

# **Jimmy Merriman v. INTEGRATED BUILDING CONTROLS, INC.,**

## **1. LINCOLN CENTER DEVELOPMENT PROJECT, INC. and LINCOLN CENTER FOR THE PERFORMING ARTS, INC.,**

**\$1,500,000 RECOVERY - LABOR LAW SEC. 240 (1) - PLAINTIFF CONTENDS INADEQUATELY SECURED LADDER SHIFTS WHILE HE IS DESCENDING, RESULTING IN HIS FALLING 2-3 RUNGS - PLAINTIFF LANDS ON HIS FEET AND SUFFERS BILATERAL TIBIAL TENDON RUPTURES - PLAINTIFF THEN FALLS BACKWARDS, STRIKING HEAD - CLOSED HEAD INJURY - ARTHRITIS TO BOTH ANKLES NECESSITATES BILATERAL ANKLE FUSION**

Queens County, NY

This action involved a plaintiff union electrician, who was 58 at the time of the incident. The plaintiff contended that as he was descending, the ladder shifted, resulting in his falling as he neared the bottom. The plaintiff landed on both feet and then fell backwards, striking his head. The plaintiff maintained that he suffered bilateral tibial tendon ruptures, that traumatic arthritis developed on both sides, and that because of the severe nature of this condition the plaintiff underwent bilateral ankle fusions. The plaintiff also contended that he sustained a closed head injury that will permanently cause memory and concentration difficulties and mood swings. The defendant maintained that the neurologist's records taken approximately six weeks after the incident attributed a statement by the plaintiff that he believed he slipped while descending, and the defendant would have argued that the sole proximate cause was the failure of the plaintiff to be more careful while descending.

The incident was unwitnessed. Another worker at the site found the plaintiff after hearing a noise that was apparently the plaintiff falling and there was no defense contention that the incident did not occur.

The plaintiff argued that the statement in the neurologist's notes was not germane to treatment and would not, therefore, be admissible as a business record exception to the hearsay rule. The plaintiff argued on his motion for summary judgment on liability that in view of the absence of admissible evidence to support the defendant's position, his motion for summary judgment on liability under the absolute liability provisions of Sec. 240 (1), should be granted. The court concurred and granted the motion. The App Div, 2nd Dept reversed, holding that inadmissible evidence did not provide the sole basis for the denial of summary judgment in this case in which the 2nd Dept ruled that the defendant was able to show an acceptable excuse for failing to elicit admissible evidence from the plaintiff's treating neurologist at the time in question. The App Div also noted that the plaintiff's responses at his deposition regarding the possibility that he "missed a step" while descending the step was equivocal.

The plaintiff would have moved for a directed verdict on liability during trial.

The plaintiff suffered bilateral tibial tendon ruptures. The plaintiff maintained that traumatic arthritis developed in both ankles and that when the severe pain continued to increase, the decision was made no undergo fusion surgery to both ankles. The operations were performed approximately three months apart. The plaintiff contended that he will permanently have extensive difficulties ambulating. The plaintiff also maintained that he will not be able to return to work.

The plaintiff further contended that he sustained a concussion and post concussion syndrome. The plaintiff maintained that he will permanently suffer very significant deficits in concentration and memory as well as mood swings.

The plaintiff is a single parent raising 5 children, the youngest of whom was approximately 12 at the time of the incident.

A mediation held at NAM by J. John DiBlasi resulted in a settlement of \$1,500,000.00 (\$600,000.00 of which is structured providing a monthly payment of \$2778.30 per month for life with a 25 year guarantee.) A workers compensation lien of \$169,598.39 is to be paid from proceeds.

The defendant had pointed out that before the incident occurred, the plaintiff had been diagnosed with arthritis in the right big toe, and pointed out that the possibility of right-sided fusion had been mentioned in the pre-accident medical records, arguing that the plaintiff's claim that the subject incident was causally related to the need for bilateral ankle fusions should be rejected. The plaintiff would have countered this position by stressing that after this physician visit, he underwent an injection and missed no time from work, and that there was never any diagnosis or treatment for the left foot.