IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Meridian Construction Inc., 2004NSPC51
R. v. London, 2004NSPC51

Date: 20041018
Docket: 1306087-89 & 1306080-81
Registry: Kentville

Between:

Her Majesty the Queen

v.

Meridian Construction Inc.

and between:

Her Majesty the Queen

v.

Mr. Donald London

Judge:	The Honourable Judge Alan T. Tufts
Heard:	Feb.10, 11, 12, 16, 17, 25, 26, June 9, 2004
Written decision:	October 18, 2004
Charge:	Meridian Const. Inc. - s. 15(d) Occupational Health and Safety Act x 2 s. 15(a) Occupational Health and Safety Act London - s. 17(1)(a) Occupational Health and Safety Act; s. 17(1)(f) Occupational Health and Safety Act
Counsel:	Richard M. Hartlen and Alonzo Wright, for the Crown David Bright, Q.C. and David Doyle, for the Defendants

By the Court:

[1] On January 30, 2003, during the construction of the Avonview School near Windsor, Nova Scotia, John Dillman, while helping to move a ladder, fell backwards onto a skylight opening covered only with rigid styrofoam board insulation. He went completely through the opening and fell approximately thirty feet onto an ice-covered concrete floor. He died as a result of the injuries he sustained from this fall.

[2] As a result of this accident, the N.S. Department of Labour conducted an investigation and Meridian Construction Incorporated (MCI) and Donald London were both charged with offences under the **Occupational Health and Safety Act** arising out of Mr. Dillman's death. During the investigation further allegations of safety issues were identified. Charges with respect to those allegations were also laid.

CHARGES

[3] MCI and Donald London were both charged with failing to take every precaution that was reasonable in the circumstances to ensure that a method of fall protection was in place at the skylight openings through which Mr. Dillman fell. Further, each was charged for failing to take every precaution that was reasonable in the circumstances to ensure that guardrails were installed as prescribed by s. 9(1) of the **Fall Protection and Scaffolding Regulations** relative to the exposed open side of the second floor mezzanine in the centre core of the subject building. Finally, MCI was additionally charged for failing to take corrective action for hazards identified by workers at the workplace; the alleged hazards being the unsecured skylight openings, ice and snow covered floor areas in the building, unguarded edges of floor slabs, insufficient lighting in the building and the lack of either a fall protection or a fall arrest system at the edges of roofs and floors. The full charges and particulars are included in Appendix “A” of this decision.

SUMMARY OF FACTS

[4] The construction of Avonview School began in the spring of 2002. MCI was the general contractor and Donald London was the site supervisor, the most senior employee of MCI on site. By January of 2003 the walls of the

school had been erected and the steel roof was largely completed. However, the roofing insulation membrane and ballast was not fully installed and was in the process of installation at that time.

[5] The building is designed around a centre core with two wings of classrooms extending on each side. To the rear of the centre core is the gymnasium. The centre core includes the front entrance of the building and is approximately thirty feet from floor to ceiling. A portion of the centre core has a second floor mezzanine which at the material times was under construction and completely open. During the material times the wings of the building had been temporarily sealed off with plastic and interior construction was underway in those areas. The centre core of the building was used primarily for storage and for travel from one wing to another and in part, via the second floor mezzanine, to access the roof.

[6] Considerable snowfall was experienced during the winter of 2002/2003. As a result of this, significant amounts of snow had accumulated in the centre core of the building prior to the roof being constructed and the large windows being installed. Because of the extremely low temperatures the snow failed to melt inside this portion of the building and when the snow became trampled down it turned to ice.

[7] On the roof of the centre core of the building a penthouse or mechanical room was being constructed. The siding on this structure consisted of sheets of wolmanized plywood. This structure was under construction during the material times.

[8] The roof of the building was constructed of a metal material referred to as Q-decking. It resembled corrugated cardboard but was made of steel and was intended to be covered by vapour barrier, styrofoam insulation and rubber membrane. The roof would then be covered with rocks or ballast to weigh down the rubber membrane. The roof was also designed to include six skylight openings. These were arranged in two rows of three openings. It was through one of these openings that Mr. Dillman fell to his death.

[9] On January 9th or 10th of 2003 construction began on the openings for one set of three skylights. At this point the roof in that area consisted only of the metal Q-decking and did not include the insulation or rubber membrane.

However, the roofing contractor was proceeding in that area at that time to install the roofing membrane.

[10] The skylight openings are constructed by first marking off a hole approximately five feet square in the Q-decking. The hole was then cut with a saw and framed with 2" x 6" wolmanized wood referred to as a “shoe”. The hole would then be covered with plywood and when it came time to advance the roofing membrane the plywood would be removed and the roofing membrane extended over the hole. The membrane would then be cut and the wooden frame or shoe would be built up a short distance with 2" x 4"s referred to as “curbing”. After this was completed plywood would be reinstalled over the curbing. The actual skylight window would be erected on this curbing.

[11] This procedure i.e., the installation of the curbings but not the installation of the skylights was completed either January 9th or 10th of 2003. There is considerable confusion in the evidence as to the precise sequence of events, but it is clear that at some point the holes were cut, the shoe installed, the roofing membrane extended, the curbing constructed and plywood was placed over the holes. While there were three holes marked to be cut only two were cut at this point.

[12] On January 17th the plywood on the two skylight openings was removed and replaced with rigid styrofoam board insulation. This product was black in colour and brittle in the sense that it could withstand very little weight. The styrofoam was installed by the carpenters employed by Charlie MacIntyre Contracting (CMC) and secured by nails through large washers to ensure that the insulation would not easily blow off. CMC was a sub-trade contracted to do carpentry work on this project.

