

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

DDT No. 339 of 2009

BETWEEN:

BLUESCOPE STEEL (AIS) PTY LTD
Plaintiff

AND

AMACA PTY LTD (Under NSW administered winding up)
First Defendant/Cross Claimant

WALLABY GRIP LTD
Second Defendant

WALLABY GRIP (BAE) PTY LTD
Third Defendant

CSR LTD
Cross Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Acting Registrar referred this matter to me by letter dated 3 February 2011 pursuant to Clause 49(1) and Part 4 Division 6 of the *Dust Diseases Tribunal Regulation 2007 (NSW)* (**the Regulations**) for a determination of apportionment as between the defendants.
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 are cross claims between defendants and cross defendants. The principal proceedings were brought by Stojan Baltoski against BlueScope Steel (AIS) Pty Ltd (**BlueScope**). He alleged that he suffered pleural plaques and pleural thickening. The proceedings were commenced in June 2003 and so did not fall within the current regime for resolution of proceedings.
4. There was a 3 day hearing commencing on 5 November 2007 and the proceedings were resolved by agreement on 16 November 2007. Bluescope commenced proceedings against Amaca Pty Ltd (**Amaca**), Wallaby Grip Ltd (**WGL**) and Wallaby Grip (BAE) Pty Ltd (**BAE**). A consent judgment was entered as between Bluescope on the one part and WGL and BAE on the other on 23 August 2010. Accordingly WGL and BAE have not filed a reply and take no further part in the proceedings.
5. Amaca has filed a Reply to Bluescope's claim and filed a cross claim on 31 January 2011 joining CSR Ltd (**CSR**).
6. The matter in issue in this Contributions Assessment is the liability of Amaca to Bluescope and whether CSR must contribute to Amaca's liability.

Summary of Mr Baltoski's Exposure to Asbestos

7. Bluescope has annexed to its Statement of Particulars a large amount of supporting evidence from the principal proceedings. I have considered that material which included:
 - (a) Filed versions of the Statement of Claim, Amended Statement of Claim and Further Amended Statement of Claim.
 - (b) Mr Baltoski's Pt 33 R8A statements.
 - (c) The Transcript of evidence of the hearing held 5, 6 and 7 November 2007.

- (d) Statements/affidavits of Mr Baltoski's co-workers John Geldeard, Raymond Barnier, Graham Perkiss and Phillip Gale.
 - (e) Mr Baltoski's affidavit dated 18 October 2007.
 - (f) Medical evidence on behalf of Mr Baltoski and Bluescope.
8. According to his affidavit Mr Baltoski left school at 12 and worked as a shepherd in Macedonia. He came to Australia on 14 December 1965 and commenced work at the BHP Steelworks 3 days later.
9. Mr Baltoski worked at the No 1 Foundry where hot metals were poured into moulds and stools. He says that he was exposed to asbestos dust and silica on a daily basis because the moulds and stools were insulated using asbestos fibre and silica. He says in his affidavit:
- "The asbestos fibre came in paper bags about the size of a cement bag but much lighter in weight. I got the bags of asbestos fibre from the store room and brought them to the floor of the foundry. The asbestos was a whitish grey colour. I tore open the top of the bag and poured the asbestos on the floor. Clouds of dust went into the air and all over my face and clothes from the asbestos. I then poured a bag of sand and some crushed clay on top of the asbestos. Again clouds of dust went into the air and all over me".*
10. Mr Baltoski then describes mixing the asbestos into a slurry and tested its lumpiness using his hands. The mixture was then sprayed into the mould using a spray gun. Dust evolved into the air. He mixed moulds for 2 to 4 hours each shift and on almost every day.
11. Another task he undertook was to assist in pouring the metals into the ingot moulds. As to his asbestos exposure in this period Mr Baltoski said:
- "I was within a few feet of the tradesmen moulders during the casting process. We had to wear asbestos gauntlets (long gloves), an asbestos coat, apron, spats and leggings to protect us from any molten metal during the pour. The asbestos*

gauntlets (long gloves), and asbestos coat, apron, spats and leggings were very fibrey, itchy to wear and gave off dust when I wore them. When I took off these items I had dust and fibres on my clothes and in my hands. Sometimes I wiped the sweat off my face while wearing the asbestos gauntlets and fibres stuck to my face. I wore these items of protective clothing during casting throughout my work at the Steelworks until about the mid 1980s, when these items were replaced with other materials”.

