The Industrial Code Index

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Preliminary Law of Interest

Labor Law § 241(6)

Labor Law § 241(6) states in full:

All contractors and owners and their agents, except owners of one or two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

Labor Law § 241(6) "imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to construction workers" in all areas in which construction, demolition, or excavation work is being performed. *Comes v. New York State Elec. & Gas Corp.,* 631 N.E.2d 876 (N.Y. 1993).

Requirement of Construction, Excavation, or Demolition Work

Labor Law § 241(6) only provides protection to those employed in, or lawfully frequenting, construction, excavation, or demolition sites. *Rizzuto v. L.A. Wenger Constr. Co.,* 693 N.E.2d 1068 (N.Y. 1998).

New York Courts interpret the meaning of construction, excavation, and demolition pursuant to the definitions contained in Industrial Code § 23-1.4(b)(13), (16), and (19). If the court determines that the plaintiff's injury did not arise in circumstances pursuant to the above definitions, § 241(6) cannot furnish liability.

For example, in Coyago v. Mapa Prop., Inc., 73 A.D.3d 664 (1st Dept 2010) an employee dismantled a boat with a flame torch. The boat exploded, injuring the employee. The court held that § 241(6) did not apply to the facts of the employee's case because § 23-1.4(b)(16) defines demolition as work associated with the "total or partial dismantling or razing of a *building or other structure including the removing or dismantling of machinery or other equipment."* The court held that dismantling vehicles, unrelated to other projects, is not the sort of demolition contemplated by § 241(6).

Specificity

Labor Law § 241(6) claims must be predicated on a violation of New York's Industrial Code. However, not all violations of the Industrial Code will trigger liability. To furnish liability, the allegedly breached regulation must be a "specific, positive command." *Gasques v. State,* 937 N.E.2d 79 (N.Y. 2008).

To state a valid Labor Law § 241(6) claim, an injured employee must allege that the defendant violated an Industrial Code regulation that "sets forth a specific standard of conduct and is simply not a recitation of common-law safety principles." *Toussaint v. Port Auth. of New York and New Jersey,* 188 N.E.3d 571, 574 (N.Y. 2022).

Below is a sequential list of I.C. regulations that either the N.Y. Court of Appeals or the 1st or 2nd Department has determined to be insufficiently specific in its entirety. Red font indicates explicit department splits. **Red cases symbolize that the department has held the corresponding provision as *sufficiently specific.***

INSUFFICIENTLY SPECIFIC PROVISIONS OF THE INDUSTRIAL CODE		
Provision	**1st Department**	**2nd Department**
§ 23-1.5(a)	*Carty v. Port Auth. of New York and New Jersey,* 32 A.D.3d 732 (1st Dept 2006).	*Greenwood v. Shearson, Lehman & Hutton,* 238 A.D.2d 311 (2d Dept 1997).
§ 23-1.5(b)	**UNADDRESSED**[1]	*Guallpa v. Canarsie Plaza, LLC,* 144 A.D.3d 1088 (2d Dept 2016).
§ 23-1.5(c)(1)	*Gasques v. State,* 937 N.E.2d 79 (N.Y. 2008).	*Gasques v. State,* 937 N.E.2d 79 (N.Y. 2008).
§ 23-1.5(c)(2)	*McLean v. Tishman Constr. Corp.,* 144 A.D.3d 534,535 (1st Dept 2016).	*Vernieri v. Empire Realty Co.,* 219 A.D.2d 593 (2d Dept 1995).
§ 23-2.1(b)	*Armental v. 401 Park Ave. S. Assoc.s, LLC,* 182 A.D.3d 405, 407 (1st Dept 2020).	*Ginter v. Flushing Terrace, LLC,* 121 A.D.3d 840, 844 (2d Dept 2014).
§ 23-4.1(b)	**UNADDRESSED**	*Reyes v. Astoria 31st St. Developers, LLC*, 190 A.D.3d 872 (2d Dept 2021).[2]

[1] In *Leon v. J&M Peppe Realty Corp.,* 190 A.D.2d 400, 410 (1st Dept 1993), the court held § 23-1.5(b) as sufficiently specific to support a § 241(6) claim. In response to the contention that § 23-1.5(b) was too general to support a § 241(6) claim, the court wrote: "We are unable to discern any logical basis for the proposition that only certain designated regulations would count towards a violation of Labor Law § 241(6)." This is wholly inconsistent with specificity requirements today. Consequently, I've listed § 23-1.5(b) as unaddressed in this First Department.

[2] Nice one, Roy!

§ 23-4.2(k)	*Willis v. Plaza Constr. Corp.,* 151 A.D.3d 568 (1st Dept 2017).	*Zaino v. Rogers,* 153 A.D.3d 763 (2d Dept 2017).
§ 23-5.1(b)	*Alberto v. DiSano Demolition Co., Inc.,* 194 A.D.3d 607, 608 (1st Dept 2021).	*Medina-Arana v. Henry St. Prop. Holdings, LLC,* 186 A.D.3d 1666, 1669 (2d Dept 2020).
§ 23-5.1(f)	*Alberto v. DiSano Demolition Co., Inc.,* 194 A.D.3d 607, 608 (1st Dept 2021).	*Debennedetto v. Chetrit,* 190 A.D.3d 933 (2d Dept 2021).
§ 23-5.3(f)	**UNADDRESSED**	*Klimowicz v. Powell Cove Assoc., LLC,* 111 A.D.3d 605 (2d Dept 2013).
§ 23-6.1(b)	*Gonzalez v. Glenwood Mason Supply Co., Inc.,* 41 A.D.3d. 338, 339 (1st Dept 2007).	*Barrick v. Palmark, Inc.,* 9 A.D.3d 414, 415 (2d Dept 2004).
§ 23-6.1(c)(1)	*Lopez v. Halletts Astoria LLC,* 205 A.D.3d 573, 575 (1st Dept 2022).	**UNADDRESSED**[3]
§ 23-6.1(h)	*Naughton v. City of New York,* 94 A.D.3d 1 (1st Dept 2012).	*Morrison v. City of New York,* 5 A.D.3d 642 (2d Dept 2004).
§ 23-7.1	*Wade v. Bovis Lend Lease LMB, Inc.,* 102 A.D.3d 476 (1st Dept 2013).	*Robles v. Taconic Mgmt. Co., LLC,* 173 A.D.3d 1089 (2d Dept 2019).
§ 23-9.2(b)(1)	*Scott v. Westmore Fuel Co., Inc.,* 96 A.D.3d 520, 521 (1st Dept 2012).	*Nicola v. United Veterans Mut. Hous. No. 2, Corp.,* 178 A.D.3d 937, 940 (2d Dept 2019).
§ 23-9.4(a)	*Scott v. Westmore Fuel Co., Inc.,* 96 A.D.3d 520, 521 (1st Dept 2012).	*Robinson v. County. of Nassau,* 84 A.D.3d 919, 921 (2d Dept 2011).
§ 23-9.6(c)(1)	**UNADDRESSED**	*Wilke v. Commc'n Constr. Grp. Inc.,* 274 A.D.2d 473, 474 (2d Dept 2000).
§ 23-9.8(k)	**UNADDRESSED**	*Ramcharan v. Beach 20th Realty, LLC,* 94 A.D.3d 964, 966 (2d Dept 2012).
§ 23-9.9(a)	*Toussaint v. Port Auth. of New York and New Jersey,* 188 N.E.3d 571 (N.Y. 2022).	*Toussaint v. Port Auth. of New York and New Jersey,* 188 N.E.3d 571 (N.Y. 2022).

[3] The 2nd Dept has held § 23-6.1(c) as *inapplicable* to the facts of a case. This might indicate that the 2nd Dept considers § 23-6.1(c) sufficiently specific. However, the court's discussion was so brief that to call it a Department Split felt incorrect. *See, Guallpa v. Canarsie Plaza, LLC,* 144 A.D.3d 1088, 1091 (2d Dept 2016).

Waiving Alleged Violations of the Industrial Code

If a plaintiff fails to specify a particular subsection and/or subdivisions of the Industrial Code which the defendant violated, then the court may consider the plaintiff's claims *abandoned.* For example, in *McLean v. Tishman Constr. Corp.,* 144 A.D.3d 534,535 (1st Dept 2016), the plaintiff alleged violations of I.C. §§ 23-1.16, 23-2.3, 23-6.1 and 23-8.1. Each of those regulations contains six to fourteen subsections. Because the plaintiff failed to allege which specific subsections the defendant had violated, the court dismissed his claims. *See also, Arizaga v. Lex Gardens II TP4 Hous. Dev. Fund Co. Inc.,* 78 Misc 3d 1216(A), 2023 N.Y. Slip Op. 50237(U), *4 (Sup Ct, Queens County 2023).

If a plaintiff fails to follow-up on alleged violations from their complaint in a response to the defendant's motion to dismiss their § 241(6) claim, the plaintiff has implicitly waived their argument as to those previously alleged violations. *See Carrion v. LSG 365 Bond St., LLC,* 62 Misc 2d 1203(A), 2018 N.Y. Slip Op. 51896(U), *4 (Sup Ct., N.Y. County 2018); *Kauffman v. New York City School Const. Auth.,* 55 Misc 3d 1208(A), 2017 N.Y. Slip Op. 50455(U) (Sup Ct, Queens County 2017).

Applicability

Any regulation inapplicable to the facts of a case will not avail a plaintiff. For example, in *Ankers v. Horizon Group, LLC,* 141 A.D.3d 418 (1st Dept 2016) a plaintiff sustained injuries after falling off an out-of-control motorized wheelbarrow. The plaintiff alleged violations of §§ 23-1.5, 23-1.7 (a), (c)-(h); 23-1.8, 23-1.23, 23-2.2, 23-4.1, 23-4.3, 23-4.4, 23-4.5, 23-9.2, 23-9.4, 23-9.5 and 23-9.7.

These regulations include: the general requirements for excavation; requirements for concrete work; specifications for earth ramps and runways; and personal protective equipment; etc. etc. etc…. The court promptly dismissed all these alleged violations of the industrial code on the grounds that they did not apply to the facts of the plaintiff's case.

Agency

In Labor Law § 241(6) claims, liability will only attach for defendants acting as agents of: (1) the general contractor; or (2) the building owner. In other words, the defendant must have had the authority to supervise and control the work that brought about the injury.

For example, in *Fiore v. Westerman Constr. Co., Inc.,* 186 A.D. 570, 571 (2d Dept 2020) the court dismissed § 241(6) claims against the installer of a manhole who had no supervisory authority over the worksite when plaintiff fell through the manhole.

Rule 23-1. General Provisions.

§ 23-1.5. GENERAL RESPONSIBILITES OF EMPLOYERS

Summary of Rule:

The First and Second Departments have rendered each provision of this regulation, except for § 23-1.5(c)(3), insufficiently specific.[4] § 23-1.5(c)(3) demands that employes keep all safety devices, safeguards, and equipment in sound and operable condition. An employer must immediately repair or remove the unsafe or defective object from the job site.

APPELLATE DECISIONS

- In *Nicholson v. Sabey Data Ctr. Prop., LLC,* 205 A.D.3d 620 (1st Dept 2022), an employee sustained injuries after a pallet jack suddenly jumped back causing him to fall and pin his ankle. He brought a § 241(6) claim premised on a violation of § 23-1.5(c)(3). § 23-1.5(c)(3) requires all safety equipment to be kept operable and immediately repaired or removed from the job site if damaged. Issues of fact remained because plaintiff testified that the pallet jack had given him problems prior to the accident.

- In *Ormsbee v. Time Warner Realty Inc.,* 203 A.D.3d 630 (1st Dept 2022), a laborer suffered injuries to his shoulders when the lid of a gang box on-site suddenly fell. The court denied defendant's motion to dismiss his § 241(6) claim premised on § 23-1.5(c)(3) because parties did not dispute the defective nature of the pumps in the gang box.

- In *Cruz v. 1142 Bedford Ave., LLC,* 192 A.D.3d 859 (2d Dept 2021), a worker injured his hand while operating a table saw equipped without a protective guard or spreader. The court granted him summary judgment on his § 241(6) claim premised on a violation of § 23-1.5(c)(3).

- In *Gomez v. 670 Merrick Rd. Realty Corp.,* 189 A.D.3d 1187 (2d Dept 2020), a construction worker injured his hand while attempting to reposition a concrete slab. The plaintiff held one end of the slab while his two co-workers pushed the other

[4] The Third Department has rendered § 23-1.5 insufficiently specific to support a § 241(6) claim in its entirety. *Trombley v. DLC Elec., LLC,* 134 A.D.3d 1343, 1344 (3d Dept 2015).

end with crowbars. The court dismissed his § 241(6) claim as premised on § 23-1.5(c)(3), reasoning that while crowbars may constitute equipment pursuant to the regulation, the plaintiff failed to establish the defective or unsafe nature of the crowbars.

TRIAL COURT DECISIONS

- In *Arizaga v. Lex Gardens II TP4 Hous. Dev. Fund Co. Inc.,* 78 Misc 3d 1216(A), 2023 N.Y. Slip Op. 50237(U) (Sup Ct, Queens County 2023), a worker fell from a scaffold after it lifted up and then fell back down. The worker merely alleged a violation of § 23-1.5(c) and the court held that the provisions was insufficiently specific for a § 241(6) claim. Had plaintiff's counsel alleged § 23-1.5(c)(3) perhaps the court would not have dismissed his claim.

- In *Ferrara v. Pacolet Milliken Enter., Inc.,* 69 Misc 3d 1216(A), 2020 N.Y. Slip Op. 51400(U) (Sup Ct, N.Y. County 2020) the plaintiff conceded that § 23-1.5(c)(3) did not apply to his injuries caused by a ladder which fell onto him. The court likely would not have considered an unsecure ladder unsound, inoperable, or in need of repair.

