CONTAINING NUCLEAR VERDICTS
Preparing for Success in New York Labor Law Claims
By Mike Coffey

This article is based off of the session: “New York Labor Law: Emerging Issues, Pitfalls, and Strategies for Success,” which the author will co-present at CLM’s virtual Construction Conference at 2 p.m. on Sept. 29. Register for the show at theclm.org.

New York has experienced an explosion of nuclear verdicts in Labor Law jury trials in the last few years. In 2015, the average payout of a neck/back injury came in just under $3.8 million, while a traumatic brain injury received around $5 million, according to VerdictSearch. Skip ahead just a few short years, and by 2019, the average neck/back injury was awarded $6.8 million at trial, while brain injuries skyrocketed to over $27 million. What is happening out there?

To put it simply, plaintiffs’ attorneys have stepped up their game. In the last few years, the
plaintiffs’ bar has developed new strategies to maximize value and increase jury awards across six different areas: past pain and suffering, future pain and suffering, past loss of earnings, future loss of earnings, past medical expense, and future medical care expenses.

While there are a variety of ways to combat these strategies, the key to a positive outcome is good preparation, including knowing the specific rules and allowances that are unique to New York cases.

**Know the Injury**

Good preparation starts with knowing the injury. In a back injury claim, for example, risk managers, claims professionals, and defense counsel must all have a solid understanding of the back—including the various types of back injuries, surgeries, and recovery procedures to correct these injuries; as well as methods to defend these matters if they proceed to trial.

This is even more important in traumatic brain injury cases, which have clearly become the most dangerous and high-value claims in New York Labor Law. The defense must be rigorous and well-versed in the testing, symptomology, causation, and long-term prognosis and treatment of these matters.

If a surgical procedure is involved, the defense must have an understanding of how prevalent that type of procedure is and how it is used to help reduce pain and/or help individuals lead productive lives after a workplace accident. The plaintiffs’ bar will often try to show that the procedure is rare and can be life-altering or result in negative outcomes. It is up to the defense to educate the jury on the commonality of the procedure, its low number of associated risks, and its regular positive outcomes.

**Anticipate Plaintiffs’ Experts**

The sophisticated plaintiff’s bar uses a large number of experts in order to build up their clients’ cases and put them on the pathway toward a large settlement or jury verdict. In the typical New York Labor Law matter, plaintiffs now routinely use the following experts on most significant matters: orthopedists, neurologists, radiologists, liability experts, vocational rehabilitation specialists, life care planners, and economists.

Risk managers, claims professionals, and defense attorneys must all have an understanding of the typical experts involved and must be prepared to cross-examine each of these experts. This is especially critical in the areas of loss of earnings and future life care claims.

Plaintiffs’ counsel is adept at finding experts who will select highly subjective tests to “prove” the claimant is not able to return to work at pre-accident levels or find meaningful employment for a number of reasons, such as lack of education, intelligence or psychological aptitude, or that home health aids will be necessary 10-20 years in the future and must be compensated for as part of the overall damages award.

For this reason, the defense also needs to retain its own experts who can explain the biases in each of the plaintiffs’ expert’s respective tests, and administer their own tests that better reflect the post-accident capabilities of the claimant.

**Investigate the Plaintiff**

Notably, New York Labor Law differs from the federal standard in that it freely allows for the introduction of plaintiff’s criminal convictions in civil matters. It is important to make sure that your investigator performs a comprehensive criminal search and procures any certified certificates of conviction so that they can be entered into the record at trial. When used properly, highlighting a plaintiff’s criminal history can significantly reduce settlement values of a matter or reduce the amount a jury will award to a claimant.

Investigators are also allowed to perform sophisticated social media searches several times throughout the pendency of every New York Labor Law matter. These searches can show plaintiffs engaging in activities that undermine their claims that the injuries sustained in the matter have caused them grievous harm or prevent them from having any decent quality of life.

**The Future of Labor Law**

The COVID-19 pandemic has led to extreme uncertainty and the beginning of a new era in the world of civil litigation. Mediation and dispute resolution have gone primarily virtual, which presents new challenges to all parties involved. Courts around the U.S. are contemplating the viability of virtual trials and whether they can be conducted in a manner that produces the fair and just outcomes the U.S. legal system is known for.

Civil trials have completely halted in New York, and there does not appear to be any indication that they will begin again until 2021. And when jury trials do resume, they will drastically differ from what we have known. Defense attorneys will be required to adapt new strategies and overcome the challenges of presenting cases in a virtual world—the potential new frontier of lawyering.

Regardless, the aforementioned defense strategies will still be critical to keep nuclear verdicts from skyrocketing even higher.

Mike Caffey is a partner at insurance defense firm Tyson & Mendes LLP. mcaffey@tysonandmendes.com