12. Asbestos was in the air when the ingots were removed from the moulds. He would then use a pinch bar or jackhammer to remove the remaining insulating material from the mould. The remaining dust was removed using a compressed air hose. Dust was in the air during this process and Mr Baltoski breathed it in.
13. Mr Baltoski also used asbestos tape and coils when insulating metal coils. He also removed and replaced those products. He was also in the vicinity of other workers who removed and replaced tape and rope from steam pipes and hoses. That was dusty work.
14. In 1968 Mr Baltoski was transferred to the Brass Foundry. The system of lining the moulds with asbestos was the same as in No 1 Foundry. The Brass Foundry was under the same roof as No 1 Foundry. He continued to be exposed to asbestos on a daily basis. On 11 April 1974 Mr Baltoski got a crane driver's licence. He operated the overhead crane in the Brass Foundry. He worked next to the furnace men who used asbestos blankets that were in a poor state. Even though he had a crane driver's licence Mr Baltoski still mixed the asbestos to line the moulds and wore the asbestos based protective clothing. Mr Baltoski's exposure to asbestos continued until about the mid 1980s when new insulating materials were incorporated into the foundry process. Mr Baltoski became a cleaner in the foundry and continued that role until 31 July 2004 when he was made redundant.

15. Mr Baltoski was never given a mask or respirator. Nor was he warned of the dangers of asbestos.

16. In his statement John Geldeard confirms that he was a colleague of Mr Baltoski and Bestobell tape was used at the Foundry. He recalls Mr Baltoski mixing the asbestos slurry and working with Bestobell asbestos tape. Graham Perkiss was also a colleague who recalled the slurry being mixed. His recollection is that masks were introduced in about 1969 or 1970. Mr Perkiss identified Bestobell as the manufacturer of the asbestos tape but could not recall the manufacturer of the loose asbestos product.

BlueScope's Claim against Amaca (Proceedings No 339 of 2009)

17. BlueScope commenced proceedings joining Amaca, WGL and BAE by Statement of Claim on 13 November 2009 seeking contribution or indemnity or, alternatively, damages. As noted above, Bluescope reached an agreement with WGL and BAE and a judgment was entered. Bluescope filed its Statement of Particulars on 7 May 2010, prior to the judgment being entered, so its submissions also address WGL and BAE. I will refer to those parties where it is necessary to give clarity to Bluescope's submissions.

18. BlueScope submits that it should be placed into category 2 and the other defendants into category 1. BlueScope says that it 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.

19. Bluescope does not admit that the plaintiff was exposed to asbestos after 1979. It is not clear to me the basis of that submission. If it is because asbestos had ceased being used at their premises some evidence to that effect would have assisted me. Bluescope's calculations as to liability are based on an assumption that no exposure

occurred after 1979. I note that Amaca has made its calculation using the assumption that exposure ceased in 1979.

20. In respect of the Mr Baltoski's exposure BlueScope submits that a "time on risk" analysis should apply to his period of exposure. Mr Baltoski says that he was exposed to asbestos on an almost daily basis from 1965 to the mid 1980s. Applying Bluescope's variable weighting analysis it says that there was 14 years of exposure covering 13 years (being 1965 – 1978 / 93% / Period B) and 1 year (1979 / 7% / Period C)

21. The exposure occurred in Periods B and C of the Standard Presumptions so that the liability is apportioned 65:35 to category 1 and category 2 parties respectively for Period B and 60:40 for Period C. Bluescope submits that the "broad brush" approach identified by Judge Curtis in *Bitupave Ltd v NSW Associated Blue Metal Quarries Pty Ltd* (1996) 13 NSWCCR 634 should be applied to reach a just and equitable apportionment. It is BlueScope's submission that the apportionment should be as follows:

Period B

BlueScope	$35\% \times 93\% = 32.55\%$
Amaca, WGL and BAE	$65\% \times 93\% = 60.45\%$