[13] On January 22, 2003 a portion of the styrofoam insulation had blown off one of the skylight holes. This was noticed by the defendant Donald London , another supervisor of MCI, Daniel Magee, foreman with CMC and Jordan Macumber, a labourer with MCI as they were all standing in the centre core of the building. As a result of this Jordan Macumber was sent to the roof by the defendant Donald London to resecure the opening, which he did by placing small strips of plywood over the portion of the hole that had been exposed. This was approximately one-third of the opening on this one

skylight opening. There is considerable dispute as to what, if anything, he told the defendant Donald London after he came back from repairing the opening which I will address later in this decision.

[14] The second floor mezzanine area was in the centre core of the building. It was completely exposed and was only marked with a rope identifying the edge of the flooring. There was no guardrail or formal fall protection system in this area. There was no particular work activity occurring during the material times, however this area was used by workers to access the roof. A ladder was erected to the second floor mezzanine and workers would ascend this ladder, walk across the mezzanine to another area where an additional ladder ascended to the roof area.

ISSUES

[15] Following are the issues to be decided:

1. SKYLIGHT

Did each defendant fail to take every precaution that was reasonable in the circumstances to ensure that a method of fall protection was in place at the skylight openings.

2. SECOND FLOOR MEZZANINE

(a) Were guardrails required at the second floor mezzanine;
(b) Was the second floor mezzanine a work area;
(c) Did the defendant fail to ensure that guardrails, if required, were in place.

3. OTHER SAFETY ISSUES

Did MCI fail to take very reasonable precaution to ensure the health and safety of persons at or near the project by failing to take corrective actions for hazards identified by workers, such hazards to include:

(a) Unsecured skylight and roof openings;
(b) Ice and snow covered floor areas in the building;
(c) Unguarded edges of floor slabs;
(d) Insufficient lighting in the building, and
(e) A lack of fall protection at the edge of roofs and floors.

LEGISLATION

[16] The following are the relevant portions of the **Occupational Health and Safety Act** and the **Fall Protection and Scaffolding Regulations**.

OCCUPATIONAL HEALTH AND SAFETY ACT

s. 15 Every constructor shall take every precaution that is reasonable in the circumstances to ensure:

(a) the health and safety of persons at or near a project;

(d) that the measures and procedures prescribed under this Act and the regulations are carried out on the project;

s. 17 (1) Every employee, while at work, shall:

(f) comply with this Act and the regulations.

Internal Responsibility System

2 The foundation of this Act is the Internal Responsibility System which

(a) is based on the principle that

(i) employers, contractors, constructors, employees and self-employed persons at a workplace, and

(ii) the owner of a workplace, a supplier of goods or provider of an occupational health or safety service to a workplace or an architect or professional engineer, all of whom can affect the health and safety of persons at the workplace, share the responsibility for the health and safety of persons at the workplace;

(b) assumes that the primary responsibility for creating and maintaining a safe and healthy workplace should be that of each of these parties, to the extent of each party's authority and ability to do so;

(c) includes a framework for participation, transfer of information and refusal of unsafe work, all of which are necessary for the parties to carry out their responsibilities pursuant to this Act and the regulations; and

(d) is supplemented by the role of the Occupational Health and Safety Division of the Department of Labour, which is not to assume responsibility for creating and maintaining safe and healthy workplaces, but to establish and clarify the responsibilities of the parties under the law, to support them in carrying out their responsibilities and to intervene appropriately when those responsibilities are not carried out.

Interpretation

s.3 In this Act

(ah) "workplace" means any place where an employee is or is likely to be engaged in any occupation and includes any vehicle or motor equipment used or likely to be used by an employee in an occupation.

FALL PROTECTION AND SCAFFOLDING REGULATIONS

Fall protection required

7 (1) Where a person is exposed to the hazard of falling from a work area that is

(a) 3 m or more above the nearest safe surface or water;

(b) above a surface or thing that could cause injury to the person upon contact; or

(c) above an open tank, pit or vat containing hazardous material,

(i) the person shall wear a fall arrest system that includes a full body harness, a lanyard and an anchor point and that otherwise complies with Section 8,

(ii) a guardrail shall be provided that meets the requirements of Section 9,

(iii) a personnel safety net shall be provided that meets the requirements of Section 10,

(iv) temporary flooring shall be provided that meets the requirements of Section 14, or

(v) a means of fall protection shall be provided that provides a level of safety equal to or greater than a fall arrest system.

And

Guardrails

9 (1) A guardrail shall be provided,

(a) around an uncovered opening in a floor or other surface;

(b) at the perimeter or other open side of

(i) a floor, mezzanine, balcony or other surface, and

(ii) a work area,

where a person is exposed to the hazard of a fall described in subsection 7(1).

(2) A guardrail shall be constructed or installed

(a) with posts that

(i) are spaced at intervals of not more than 2.4 metres, and

(ii) are secured against movement by the attachment of the posts to the structure under construction or that is otherwise being worked on, or by another means that provides an equivalent level of safety;

(b) with a top railing that is between 0.91 and 1.06 m above the surface of the protected working area and that is securely fastened to posts secured in compliance with subclause 9(2)(a)(ii);

(c) with a toeboard, securely attached to the posts and the structure to which the posts are secured, extending from the base of the posts to a height of 102 mm; and

(d) with an intermediate railing on the inner side of the posts midway between the top railing and the toeboard.