- In *Trotman v. Boston Prop., Inc.,* 59 Misc. 3d 1230(A), 2018 N.Y. Slip Op. 50803(U) (Sup Ct, Bronx County 2018) a laborer sustained injuries while moving a handcart down a steel ramp. The cart struck something, tipped over, and fell onto the laborer's leg. The court held that the ramp did not constitute a safety device, safeguard, or equipment as contemplated by § 23-1.5(c)(3).

- In *Delli Gatti v. Dordevic Constr. Co.,* 35 Misc 3d 1241(A), 2012 N.Y. Slip Op. 51087(U) (Sup Ct, N.Y. County 2012) the plaintiff abandoned his alleged violation of § 23-1.5(c)(3) in his claim arising from a fall from a ladder. The plaintiff testified that he inspected the ladder before climbing it and he witnessed coworkers use the same ladder that day. He alleged the ladder gave out underneath him. The court likely would have held § 23-1.5(c)(3) as inapplicable to the facts of his case.

§ 23-1.7. PROTECTION FROM GENERAL HAZARDS

(1) I.C. § 23-1.7(a): Overhead Hazards.

Summary of Rule:

Under Rule 23-1.7(a), "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection."

APPELLATE DECISIONS

- In *Griffin v Clinton Green S., LLC*, 98 A.D. 3d 41, 42 (1st Dept 2012), an employee sustained injuries while tearing down a scaffold erected to prevent injury from a newly installed collapsing ceiling. The court dismissed plaintiff's § 241(6) claim premised on an alleged violation of Rule 23-1.7(a). Since the ceiling work had been completed, the area where the accident occurred no longer constituted an area "normally exposed to falling material or objects." Accordingly, the defendant had not violated § 23-1.7(a) and did not need to fit the area with suitable overhead protection.

- In *Rivas-Pichardo v. 292 Fifth Ave. Holdings, LLC*, 198 A.D.3d 826 (2d Dept 2021), an employee sustained injuries while working at the bottom of an elevator shaft converted into a trash chute. The court rejected the employer's motion for summary judgment on employee's § 241(6) claim premised on § 23-1.7(a). The employer failed to demonstrate that § 23-1.7(a) did not apply to the facts of the case or that the alleged violations did not a proximately cause the plaintiff's injuries. In other words, an elevator shaft converted into a trash chute would constitute an area normally exposed to falling material.

TRIAL COURT DECISIONS

- In *Alvardo v. Bermuda Realty,* 77 Misc 3d 1207(A), 2022 N.Y. Slip Op. 51160(U) (Sup Ct, Kings County 2022) a portion of a ceiling fell and struck a worker performing demolition work at a supermarket. The court held that the supermarket demolition did not constitute an area normally exposed to falling objects. Demolition sites without some other sort of extraneous hazard of falling objects will not constitute an area exposed to falling objects.

- In *Crichigno v. Pacific Park 550 Vanderbilt, LLC,* 56 Misc 3d 1217(A), 2017 N.Y. Slip Op. 51048(U) (Sup Ct, Kings County 2017) the plaintiff effectively dismissed his own § 241(6) claim premised on a violation of § 23-1.7(a) when he testified that he did not consider the site of his injury an area normally exposed to falling objects and materials.

- In *Galarza v. Lincoln Ctr. for the Performing Arts, Inc.,* 32 Misc 3d 1226(A), 2011 N.Y. Slip Op. 51435(U) (Sup Ct, NY County 2011) asbestos-contaminated dirt fell into a worker's eye during an asbestos abatement job. The injury occurred while the worker stood on a ladder, receiving detached ceiling panels from his coworker located in the ceiling. The court considered this area normally exposed to falling objects and materials.

- In *McLean v. 405 Webster Ave. Assoc.,* 28 Misc 3d 1219(A), 2010 N.Y. Slip Op. 51396(U) (Sup Ct, Kings County 2010), *aff'd,* 98 A.D.3d 1090, 1094 (2d Dept 2012) a dumbwaiter counterweight fell onto a microduct installer's head and broke his neck while he performed installation work in the dumbwaiter shaft. The court held that the dumbwaiter shaft did not constitute an area normally exposed to falling materials or objects. The court considered the falling of the dumbwaiter's counterweight down a dumbwaiter shaft an unexpected occurrence.

- In *Magnello v. Hamilton,* 12 Misc 3d 1178(A), 2006 N.Y. Slip Op. 51301(U) (Sup Ct, Queens County 2006) a foreman on a chimney job died after a rotten and loose metal chimney pipe fell from the roof and struck him on the head. The pipe fell on the decedent as he stood on the street, adjusting his safety belt. The court held that this worksite, outdoors near a chimney demolition, did not constitute an area normally exposed to the hazard of falling objects.

(2) I.C. § 23-1.7(b)(1): Hazardous Openings.

Summary of Rule:

Pursuant to Rule 23-1.7(b)(1)(i), employers must guard hazardous openings, into which a person may step or fall, with substantial covers fastened in place or by a safety railing.

Further, Rule 23-1.7(b)(1)(ii) provides where work requires access into hazardous openings, a barrier or safety railing shall guard such opening. A substantial gate must guard access to the opening. The gate shall swing away from the opening and remain latched.

Finally, § 23-1.7(b)(1)(iii) states that if employees must work near such openings, employers must provide: (a) planking beneath the opening; (b) a life net beneath the opening; or (c) a safety belt with an attached lifeline.

APPELLATE DECISIONS

- In *Forschner v. Jucca Co.,* 63 A.D.3d 996, 999 (2d Dept 2009), the court held that § 23-1.7(b) did not apply to elevated hazards. Plaintiff fell nine feet to the ground from a beam. The court held that § 23-1.7(b) solely applies to hazardous openings.

- In *Norero v. 99-105 Third Ave. Realty, LLC,* 96 A.D.3d 727, 728 (2d Dept 2012), the court granted an employee's motion for summary judgment, on his § 241(6) claim premised on I.C. § 23-1.7(b), against a general contractor and building owner when he fell through an "unprotected opening in the floor that was large enough for his body to have passed through."

- Alternatively, *Francescon v. Gucci America, Inc.*, 105 A.D.3d 503, 504 (1st Dept 2013), the court dismissed plaintiff's cause of action based on a violation of Rule 23-1.7(b)(1). The plaintiff allegedly sustained his injuries after stepping off the edge of a work area to a subfloor 12-15 inches below. The court did not consider this a "hazardous opening" within the meaning of Rule 23-1.7(b). *See also, Urban v. No. 5 Times Square Development, LLC,* 62 A.D.3d 553, 556 (1st Dept 2009) ("a 10 to 12-inch gap is not a hazardous opening for purposes of" Rule 23-1.7(b).").

- In *Bonkoski v. Condos Brothers Constr. Corp.* 188 N.Y.S.3d 137, 142 (2d Dept 2023), a plumber sustained injuries after falling through a partially covered manhole. The plumber established liability against the general contractor and building owner based on violations of Rule 23-1.7(b)(1)(i). The manhole had a hazardous opening large enough for a worker to fall through and lacked a covering.

TRIAL COURT DECISIONS

- In *Robbins v. Goldman Sachs Headquarters, LLC,* 33 Misc.3d 1216(A), 2011 N.Y. Slip Op. 51948(U) (Sup Ct., N.Y. County 2011) a foreman and laborer picked up a large construction form to move it elsewhere. The laborer took one step and fell into a hole which the form had covered. The court granted summary judgment for the laborer on his § 241(6) claim premised on a violation of § 23-1.7(b)(1). Parties did not dispute that the form, which covered the hazardous opening, had not been fastened to the ground. Additionally, the parties did not contest the fact that no safety railings had been constructed around the hole. Finally, the laborer did not contribute to his own injury — he had no reason to believe the hazardous opening existed and his supervisor instructed him to move the form.

- In *Brown v. 44th St. Dev., LLC,* 48 Misc 3d 234, 2015 N.Y. Slip Op. 25088 (Sup Ct, N.Y. County 2015) an employee fell and sustained injuries while traversing rebar lattice and carrying wood planks. The court dismissed his § 241(6) claim on the grounds that the rebar lattice was an integral part of the ongoing construction.

- In *Tornabene v. City of New York,* 40 Misc.3d 992, 2013 N.Y. Slip Op. 23220 (Sup Ct, Kings County 2013) a utility worker injured his hand and shoulder after falling off an I-beam into an open trench. The court rejected the City's motion for summary judgment to dismiss the utility worker's § 241(6) claim premised on violations of §§ 23-1.7(b)(i)-(ii). The court reasoned that the trench indisputably constituted a hazardous opening. However, since plaintiff failed to contest the City's showing regarding the inapplicability of § 23-1.7(b)(iii), the court considered any claim premised on that alleged violation abandoned.

- In *Campbell v. Cobblestone Rest. of Geneva, LLC,* 78 Misc 3d 1216(A), 2023 N.Y. Slip Op. 50236(U) (Sup Ct, Monroe County 2023) a worker sustained injuries after falling on a construction job. The restaurant required the worker to work near the edge of an excavation. The court rejected the restaurant's motion for summary judgment on the worker's § 241(6) claim premised on a violation of § 23-1.7(b). The restaurant failed to submit evidence eliminating questions of fact as to the necessity of railings or safety belts on the job.

(3) I.C. § 23-1.7(d) & § 23-1.7(e): Slipping and Tripping Hazards.

Summary of Rule:

Under Rule 23-1.7(d) employers shall not permit their employees to walk upon slippery floors, passageways, walkways, scaffolds, platforms, or other elevated working surfaces. Employers must remove slippery substances from their floors, including ice, snow, water, and/or grease. Rule 23-1.7(e) states that all passageways and working areas be free of dirt, debris, and other obstructions or conditions which would cause tripping.

APPELLATE DECISIONS

- In *Stier v. One Bryant Park LLC,* 113 A.D.3d 551, 552 (1st Dept 2014), an employee slipped on an unsecured piece of Masonite. The court affirmed the dismissal of the employee's claim under rules §§ 23-1.7(d) & (e). The court held that Masonite does not constitute a slipping hazard contemplated by Rule 23-1.7(d). Further, plaintiff could not prevail under 23-1.7(e) because he did not allege that he tripped on an accumulation of dirt or debris — plaintiff testified that he slipped on an unsecured piece of Masonite.

- Employees cannot recover under Rule 23-1.7(e) if the material over which they tripped was integral to the work being performed. *O'Sullivan v. IDI Constr. Co., Inc.,* 855 N.E.2d 1159 (N.Y. 2006).

    - For example, in *Martinez v. 281 Broadway Holdings, LLC,* 183 A.D.3d 712, 714 (2d Dept 2020), the court dismissed an employee's claim under § 23-1.7(e) after he became tangled in exposed electrical wiring causing him to fall while carrying over 150 pounds of material. The court held that the hazardous wirings were integral to the work being performed and therefore barred the employee from recovery under Rule 23-1.7(e).

TRIAL COURT DECISIONS

- In *Rawald v. Dormitory Auth.,* 67 Misc 3d 1210(A), 2020 N.Y. Slip Op. 50490(U) (Sup Ct, N.Y. County 2020) a worker stepped onto concrete ground which somehow caused him to twist his right knee and give out. The court dismissed his § 241(6) claim predicated on both §§ 23-1.7(e)(1) & (e)(2). § 23-1.7(e)(1) did not apply because the concrete floor was "undisputedly" an "integral part" of the job. § 23-1.7(e)(2) did not apply because the worker never testified that dirt, debris, or

scattered materials caused his fall — in other words, the textured surface of the floor did not constitute a hazard contemplated by § 23-1.7(e)(2).

- In *Stachoski v. Pams Prop., LLC,* 67 Misc 3d 1223(A), 2020 N.Y. Slip Op. 50619(U) (Sup Ct, Erie County 2020) a laborer twisted his knee after slipping on a wet, mud-covered piece of plywood used a makeshift walkway to the job site's dumpster. The court held that the defendant had violated § 23-1.7(d) by failing to remove the slippery, foreign substance of mud from the walkway to the dumpster. However, questions of causation remained in light of evidence that plaintiff's slip might have occurred after a rat startled him. The court dismissed the laborer's claim as premised on § 23-1.7(e)(1) as he did not trip. But the laborer's claim as premised on § 23-1.7(e)(2) survived summary judgment on the grounds that a jury could construe the muddy plywood "as a 'similar area' to floors and platforms where persons 'pass.'"

- In *Warchol v. City of New York,* 58 Misc 3d 1211(A), 2018 N.Y. Slip Op. 50049(U) (Sup Ct, Queens County 2018) an employee sustained injuries while climbing through bent iron bars of a fence surrounding a school. The court dismissed his § 241(6) claim insofar as predicated upon § 23-1.7(e)(1) & (e)(2). The iron fence did not come under the purview of § 23-1.7(e)(1) which regulates floors, platforms, and passageways. Further, the employee did not trip or fall due to dirt, debris, or scattered materials.

- In *Wittman v. FC Beekman Assoc., LLC,* 40 Misc. 3d 1234(A), 2013 N.Y. Slip Op. 51422(U) (Sup Ct, Kings County 2013) a worker sustained injuries while laying steel beams when he tripped over an electrical conduit pipe. The court dismissed the worker's claim under an alleged violation of § 23-1.7(d) because he did not slip, he tripped. However, the court rejected defendant's motion to dismiss the worker's § 241(6) claim predicated on a violation of § 23-1.7(e)(2). The electrical conduit pipe was not integral to the plaintiff's work; accordingly, the defendants had a duty to ensure plaintiff would not trip over it.

- In *Reynoso v. Bovis Lend Lease, Lmb, Inc.,* 39 Misc.3d 1224(A) 2013 N.Y. Slip Op. 50725(U) (Sup Ct, Kings County 2013) a laborer slipped on ice during construction of the World Trade Center. The court granted summary judgment to the plaintiff on his § 241(6) claim predicated on a violation of § 23-1.7(d). The employer instructed the plaintiff to walk across platforms covered with snow and ice, and as a result he slipped. This established prima facie entitlement to summary judgment.

