project.

Employers must demonstrate that each employee was informed at time of hire that the job was seasonal or would only last to completion of the project. Simply relying on the fact that the job is traditionally seasonal will not necessarily meet this requirement. To avoid a dispute, job postings and employment applications for these jobs should clearly and expressly advise that the position is seasonal and/or limited to the completion of the project. Also, when such an employee is hired he should be again given *written* notice of this status. E&D