(3) A guardrail consisting of wood shall, in addition to the requirements of subsection (2),

(a) have top and intermediate railings and posts that are at least 51 mm x 102 mm;

(b) have a toeboard that is at least 25 mm x 75 mm; and

(c) be made of Number One Grade spruce or other lumber that provides an equivalent level of safety.

(4) A guardrail consisting of wire rope shall, in addition to the requirements of subsection (2),

(a) have wire rope railings that are at least 8 mm thick;

(b) be identified with high visibility markings placed every 1.5 m on the top railing; and

(c) have railings with turnbuckles or other means that provide adequate tension to ensure an equivalent level of protection to that provided by a wooden guardrail.

(5) A manufactured guardrail may be used in place of a wooden or wire rope guardrail if it provides an equivalent level of protection to that provided by a wooden guardrail.

(6) No guardrail is required around an opening in a floor or other surface if the opening is covered with fastened planks, plywood or other material where the covering

(a) is capable of supporting four times the maximum load likely to be imposed;

(b) is secured to prevent lateral and upward movement; and

(c) is identified by a sign that warns of the potential hazard.

INTERPRETATION

s. 3(at) “work area” means a location at the workplace at which an employee is, or may be required or permitted to be, stationed and includes a work platform;

OCCUPATIONAL HEALTH AND SAFETY ACT PRINCIPLES

[17] A succinct statement of the principles related to occupational health and safety can be found in this Court's decision in R. v. A.W. Leil Cranes & Equipment (1986) Limited, 2003NSPC60, as follows:

[51] The principles with respect to occupational health and safety have been developed through a series of case authorities. Those cases have been referred to in **R. v. the Minister of Transportation and Public Works**, a decision of the Provincial Court of Nova Scotia per McDougall, P.C.J., September 30, 2002. The purpose of the statute is to impose on each person a responsibility to protect the worker even from his/her own carelessness by creating joint and several obligations. The constructor has a heavy burden commensurate with the ability to control – **R. v. Stelco** [1989], O.J. No. 3122, p. 5.

[52] Each individual is accountable to the extent of his/her responsibility and/or control as dictated by the hazard presented and not the size, scale or

operation or economic resources of the employer – **R. v. Adam Clark Company,** [1990],N.S.J. No.451, p. 3.

[53] The duty imposed is not that of an insurer with the benefit of hindsight, which would amount to absolute liability, or to anticipate the way an accident might happen. The duty is to identify risks and develop systems that would minimize the potential hazard - **R. v. London, (City)** [1999], O.J. No. 4461, p. **2.**

[53] The duty can neither be contracted out nor delegated – **R. v. Wyssen,** (1992) 10 0.R. (3d) 193 at pg. 198 (Ontario, C.A.).

[54] The issue is what the defendant did to discharge his/her duties with respect to that particular site, not what general education did the employer carry out or what a sub-contractor failed to do – **R. v. Dagmar Construction Limited** [1989] O.J. No. 1665.

[55] The control of the constructor as it relates to its experience, resources and on site involvement will impact on the determination of whether due diligence was exercised with respect to the prevention of the prohibited act – **R. v. Belhi Brothers Ontario Limited** [1993, O.J. No. 1600).

[18] This summary was approved by the Supreme Court of Nova Scotia in **Dexter Construction Limited v. Her Majesty the Queen**, unreported, Nova Scotia Supreme Court, CRSK 207088, where Stewart, J. said as follows:

[27] The basis of the trial judge's finding is in keeping with the kind of duties and responsibilities under the Act noted in the case law for a company in Dexter's position. Drawing from Tufts, J.P.C. summary in **R. v. A.W. Leil Cranes and Equipment (1986) Ltd.** (2002) Doc. 364097, such duty entails, the duty to identify risks and develop systems that would minimize the potential hazard **(R. v. London, (City)** [1999], O.J. No. 4461). The duty can neither be contracted out nor delegated despite diligence in hiring a competent subcontractor, [**R. v. Wyssen**, [1992] 10 O.R. (3d) 193 (Ont. C.A.)]. Responsibility lies with the contractor to ensure the system is implemented and monitored even if the subcontractor has the personnel to carry out its safety plan without interference from the contractor's personnel. (**R. v. Nova Scotia (Minister of Transportation and Public Works)** 2002 N.S.P. 33). The issues is what the defendant did to discharge his/her duties with respect to that particular site, not what

general education did the employer carry out or what a subcontractor failed to do, (**R. v. Dagmar Construction Ltd.** [1989], O.J. No. 1665.

FACT FINDING ANALYSIS

[19] There are considerable discrepancies in the evidence amongst many of the witnesses. Many of the descriptions given by the witnesses relate to the sequence of events that occurred during the events of January 9th and 10th when the skylight holes were cut, the shoe frames constructed, and the curbs installed, and what if anything was covering the skylight holes at particular times.

[20] It is clear to me that many of the witnesses were confused about the precise timing of events given the number of times the plywood would have been removed and reinstalled. It is also clear that many of the witnesses were defensive and careful to limit their own responsibility. It is apparent that the plywood was removed and replaced during the construction of the shoe, the installation of the rubber membrane and the construction of the curbing. The exact number of times these events took place and when they occurred gave rise to the many inconsistencies referred to above. However, much of these inconsistencies are not critical as it is clear that by January 17th plywood was covering both skylight openings.

[21] It is not necessary therefore for me to resolve exactly what occurred on January 9th or 10th regarding how the skylight openings were cut, the frames constructed and how the holes were eventually covered.