(4) I.C. § 23-1.7(c)(f)(g) & (h): Drowning, Vertical Passageways, Oxygen Deficiency, and Corrosive Substances

Summary of Rules:

- Rule 23-1.7(c) states that employers must provide an equipped and manned boat for prompt rescue of employees at risk of drowning on the job. The boat must continuously patrol the work area for the duration of the job.

- Rule 23-1.7(f) prioritizes stairways, ramps, or runways as the means of accessing working levels above or below ground. Ladders will suffice if the nature of the work does not permit the installation of a stairway. *See, Channer v. ABAX Inc.,* 169 A.D.3d 758, 760 (2d Dept 2019) (rejecting employees claim predicated upon 23-1.7(f) because he could access the second floor of the building by using stairs.). *But see, e.g., O'Hare v. City of New York,* 280 A.D.2d 458 (2d Dept 2001) (holding an employer's alleged violation of § 23-1.7(f) as sufficiently specific to support an employee's claim when he sustained injuries on-site after using a wood plank as an exit from a concrete pit.).

- Pursuant to Rule 23-1.7(g), employers must test **unventilated and confined** work areas where dangerous air contaminants exist. Before any employee enters the potentially dangerous work area, the employer must determine that the air quality complies with Industrial Code Rule 12 relating to the "Control of Air Contaminants." *See Marl v. Liro Eng'r, Inc.,* 159 A.D.3d 688, 690 (2d Dept 2018) (rejecting employees' claim predicated on § 23-1.7(g) because the toxic landfill which allegedly caused personal injuries was neither unventilated nor confined.).

- Finally, Rule 23-1.7(h) provides that all corrosive materials be stored to not endanger any person. Employers must also provide protective equipment for the use of such corrosive materials. Plaintiffs must prove the injurious material's corrosive nature. *See Flores v. Infrastructure Repair Serv., LLC,* 115 A.D.3d 543 (1st Dept 2014) (dismissing employee's claims under § 23-1.7(h) because defendant's expert provided evidence that Monolithic Membrane 6125 EV, a hot rubberized asphalt substance, did not qualify as a corrosive substance or chemical.).

§ 23-1.8. PERSONAL PROTECTIVE EQUIPMENT

(1) I.C. § 23-1.8(a): Eye Protection

Summary of the Rule:

Rule 23-1.8(a) orders that employers provide employees with approved eye protection suitable for the work's hazard. The rule specifically lists that all persons employed in welding, burning, chipping, cutting, or grinding any material from which particles may fly must wear protective eyewear.

- To prevail on a claim rooted in § 23-1.8(a), plaintiffs must sufficiently allege that their employer did not provide them with adequate eye protection on the job. *Montenegro v. P12, LLC,* 130 A.D.3d 695, 696 (2d Dept 2015).
    - For example, in *Ramos v. Penn Tower, LLC,* 136 A.D.3d 1009 (2d Dept 2016), the Second Department reversed the Supreme Court's order in favor of plaintiff in an action where he sustained eye injuries while using a table saw. A factual dispute remained as to whether the employer provided plaintiff with safety goggles.
- Additionally, plaintiffs must prove they engaged in work that "may endanger the eyes so as to require the use of eye protection…" *Gurev v. Tomchinsky, 87* A.D.3d 612, 613 (2d Dept 2011).
    - For example, in *Montenegro v. P12, LLC,* 130 A.D.3d 695, 696 (2d Dept 2015), the Second Department reversed the Supreme Court's dismissal of a carpenter's action premised on § 23-1.8(a) after he sustained eye injuries while using a pneumatic nail gun. An issue of fact remained as to whether the carpenter's use of the nail gun made the possibility of injury to his eye sufficiently foreseeable.
    - *See also: Paulino v. Bradhurst Assoc., LLC,* 144 A.D.3d 430 (1st Dept 2016) (where an issue of fact remained as to whether driving a screw into Sheetrock using a power drill constituted an operation that may "endanger the eyes."); *Roque v. 475 Building Co., LLC* 171 A.D.3d 543, 544 (1st Dept 2019) (where an issue of fact remained regarding whether demolishing a sidewalk bridge and removing nails constitute an activity covered by § 23-1.8(a).).

TRIAL COURT DECISIONS

- In *Galarza v. Lincoln Ctr. for the Performing Arts, Inc.,* 32 Misc.3d 1226(A), 2011 N.Y. Slip Op. 51435(U) (Sup Ct, N.Y. County 2011), asbestos dust landed in a laborer's eye. His employer only provided him with plastic glasses. The court rejected the defendant's contention that § 23-1.8(a) only applies to workers involved in welding, burning, or cutting operations. The court held that § 23-1.8(a) protects employees engaged in any operation which may endanger the eyes. Further, the court emphasized § 23-1.8(a)'s title *approved* eye protection. The court looked to standards set forth by ANSI and OSHA, which require the use of full-face masks in asbestos abatement work. In light of these considerations, the court held that an issue of fact remained with respect to liability under § 241(6).

(2) I.C. § 23-1.8(b): Respirators

Summary of the Rule:

Under Rule 23-1.8(b), employers must furnish respiratory devices when required, and employees must use such respirator. Only approved respirators (for the type of work and particular air contaminant) may be used on jobs. Employers must keep respirators in good repair. Further, employers must inspect respirators daily and disinfect them weekly. Additionally, the employer must clean a respirator before transferring it to a different employee.

(3) I.C. § 23-1.8(c): Protective Apparel

Summary of the Rule:

Rule 23-1.8(c)(1) demands that employers provide protective headwear for employees required to work in any areas with falling object hazards. Employees must wear the approved safety hat. Employers must also provide liners in a safety hat in areas where the temperature drops below 55 degrees Fahrenheit.

§ 23-1.8(c)(2) requires that employers provide waterproof boots (or similar safety products) to all employees working in water, mud, or in any other wet footing. Similarly, § 23-1.8(c)(3) demands that employers provide waterproof clothing to employees required to work in wet conditions.[5] Finally, § 23-1.8(c)(4) states that employees who *must* handle corrosive substances must be provided *appropriate* protective apparel and eye protection.

I.C. § 23-1.8(c)(1): Hard Hats

APPELLATE DECISIONS

- To prevail on a Labor Law § 241(6) cause of action predicated upon a § 23-1.8(c)(1), **the plaintiff must establish that the job was a hard hat job**, and that the plaintiff's failure to wear a hard hat proximately caused the injury. *Aguilar v. Graham Terrace, LLC,* 186 A.D.3d 1298, 1301 (2d Dept 2020).
    - In *Carlton v. City New York,* 161 A.D.3d 930, 934 (2d Dept 2018),a steamfitter, sustained injuries when a flange struck him. His § 241(6) claim, predicated on an alleged violation of § 23-1.8(c)(1), survived a motion for summary judgment. The defendant provided the steamfitter with a hard hat. However, the steamfitter could not wear his welding mask and hard hat simultaneously. A question of fact remained regarding whether the provided hard hat, which the employee could not wear, satisfied the defendant's duty to provide a hard hat.
    - In *Santana v. MMF 1212 Assoc. LLC,* 190 A.D.3d 505, 506 (1st Dept 2021), during a bathroom demolition, a portion of the ceiling fell and struck an employee in the head. The court denied defendant's motion for summary judgment against plaintiff's claim premised on § 23-1.8(c)(1). The defendants failed to establish that the bathroom demolition was not an area

[5] Seemingly no litigation focuses on § 23-1.8(c)(2) & (3). Almost all litigation for this provision centers on hardhats. Various counties have dealt with the corrosive substance provision in § 23-1.8(c)(4), but it is not a provision addressed by the 1st or 2nd Departments.

where there was a danger of being struck by falling objects or materials, i.e., a hard hat job.

- Similarly, in *Reyes v. Sligo Constr. Corp.,* 214 A.D.3d 1014, 1016 (2d Dept 2023), the court denied defendant's motion for summary judgement on a claim premised on a violation of § 1.8(c)(1). A piece of wood dislodged and struck the plaintiff in the head during a partial demolition of a house. The defendants failed to demonstrate that the demolition work was not a hard hat job. Further, they failed to establish that the plaintiff's lack of head protection did not play a role in his injuries.

TRIAL COURT DECISIONS

- In *Rakaj v. JT MH 1250 Owner LP,* 69 Misc 3d 1215(A), 2020 N.Y. Slip Op. 51387(U) (Sup Ct, Bronx County 2020) while removing bolts from a ceiling, a piece of metal struck an employee in the eye, causing him to stagger and fall from a scaffold. In the course of his work, the employee used an angle grinder and hammer. The court held that the employee failed to establish that his work constituted a hardhat job so as to trigger the protections of § 23-1.8(c)(1). Further, the court expressed skepticism about the causal link between the employee's lack of hard hat and his injury sustained.

- In *Melendez v. Brown-United, Inc.,* 68 Misc 3d 1202(A), 2020 N.Y. Slip Op. 50832(U) (Sup Ct, N.Y. County 2020), a steel pipe struck a laborer in the head while he erected scaffold-like structures for a music festival. The laborer did not wear a hard hat, but he requested one. His supervisor instructed him to continue work despite not having a hard hat. The laborer sustained injuries while carrying 40lb steel pipes to bases where another worker fastened the pipe. The coworker had not fully tightened the pipe which fell and struck the laborer in the head. The court held that scaffold construction zones are hard hat jobs, triggering the protections of § 23-1.8(c)(1). However, questions of contributory negligence and causation remained.

- In *Howell v. Bethune W. Assoc., LLC,* 33 Misc 3d 1215(A,) 2011 N.Y. Slip Op. 51939(U) (Sup Ct, N.Y. County 2011) plaintiff testified that he wore a hard hat at the time of his injury. Accordingly, defendants did not violate § 23-1.8(c)(1).

- In *Rodriguez v. D&S Builders, LLC,* 29 Misc 3d 1217(A), 2010 N.Y. Slip Op. 51855(U) (Sup Ct, Queens County 2010), a stack concrete forms, improperly tied

to a flatbed truck toppled over onto a worker and crushed him to death. The court dismissed the plaintiff's § 241(6) claim insofar as predicated upon § 23-1.8(c)(1) on the grounds that the record indicated that the decedent was not working below the area from where the forms fell.

I.C. § 23-1.8(c)(4): Protective Equipment for Corrosive Substances

- In *Sellars v. City of New York,* 40 Misc. 3d 1205(A), 2013 N.Y. Slip Op. 51053(U) (Sup Ct, Queens County 2013) a surveyor's leg became infected after exposure to an unknown toxic substance while working in the basement of a wastewater treatment plant. The court explained that to prevail on claim rooted in an alleged violation of § 23-1.8(c)(4), the plaintiff must prove that their job *required* the use or handling of corrosive substances. Here, since the surveyor's duties did not include the handling of the injurious substance, the protections of § 23-1.8(c)(4) did not trigger.

- In *Konderevych v. Compare Foods, Inc.,* 36 Misc 3d 1226(A), 2012 N.Y. Slip Op. 51514(U) (Sup Ct, Bronx County 2012) the court dismissed a claim arising from an inadvertent chemical burn caused by Freon; plaintiff's job did not entail handling Freon, the chemical burns he received resulted from an attempt to reseal an accidentally burst pipe.

- In *Galarza v. Lincoln Ctr. for the Performing Arts, Inc.,* 32 Misc.3d 1226(A), 2011 N.Y. Slip Op. 51435(U) (Sup Ct, N.Y. County 2011) the court rejected the dismissal of plaintiff's claim rooted in a violation of § 23-1.8(c)(4) when some asbestos slipped past his plastic glasses; a question of fact remained as to whether the goggles constituted appropriate protection under § 23-1.8(c)(4).

(4) I.C. § 23-1.8(d): Cleanliness of Personal Protective Equipment

Summary of the Rule:

Rule § 23-1.8(d) requires employers to keep personal protective equipment clean and in good repair. Employers must wash or dry clean all safety hats, foul weather hats, boots and hat and boot liners before transferring any of the items to another employee. Also, employers must disinfect all goggles, glasses, and a welder's shields before transferring said items to another employee.

§ 23-1.10. HAND TOOLS

Summary of the Rule:

This rule governs safety standards for both unpowered and electrical/pneumatic hand tools. § 23-1.10(a) requires that unpowered edged tools be kept sharp and free from burrs/ mushroomed heads.

§ 23-1.10(b)(1) demands that power tools be shut off before repair or maintenance. Additionally, power tools must have an easy cut-off switch. § 23-1.10(b)(2) states that electric lines must be guarded or covered to prevent tripping. § 23-1.10(b)(3) requires that electric hand tools be grounded during use.

- In *Charles v. Summit Glory LLC,* 180 A.D.3d 572 (1st Dept 2020), an employee sustained injuries when a metal shard flew off a "'mushroomed' head of a 'drift pin.'" The court dismissed his § 241(6) claim premised on § 23-1.10(a) reasoning that the regulation did not apply to tools that have "flat and/or round edges." *See also, Pol v. City of New York,* 126 A.D.3d 526 (1st Dept 2015).

- In *Opalinski v. City of New York,* 110 A.D.3d 694 (2d Dept 2013) an out-of-control hand-held grinder cut a laborer's hand. He filed a § 241(6) claim premised on § 23-1.10(b)(1) which requires that an "on/off switch be within easy reach of the operator." The court dismissed his claim. The rule did not apply because the laborer "could not get to the on/off switch because the grinder had 'jumped' out of his hands when the power suddenly came on, not because of where the switch was placed on the grinder itself."

- In *Rivera v. 15 Broad St., LLC,* 76 A.D.3d 621 (2d Dept 2010), the court determined that a core "drilling machine" or "core borer" did not constitute a hand tool within the meaning of § 23-1.10(b)(1).

§ 23-1.11. LUMBER AND NAIL FASTENINGS

Summary of the Rule:

I.C. § 23-1.11 governs the requirements for lumber and nail fastenings. § 23-1.11(a) demands that lumber be sound and free of defects which might compromise the strength of the lumber. § 23-1.11(b) stipulates that the lumber must be "trade size except as otherwise specifically stated with the words 'full size.'" Finally, § 23-1.11(c) states that all nails must be driven full length and be of proper size, type, and length to provide the required strength.

