

**IN THE DUST DISEASES TRIBUNAL  
OF NEW SOUTH WALES**

**DDT No. 45 of 2011**

BETWEEN:

**BLUESCOPE STEEL (AIS) PTY LTD**  
Plaintiff

AND

**AMACA PTY LTD (Under NSW administered winding up)**  
Defendant

**CONTRIBUTIONS ASSESSMENT  
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 26 May 2011 pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007 (NSW)* (**the Regulations**) for a determination of apportionment as between the parties.
2. The determination is to be made by me on the papers, on the assumption that the Defendants are liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007* (**Standard Presumptions**).
3. These proceedings were commenced by Bluescope Steel (AIS) Pty Ltd (**Bluescope**) who was a defendant to proceedings brought by William Brodie in 2008. Mr Brodie alleged that he suffered pleural mesothelioma.

4. Bluescope now brings these proceedings against Amaca Pty Ltd (**Amaca**) alleging that it supplied products to Bluescope that contributed to Mr Brodie's injury. Bluescope seeks indemnity or contribution from Amaca.

### **Summary of Mr Brodie's Exposure to Asbestos**

5. Mr Brodie had a career that spanned from 1957 to 1989 and included roles as a slaughterman, barman and cellarman, club manager and in manufacturing. He said in his Statement of Particulars that his only occupational exposure to asbestos occurred between about 1979 and 1984 when he worked at Bluescope's facility as an apprentice, soot blower and fireman. Those dates may be inaccurate for reasons referred to below.
6. Mr Brodie worked in the Number 1 Powerhouse cleaning up after the fitters and turners. He worked in the vicinity of ladders who stripped and replaced asbestos insulation described as "*halfpipe sections, rope and slurry*". He was exposed to this asbestos on a daily basis.
7. Mr Brodie described the work he undertook in this role as follows:

*As a tradesman's assistant I was required to sweep up the debris and dust of the asbestos insulation ...on a weekly basis throughout a full eight hour shift. Occasionally there was a calico material wrapped around the pipe sections and the fitters used their hands and a crow bar to break off and remove the insulation. Dust went everywhere. The insulation was grey white in colour. Using a broom to dry sweep the dust and debris from the insulation caused more dust to go into the air and onto me. I was covered in insulation dust, and I could not help but breathe in the dust.*

8. Between 1980 and 1981 Mr Brodie says he worked as a soot blower. This involved using a high pressure air gun to remove soot from furnaces. He walked on the top

of boilers that had greyish white insulation which was stirred up by the air pressure gun. He breathed in this dust. I note that Mr Brodie does not identify this product as asbestos. Ladders also removed and replaced asbestos insulation in his vicinity when he did this work.

9. From 1981 to 1984 Mr Brodie says that he worked as a fireman/boiler attendant at Number 1 Powerhouse. He sat by the boiler and was exposed to asbestos dust when the ladders removed and reapplied asbestos products. He was also exposed to loose material on the top of the boiler.
10. Mr Brodie recalled that Number 1 Powerhouse was a particularly dusty environment with little ventilation and where asbestos insulation was a mainstay. The asbestos insulation products used were “*rope, tape, millboard, fibre composition (slurry), and prefabricated pipe sections, segments and blocks*”.
11. Mr Brodie was unable to identify products by name in his Statement of Particulars.
12. Mr Brodie was cross-examined by Bluescope’s counsel. He agreed that he commenced employment in about February 1976 and ceased working in Number 1 Powerhouse in about 1981 following a back injury. Mr Brodie was shown and identified products that were manufactured and supplied by Bells Asbestos (Wallaby Grip) as well as James Hardie.
13. A consent judgment between Mr Brodie and Bluescope was entered on 16 February 2009

#### **BlueScope’s Claim (Proceedings No 45 of 2011)**

14. BlueScope has focussed in its Reply on the issues of categorising the parties and the application of the Standard Presumptions. As to categorising the parties

BlueScope submits that it should be placed into category 2 and Amaca into category 1. It makes specific submissions as to why it should not be placed into categories 1 and 2 on the basis that it was not an installer of asbestos: Standard Presumptions Cl 5(3). It points to the findings of contributions assessments by Mr John Sharpe (Re Jones), Mr Blackett SC (Re Harvey) and Ms Strathdee (Re Fais) in which each found that BlueScope was a Category 2 defendant only. The essence of the submission is that BlueScope was in the business of steel production and that any asbestos installation at its premises was ancillary to that business. BlueScope was not in the business of asbestos installation. Asbestos was not a component of the products it produced.