[22] I do accept that at one point only a bundle of insulation covered at least one of the openings. It is not exactly clear at what point in the sequence of events this occurred. It may have been when the roof membrane was extended and the plywood initially installed was removed. This appeared to have occurred on January 10, 2003. In any event it was this incident which was raised at the Joint Occupational Health and Safety (JOHS) meeting on the same date which prompted a directive to be given to have the holes covered immediately.

[23] It is not clear why the iron workers did not cut the third hole. Their testimony that there was no plywood seems to be supported by the testimony of Vernon Gibson, however Donald London and Daniel Magee both confirm that the ironworkers were directed by the defendant Donald London not to cut any further as the decision to cut any of the holes was intended to be delayed and the ironworkers' foreman, Robert Werenka had forgotten this. It is not necessary to resolve this point.

[24] The critical factual dispute centres around what, if anything, did Arnold Salsman, a carpenter with CMC, tell the defendant Donald London when the plywood was removed and replaced with the styrofoam board insulation and what did Jordan Macumber tell the defendant Donald London after he went to the roof to repair the openings after the insulation blew off.

[25] Arnold Salsman, and Bruce Burrell, carpenters with CMC removed the plywood on January 17, 2003. This was witnessed by Brian Benedict another carpenter with CMC. This was done because of a lack of plywood needed to side the mechanical penthouse. Arnold Salsman was directed to remove the plywood by Daniel Magee. Mr. Magee had suggested to Arnold Salsman that sheets of plywood over smaller holes could be removed and replaced by smaller pieces of plywood. This would allow a further supply of plywood to be placed on the mechanical penthouse. It is clear that Arnold Salsman took this to include the plywood over the skylight openings.

[26] I do not accept that Arnold Salsman spoke to Donald London about this subject in the manner and way that he testified. Arnold Salsman indicated that Donald London gave him permission to remove the plywood and replace it with styrofoam insulation or any material to keep the weather out. I reject this testimony. Arnold Salsman was not a credible witness in my opinion. It was clear that he was very concerned about his own liability and in fact mentioned in his testimony that he was still not sure whether he may be charged as a result of the accident. Furthermore, he was very confused about the events surrounding the construction of the skylight openings and was clearly mistaken about when certain events occurred.

[27] I do, however, accept that the presence of the styrofoam was known by those working in the area. I accept the evidence of Brian Benedict and Bruce Burrell on this point. Because of the apparent nature of the styrofoam it is

my opinion that its presence would have been apparent to anyone working at or near that area of the roof.

[28] It is also apparent that Arnold Salsman, and Bruce Burrell, the carpenters who removed the plywood and installed the styrofoam and Brian Benedict who was present when this occurred, had no appreciation whatsoever of the significant danger which the skylight openings covered only with styrofoam presented. None of them formally reported this nor did any of them follow up with their superiors about remedying this dangerous hazard. Their evidence to the effect that this was not their responsibility was a shocking testimony to their lack of appreciation for their own responsibility to safety in the workplace. I will return to this point later.

[29] I accept that the defendant Donald London did not specifically know on January 17th that the plywood had been removed and the styrofoam installed. It appears that during this time the weather was extremely cold and that there was little or no activity on the roof for approximately a one week period. It is not clear whether Donald London was on the roof around this point in time.

[30] On January 22, 2003 a portion of the styrofoam blew off one of the skylight openings. I am satisfied that Donald London believed it was plywood which had come loose. The testimony of Jordan Macumber confirms this. What occurred after Jordan Macumber repaired the skylight opening and returned to speak to the defendant Donald London is more contentious.

[31] Jordan Macumber testified that when he returned he spoke to Donald London and Daniel Magee in the centre core of the building. He said he told Donald London that while he fixed the covering on the opening only styrofoam insulation was over the skylight holes. Daniel Magee seems to confirm this, although he acknowledges he was working on installing windows at the time. The defendant Donald London denies that he was told anything more than that the holes were fixed. Michael Healey testified that Jordan Macumber did not say anything about what was covering the holes "that he heard".

[32] Donald London also denies being reminded by Jordan Macumber days later about the need to repair the skylight holes more securely.

[33] I accept the testimony of Jordan Macumber regarding his conversation with the defendant Donald London after returning to the roof and subsequently days later at the trailer. I find as a fact that Jordan Macumber returned from the roof and spoke to Donald London while Daniel Magee was nearby. He advised Donald London how he repaired the skylight holes specifically and spoke to him about the need to do more secure repairs. Given the severe weather conditions and the fact that it appeared that no one was working on the roof at the time, no immediate action was taken. However, I am satisfied that the need to better and more properly secure the openings was brought to Donald London's attention at that time by Jordan Macumber. In my opinion Daniel Magee's evidence confirms this. Furthermore, I accept the testimony of Jordan Macumber that he spoke to Donald London a couple of days later in the construction trailer to remind him of the need to replace the coverings over the skylight holes.

[34] Clearly, the small strips of plywood which Jordan Macumber installed were not adequate to properly and safely cover the skylight holes. Even if the remaining portion of the affected opening was covered with plywood a better and more secure repair would have been required given the nature of the repairs done by Jordan Macumber. In my opinion, Jordan Macumber's testimony that he brought to Donald London's attention the need to better secure the holes is credible. Donald London's testimony that Jordan Macumber did not alert him to the need to more properly secure the opening is not credible. The temporary measures Jordan Macumber took to repair the opening clearly called for follow-up repair action. It is understandable Jordan Macumber would have appreciated this and reminded Donald London of that requirement, as he testified. This fact makes his testimony compellable and credible.