- In *DePaul v. N.Y. Brush LLC,* 120 A.D.3d 1046, 1047-1048 (1st Dept 2014), the court affirmed the trial court's dismissal of plaintiff's claim predicated on § 23-1.11(a). Plaintiff sustained injuries from a fall when rotten planks, used as a makeshift bridge on-site, collapsed underneath him. The court held that the planks failed to meet criteria required for a violation of § 23-1.11(a). Had someone joined the planks together in some definite manner, then § 23-1.11(a) might have triggered. The court reasoned, "nothing had been constructed from the planks so as to come within the ambit of the regulation."

§ 23-1.15. SAFETY RAILING

Summary of the Rule:

I.C. § 23-1.15 governs the exact specifications required for safety railings. The rule demands that a safety railing consist of:

> **(a)** A two inch by four-inch horizontal wooden handrail, not less than 36 inches nor more than 42 inches above the walking level, securely supported by two inch by four-inch vertical posts at intervals of not more than eight feet.
>
> **(b)** A one inch by four-inch horizontal midrail.
>
> **(c)** A one inch by four-inch toeboard except when such safety railing is installed at grade or ground level or is not adjacent to any opening, pit or other area which may be occupied by any person.

The rule also requires safety railings to be smooth and free from splinters and protruding nails. Finally, the rule permits the use of alternative materials in the construction of safety railings, so long as the material assures equivalent safety.

APPELLATE DECISIONS

- In *Macedo v. J.D. Posillico, Inc.,* 68 A.D.3d 508, 510 (1st Dept, 2009), the court affirmed the trial court's refusal to dismiss plaintiff's § 241(6) claim premised on § 23-1.15. Plaintiff fell from a scaffold while trying to hoist up a traffic cone. The court reasoned that because § 23-5.3(e) required safety railings on all metal scaffolds, the requirements of § 23-1.15 triggered. However, since no material on the scaffold threatened workers below the platform, the court rejected plaintiff's claim under § 23-1.15(c), requiring the installation of toeboards in safety railings.

- In *Fusca v. A & S Constr., LLC,* 84 A.D.3d 1155, 1158 (2d Dept 2011), an employee fell from an unfinished and unguarded stairwell. The court dismissed his claim based in part on § 23-1.15 because his employer had not provided him safety railings. The protections of § 23-1.15 did not trigger because defendant never provided a safety railing. *See also, Dzieran v. 1800 Boston Rd., LLC,* 25 A.D.3d 336, 337 (1st Dept 2006) ("Those sections, which set standards for safety railings, safety belts and life nets, respectively, do not apply because plaintiff was not provided with any such safety devices.")

- In *Rooney v. D.P. Consulting Corp.,* 204 A.D.3d 428, 429 (1st Dept 2022), the First Department reinstated plaintiff's claim based on an alleged violation of § 23-

1.15(a). Plaintiff tripped on a wooden ramp which he used to access the top of an elevator under repair. Plaintiff fell somewhere between 8 and 10 feet to the ground. Because a safety railing did not guard the "hazardous opening," issues of fact remained regarding whether the lack of a safety railing proximately caused plaintiff's injuries.

TRIAL COURT DECISIONS

- In *Constantine v. City of New York,* 29 Misc 3d 396, 2010 N.Y. Slip Op. 51805(U) (Sup Ct, Richmond County 2010) a welder caught on fire atop a scaffold and attempted to leap off upon discovering he did not have a fire extinguisher handy. The safety line prevented the welder from reaching the ground. The welder suffered burn injuries. The court dismissed his § 241(6) claim insofar as predicated upon a violation § 23-1.15 as inapplicable. The welder testified that he sustained no injuries from his fall, only from burns. Additionally, the welder leaped over the scaffold's safety railings, he did not fall as a result of defective safety railings.

- In *Cocoli v. Champion Constr. Corp.,* 25 Misc 3d 1244(A), 2009 N.Y. Slip Op. 52570(U) (Sup Ct, Kings County 2009) a laborer fell off a ladder. The court dismissed his § 241(6) claim predicated upon a violation of § 23-1.15 on the grounds that employer did not provide the laborer with a safety railing. Further, safety railings, as defined by § 23-1.15, are not required on ladders. *See also Quiles v. City of New York,* 25 Misc 3d 1222(A), 2009 N.Y. Slip Op. 52255(U) (Sup Ct, Kings County 2009) (defendant did not supply plaintiff with safety railing, accordingly, § 23-1.15 was not violated.).

§ 23-1.16. SAFETY BELTS, HARNESSES, TAIL LINES AND LIFELINES

Summary of Rule:

Rule 23-1.16 specifies the exact requirements for safety belts, harnesses, tail lines and lifelines. Each of the named devices must be approved. The rule requires that every worker given one of these devices must use the device. Safety belts and harnesses must be anchored to either a tail line or lifeline such that the anchoring will not permit the user to fall more than five feet.

Additionally, every user of any of these devices must be instructed in their proper use. Subsections (d) and (e) go on to describe the approved materials, dimensions, and required qualities of tail lines and lifelines. Finally, § 23-1.16(f) requires that each of these devices be inspected prior to every use for signs of deterioration.

- In *Stigall v. State,* 189 A.D.3d 469, 470 (1st Dept 2020), the court awarded plaintiff summary judgment for his injuries sustained after falling 8 to 10 feet from a beam before his safety cable retracted him back to the beam. Rule § 23-1.16(b) provides that tail lines and lifelines shall not permit a user to fall more than five feet. *See also, King v. Villette,* 155 A.D.3d 619, 623 (2d Dept 2017) (refusing to dismiss plaintiff's claim after falling from makeshift scaffold while wearing a lifeline with too much slack.).

- In *Venegas v. Shymer,* 201 A.D.3d 1001, 1003 (2d Dept 2022), the court dismissed a Labor Law § 241(6) claim premised on alleged violations of § 23-1.16. Plaintiff fell from the work-site's roof 25 to 30 feet. The employer did not provide the plaintiff with any safety belt or similar item. Accordingly, the rule's requirements did not trigger.

- In *Straughter v. Thor Shore Parkway Developers, LLC,* 199 A.D.3d 434 (1st Dept 2021), the court held that conflicting evidence regarding the availability of safety devices on-site on the day of plaintiff's accident precluded either party from summary judgment on plaintiff's claim predicated on § 23-1.16.

§ 23-1.17. LIFE NETS

Summary of the Rule:

Rule § 23-1.17 governs the requirements for life nets on construction sites. Life nets used in construction or demolition jobs must be approved. Rule § 23-1.17(b) discusses the appropriate materials for a life net and how employees must install them on-site. Rule § 23-1.17(c) describes the required size, strength, location, and attachment of life nets. In pertinent part, life nets must be capable of catching any person at risk of falling. Additionally, life nets must completely cover the area of possible fall.

Rule § 23-1.17(d) & (e) discuss the maintenance and inspection requirements for life nets. Life nets must be thoroughly dried before storage and kept in places protected from the elements, mechanical devices, or corrosive substances. Each life net must be inspected thoroughly by a designated qualified person before installation. Finally, designated personnel must visually inspect a life net every day.

- No significant case law exists surrounding § 23-1.17. In each case that cited § 23-1.17, the court dismissed Plaintiff's claim as inapplicable because the employers never provided plaintiffs with a life net.
    - *See, Kwang Ho Kim v. D & W Shin Realty Corp.,* 47 A.D.3d 616, 619 (2d Dept 2008) ("The regulations set forth at [I.C. § 23-1.15, 23-1.16, 23-1.17], which set standards for safety railings, safety belts, and life nets, respectively, are inapplicable here because employer did not provide the plaintiff with any such devices.").
        - *Accord, Dzieran v. 1800 Boston Rd., LLC,* 25 A.D.3d 336, 337 (1st Dept 2006) ("Those sections, which set standards for safety railings, safety belts and life nets, respectively, do not apply because the employer did not provide plaintiff with any such safety devices.")

§ 23-1.18. SIDEWALK SHEDS AND BARRICADES

Summary of the Rule:

I.C. § 23-1.18(a) discusses the necessary conditions for sidewalk shed construction. Concisely, the rule demands the erection of sidewalk sheds along: (1) construction sites exceeding 40 feet in height; (2) demolition sites exceeding 25 feet in height; or (3) sites where material or debris transported over the sidewalk, regardless of the building's height.

I.C. § 23-1.18(b) governs the exact specifications a sidewalk shed must fulfill. Finally, I.C. § 23-1.18(c) requires the construction of barricades that on any construction or demolition job that does not require a sidewalk shed.

Almost no case law exists in the First and Second Departments surrounding this regulation.

- In *Turgeon v. Vassar Coll.,* 172 A.D.3d 1134, 1135 (2d Dept 2019) the court held § 23-1.18 as inapplicable because even if the Industrial Code required a sidewalk shed, the defendants established, prima facie, that the lack of a sidewalk shed did not proximately cause of the plaintiff's injuries.

- In *Morales v. Spring Scaffolding, Inc.,* 24 A.D.3d 42, 45 (1st Dept 2005), the court dismissed plaintiff's Labor Law § 241(6) claims premised on a violation of § 23-1.18(b) because defendants did not qualify as relevant agents pursuant to the statute's requirements. However, the court found that defendants had in fact violated I.C. § 23-1.18(b) by failing to construct sidewalk shed parapets at least 42 inches tall. Accordingly, plaintiff could pursue common law negligence claims against defendants.

§ 23-1.21. LADDERS AND LADDERWAYS

Summary of the Rule:

I.C. § 23-1.21 describes in detail the installation specifications, material requirements, permitted usage of ladders. Almost all litigation involving this section of the I.C. centers on § 23-1.21(b), the general requirements for ladders. But even more specifically, §§ 23-1.21(b)(4) seems to be the only fertile area for litigation. Accordingly, I have only summarized that section.

§ 23-1.21(b)(4) dictates the installation and use of ladders. The rule states that any *portable* ladder used as a means of access between floors must be securely fastened. The semi-permanent ladder must then extend 36 inches above the upper floor. Further, the upper end of any ladder leaning against a slippery surface must be mechanically secured against the slip side.

Within § 23-1.21(b)(4), § 23-1.21(b)(4)(ii) and (iv) see the most attention in the First and Second Department. § 23-1.21(b)(4)(ii) states that every ladder's footing must be firm. No ladder can be set up on a slippery surface or insecure object. § 23-1.21(b)(4)(iv) requires that employees perform work on a ladder between 6 and 10 feet above ground. Additionally, a leaning ladder must be held in place by someone at the ground level, unless if secured by mechanical means. If the work conducted on the ladder goes above 10 feet, the ladder's upper end must be secured by mechanical means and the lower end must be held in place by another person.

APPELLATE DECISIONS

- In *Rodriguez v. BSREP UA Heritage LLC,* 181 A.D.3d 10, 11 (1st Dept 2020), the court granted partial summary judgment to plaintiff who fell from a 10-foot ladder. Defendants failed to raise an issue as to whether plaintiff caused his own injuries. Additionally, plaintiff had watched coworkers use the same ladder earlier in the day. Finally, defendant's argument that plaintiff's failure to solicit help in securing the ladder did not prevail because "coworkers are not a safety device contemplated" by the regulation.

- In *Cordova v. 653 Eleventh Ave. LLC,* 190 A.D.3d 637 (1st Dept 2021), the court dismissed plaintiff's claims predicated on § 23-1.21(b)(4)(ii) and (iv). The court found that the ladder was not set up on a slippery surface and had appropriate rubber feet, thus destroying liability via § 23-1.21(b)(4)(ii). Additionally, the court dismissed the alleged violation of § 23-1.21(b)(4)(iv) because that provision only triggers when someone works from a ladder.

- In *Martinez v. St-Dil LLC,* 192 A.D.3d 511 (1st Dept 2021), an employee fell from a ladder atop a scaffold. The scaffold could not reach where plaintiff needed to

conduct his work. Also, the plaintiff had to use the ladder in a closed position, because the scaffold did not have adequate space to open the ladder. The court rejected defendants' summary judgement motion, finding sufficient evidence of violations of § 23-1.21(b)(4)(ii) and (iv) including that: the ladder lacked rubber footing, and no other person held the unsecure ladder.

- In *Singh v. 180 Varick, LLC,* 203 A.D.3d 1194 (2d Dept 2022), the court granted defendants' motion for summary judgment on plaintiff's claim rooted in § 23-1.21(b) based upon plaintiff's own testimony that his own loss of balance caused his own fall.

- In *Rivera v. Suydam 379 LLC,* 189 N.Y.S.3d 126, 128 (1st Dept 2023), the court held that a triable issue of fact remained as to whether defendant violated § 23-1.21(b)(4)(iv) which requires the securing of leaning ladders.

TRIAL COURT DECISIONS

- In *Puchalski v. 4212 28ST LLC,* 69 Misc 3d 1222(A), 2020 N.Y. Slip Op. 51463(U) (Sup Ct, Kings County 2020) a ladder closed while an employee worked atop it and he fell, sustaining injuries. Plaintiff premised his § 241(6) claim solely on § 23-1.21(b)(3)(iv) which prohibits the use of flawed or defective ladders. The experts could not reach a consensus as to whether the ladder was flawed or defective. Accordingly, the court denied both parties' motions for summary judgment.

- In *Ferrara v. Pacolet Milliken Enter., Inc.,* 69 Misc 3d 1216(A), 2020 N.Y. Slip Op. 51400(U) (Sup Ct, N.Y. County 2020) an unsecured ladder fell onto a worker. The worker's § 241(6) claim survived defendant's motion for summary judgment insofar as predicated upon § 23-1.21(b)(4)(i). The court rejected the defendant's argument that § 23-1.21(b)(4) only applied to injuries sustained while using a ladder.

- In *Bedoya v. Hackley Sch.,* 57 Misc 3d 1203(A), 2017 N.Y. Slip Op. 51220(U) (Sup Ct, Westchester County, 2017) parties failed to preserve the ladder which plaintiff fell from. Accordingly, questions of fact remained with respect to as to whether defendants had violated any provision of § 23-1.21.