15. In respect of the Mr Brodie's exposure BlueScope submits that a "time on risk" analysis should apply to his period of exposure. In essence Mr Brodie's evidence was that he was exposed regularly from 1976 to 1981. Bluescope has narrowed this to a period of exposure from 1976 to 1979. It is not clear to me why 1979 has been nominated as the end of Mr Brodie's exposure other than it is when Period B of the Standard Presumptions ceases. That does not appear to accord with his Statement of Particulars or the transcript of cross-examination.

16. Assuming Bluescope is correct, the exposure occurred in Period B of the Standard Presumptions so that the liability is apportioned 65:35 to category 1 and category 2 parties respectively. Applying a broad brush approach identified by Judge Curtis in *Bitupave Ltd v NSW Associated Blue Metal Quarries Pty Ltd* (1996) 13 NSWCCR 634 it is BlueScope's submission that the apportionment should be as follows:

BlueScope	Category 2 – 35%
Amaca	Category 1 – 65%

17. Bluescope accepts that although Amaca is the only defendant to its proceeding that there were other suppliers of asbestos products to which Mr Brodie was exposed,

specifically Wallaby Grip. It estimates that 70% of Mr Brodie's exposure was to products manufactured by Amaca giving the following apportionments:

Bluescope	35%
Amaca	$65\% \times 70\% = 45.5\%$
Other manufacturers	$30\% \times 65\% = 19.5\%$

### **Amaca's Reply**

18. Amaca submits that the parties should be placed into the following categories:

Category 1	Amaca and Bluescope
Category 2	BlueScope

19. Amaca submits that the Standard Presumptions should be increased as against BlueScope by 20% and points to the following aggravating factors:

- (a) BlueScope was a large and sophisticated organisation at the time of Mr Brodie's exposure (ie from the mid 1970s).
- (b) At the time of his exposure Bluescope had actual knowledge of the dangers of asbestos exposure in the workplace.
- (c) As the employer BlueScope was the only party able to protect Mr Brodie from the risks of exposure to asbestos. In that regard it did nothing to prevent or minimise his exposure.

20. Amaca submits that it was not the manufacturer and/or supplier of any of the products Mr Brodie alleges he was exposed to. Amaca ceased manufacturing

asbestos containing insulation materials in 1974 at the end of the Hardie-BI Period. That is, it had not manufactured insulation products for over 18 months when Mr Brodie alleges his exposure commenced.

21. On the basis that it did not supply the product Mr Brodie alleges he was exposed to it submits that it should bear no liability for his loss. In the absence of evidence of actual liability then it should be relieved of any responsibility: *Seltsam v State of QLD* [2003] NSWDDT 3. In effect, it is an innocent defendant.

22. In the alternative, if I am not minded to accept its principal submission, Amaca makes the following further submission on liability. It notes that Mr Brodie could not identify the manufacturer of any of the products that he was exposed to. He did describe the products as:

- Half pipe sections
- Rope
- Slurry
- Tape
- millboard

23. Amaca denies that it manufactured asbestos rope or tape. It also denies manufacturing half pipe sections, slurry and millboard during the period of Mr Brodie's employment.

24. Accepting those limitations it says that its liability should be 1% of the category 1 defendant's liability with the remaining 99% falling to Bluescope.