[35] Clearly there was a concern about the weather and the need to keep the snow out of the building. It would appear that the immediate concern was to cover the holes for this purpose and because no workers were present on the roof the safety aspect of covering the holes was not addressed. It is clear that the danger which this situation presented was either forgotten or never fully appreciated by the defendant Donald London and consequently no further repairs were directed.

ISSUE ANALYSIS

ISSUE #1

[36] It is clear from the moment the plywood was removed from the skylight hole openings on January 17, 2003 and replaced by the rigid styrofoam insulation board an extremely hazardous and dangerous situation was created. This situation lasted approximately thirteen days until Mr. Dillman's tragic death.

[37] It was a dangerous situation because the openings were neither marked nor fenced and more particularly because these holes were in the roof of the building, some 30 feet above the floor. They were unlike the edge of the building which would have been readily apparent to any person working in that location. Workers would not immediately perceive an opening in the roof to be present either consciously or subconsciously. Therefore, the need to take extra care when working near an unsafe opening in a roof would not be readily apparent as if one was working near the edge of the roof of a building. Accordingly, even if one was told or was aware of the styrofoam's presence over the openings the need to take extra precautions would not necessarily have been in the forefront of one's mind. All of this was compounded by a moderate snow cover which further obstructed the presence of the styrofoam coverings.

[38] In short, as was conceded by the defence in submissions, these skylight openings covered only with styrofoam amounted to a “trap”. In my opinion, this was an accident waiting to happen. As the defendant Donald London said himself, the presence of the styrofoam was “worse than having nothing on these”. At least if the holes were open the danger would have been more readily apparent, although the presence of that circumstance would also constitute an extreme danger.

[39] The defendants MCI and Donald London each had the greatest authority on this work site and accordingly bear the greatest responsibility for creating and maintaining a safe and healthy workplace. Each therefore had a responsibility either to avoid the creation of the hazardous situation described above or to have it corrected without delay by creating and maintaining a safety system which would detect and correct such unsafe conditions.

[40] The defendants are required to take every reasonable precaution that is reasonable in the circumstances to ensure, among other things, the health and safety of persons on this project, and in particular to ensure a method of fall protection was in place where and when required.

[41] In my opinion each failed to do this. Firstly, I reject the defence argument that the creation of this hazard was wholly within the knowledge and control of the carpenters at CMC and the workers in the area. As indicated above, I find as a fact that the defendant Donald London, and thereby MCI, were aware of the hazard on January 17, 2003 when the opening became partially exposed. Whether Donald London was fully appreciative of the presence of the styrofoam or not, he was at least aware of the need to effect more secure repairs. Given the extremely dangerous nature of this situation as described above, anything short of immediate action to ensure that the holes were safely covered prior to the workers going onto the roof was not reasonable. He should have ensured the holes were properly covered and safely secured before allowing any other workers on this roof. He failed to do this.

[42] I also accept the other failings which the Crown have alleged, in particular the failure to insist upon regular Toolbox meetings by CMC which contributed to the continuation of an unsafe hazard and possibly to the accident which occurred. Had CMC held such meetings with the consequent minutes being sent to the defendants this situation may have been detected and corrected earlier. Such meetings would have revealed, in my opinion, the actions of Bruce Burrell and Arnold Salsman, the CMC carpenters, of removing the plywood over the skylight openings. Also, it was a reasonable precaution regarding safety for Donald London to inspect the work of CMC, particularly with respect to the skylight openings, before CMC left the site. This was particularly so given the potential danger which the improper covering of the skylight holes would have held.

[43] Furthermore, I also agree that it was a reasonable procedure for MCI and Donald London to insist upon regular and documented meetings with its own employees, that is Jordan Macumber, or to develop a system of written documenting of safety concerns and follow up. This procedure was not in place. In my opinion it was unreasonable for Donald London simply to rely on Jordan Macumber to raise any concerns at the JOHS meetings. It is quite clear this employee had no clear idea why he was at the meetings or his

function there. There should have been a formal system to allow MCI employees, i.e. Jordan Macumber, to document and report safety concerns including a follow-up mechanism to ensure such safety concerns were adequately addressed.

[44] In summary, Donald London and thereby MCI each failed to take every reasonable precaution that was reasonable in the circumstances to ensure the health and safety of persons at this project, and in particular each failed to:

1. ensure that the skylight openings were properly secured after Jordan Macumber brought the need to do same to Donald London's attention on January 22, 2003;

2. ensure that CMC held regular toolbox meetings wherein safety issues would be raised, documented and forwarded to the JOHS meetings and thereby to the attention of MCI, Donald London and other safety officers whose responsibility it was to take corrective action;

3. ensure that a proper inspection of the work of CMC was completed relative to the skylight opening given the temporary nature of the work; ie., the covering and the inherent danger surrounding it;

4. ensure that a system of formal reporting of safety concerns was in place for the workers of MCI, including Jordan Macumber, which would have allowed Jordan Macumber to record and report his concerns relative to the skylight opening on January 22, 2003 and thereby ensure this concern was brought to the attention of MCI, Donald London and other safety officers.

[45] Both MCI and Donald London had the control and authority necessary to take the steps mentioned above. Each of these steps was reasonable in the circumstances and anyone of these steps could have prevented the tragedy which occurred on January 30, 2003. Accordingly, MCI and Donald London each failed to take every reasonable precaution in these circumstances to protect the workers' safety relative to the skylight openings and therefore each committed the offences under s. 15(d) and s. 17(1)(f) of the **Occupational Health and Safety Act** respectively.