§ 23-1.22. STRUCTURAL RUNWAYS, RAMPS AND PLATFORMS

Summary of the Rule:

I.C. § 23-1.22 dictates the requirements for runways, ramps, and platforms. The rule stipulates that the specifications contained within do not apply to runways and ramps constructed of earth, gravel, stone, or similar embankment materials. § 23-1.22(b) discusses the different requirements for runways and ramps on which vehicles, people, and/or wheelbarrows will utilize. § 23-1.22(c) governs platforms. In pertinent part, § 23-1.22(c)(2), states that all platforms at least seven feet above the ground require a safety railing.

- In *Sotarriba v. 346 W. 17th St. LLC,* 179 A.D.3d 599, 601 (1st Dept 2020), the court dismissed a claim premised on I.C. § 23-1.22(c) when plaintiff sustained injuries when he fell through an unprotected stairwell opening. The court held § 23-1.22 as inapplicable because a stairwell did not constitute a platform used to transport vehicular and/or pedestrian traffic.

- In *Torres v. Accumanage, LLC,* 210 A.D.3d 718, 722 (2d Dept 2022), the court dismissed plaintiff's claim alleging a violation of § 23-1.22(c). That provision requires platforms used as working areas to consist of planking at least two inches thick. Also, the regulation demands that platforms more than 7 feet above the ground have safety railings. Plaintiff conceded that the platform was at least 2 inches thick. While the record did not establish the height of the scaffold, defendants proved that the lack of safety railings did not proximately cause plaintiff's injury. Accordingly, § 23-1.22 could not serve as a basis of liability.

§ 23-1.24. WORK ON ROOFS

Summary of Rule:

This lengthy rule governs construction work on roofs. Little case law exists on this topic. § 23-1.24(a) discusses the general requirements of work on roofs including roofing brackets and crawling boards. § 23-1.24(b) governs work on "high and steep roofs." § 23-1.24(c) discusses the protection of people using roofing machines. § 23-1.24(d) dictates transporters of hot roofing materials, i.e., tar.

- In *Perri v. Gilbert Johnson Enter., Ltd.,* 14 A.D.2d 681 (2d Dept 2005), the court held that issues of fact remained as to whether defendant's established violation of § 23-1.24(b) proximately caused a worker's death after falling from a roof. § 23-1.24(b) requires the erection of a scaffold for roofs more than 20 feet above ground, whose slope exceeds 1:4. The parties did not dispute that the roof exceeded § 23-1.24(b)'s limitations. But a question remained as to whether the violation proximately caused the workers death.

- In *Castillo v. Starrett City, Inc.,* 4 A.D.3d 320 (2d Dept 2004), a laborer sustained injuries after losing his balance on a roof and his left arm became submerged in an open container of hot tar. The court held that § 23-1.24(d) did not apply because that regulation only requires that *closed containers* of molten roofing material. The parties did not dispute that the container of tar was open and accordingly § 23-1.24(d) did not trigger.

- *D'Acunti v. New York City Sch. Constr. Auth.,* 300 A.D.2d 107 (1st Dept 2002), a construction worker slid four feet down a barrel roof and sustained injuries. The court dismissed his claims predicated on § 23-1.24 reasoning that he failed to submit evidence that the pitch of the roof exceeded the 1:4 requirement.

§ 23-1.25. WELDING AND FLAME CUTTING OPERATIONS

Summary of the Rule:

This rule governs the use of controlled flames. § 23-1.25(a) stipulates the rules surrounding compressed gas cylinders. § 23-1.25(b) discusses hoses. § 23-1.25(c) governs the use of torches.

§ 23-1.25(d) dictates that proper scaffolds (I.C. compliant) be used in accordance when necessary in welding operations. § 23-1.25(e) discusses fire protection precautions in welding operations. Finally, § 23-1.25(f) requires that flammable vapors, pipes, tanks, containers, and/or materials be disconnected or removed prior to commencing welding.

APPELLATE DECISIONS

- In *Healy v. BOP One N. End LLC,* 203 A.D.3d 428 (1st Dept 2022) a worker felt an electric shock shoot through his body while his co-worker welded a steel pipe nearby and as a consequence, fell from a scaffold. The court denied the defendant's motion for summary judgment on the worker's § 241(6) claim as premised on § 23-1.25(d), which requires the proper installation of scaffolds used in compliance with the Industrial Code in welding jobs. Defendants failed to demonstrate that: (1) they did not violate § 23-1.25(d); (2) § 23-1.25(d) was inapplicable to the case; (3) any violation did not proximately cause the worker's injuries.

- In *Coyago v. Mapa Prop., Inc.,* 73 A.D.3d 664 (1st Dept 2010) a boat exploded and injured an employee while he dismantled it with a flame torch. The court admitted that defendants may have violated § 23-1.25(f), but nevertheless, the employee was not engaged in construction or demolition as required for a § 241(6) claim. Accordingly, the court dismissed his § 241(6) claim.

TRIAL COURT DECISIONS

- In *Constantine v. City of New York,* 29 Misc 3d 396, 2010 N.Y. Slip Op. 51805(U) (Sup Ct, Richmond County 2010) a welder caught on fire atop a scaffold and attempted to leap off upon discovering he did not have a fire extinguisher handy. The welder's § 241(6) claim as premised upon § 23-1.25 survived the defendant's motion for summary judgment. Interestingly, the court did not request plaintiff to allege a specific violation of § 23-1.25, which contains six sub provisions, with sub provisions of their own.

§ 23-1.30. ILLUMINATION

Summary of Rule:

This rule dictates the illumination of working areas and passageways. The rule states that illumination must not be less than "10-foot candles" in any working area, or less than "5-foot candles" in any passageway.

- In *Cruz v. Metro. Transit Auth.,* 193 A.D.3d 639 (1st Dept 2021) a carpenter sustained injuries when a washer fell and struck him in chest while working underground, constructing the 2d Ave. subway line. Plaintiff alleged a violation of § 23-1.30 but the court rejected his claim. The court held that plaintiff failed to establish that the lighting fell below the specific statutory standard. In fact, testimony confirmed that plaintiff's headlamp sufficiently lit his work area.

- In *Favaloro v. Port Auth. of New York and New Jersey,* 191 A.D.3d 524 (1st Dept 2021), a laborer's right leg fell into a hole up to his hip after he stepped on a piece of plywood covering up the hole. The court granted summary judgment to the laborer on his claim predicated on § 23-1.30 based on uncontested testimony that the only lighting in the area came from floodlights 80 feet above the accident site and that it was "very dark."

§ 23-1.32. IMMINENT DANGER — NOTICE, WARNING, AND AVOIDANCE

Summary of Rule:

I.C. § 23-1.32 dictates that where noncompliance with the I.C. causes imminent danger, and someone gives written notice of that danger to an appropriate agent, that agent must: (a) effect compliance with the I.C. to end the danger; or (b) post and maintain warnings on the dangerous area or material until the danger has ended. Finally, while the danger persists, no employer shall suffer or permit any employee to enter the dangerous area or use the dangerous device.

- No serious litigation has occurred surrounding this regulation in the First or Second Department.
    - In *Mancini v. Pedra Constr.,* 293 A.D.2d 453 (2d Dept 2002), the court held that § 23-1.32 did not apply in the injured laborer's personal injury suit because the contractor did not receive written notice of the alleged violation of the Industrial Code. *Accord, Delaney v. City of New York,* 78 A.D.3d 540 (1st Dept 2010).

§ 23-1.33. PROTECTION OF PERSONS PASSING BY CONSTRUCTION, DEMOLITION OR EXCAVATION OPERATIONS

Summary of Rule:

This rule governs the duties to protect people passing by construction. In the scope of a § 241(6) claim, this rule has absolutely no bite. § 241(6) only grants a cause of action to workers engaged in construction or demolition work. Accordingly, an alleged violation of § 23-1.33 cannot support any § 241(6) claim.

- For example, in *Morra v. White,* 276 A.D.2d 536 (2d Dept 2000), a pedestrian slipped and fell on ice at a construction site while performing his duty of taking water readings. Because plaintiff did not qualify as a member of the class entitled to protection under § 241(6), the court rejected his claim.

Rule 23-2. Construction Operations.

§ 23-2.1. MAINTENANCE AND HOUSEKEEPING

Summary of Rule:

This rule mandates the storage of materials and the disposal of debris. § 23-2.1(a) requires that all materials be stored in a safe an orderly manner. Piles must be stable and must not obstruct areas where employees travel. Additionally, the weight of materials must not exceed the floor's capability. Finally, materials must not be stored close to the edge of a floor, platform, or scaffold. A bounty of caselaw exists surrounding this provision.

§ 23-21.1(b) dictates that debris must be disposed of by methods which will not endanger any person. Both the 1st and 2nd Dept have held that this provision as insufficiently specific.

- In *Parrino v. Rauert,* 208 A.D.3d 672 (2d Dept 2022), a tile worker sustained injuries after 20 unsecured panels of sheetrock, stored upright against a wall, toppled, and pinned the worker to another wall. The court held that issues of fact remained such as to preclude dismissing the worker's § 241(6) claim premised on a violation of § 23-2.1(a)(1), which requires the safe and orderly storage of construction materials.

- In *Nicholson v. Sabey Data Ctr. Prop., LLC,* 205 A.D.3d 620 (1st Dept 2022), an employee sustained injuries when a pallet jack suddenly engaged, hitting a loose pipe, and launching him backwards, pinning his ankle against the pipe. The employee's § 241(6) claim, premised on a violation of § 23-2.1(a) survived summary judgment as both he and the defendant's superintendent testified that they saw four or five pipes scattered on the ground.

- In *Ormsbee v. Time Warner Realty Inc.,* 203 A.D.3d 630 (1st Dept 2022), a laborer suffered injuries to his shoulders when the lid of a gang box on-site suddenly fell. The court held that § 23-2.1(a) did not apply since the laborer's injury occurred in an open work area, not in a "passageway, hallway, stairway, or other thoroughfare."

- In *Kuylen v. KPP 107th St., LLC,* 203 A.D.3d 465 (1st Dept 2022), the court held that § 23-2.1(a) did not apply in a case where the plaintiff's injury occurred in an apartment unit and not a "passageway, hallway, stairway, or other walkway."

- In *Armental v. 401 Park Ave. S. Assoc.*, LLC, 182 A.D.3d 405, 407 (1st Dept 2020), an issue of fact remained as to whether unsecured pipes, allegedly piled two feet high, directly in front of the doorway, complied with the safe storage requirements under § 23-2.1(a).

§ 23-2.2. CONCRETE WORK

Summary of the Rule:

IC § 23-2.2 governs concrete construction work. Most litigation focuses on § 23-2.2(a) which requires all forms, shores and reshores be "braced or tied together so as to maintain position and shape." § 23-2.2(b) demands that all forms, shores, and reshores be continuously inspected during concrete work. § 23-2.2(c) dictates the specifications for concrete work with beams, floors, and roofs. § 23-2.2(d) requires that forms be promptly removed for a worksite after stripping down. Finally, § 23-2.2(e) states that reshoring shall occur when necessary.

- In *Winkler v. Halmar Int'l, LLC,* 199 A.D.3d 598 (1st Circuit 2021), a laborer died while filling a concrete form. The form gave way, causing the scaffold on which decedent stood to collapse. The wreckage crushed decedent. Plaintiff prevailed on her § 241(6) claim premised on § 23-2.2(a) which requires proper bracing of forms to maintain position and shape. Evidence conclusively established that the form did not comply with the demands of § 23-2.2(a). The court rejected the plaintiff's claim under § 23-2.2(b), which requires continuous inspection of all forms. Plaintiff could not prove that defendants failed to inspect the form.

- In *Morris v. Pavarini Constr.,* 874 N.E.2d 723 (N.Y. 2007), a large form fell onto a laborer and injured his hand. The laborer filed a § 241(6) claim premised on a violation of § 23-2.2(a), which requires forms to *structurally safe* and *properly braced to maintain position and shape.* The Court held that the words, "braced together so as to maintain position and shape" is sufficiently specific for a § 241(6) claim. Defendants argued, because only one side of an uncompleted form fell onto plaintiff, the falling object did not constitute a form. The court remanded, seeking testimony to determine when a form, for purposes of § 23-2.2(a), comes into existence. The court emphasized that experts can (and should) assist in defining specialized terms.

    - In *Morris v. Pavarini Constr.,* 8 N.E.3d 317 (N.Y. 2014), the same case again reached the Court of Appeals. This time, with testimony on the record as to whether § 23-2.2(a) applied only to completed forms, the Court held that the regulation applies to wall components.

    - *See also, Ross v. DD 11th Ave., LLC,* 109 A.D. 605 (2d Dept 2013), which required defendants to demonstrate for summary judgment that § 23-2.2(a) does not apply to the dismantling of completed forms. Plaintiff sustained injuries while tearing down a completed form.

§ 23-2.3. STRUCTURAL STEEL ASSEMBLY

Summary of the Rule:

IC § 23-2.3 governs the installation structural steel members. All litigation in the First and Second departments has focused on §§ 23-2.3(a) & (c). In pertinent part, § 23-2.3(a) states that steel members shall not be released from hoisting ropes until such members have been securely fastened. Additionally, no member shall be forced into place by hoisting machines where people stand nearby. § 23-2.3(c) demands that employers provide, and employees use taglines while hoisting steel panels or members.

- In *MacGregor v. MRMD N.Y. Corp.,* 194 A.D.3d 550 (1st Dept 2021) the court granted summary judgment to a laborer on his § 241(6) claim premised on a violation of § 23-2.3(c) which requires the use of tag lines in the hoisting of steel beams. Plaintiff established that his employer provided no taglines after sustaining injuries while hoisting steel beams. *Alternatively, see, Tomala-Campoverde v. Trumball Equities, LLC,* 186 A.D.3d 522 (2d Dept 2020) (rejecting defendant's summary judgment motion against § 241(6) claim predicated on violation of § 23-2.3(c) when a triable issue of fact remained regarding the availability of taglines on the job.).