Period C

BlueScope	$40\% \times 7\% = 2.8\%$
Amaca, WGL and BAE	$60\% \times 7\% = 4.2\%$

Bluescope then submits that Mr Baltoski was equally exposed to the products supplied and manufactured by each of Amaca, WGL and BAE. It submits that the Category 1 liability should be split equally as between Amaca on the one part and WGL and BAE on the other part. As between WGL and BAE resulting in the following final apportionments:

BlueScope	$32.55 + 2.8 = 35.35\%$
Amaca	$(60.45 + 4.2)/2 = 32.33\%$
WGL and BAE	32.33% (shared proportionally)

Amaca's Reply

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

Category 1	Amaca, Bells (WGL and BAE) and CSR
Category 2	BlueScope

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

- (a) Mr Baltoski's evidence was to the effect that he was never advised of the dangers of asbestos and was not provided with protective equipment.
- (b) BlueScope was a large and sophisticated organisation at the time of his exposure. It should be inferred that it had actual knowledge of the dangers of asbestos.
- (c) As the employer BlueScope was uniquely in a position to protect Mr Baltoski from environmental exposure to asbestos. It controlled his working conditions and the materials he worked with.

24. Amaca does not admit manufacturing asbestos gauntlets, aprons, coats, spats, leggings, asbestos rope or asbestos tape.

25. It accepts for the purposes of assessing contribution under the Regulations that it must address the allegations that it supplied other asbestos product to BlueScope that was responsible for Mr Baltoski's exposure.

26. Amaca adopts the submissions of Bluescope in its Statement of Particulars regarding the proportion of Mr Baltoski's lifetime exposure ie

- *December 1965 to December 1978 (Period 1) – 97% (sic 93%)*
- *January 1979 to December 1979 (Period 2) – 3% (sic 7%)*

I observe that Bluescope's submission was that Period 1 was 93% (rather than 97%). I take Amaca's submission to be a typographical error.

27. Amaca admits that it was one of several entities that manufactured and supplied "loose asbestos powder". It submits that Bells (WGL and BAE) was also a supplier of that product. Nevertheless Amaca notes that it was not alleged by Mr Baltoski that it was the manufacturer of the loose asbestos powder and "*it was not put to the Plaintiff at the hearing of his claim that Amaca was the manufacturer of the loose asbestos powder*".

28. Amaca submits that having regard to the evidence as a whole it can be liable for no more than 1% of the Category 1 Defendants' liability (to be apportioned equally between Amaca and CSR). It says the remaining 99% of the Category 1 liability should fall to Bells.

29. Amaca submits that the Standard Apportionments should be varied as against Bluescope by 20%. It then submits that the period December 1965 – December 1978 (which falls within Period A) into 2 sub-periods being Dec 1965 to June 1974 (Period 1A) and July 1974 to December 1978 (Period 1B). The distinction between period 1A and Period 1B is that Amaca (and CSR) have no liability. Amaca's reasoning is that it ceased to manufacture asbestos containing insulation products

including products in partnership with CSR ceased in June 1974. After that date it can have no continuing liability.

30. A summary of the total apportionment as submitted by Amaca is sent out in the following table:

Defendant	Category	Period 1A	Period 1B	Period 2	Total Liability
Bluescope	2	34.98%	18.37%	1.8%	55.15%
Bells	1	28.33%	15.03%	1.2%	44.56%
Amaca	1	0.145%	-	-	0.145%
CSR	1	0.145%	-	-	0.145%
Total		63.6%	33.4%	3%	100%

CSR's Position

31. CSR is the defendant to Amaca's cross-claim. That cross-claim was filed on 31 January 2011 pursuant to a timetable for directions filed on 6 December 2010 (**the Timetable**). By letter dated 3 February 2011 (a copy of which was provided to the other parties and the Acting Registrar) the solicitors for CSR took the view that the Claims Resolution Process (**CRP**) does not apply to this claim on the basis that the timetable for service of claims under the CRP expired in July 2010. Therefore Bluescope and Amaca "*should pursue their claims in the usual way*".

32. I advised the parties that I did not have a view as to whether or not the CRP applies but considered that any dispute should be resolved inter-parties or by application to the Dust Diseases Tribunal: Facsimile dated 10 February 2011. I understand no application has been made. The Timetable provides for all Replies to be filed by 15 March 2011 and the contributions assessment to be completed 16 May 2011.