ISSUE # 2

[46] The Crown and defence both concede that count two of each Information relates to the second floor mezzanine area in the centre core of the building.

[47] It is also undisputed that no guardrails were in place guarding the open side of this floor or mezzanine to the ground level. This area was used by workers to access the roof. A ladder was used to ascend to the mezzanine area. Workers would then walk or travel through this area to a second ladder which workers used to access the roof.

[48] The defence contends that the subject area must be a "work area" as defined in the regulations before a guardrail is required. The Crown argues that it is not necessary for the area to be a "work area" but notwithstanding this, the area was so defined.

[49] Section 7(1) of the regulations defines situations in which workers are required to have a fall protection system. This section also lists the fall protection alternatives. Section 7(1) clearly contemplates exposures to hazards of falling from a "work area".

[50] Guardrails are one fall protection method. Section 9 provides when guardrails are required and the specifications for same. Section 9 reads as follows:

9 (1) A guardrail shall be provided,

(a) around an uncovered opening in a floor or other surface;

(b) at the perimeter or other open side of

(i) a floor, mezzanine, balcony or other surface, and

(ii) a work area,

where a person is exposed to the hazard of a fall described in subsection 7(1).

(2) A guardrail shall be constructed or installed

(a) with posts that

(i) are spaced at intervals of not more than 2.4 metres, and

(ii) are secured against movement by the attachment of the posts to the structure under construction or that is otherwise being worked on, or by another means that provides an equivalent level of safety;

(b) with a top railing that is between 0.91 and 1.06 m above the surface of the protected working area and that is securely fastened to posts secured in compliance with subclause 9(2)(a)(ii);

(c) with a toeboard, securely attached to the posts and the structure to which the posts are secured, extending from the base of the posts to a height of 102 mm; and

(d) with an intermediate railing on the inner side of the posts midway between the top railing and the toeboard.

(3) A guardrail consisting of wood shall, in addition to the requirements of subsection (2),

(a) have top and intermediate railings and posts that are at least 51 mm x 102 mm;

(b) have a toeboard that is at least 25 mm x 75 mm; and

(c) be made of Number One Grade spruce or other lumber that provides an equivalent level of safety.

(4) A guardrail consisting of wire rope shall, in addition to the requirements of subsection (2),

(a) have wire rope railings that are at least 8 mm thick;

(b) be identified with high visibility markings placed every 1.5 m on the top railing; and

(c) have railings with turnbuckles or other means that provide adequate tension to ensure an equivalent level of protection to that provided by a wooden guardrail.

(5) A manufactured guardrail may be used in place of a wooden or wire rope guardrail if it provides an equivalent level of protection to that provided by a wooden guardrail.

(6) No guardrail is required around an opening in a floor or other surface if the opening is covered with fastened planks, plywood or other material where the covering

(a) is capable of supporting four times the maximum load likely to be imposed;

(b) is secured to prevent lateral and upward movement; and

(c) is identified by a sign that warns of the potential hazard.

[51] In my opinion the requirement to erect a guardrail at the open side of the floor contemplates that it be in a “work area”. The conjunctive “and” in s. 9(1)(b)(i) and (ii) requires this in combination with s. 7, which contemplates a hazard from falling from a “work area”. The issue then is whether the area of the second floor mezzanine is a “work area”. “Work Area” is defined as follows:

> “work area” means a location at the workplace at which an employee is, or may be required or permitted to be, stationed and includes a work platform.

[52] The Crown argues that the workers who were travelling through the area were working or were required or permitted to be in that location. However, the definition clearly contemplates that workers must be "stationed" or possibly be or permitted to be stationed in an area to constitute a "work area". It cannot be considered, in my opinion, that those workers travelling through the area were "stationed". The only "stationed" workers were the ironworkers who the evidence confirmed always wore fall arrest protection. To this extent I agree with the defence submission that the guardrails are not required in this area in accordance with s. 9 or s. 7. It may be that other regulations require better protection or warning regarding the use of the mezzanine as a travelway; however, a violation of those Regulations, if they exist, was not alleged here.

ISSUE #3

[53] In the third count of the Information alleging offences against Meridian Construction Inc. the Crown alleges and argues that MCI failed to take every reasonable precaution necessary to ensure the health and safety of workers by failing to take corrective action for the following alleged hazards:

1. Unsecured skylight and roof openings;
2. Ice and snow covered floor areas in the building;
3. Unguarded edges of floor slabs;
4. Insufficient lighting in the building;
5. Lack of fall protection at the edge of roofs and floors.

[54] Count 3 of this Information was particularized - see Appendix "A"

[55] Number 1 above is a reference to Count 1 in the Informations alleging offences against Meridian Construction Inc. and Donald London. Numbers 3 and 5 appear to relate to the allegations of failure to erect a guardrail around the second floor mezzanine and the quality of railings around the stairwells. The issue regarding the guardrail around the second floor

mezzanine area was dealt with in Count 2 of the aforementioned Informations and Issue No. 2 above.

[56] Numbers 2 and 4 above relate to issues which I will deal with separately below.

[57] Given the way the Crown particularized this count it is necessary to show that MCI failed in every instance alleged in order to make a finding of guilt. The Crown did not charge each alleged failure individually.

SNOW AND ICE (Number 2)

[58] It appears as if the centre core of the building was the last portion of the building to have the roof completed. As a result of this large portions of snow accumulated in the centre core of the building. Snow also entered the building through the window openings. Over time the snow built up, became packed down, and ice formed in some areas. The issue of snow and ice in the centre core of the building was a continuous concern and raised at the JOHS meetings. As a result of these concerns sand was spread over the travelled portion of the centre core of the building, and portions of the snow were shovelled away by Jordan Macumber, the labourer for MCI, in order to allow safer passage by workers. During the material times this portion of the building was used as a travelway for workers entering other portions of the building where work was ongoing. This area was also used in part for storage and workers would be carrying supplies and equipment through this area.