- In *Cardenas v. BBM Constr. Corp.,* 133 A.D.3d 626, 628 (2d Dept 2015) a carpenter injured his back while manually lifting a 500-pound steel beam. The court rejected defendant's motion for summary judgment against the carpenter's § 241(6) claim premised on a violation of § 23-2.3(a) which requires steel beams to remain in hoisting ropes until personnel securely fastens the members. The carpenter only lifted the steel beam because the crew had not yet fastened it into place.

- In *Cruz v. Neil Hosp., LLC,* 50 A.D.3d 619, 621 (2d Dept 2008) an 800-pound steel beam crushed a laborer's leg after he and his co-workers attempted to push the beam over a mound. The court dismissed the plaintiff's § 241(6) claim predicated on a violation of 23-2.3(c) as inapplicable. The regulation's restrictions regarding taglines did not trigger because plaintiff and his coworkers did not hoist the beam.

§ 23-2.5 PROTECTION OF PERSONS IN SHAFTS

Summary of the Rule:

§ 23-2.5 of the Industrial Code governs the required protections for people working in: (a) general shafts; and (b) elevator shafts. To protect from falling materials, both provisions require that a covering be installed "not more than two stories or 30 feet, whichever is less, above the level where persons are working." Additionally, in both types of shafts, adequate fall protection must be in place. Specifically for elevator shafts, platforms must be constructed at each top landing to prevent workers from falling into the shaft.

- In *Parrales v. Wonder Works Constr. Corp.,* 55 A.D.3d 579 (2d Dept 2008), a piece of wood struck a laborer in the head while he cleaned out the bottom of elevator-shaft-turned-trash-chute during a demolition job. The court granted summary judgment to him on his claim as premised on a violation of IC § 23-2.5(a). The employee proved that the employer failed to provide covering at a point in the shaft not more than two stories or 30 feet above where plaintiff sustained injuries.

- In *McLean v. 405 Webster Ave. Assoc.,* 98 A.D. 1090 (2d Dept 2012), a counterweight struck a laborer in the head and broke his neck while he installed fiberoptic cables in a dumbwaiter shaft. The court held § 23-2.5 as inapplicable because the particularities of the work demanded noncompliance with the provision.

- In *Greenwood v. Whitney Museum of Am. Art,* 161 A.D.3d 425 (1st Dept 2018), a piece of scrap metal struck an employee in the head from about 30 feet above. The metal fell due to welding overhead. The injured employee was "fire watching" which required him to suppress fires inadvertently started by errant sparks from the welding above. The court rejected summary judgment for both parties on plaintiff's § 241(6) claim. Questions of fact remained as to whether: (1) the steel fell from more than 30 feet; (2) whether protections would hinder plaintiff's work as "fire watcher;" and (3) planking would increase the risk of fire.

Rule 23-3. Demolition Operations.

§ 23-3.2. GENERAL REQUIREMENTS.

Summary of Rule:

§ 23-3.2's general demolition requirements have rarely constituted a violation sufficient for a § 241(6) claim. Nevertheless, the rule requires that all exterior facing glass be removed before demolition begins. Additionally, all gas, electric, water, steam, and other supply lines must be shut off before demolition unless necessary to maintain such supply lines during demolition. If necessary, the supply lines must be substantially covered or relocated.

§ 23-3.2(b) provides that employers must inspect the walls of all adjacent buildings to the demolition site to assess whether the adjacent structure will become unsafe due to the demolition. § 23-3.2(c) requires that sidewalk sheds surround a demolition site. § 23-3.2(d) requires that employers control the dust resulting from a demolition.

I.C. § 23-1.4(b)(16) defines demolition work as: "The work incidental to or Assoc.d with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment."

- In *Turgeon v. Vassar Coll.,* 172 A.D.3d 1134, 1135 (2d Dept 2019), a mason lost his finger while performing maintenance on the façade of a college campus building. The court held that façade maintenance did not constitute demolition work and thus, § 23-3.2 did not apply.

- In *Karanikolas v. Elias Taverna, LLC,* 120 A.D.3d 552, 555 (2d Dept 2014), a laborer fell from a ladder during a construction job. The court dismissed his claim premised on § 23-3.2 as entirely inapplicable to the facts of his case.

- In *Fenty v. City of New York,* 71 A.D. 459 (1st Dept 2010), a steam pipe burned a laborer while he worked on an extensive renovation job at the New York City Department of Transportation Maintenance and Repair Facility. The court held that § 23-3.2(a)(2) did not apply because the extensive renovation work did not fall under the definition of demolition work provided by § 23-1.4(b)(16).

§ 23-3.3. DEMOLITION BY HAND.

Summary of Rule:

A wealth of caselaw exists surrounding this lengthy regulation. Almost all litigation of IC § 23-3.3 focuses on two subsections: § 23-3.3(b)(3) and § 23-3.3(c). § 23-3.3(b)(3) states that, "walls, chimneys, and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration." § 23-3.3(c) provides that employers must continually inspect a demolition site to detect hazards "resulting from weakened or deteriorated floors or walls or from loosened materials."

- In *Carillo v. Circle Manor Apartments,* 131 A.D.3d 662 (2d Dept 2015), a laborer fell through rotten plywood while performing repair work. The court denied his § 241(6) claim predicated on § 23-3.3 on the grounds that his repair work did not constitute a demolition job.

- In *Mendez v. Vardaris Tech, Inc.,* 173 A.D.3d 1004 (2d Dept 2019), a light fixture fell and struck a foreman on the head while he used a jackhammer to remove asbestos from a Manhattan school. The court rejected the defendant's motion for summary judgment dismissing the § 241(6) claim premised on violations of § 23-3.3(b)(3) and (c). § 23-3.3(b)(3) requires that "…parts of building[s]… shall not be left unguarded in such condition that such parts may fall, collapse, or be wakened by… vibration." § 23-3.3(c) requires continuing inspections against hazards created by demolition work, "rather than inspections of how demolition would be performed."

- In *Gomez v. Merrick Rd. Realty Corp.,* 189 A.D.3d 1187 (2d Dept 2020), a concrete slab fell onto a laborer's hand while he attempted to reposition it in the building's ceiling while performing a demolition job. The court rejected his § 241(6) claim premised on § 23-3.3(c) on the grounds that the accident "was not caused by structural instability that could have been noticed and addressed by further inspections but resulted from the planned performance of the removal or repositioning of the cement slab."

    - *See also: Mayorga v. 75 Plaza LLC,* 191 A.D.3d 606 (1st Dept 2021) (rejecting alleged violations of § 23-3.3(b)(3) and (c) because injuries sustained arose from the demolition work itself as opposed to any structural instability caused by the progress of the demolition); *Majerski v.*

City of New York, 193 A.D.3d 715 (2d Dept 2021) ("These provisions [§ 23-3.3(b)(3) and (c)] are intended to guard against hazards caused by structural instability resulting from the progress of the demolition; they do not apply to hazards caused by the actual performance of demolition work.").

- In *Bernandez v. 70 Franklin Place LLC,* 205 A.D.3d 642 (1st Dept 2022), an electrician removing old electrical equipment fell through a basement floor. The court dismissed his § 241(6) claim on the grounds that the electrician failed to present evidence demonstrating that his work in removing equipment from the walls caused the floor's collapse.

Rule 23-4. Excavation Operations.

§ 23-4.1. GENERAL REQUIREMENTS.

Summary of Rule:

Plaintiffs have had no success in alleging violations of § 23-4.1. First, on grounds of insufficient specificity, IC § 23-4.1(b) cannot support a § 241(6) claim. *Reyes v. Astoria 31st St. Developers, LLC*, 190 A.D.3d 872 (2d Dept 2021).

Additionally, the First and Second Departments have yet to hear a case where plaintiff's allegation of a violation of § 23-4.1(a) applied to the facts of the case. For example, s*ee Ankers v. Horizon Group, LLC,* 141 A.D. 418 (1st Dept 2016) (plaintiff fell or jumped from out-of-control motorized wheelbarrow, § 23-4.1(a) requires the maintenance of all buildings and/or structures in the vicinity of an excavation job.).

§ 23-4.2. TRENCH AND AREA TYPE EXCAVATIONS.

Summary of Rule:

This bulky rule governs trench-type excavation work sites. The rule's scope is vast compared to the relatively thin litigation history. Worse yet, the case law sprawls across each subsection. Unfortunate for the attorney tasked with obtaining a dismissal of claims premised on § 23-4.2, this rule can only be summarized through the grab bag of cases below:

- In *Gurewitz v. City of New York,* 175 A.D.3d 655 (2d Dept 2019), the wind blew down a temporary chain link fence protecting a construction site, striking three employees. All three filed suit alleging a violation of § 23-4.2(h). The court granted summary judgment on their § 241(6) motion premised on the violation of that rule. The rule requires the effective guarding of open excavations adjacent to any area lawfully frequented by any person, i.e., a substantial fence or barricade.
    - See also*, Gjeka v. Iron Horse Transp., Inc.,* 151 A.D.3d 463 (1st Dept 2017) where a truck driver struck an employee directing traffic around his employer's excavation job. After the driver hit the employee, he fell down the excavation. The court denied defendants' motion for summary judgment reasoning that § 23-4.2(h) requires open excavations in areas "lawfully frequented by any person shall be effectively guarded." The excavation the plaintiff fell into had no protection to keep people from falling in.

- In *Moscati v. Consol. Edison Co. of New York, Inc.,* 168 A.D.3d 717 (2d Dept 2019), the operator of an excavator sustained injuries after his operator slid or tipped into a creek. The Second Department reversed the trial court's dismissal of plaintiff's § 241(6) claim rooted in § 23-4.2(a) and (c). ConEd failed to demonstrate that the regulations' inapplicability. § 23-4.2(a) governs sheeting and shoring for excavation sites exceeding a certain depth. § 23-4.2(c) demands supervision of unbraced excavations which extend below the ground water table.

- In *Zaino v. Rogers,* 153 A.D.3d 763 (2d Dept 2017), the operator of an excavator struck his employee. The employee filed a § 241(6) claim premised on § 23-4.2(k) which prohibits employers from forcing employees to work in areas where excavation equipment threatens them. The court denied the defendants' motion for summary judgment to dismiss the employee's claim. A question of fact remained as to whether the employer "suffered or permitted" the employee to work near the excavator.

    - **HOWEVER**, in *Willis v. Plaza Constr. Corp.,* 151 A.D.3d 568 (1st Dept 2017), the court held that IC § 23-4.2(k) is insufficiently specific to support a § 241(6) claim.

§ 23-4.3. ACCESS TO EXCAVATIONS.

Summary of Rule:

This rule simply requires that proper access to and from excavations be provided on sites more than three feet in depth. A sufficient number of access points must be provided, and such access points must not be more than 25 feet away from each other.

- In *Calle v. City of New York,* 212 A.D.3d 763 (2d Dept 2023), a laborer fell into an excavation after he stepped onto a wooden cross brace that collapsed. The court granted summary judgment to the city on the laborer's § 241(6) claim premised on a violation of § 23-4.3 on the grounds that the city proved that they provided ladders at the excavation site.

Rule 23-5. Scaffolding.

§ 23-5.1. GENERAL PROVISIONS FOR ALL SCAFFOLDS.

Summary of the Rule:

This expansive rule has been the subject of much litigation. As the title indicates, this regulation governs the use of scaffold in construction jobs. § 23-5.1(a) clarifies that this rule pertains to all scaffolding as mentioned in the entirety of the Industrial Code. § 23-5.1(b) requires that scaffold be erected on solid ground and not upon unstable supports.

§ 23-5.1(c) states that scaffolding shall be constructed to bear four times the maximum weight required. § § 23-5.1(d) discusses those maximum weights per square foot for each type of scaffold. § 23-5.1(e) further stipulates the maximum weight loads for the types of planks used in a scaffolding.

§ 23-5.1(f), which requires scaffolds to be safe and properly maintained is insufficiently specific to support a § 241(6) claim. *Pontes v. F&S Contracting, LLC,* 146 A.D.3d 43 (2d Dept 2017); *accord Schiulaz v. Arnell Constr. Corp.,* 261 A.D.2d 247 (1st Dept 1999).

§ 23-5.1(g) discusses the requirements for lumber used in scaffolds. Lumber must pass a minimum stress test of 1500 psi. Additionally, the lumber must be free from "shakes, large, loose or dead knots or checks or from any other defects which may impair its strength or durability." § 23-5.1(h) requires a designated supervisor oversee scaffold erection and removal. § 23-5.1(i) spells out the requirements for scaffolds which require overhead protections. § 23-5.1(j) governs the use of safety railings in scaffolds.

- In *Fischer v. VNO 225 W. 58th St. LLC,* 215 A.D.3d 486 (1st Dept 2023), the plaintiff fell from a plywood platform which ran from an exterior hoist of a building into a mechanical room. The court dismissed his claim premised on a violation of § 23-5.1 because workers used the platform to transport materials between the hoist and mechanical room. The platform did not serve the functional equivalent of a scaffold. Accordingly, no provision of § 23-5.1 triggered.

(1) I.C. § 23-5.1(e): Scaffold Planking.

- In *Payne v. NSH Cmty. Serv., Inc.,* 203 A.D.3d 546 (1st Dept 2022), a laborer fell over a rebar mat installed to reinforce yet-to-be poured concrete. The court dismissed his labor law claim premised on § 23-5.1(e), which mandates a minimum width for planked scaffold platforms. The court held that the rebar mat

did not constitute a planked scaffold, and even if the employer constructed a walkway over the rebar mat, that walkway would also not constitute a scaffold. The court characterized scaffolds as "a device designed to protect a worker from elevation related hazards."