25. Assuming there is a variation of 20% as against Bluescope the following apportionments will apply:

Defendant	Category	Calculation	Total Liability
Bluescope	1 & 2	(99% x 40%) +	99.6%

		60%	
Amaca	1	1% x 40%	0.4%
Total			100%

## Findings

26. I make the following findings for the purpose of BlueScope's claim:

- (a) Mr Brodie suffered from mesothelioma, an indivisible injury.
- (b) Mr Brodie could not identify the manufacturers of the asbestos products he was exposed to in his Statement of Claim although the transcript of evidence before the mediator shows he identified from a catalogue a product called "Hardies High Temperature Insulation" as one product that was used by ladders in his vicinity. He also identified from a catalogue a product called "Bell's Asbestos Tubing".
- (c) His exposure likely commenced in February 1976 and ceased in November 1981 when he suffered a ruptured disc in his back.
- (d) The duration and intensity of his exposure was largely consistent over the entire period of his exposure.
- (e) No effective steps were taken to minimise Mr Brodie's exposure to asbestos at Bluescope.

27. I accept BlueScope's submissions as to the categorisation of the parties as follows:

Amaca	Category 1
BlueScope	Category 2

28. I have reached that conclusion considering the decisions of Mr Sharpe (Re Jones), Mr Blackett SC (Re Harvey) and Ms Strathdee (Re Fais) as well as the conclusion I reached in Re Baltoski, Re Zanesco and Re Ditcher. I accept that BlueScope was

not in the business of installation of asbestos products even though asbestos installation occurred at its premises.

29. I consider there should be an adjustment of the Standard Presumptions against BlueScope. The exposure occurred in Periods B and C. The Standard Presumptions for each period are:

Period B (pre 1975 to 31/12/78)	Category 1	65%
	Category 2	35%
Period C (post 1/12/79)	Category 1	60%
	Category 2	40%

30. In my view the Standard Presumptions should be increased by 15% as against Bluescope on the bases that:

- (a) BlueScope had actual knowledge of the dangers of asbestos by the time of Mr Brodie's exposure at its premises: *BlueScope Steel v Amaca Pty Ltd (Re Oswald)* [2009] NSWDDT 5.
- (b) BlueScope took no steps to provide protective equipment or a work environment free of asbestos dust and fibre to Mr Brodie.
- (c) BlueScope was a large and sophisticated organisation.

31. Considering some of the Tribunal's decisions involving Amaca and Bluescope (such as *Re Lawrence*, *Re Floro* and *Re Oswald*) the tenor of those decisions is that the earlier in time that a worker's exposure occurred the greater the liability Amaca should bear. In this case the exposure appears to have occurred at a very late stage such that Amaca had in fact ceased manufacturing half pipe sections. That is not to say that Mr Brodie was not exposed to half pipe sections manufactured by Amaca. They may have been held as part of an inventory and exposure is likely to have occurred in the removal process as well. Accordingly, I do not accept Amaca's principal submission that it can bear no responsibility but I think it is reasonable to expect it will be responsible for less than Bluescope.

32. Accordingly BlueScope's liability under the Standard Presumptions is increase from 35% to 50% for Period B and 40% to 55% in Period C.

33. In respect of the liability that should be apportioned to other manufacturers it is almost a matter for speculation as to what the correct figure might be. There is no benefit in considering other decisions of the Tribunal as they must turn on their own facts. Doing the best I can, and accepting that Wallaby Grip manufactured asbestos rope, asbestos tape, loose asbestos and Bell's Asbestos Tubing the Category 1 defendant's liability should be shared 50:50.

34. That gives the following result:

Period B exposure Feb 1976 – Dec 1978 34/56 months (60.7%)

Period C exposure Jan 1979 – Nov 1981 22/56 months (39.3%)

Period B

Category 1                       $60.7\% \times 50\% = 30.35\%$

Category 2                       $60.7\% \times 50\% = 30.35\%$

Period C

Category 1                       $39.3\% \times 45\% = 17.7\%$

Category 2                       $39.3\% \times 55\% = 21.6\%$

35. As the Category 1 liability is shared equally between "Other manufacturers" and Amaca the final apportionments are:

Amaca                               $(30.35\% + 17.7\%) \times 50\% = 24\%$  (rounded)

Other manufacturers       $(30.35\% + 17.7\%) \times 50\% = 24\%$  (rounded)

Bluescope                       $30.35\% + 21.6\% = 52\%$  (rounded)

36. I have not been asked to appoint a Single Claims Manager (**SCM**) by the Acting Registrar.

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David Jay

Contributions Assessor

1 June 2011