[59] The Crown alleges that the presence of the snow and ice constituted an unsafe hazard. It refers to the evidence of Vernon Gibson who testified that he raised this concern repeatedly and that it was a general concern among the workers. He indicated that the snow and ice made the area slippery. The Crown alleges that the actions which MCI took were not sufficient or reasonable. The Crown alleges that more workers could have been employed to remove the snow or better equipment could have been used to remove the snow more completely. The Crown points to the actions which

MCI took after the accident, wherein all of the snow was removed from the centre core of the building.

[60] The defence argues that there was no evidence that any method would have been reasonable during the material times to remove the snow. It argues that using such equipment as a Steam Jenny would have simply melted the snow and risked the freezing of the melted snow into ice making the area more hazardous. It also argues that because the roof was incomplete the building could not be adequately heated to allow removal of the snow. The defence argues that no expert evidence was tendered to show what other reasonable methods could have been used to address the snow and ice issue in the centre core of the building. The defence also points out that a dozer was used by MCI during the material times to help remove the snow.

[61] I agree with the Defence submissions in this regard. The evidence shows that during the material times the weather was extremely cold and to heat the building or have the area subject to a Steam Jenny would be impractical given the risk of the melted snow freezing and causing a more unsafe hazard. The concerns raised with respect to the footing in the area was not unaddressed by MCI. I am satisfied that the spreading of the sand in the area was a reasonable precaution to address the safety concerns raised. Photographs show the area as having travelled pathways that are reasonably clear and do not appear to be unsafe, notwithstanding the concerns raised by Vernon Gibson. I am not satisfied beyond a reasonable doubt that MCI failed to take every reasonable precaution to address the issue of ice and snow build up in the centre square area of the building.

LIGHTING (Number 4)

[62] The Crown alleges that the lighting in the building was not adequate. It relies on the evidence of Vernon Gibson, who indicated that the lighting was poor and insufficient during the daytime hours. He indicated that this was an ongoing concern and a common complaint among the workers.

[63] The defence argues that the lighting needs in a building under construction are dynamic in that as the rooms are constructed and enclosed the lighting needs are changing. Defence also argues that MCI provided temporary lighting and that Donald London caused the purchase of several strings of pigtail lighting which were strung in the hallways and were portable in the sense that they could be relocated if necessary. The evidence also shows that the various trades carried their own "task lighting" and that such lighting was available to assist individual tradesmen.

[64] The defence also argues that no expert evidence was tendered to show that the lighting in question was not adequate or safe.

[65] Again, I agree with the defence's submissions on this issue. I am not satisfied beyond a reasonable doubt that MCI failed to take every reasonable precaution to address the issue of lighting in the building. The power supply to the building had been delayed and the building was not at a level of construction to allow for permanent lighting to be used. The evidence shows that MCI purchased additional pigtail lighting and installed it where necessary. I am not satisfied that the complaints coming principally from Vernon Gibson show that the "poor lighting" that he described constituted an unsafe condition. Much of his evidence centred around the adequacy of the lighting in the daytime hours when the contrast of the outside light made the illumination from the artificial lighting less apparent. There was no expert evidence to show that this established that the illumination from the artificial lighting was insufficient or unsafe. I am satisfied that the actions MCI took to address this issue were reasonable in the circumstances. In particular I am not satisfied beyond a reasonable doubt that MCI failed to take every reasonable precaution to address this safety issue.

UNGUARDED EDGES OF FLOORS AND ROOFS (Number 3)

[66] As indicated above this appears to relate to the issue of the lack of a guardrail at the second floor mezzanine and the quality of other rails around the stairwells. The issue with respect to the second floor mezzanine

guardrail was dealt with in Count 2 of both Informations - see Issue No. 2 above. It is not necessary for me to repeat that analysis here.

[67] With respect to the railings around the stairwells it is clear that these areas were work areas and that guardrails or other fall protection was required. The guardrails in question were inadequate and did not meet the requirements of Regulation 9 in that, among other things, they did not include a toe rail such that the railings did not comply with the specifications set out in the Regulations.

UNSECURED SKYLIGHT AND ROOF OPENINGS (Number 1)

[68] As indicated above, Number 1 is a reference to Count 1 in both Informations. As I indicated above both defendants failed to take every reasonable precaution necessary in the circumstances to protect the safety of the workers with respect to the unsecured skylight and roof openings.

[69] Given my conclusions with respect to these various issues and in particular with respect to Number 2, the snow and ice covered floor areas, Number 3 alleged insufficient lighting in the building and with respect to my conclusions regarding the requirement for a guardrail around the second floor mezzanine, I am not satisfied that MCI failed to take every reasonable precaution to ensure the health and safety of the workers on this project by failing to take corrective actions for hazards identified above. While there are failures with respect to the skylight openings which were dealt with in Count 1 and failures to maintain a proper guardrail around the stairwells, all the particulars of this count have not been fully established by the Crown and accordingly a finding of guilt is not possible.