- In *Lojano v. Soiefer Bros. Realty Corp*., 187 A.D.3d 1160 (2d Dept 2020), an employer and employee built a makeshift scaffold when they determined they could not complete the job time using only a scissor lift. The employee fell from makeshift scaffold and sustained injuries. He filed a § 241(6) claim premised on § 23-5.1(e). The court denied the defendant's motion for summary judgment on that claim, reasoning that they failed to demonstrate § 23-5.1(e)'s inapplicability or that the violation did not proximately cause the employee's injuries.

- In *Monfredo v. Arnell Constr. Corp.,* 171 A.D.3d 600 (1st Dept 2019), the court dismissed a claim premised on § 23-5.1(e) on the grounds that the scaffold in question did not rise over seven feet tall.

(2) I.C. § 23-5.1(h): Scaffold Erection and Removal.

- In *Ortega v. Trinity Hudson Holding LLC,* 176 A.D.3d 625 (1st Dept 2019), during the set-up of a scaffold, the scaffold tipped over and pinned an employee's hand. The court denied his claim predicated on § 23-5.1(h). The foreman had instructed the plaintiff on how to set up the scaffold, and plaintiff had been performing the same work for over a week before the accident. Accordingly, the court held that the foreman's absence did not constitute a proximate cause of the plaintiff's injuries.

- In *Devoy v. City of New York,* 192 A.D.3d 665 (2d Dept), the court dismissed a § 241(6) claim premised on § 23-5.1(h) because plaintiff's injury did not occur during the set-up or tear down of a scaffolding.

(3) I.C. § 23-5.1(j): Safety Railings.

- In *Torres v. New York City Hous. Auth.,* 199 A.D.3d 852 (2d Dept 2021), a laborer conducting asbestos abatement work fell off a scaffold. He filed a § 241(6) claim premised on § 23-5.1(j), the provision relevant to safety railings on scaffolds. The court dismissed his claim, reasoning that he failed to establish that the scaffold lacked railings and that such violation proximately caused his injury.

- In *Gomes v. Pearson Cap. Partners, LLC*, 159 A.D.3d 480 (1st Dept 2018), issues of fact regarding the height of the scaffold precluded summary judgment in favor of defendants against an employee's claim premised on § 23-5.1(j).

- In *Santos v. Condo 124, LLC,* 161 A.D.3d 650 (1st Dept 2018), the court dismissed plaintiff's claim premised on § 23-5.1(j) because the plaintiff failed to testify that the lack of safety railings caused his injury.

§ 23-5.3. GENERAL PROVISIONS FOR METAL SCAFFOLDS.

Summary of the Rule:

This regulation governs the same criteria specified in § 23-5.1, but for metal scaffolds.

- In *Leon-Rodriguez v. Roman Cath. Church of Saints Cyril and Methodius,* 192 A.D.3d 883 (2d Dept 2021), a laborer fell from a scaffold without safety railings during a demolition job when a piece of concrete fell from the ceiling and struck him in the head. The court granted the laborer summary judgment on his § 241(6) claim premised on a violation of § 23-5.3(e) which requires that metal scaffolds contain adequate safety railings.

§ 23-5.4 — § 23-5.18 PROVISIONS FOR VARIOUS SCAFFOLD TYPES.

Summary of Rules:

These regulations govern the inspection, installation, and specific requirements for all types of scaffolds which may be used in a construction job. These include:

- Tubular welded frame scaffolds
- Pole Scaffolds
- Outrigger scaffolds
- Suspended scaffolds
- Horse scaffolds
- Lean-to scaffolds

These hyper-technical regulations have little caselaw surrounding them. Simply put, if plaintiff's counsel alleges a violation of any of these provisions, you must determine the corresponding type of scaffold which the injured fell from. More likely though, it seems that plaintiff's counsel will remain in the realm of § 23-5.1.

§ 23-5.22. STILTS.

Summary of Rule:

This rule governs the use of stilts in construction work. § 23-5.22(a) states that stilts shall only be used in limited circumstances and by competent persons. § 23-5.22(b) provides that a commissioner shall be notified if stilts will be used on a job.

§ 23-5.22(c) requires that scaffolds be used alongside stilts. § 23-5.22(d) demands that stilts be maintained in good repair. § 23-5.22(e) states that stilts shall not elevate any person more than 24 inches above the ground. Finally, § 23-5.22(f) requires that the working area of stilts be kept free of obstructions, debris, or slipping hazards.

- In *Gonzalez v. Magestic Fine Custom Home,* 115 A.D.3d 798 (2d Dept 2014) the court extended *O'Sullivan v. IDI Constr. Co., Inc.,* 855 N.E.2d 1159 (N.Y. 2006) to § 23-5.22(f). The *O'Sullivan* court held that debris integral to construction, that an employee trips over, cannot furnish liability in a § 241(6) claim. In this case, a worker's stilts became tangled in wires, and he sustained injuries after falling from them. The court held that a question of fact remained as to whether the wires were an integral part of the construction job.

Rule 23-6. Material Hoisting.

§ 23-6.1. GENERAL REQUIREMENTS.

Summary of Rule:

§ 23-6.1(a) states that this section of the Industrial Code applies to all material hoisting equipment except: cranes, derricks, aerial baskets, excavating machines, and forklifts. § 23-6.1(b) acts as this section's "good repair" provision. Like other "good repair" provisions of the Industrial Code, the 1st and 2nd Department have held this provision as insufficiently specific to form the basis of a § 241(6) claim. *See Barrick v. Palmark, Inc.,* 9 A.D.3d 414, 415 (2d Dept 2004); *Gonzalez v. Glenwood Mason Supply Co., Inc.,* 41 A.D.3d. 338, 339 (1st Dept 2007).

§ 23-6.1(c) discusses operation of material hoists. § 23-6.1(c)(1) requires training of operators. The 1st Department has held that § 23-6.1(c)(1) as insufficiently specific for a § 241(6) claim. *Lopez v. Halletts Astoria LLC,* 205 A.D.3d 573, 575 (1st Dept 2022). § 23-6.1(c)(2) demands that operators remain at the controls whenever suspending a load. § 23-6.1(d) requires loads to not exceed the maximum load weight specified by the equipment manufacturer.

§ 23-6.1(e) discusses the variety of requirements for a material hoists signal system. In brief, material hoists must be operated in response to a signal system. Operators and signal men must be able to comprehend each other. § 23-6.1(e)(2) permits hand signals, telephone, or other audiovisual signals as proper conveyance of signals. If signal men cannot be seen by an operator, an audible signal must be used. The regulation goes on to provide a specific scheme of audible and visual codes to convey specific instructions to the operator.

§ 23-6.1(f) requires that operators receive overhead protection. § 23-6.1(g) demands the guarding of moving parts. § 23-6.1(h) requires taglines on loads which tend to swing. § 23-6.1(i) prohibits riding on loads. § 23-6.1(j) discusses the requirements for hoist brakes and anchors. Finally, § 23-6.1(k) declares that personnel may only repair machines at rest.

- In *Dominguez v. Mirman, Markovits & Landau, P.C.*, 180 A.D.3d 646 (2d Dept 2020), a laborer sued his attorneys for alleged malpractice in an underlying personal injury suit. In that personal injury case, an excavator machine's bucket struck the laborer. The court discussed the inapplicability of rule § 23-6.1 as a basis for liability in plaintiff's case because § 23-6.1(a) expressly declares that the rules of § 23-6.1 do not apply to excavators used as hoists. *See also, Scott v. Westmore Fuel Co., Inc.,* 96 A.D.3d 520 (1st Dept 2012).

- In *Martinez v. 342 Prop. LLC,* 128 A.D.3d 408 (1st Dept 2015) an 8,000-pound machine pinned an employee while he and his coworkers attempted to load it onto a forklift. The court affirmed a dismissal of his § 241(6) claim premised on § 23-6.1 because his injuries did not arise as a result of loading "material hoisting equipment." § 23-6.1(a) expressly states that the provisions of the rule do not apply to forklifts.

- In *Naughton v. City of New York,* 94 A.D.3d 1 (1st Dept 2012), an unsecure bundle of wall panels swung from a hoist and struck the plaintiff who subsequently fell 15 feet to the grounds. The court held that question of fact remained with respect to the plaintiff's § 241(6) claim premised on a violation of § 23-6.1(h) which requires the use of taglines on loads tending to swing. Taglines existed on the load, but evidence indicated that the tags did not properly curb swaying. Accordingly, an issue of fact remained as to whether the tagline "controlled" the load.

- In *Kretowski v, Braender Condo.,* 57 A.D.3d 950 (2d Dept 2008), a brick fell from a pallet being hoisted and struck a worker in the head. The court held that issues of fact remained regarding an alleged violation of § 23-6.1(d). That provision requires the proper trimming of loads to prevent dislodgment of materials during transit.

- In *Barrios v. Boston Prop. LLC,* 55 A.D.3d 339 (1st Dept 2008), material loaded into a freight elevator fell out and struck an employee. The court dismissed her claim premised in part on § 23-6.1(d) on the grounds that a freight elevator does not constitute a material hoist as contemplated by the Industrial Code.

§ 23-6.2. RIGGING, ROPE, AND CHAINS FOR MATERIAL HOISTS.

Summary of Rule:

This verbose rule dwarfs the relevant case law which discusses it. In pertinent part, § 23-6.2 governs the specific requirements for types of hoisting ropes and chains. The thin litigation history best summarizes § 23-6.2.

- In *Guerra v. Port Auth. of New York and New Jersey,* 35 A.D.3d 810 (2d Dept 2020) a swinging chain inadvertently lifted a barrier which subsequently fell onto an employee's leg. The court dismissed the employee's claim premised on § 23-6.2(d)(3) which prohibits the use of defective chains. Plaintiff failed to demonstrate that the chain's defectiveness. However, the alleged violation of § 23-6.2(c) survived summary judgment on the grounds that the safety hook caused the injury.

- In *Hawkins v. City of New York,* 275 A.D.2d 634 (1st Dept 2000) the court rejected an employee's claim premised in part upon a violation of § 23-6.2. The employee sustained injuries after lifting a steel beam by hand. His employer never provided a hoist system and accordingly, the requirements of § 23-6.2 did not trigger.

§ 23-6.3. MATERIAL PLATFORM OR BUCKET HOISTS.

Summary of Rule:

Like the immediately preceding rule, the thick eleven subparts of § 23-6.3 tower over the mere seven cases which have litigated the rule. Accordingly, the pertinent aspects of the rule will simply be summarized in the substantial case law contained below.

- In *Lopez v. Hallets Astoria LLC,* 205 A.D.3d 573 (1st Dept 2022), an adjacent ascending hoist elevator struck an employee's foot from underneath while he attempted to fix a misaligned hoist elevator. An issue of fact remained with respect to the § 241(6) claim premised on § 23-6.3(g). § 23-6.3(g) provides that hoist operations must cease whenever someone climbs the hoist tower to perform work. The court held that an issue of fact concerning whether the operation of the hoist while plaintiff climbed an adjacent hoist proximately caused his injury.

- In *Kretowski v. Braender Condominium,* 57 A.D.3d 950 (2d Dept 2008), a brick fell from a pallet being hoisted and struck a worker in the head. The court rejected the worker's § 241(6) claim, premised on a violation of § 23-6.3(a), which requires licensed engineers to design material platforms used in hoists. Plaintiff failed to set forth evidence indicating that a professional engineer did not design the platform.

Rule 23-7. Personnel Hoists.

Summary of Rule:

Across § 23-7's three subparts, only three cases have reached the First or Second Department which cite to this rule. § 23-7.1 lays down the general requirements for personnel hoists. Both the First and Second Departments have held § 23-7.1 as insufficiently specific in its entirety. *See, Robles v. Taconic Mgmt. Co., LLC,* 173 A.D.3d 1089 (2d Dept 2019); *accord, Wade v. Bovis Lend Lease LMB, Inc.,* 102 A.D.3d 476 (1st Dept 2013).

§ 23-7.2 discusses, in great detail, the specifications for temporary personnel hoists. § 23-7.3 elaborates extensively on the requirements for elevators converted into personnel hoists.

In all three cases, the court dismissed plaintiff's § 241(6) claim premised on a § 23-7 violation on the grounds of its inapplicability to the plaintiff's case. *See, Robles v. Taconic Mgmt. Co., LLC,* 173 A.D.3d 1089 (2d Dept 2019); *Wade v. Bovis Lend Lease LMB, Inc.,* 102 A.D.3d 476 (1st Dept 2013); *Murphy v. Am. Airlines, Inc.,* 277 A.D.2d 25 (1st Dept 2000).

Rule 23-8. Mobile Cranes, Tower Cranes and Derricks.

§ 23-8.1. GENERAL PROVISIONS.

Summary of the Rule:

This massive rule contains a variety of provisions governing the hoisting, handling. mechanisms, materials, and maintenance of cranes and derricks. Despite its expansive scope almost all litigation has exclusively focused on rules §§ 23-8.1(f)(1)(iv), 23-8.1(f)(2)(i), and 23-8.1(f)(5).

§ 23-8.1(f)(1)(iv) requires personnel to inspect that the load has been secured and properly balanced before lifting. § 23-8.1(f)(2)(i) demands that during a hoisting operation, operators may not suddenly accelerate or decelerate the hoist. 23-8.1(f)(5) prohibits the use of a crane or derrick while any person climbs atop a load or hook.

- In *MacGregor v. MRMD N.Y. Corp.,* 194 A.D.3d 550 (1st Dept 2021), an employee fell from the cab of a truck after the operator mistakenly swung steel beams which struck the employee and the truck itself. The court granted the employee summary judgment on his § 241(6) claim premised on a violation of § 23-8.1(f)(2)(i). The employee sufficiently demonstrated that the operator's sudden deceleration of the hoist caused the impact which knocked him from the cab.

- In *Wein v. E. Side 11th and 28th, LLC,* 186 A.D.3d 1579 (2d Dept 2020), a load suddenly swung to the side and pinned a laborer against a pipe. The court rejected his claim premised on § 23-8.1(f)(1)(iv) because his own testimony demonstrated that he and his coworkers inspected the load before hoisting it. However, the court granted the laborer summary judgment on his § 241(6) claim premised on § 23-8.1(f)(2)(i) because he established that the load suddenly moved and caused his injuries.