33. The matter having been referred to me I propose to complete the contributions assessment.

Findings

34. The parties submitted, and I accept, that they should be categorised as follows:

Amaca	Category 1
CSR	Category 1
WGL/BAE	Category 1
BlueScope	Category 2

35. I consider there should be an adjustment of the Standard Presumptions against BlueScope. The exposure occurred in Periods B and C of the Standard Presumptions. In my view the proportion that BlueScope should bear in each of those periods should be increased by 15% on the bases that:

- (a) BlueScope had actual knowledge of the dangers of asbestos at the relevant time: *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 Baltoski.
- (c) BlueScope was a large and sophisticated organisation.

36. Accordingly BlueScope's liability under the Standard Presumptions is increased as follows:

Period B (December 1965 – December 1978) from 35% to 50%.

Period C (Post 1 January 1979) from 40% to 55%

37. As between the defendant and the cross-defendant I note that the only products identified by the plaintiff or his colleagues are Bells products. WGL and BAE did

manufacture tape, rope and gauntlets as well as loose asbestos. There is no evidence as to who manufactured and supplied the loose asbestos. In those circumstances I accept there is substance to Amaca's argument that Bells (WGL and BAE) should bear the greatest proportion of the defendants' liability. I do not agree that Amaca's liability is capped at 1%. Doing the best I can I consider WGL and BAE should be apportioned 60% of the defendant/cross-defendants' liability. Amaca (and CSR) are liable for the balance (40%).

38. I accept also that Amaca's liability ceased at the time that it stopped manufacturing asbestos containing insulation products in June 1974. Mr Baltoski's exposure commenced in December 1965 and ceased in about December 1979 (according to the defendants). That is 14 years. 13 years of exposure in Period B – 92.9% (156 of 168 months). 1 of those years occurred in Period C – 7.1% (12 of 168 months).

39. Amaca and CSR are on risk for the period from December 1965 to June 1974 (Period B1) being 102 of 168 months (60.7%). Period B2 (July 1974 – December 1978) is 54 of 168 months (32.2%). For period B1 the liabilities are as follows:

Defendant	Category	Calculation	Liability
Bluescope	2	$50\% \times 60.7\%$	30.35%
WGL/BAE	1	$(50\% \times 60\%) \times 60.7\%$	18.21%
Amaca	1	$[(50\% \times 40\%) / 2] \times 60.7\%$	6.07%
CSR	1	$[(50\% \times 40\%) / 2] \times 60.7\%$	6.07%
Total			60.7%

40. For Period B2 the calculations are as follows:

Defendant	Category	Calculation	Liability
Bluescope	2	$50\% \times 32.2\%$	16.1%
WGL/BAE	1	$50\% \times 32.2\%$	16.1%
			32.2%

41. For Period C (post 1 January 1979) I adopt the defendants' assumption that there was only 1 year of relevant exposure.

Defendant	Category	Calculation	Liability
Bluescope	2	55%x7.1%	3.9%
WGL/BAE	1	45%x7.1%	3.2%
			7.1%

42. The final apportionments are as follows:

Defendant	Period B1	Period B2	Period C	Total
Bluescope	30.35%	16.1%	3.9%	50.35%
WGL/BAE	18.21%	16.1%	3.2%	37.51%
Amaca	6.07%			6.07%
CSR	6.07%			6.07%
	60.7%	32.2%	7.1%	100%

43. Accordingly, Amaca is liable to Bluescope for 12.14% of the total liability. Amaca is entitled to a contribution from CSR of 6.07%.

44. I consider the facts of this matter are unique. The principal proceedings were settled and the CRP did not apply to them so there is no Statement of Particulars from Mr Baltoski. WGL/BAE did not file Replies as they have reached a settlement with Bluescope. CSR has not filed a Reply. With the benefit of evidence from those parties the decision on apportionment may have been significantly different.

45. I have been asked to appoint a Single Claims Manager (**SCM**) by the Acting Registrar. BlueScope is the primary defendant and the only remaining party with more than 15%. I appoint it as the SCM.

.....
David Jay

Contributions Assessor

18 March 2010