CONCLUSION

[70] With respect to Count 1 in both Informations I am satisfied beyond a reasonable doubt that each defendant failed to take every reasonable

precaution that was reasonable in the circumstances to ensure that a method of fall protection was in place at the skylight openings as prescribed by the Regulations. In particular I am satisfied that Donald London and thereby Meridian Construction Inc. were aware of the unsafe condition of the skylight openings on January 22, 2003 when the same was brought to Donald London's attention by Jordan Macumber. His failure to take immediate action prior to workers ascending onto the roof in my opinion constitutes the offence. I am also satisfied that the failure by Donald London and thereby MCI to take the other actions described above also substantiate the allegations implicit in Count 1 of both Informations. Accordingly each defendant is found guilty on this count of the Informations.

[71] With respect to Count 2 of the Informations, this allegation relates to the issue of whether a guardrail was required around the second floor mezzanine area. I have concluded that this area is not a work area and accordingly a guardrail is not required. Whether this area is unsafe for other reasons or whether other regulations were breached has not been alleged. Accordingly, each defendant is found not guilty on Count 2 of the Information.

[72] The Crown has alleged a further breach of s. 15(a) of the **Occupational Health and Safety Act** in Count 3 of the Information relative to MCI. This count is particularized by an allegation of failings with respect to a number of issues. I have concluded that while there are some deficiencies with respect to the failure to take reasonable precautions with regard to the skylight openings and the failure to maintain guardrails around the stairwell openings in accordance with the Regulations, the other areas identified by the Crown have not been established by the Crown, in my opinion. These areas relate to the allegations surrounding the snow and ice build up in the centre core of the building and the allegation of insufficient lighting in the building. With respect to these latter two issues I am not satisfied beyond a reasonable doubt that MCI failed to take every reasonable precaution to ensure the health and safety of the workers with respect to these issues.

[73] Therefore, the defendant Meridian Construction Inc. is found guilty of Count 1 on the Information; not guilty on Count 2 and not guilty on Count 3. The

defendant Donald London is found guilty on Count 1 of the Information, and not guilty on Count 2.

DATED AT Windsor, Nova Scotia this 18th day of October, 2004.

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ALAN T. TUFTS, J.P.C.

APPENDIX “A”

Charges against Donald London:

That Donald London, between Jan. 9, 2003 and Jan. 31, 2003 at, or near Windsor, Hants Co., N.S. did:

#1. Mr. Donald London, as an employee of Meridian Construction Inc. while at work on a project known as the Windsor Hants West High School, County of Hants, Province of Nova Scotia, failed to take every reasonable precaution in the circumstances to protect the employee's own health and safety and that of others at or near the workplace by neglecting to ensure a method of fall protection was in place at the skylight openings as prescribed in Section 7(1) of the Fall Protection and Scaffolding Regulations made pursuant to the Occupational Health and Safety Act S.N..S. 1996, c. 7, and did thereby commit an offence contrary to Section 17(1)(a) and Section 74(1)(a) of the said Act.

#2. And further at the same time and place aforesaid, the defendant as an employee, failed to comply with the Act and regulations by neglecting to ensure that guardrails were installed as prescribed by Section 9 of the Fall Protection and Scaffolding Regulations made pursuant to the Occupational Health and Safety Act S.N.S. 1996, c. 7 and did thereby commit an offence contrary to Section 17(1)(f) and Section 74(1)(a) of the said Act.

Charges against Meridian Construction Inc. with particulars:

That Meridian Construction Inc. between Jan. 9, 2003 and Jan. 31, 2003 at or near Windsor, N.S. did:

#1. Meridian Construction Inc. while being a constructor on a project known as the Windsor Hants West High School, County of Hants, Province of Nova Scotia, failed to take every precaution that was reasonable in the

circumstances to ensure that a method of fall protection was in place at the skylight openings as prescribed in Section 7(1) of the Fall Protection and Scaffolding Regulations made pursuant to the Occupational Health and Safety Act S.N..S. 1996, c. 7, and did thereby commit an offence contrary to Section 15(d) and Section 74(1)(a) of the said Act.

Particulars:

The defendant failed to ensure a required means of fall protection, either a fall arrest system attached to an anchor point or a guardrail or a personal safety net or temporary flooring or a means of fall protection that provides a level of safety equal to or greater than a fall arrest system attached to an anchor point, were installed around skylight openings as prescribed in Section 7(1) of the Fall Protection and Scaffolding Regulations made pursuant to the Occupational Health and Safety Act.

#2. And further at the same time and place aforesaid, while being a constructor, failed to take every precaution to ensure that guardrails were installed as prescribed by Section 9(1) of the Fall Protection and Scaffolding Regulations made pursuant to the Occupational Health and Safety Act S.N.S. 1996, c. 7 and did thereby commit an offence contrary to Section 15(d) and Section 74(1)(a) of the said Act.

Particulars:

The defendant failed to ensure that where workers were exposed to the open side of a floor or mezzanine, that such open sides were provided with a guardrail that met the minimum standards prescribed under Section 9 of the Fall Protection and Scaffolding Regulations made pursuant to the Occupational Health and Safety Act.

#3 And further at the same time and place aforesaid, while being a constructor failed to take every precaution that was reasonable in the circumstances to ensure the health and safety of persons at or near a project as prescribed by Section 15(a) of the Occupational Health and Safety Act S.N.S. 1996, c. 7, and did thereby commit an offence contrary to Section 15(a) and Section 74(1)(a) of said Act.

Particulars:

The defendant failed to take corrective action for hazards identified by workers at the workplace as prescribed in the Act and in failing to do so exposed employees to hazards, including to unsecured skylight openings, ice and snow covered floor areas in the building, unguarded edges of floor slabs, insufficient lighting in the building and the lack of fall protection or lack of a fall arrest system at the edge of roofs and floors.