- In *Valdez v. Turner Constr. Co.,* 171 A.D.3d 836 (2d Dept 2019), a worker sustained injuries while attempting to detach a bag of soil from a crane. The worker's hand got caught in the rig and the crane lifted him off the ground. When he freed his hand, he fell from the crane and sustained injuries. The court granted the worker's motion for summary judgment premised on a violation of § 23-8.1(f)(5), which strictly prohibits the use cranes and derricks to hoist persons.

- In *Harris v. City of New York,* 83 A.D.3d 104 (1st Dept 2011), the plaintiff sustained injuries when a four-by-four plank shattered underneath his feet after

the operator of a crane suddenly dropped a slab onto the plank. The court granted the plaintiff summary judgment on his § 241(6) claim premised on §§ 23-8.1(f)(1)(iv) and 23-8.1(f)(2)(i).

- In *Catarino v. State,* 55 A.D.3d 467 (1st Dept 2008), a crane operator began reeling in cables which another employer used to steady himself. In doing this, the operator inadvertently crushed the employee's hand in the crane's mechanism. The court rejected the defendant's argument that § 23-8.1(f)(5) only applied to loads in motion. The court reasoned that the regulation clearly prohibits the operation of cranes while workers climb atop a load — the load need not be in motion for a violation of § 23-8.1(f)(5).

- In *Locicero v. Princeton Restoration, Inc.,* 25 A.D.3d 664 (2d Dept 2006), gauge wire snapped and dropped a bundle of wire mesh rebar onto a laborer. The court held that defendants had violated § 23-8.1(f)(6) which prohibits the hoisting of loads over any person.

§ 23-8.2. SPECIAL PROVISIONS FOR MOBILE CRANES.

Summary of Rule:

This rule specifically discusses the requirements for mobile cranes. Almost all litigation of this rule focuses on § 23-8.2(c)(3) which demands the vertical lifting of loads to avoid swinging during hoisting. Additionally, tag lines must be used in situations where rotation or swinging of any load being hoisted might create a hazard.

- In *Wein v. E. Side 11th and 28th, LLC,* 186 A.D.3d 1579 (2d Dept 2020), a load suddenly swung to the side and pinned a laborer against a pipe. The court rejected the laborer's § 241(6) claim premised on § 23-8.2(c)(3) on the grounds that he testified that he and the crew used tag lines during the hoist.

    - *See also, Flores v. Metro. Transp. Auth.,* 164 A.D.3d 418 (1st Dept 2018) where plaintiff established the lack of taglines during a hoist causing injury, entitling him to summary judgment on his claim premised on a violation of § 23-8.2(c)(3).

Rule 23-9. Power-Operated Equipment.

§ 23-9.1. APPLICATION OF THIS SUBPART.

Summary of the Rule:

Rule § 23-9 applies to power-operated heavy equipment or machinery. This rule expressly does not apply to hoists, cranes, or derricks.

- In *Nicola v. United Veterans Mut. Hous. No. 2, Corp.,* 178 A.D.3d 937 (2d Dept 2019) the court held that a hammer drill which injured the plaintiff did not constitute heavy equipment or machinery. Accordingly, the provisions of § 23-9 did not apply to the plaintiff's case.

- In *Shields v. First Ave. Builders LLC,* 118 A.D.3d 588 (1st Dept 2014), the court held that concrete pumps constitute power-operated heavy equipment and/or machinery.

- In *Cabrera v. Revere Condo.,* 91 A.D.3d 695 (2d Dept 2012), the court held that a hand-held power grinder did not constitute heavy machinery for the purposes of rule § 23-9.

§ 23-9.2. GENERAL REQUIREMENTS.

Summary of Rule:

This rule addresses general concerns applicable to all power-operated machinery. Most litigation focuses on § 23-9.2(a) and some litigation calls § 23-9.2(b)(1) into question.

§ 23-9.2(a) dictates that power operated machinery be maintained in good repair. Sufficient inspections must be made to insure such maintenance. Defects or unsafe conditions must be corrected upon discovery. Such repairs must be performed by or under the supervision of designated persons. Finally, all repairs may only be performed while equipment rests.

- In *Nicholson v. Sabey Data Ctr. Prop., LLC,* 205 A.D.3d 620 (1st Dept 2022), an employee sustained injuries when a pallet jack suddenly engaged, launching him backwards and pinning his ankle against a pipe. The court held that the plaintiff's testimony about the pallet jack's defectiveness established an issue of fact as to a violation of § 23-9.2(a).

- In *Viruet v. Purvis Holdings LLC,* 198 A.D.3d 587 (1st Dept 2021), the court granted summary judgment to a plaintiff on his § 241(6) claim premised on a violation of § 23-9.2(a). Plaintiff sustained injuries from a defective grinder. The grinder had no blade, safety guard, side handle, nor cut-off switch. The grinder spontaneously turned on and off. When plaintiff complained, his employer told him to proceed with the grinder or go home.

- In *Golec v. Dock St. Constr. LLC,* 186 A.D.3d 463 (2d Dept 2020), a laborer entered the hopper of a concrete pumper truck to remove residual concrete. The pump motor was off when the laborer entered, but the truck's engine was still running. Somehow, the s-tube moved, the laborer slipped, and the pump crushed his foot. The court held because the truck's motor ran at the time of the accident, defendants had violated § 23-9.2(a). However, questions of fact remained as to whether the truck motor's running caused the laborer's injury.

- In *Nicola v. United Veterans Mut. Hous. No. 2, Corp.,* 178 A.D.3d 937, 940 (2d Dept 2019), the court granted summary judgment to defendants on a § 241(6) claim premised on § 23-9.2(a) because defendants lacked notice of any defect or unsafe condition in the injury causing hammer drill.

§ 23-9.4. POWER SHOVELS AND BACKHOES USED FOR MATERIAL HANDLING.

Summary of Rule:

This regulation governs the use of power shovels and backhoes. Litigation is scattered across the many provisions of this rule. Both departments have held § 23-9.4(a) as insufficiently specific to support a § 241(6) claim.

§ 23-9.4(b) requires thorough inspection of power shovels and backhoes at least every three minutes. Additionally, such machines must be at rest during inspection and repair. Finally, records must be kept of inspection and repairs. § 23-9.4(c) demands that power shovels and backhoes only be established on stable footing. § 23-9.4(d) dictates that proper brakes be provided, with locking devices.

§ 23-9.4(e) requires loads to be suspended from a bucket or bucket arm by means of a safety factor of four wire rope. The rule goes on to state that such rope shall be connected by closed shackle or safety hook capable of withstanding four times the intended load. § 23-9.4(f) prohibits the modification of a machine's load handling capacity and § 23-9.4(g) prohibits exceeding the machine's maximum capacity.

Finally, in six subparts, § 23-9.4(h) governs the operation of power shovels and backhoes. This rule demands that: (1) loads be lifted in a vertical plane; (2) machines not travel with a suspended load; (3) ignition locks be utilized to prevent unauthorized use; (4) operators be authorized; (5) loads never be carried or swung over areas where people work; (6) operation never occur near power lines.

- In *St Louis v. Town of N. Elba,* 947 N.E.2d 1169, 1171 (N.Y. 2011), the court held that § 23-9.4 applies to front-end loaders. The Court of Appeals affirmed the Appellate Division's assertion that the touchstone to assess the applicability of § 23-9.4 is "the manner in which the equipment is used rather that its name or label."

- In *Moscati v. Consol. Edison Co. of New York, Inc.,* 168 A.D.3d 717 (2d Dept 2019), the operator of an excavator sustained injuries after his excavator slid or tipped into a creek. The court rejected ConEd's motion for summary judgment on plaintiff's § 241(6) claim premised on § 23-9.4(c), which requires the use power shovels and backhoes on only stable footing.

- In *Cunha v. Crossroads II,* 131 A.D.3d 440, 441 (2d Dept 2015), the operator of an excavator rolled over an employee's legs. The court held that issues of fact

remained with respect to plaintiff's § 241(6) claim premised on a violation of § 23-9.4(h)(4), which prohibits unauthorized persons from working immediately adjacent to power shovels and backhoes. Defendants failed to submit evidence that the plaintiff received authorization to give signals to the excavator operator. Accordingly, questions remained as to whether § 23-9.4(h)(4) protected him.

§ 23-9.5. EXCAVATING MACHINES.

Summary of Rule:

This rule mimics the immediately preceding rule, but for excavating machines. Accordingly, the same cases pop-up in alleged violations of § 23-9.5.

§ 23-9.5(a) requires that excavators be set up on stable footing. § 23-9.5(c) demands that only authorized individuals operate and work in the vicinity of excavators. § 23-9.5(g) states that excavator machines must be installed with back-up alarms.

- In *Moscati v. Consol. Edison Co. of New York, Inc.,* 168 A.D.3d 717 (2d Dept 2019), the operator of an excavator sustained injuries after his excavator slid or tipped into a creek. The court rejected ConEd's motion for summary judgment on plaintiff's § 241(6) claim premised on § 23-9.5(a), which requires the use of excavating machines on stable footing.

- In *Zaino v. Rogers,* 153 A.D.3d 763, 764 (2d Dept 2017), the court easily dismissed a § 241(6) claim premised on a violation of § 23-9.5(g), which requires "back-up alarms" on all excavators except crawler mounted excavators. Defendants established that the excavator in question was crawler mounted.

- In *Cunha v. Crossroads II,* 131 A.D.3d 440, 441 (2d Dept 2015), the operator of an excavator rolled over an employee's legs. The court held that the defendant had failed to establish their entitlement to judgment as a matter of law on plaintiff's § 241(6) claim premised on a violation of § 23-9.5(c) which prohibits the operation of excavators by unauthorized personnel. Defendants failed to demonstrate that the employer chose the excavator operator.

    - Alternatively, in *Torres v. City of New York,* 127 A.D.3d 1163, 1166 (2d Dept 2015), the court dismissed plaintiff's claim premised on § 23-9.5(c) because the defendant had demonstrated that plaintiff was a member of the "excavation crew" and therefore authorized to work near the excavator bucket.

§ 23-9.6. AERIAL BASKETS.

Summary of Rule:

This rule falls into the category of lengthy Industrial Code provisions with little to no caselaw centered on it. Three cases have reached the First and Second Departments which cite to § 23-9.6. A single case contained substantial information worthy of summary.

- In *Simoes v. City of New York,* 81 A.D.3d 514, 515 (1st Dept 2011) plaintiff sustained injuries while inside an aerial basket. His coworker drove a vehicle into the manlift, unaware plaintiff was inside the aerial basket. The court declined to dismiss the plaintiff's claim under § 241(6) premised on violations of §§ 23-9.6(c)(3) and 23-9.6(e)(8). Those provisions both prohibit the moving of an aerial basket truck while any person is elevated in the basket.

§ 23-9.7. MOTOR TRUCKS.

Summary of Rule:

This rule governs the use of trucks. Litigation has focused primarily on §§ 23-9.7(e) and § 23-9.7(d). § 23-9.7(e) prohibits riding anywhere but a designated seat in a truck. § 23-9.7(d) requires drivers backing into a worksite to be guided by another employee.

- In *Wetter v. Northville Indus. Corp.,* 185 A.D.3d 874, 875 (2d Dept 2020) an employee sustained injuries after jumping from the bed of a truck and landed in a roadside ditch. The employee filed a § 241(6) claim premised on a violation of § 23-9.7(e) which prohibits persons from riding anywhere except where a properly installed seat is provided. The court dismissed his claim reasoning that § 23-9.7(e) applies when plaintiffs suffer injuries while riding in trucks. § 23-9.7(e) does not trigger for injuries suffered while exiting a truck.

- In *Pruszko v. Pine Hollow Country Club, Inc.,* 149 A.D.3d 986, 988 (2d Dept 2017) a laborer hit his knee while riding in the bed of a truck. The court dismissed his § 241(6) claim premised on § 23-9.7(e), reasoning that Vehicle and Traffic Law § 1222 permits the carrying of people in the bed of a truck over distances less than five miles.

- In *Erickson v. Cross Ready Mix, Inc.,* 75 A.D.3d 524, 526 (2d Dept 2010) a truck driver struck the plaintiff. The plaintiff's claim premised on a violation of § 23-9.7(d), which prohibits unguided backing-in of trucks, survived a motion for summary judgment. Issues of fact remained to assess whether the driver's unguided backing-in proximately caused the plaintiff's injury.

- In *Scott v. Am. Museum of Nat. Hist.,* 3 A.D.3d 442 (1st Dept 2004), the court held that § 23-9.7 does not apply to forklifts.

§ 23-9.8. LIFT AND FORK TRUCKS.

Summary of Rule:

This rule governs the use of forklifts. Not much litigation has occurred which cites to this regulation of the Industrial Code. One commonly litigated provision, § 23-9.8(e) states that forklifts may not be used on uneven surfaces, so as to make upsetting likely. The 2nd Department has held § 23-9.8(k) as insufficiently specific to support a § 241(6) claim. § 23-.9.8(l) requires forklifts to be equipped with audible warning devices such as a horn, whistle, or gong.

- In *Fritz v. Sports Auth.,* 91 A.D.3d 712 (2d Dept 2012), a laborer suffered injuries after his forklift fell into a conduit trench. The court found issues of triable fact with respect to the alleged violation of § 23-9.8(e), which prohibits the use of forklifts on uneven ground. The worksite's ground was composed of crushed concrete and appeared flat and level. Nevertheless, plaintiff's § 241(6) claim survived summary judgment.

- In *Fitzgerald v. New York City Sch. Constr. Auth.,* 18 A.D.3d 807 (2d Dept 2005), a forklift operator ran over a laborer while backing up the lift. The court dismissed plaintiff's § 241(6) claim on the grounds that § 23-9.8 contains no provision whatsoever pertaining to the backing up of a forklift. *See also, Scott v. Am. Museum of Nat. Hist.,* 3 A.D.3d 442 (1st Dept 2004).