

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

DDT No. 316 of 2011

BETWEEN:

DAVID MICHAEL HEATH
Plaintiff

AND

BLUESCOPE STEEL (AIS) PTY LTD
First Defendant/Cross Claimant

STADUP PTY LTD
Second Defendant

GIO GENERAL LTD
Third Defendant

CGU WORKERS COMPENSATION (NSW) LTD
Fourth Defendant

VERO INSURANCE LTD
Fifth Defendant

KLINGER LTD
Cross Defendant to First Cross Claim

GIO GENERAL LTD
Cross Defendant to Second Cross Claim

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 8 December 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 / cross defendants.

2. The plaintiff suffers from mesothelioma. As such the matter has innate urgency. However in his letter the Registrar noted that Judge Kearns ordered that the contributions assessment be completed by 5pm on 9 December 2011. That is, today, so there is an added element of urgency. I have reviewed all of the relevant material but have attempted to be concise in drafting this determination.
3. 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)*.
4. The plaintiff is David Heath. By his Third Further Amended Statement of Claim he sues BlueScope Steel (AIS) Pty Ltd (**BlueScope**), Stadup Pty Ltd (**Stadup**), GIO General Ltd (**GIO**), CGU WORKERS Compensation (NSW) Ltd (**CGU**) and Vero Insurance Ltd (**Vero**). Stadup is a deregistered company.
5. Bluescope have filed two cross claims joining Klinger Ltd (**Klinger**) and GIO. By its Supplementary Reply Bluescope noted that the cross claim against Klinger is to be dismissed by consent.

Mr Heath's Exposure to Asbestos

6. From 1979 to mid 1986 Mr Heath was employed by Joan Hodges t/as Hodges Fabrications. Vero was Mrs Hodges' insurer. From mid 1986 to November 1989 Mr Heath was employed by Stadup Pty Ltd trading as Hodges Fabrications. Stadup was insured by CGU. From 1991 to 1998 Mr Heath was employed by Garnock Engineering Co Pty Ltd (**Garnock**). Garnock's insurer was GIO.
7. Mr Heath has filed a Statement of Particulars and an Amended Statement of Particulars. Annexed to the Statement of Particulars is an affidavit sworn 5

November 2011. In that affidavit Mr Heath says that he worked for 3 years between 1964 and 1967 for Richard Klinger at Footscray in Kent (UK). He believes Richard Klinger manufactured rubberised asbestos sheeting for gaskets. He worked in an office environment and does not believe he was exposed to asbestos.

8. Between 1967 and 1972 Mr Heath worked for Klinger in Perth and Melbourne as a tool maker. He spent half his time making gaskets and the rest of the time making tools. He worked in the same area where the rubberised asbestos sheeting was manufactured. He says he was not near that part of the factory where the work was performed. From February 1972 he worked in the toolmaking section but says that did *“not believe that I was exposed to asbestos during this employment”*.
9. Mr Heath worked in various roles that did not involve exposure to asbestos until 1979. From 1979 he worked for Hodges Fabrications as a crane driver and trades assistant. About 20% of the time in this role was spent driving a train in the yard at Hodges Fabrications. The remaining 80% was spent assisting the fitters on demolition, rebuilding and maintenance works at the steelworks at Port Kembla.
10. He says that while working at the BHP premises at Port Kembla he believes he was exposed to asbestos when replacing hoods and plates under the ovens. This worked was done on a “down day” and ladders in his vicinity removed and replaced asbestos. He was covered in asbestos dust at the end of the day. The exposure was about 1 day per month for a period of 10 to 15 hours.
11. He was also exposed to asbestos when the sinter plant was demolished.
12. He also believes he was exposed to asbestos when undertaking maintenance work in the coke ovens, the BOS and the blast furnace. He assisted other workmen to keep their tools running. Asbestos exposure occurred in this role.

13. Mr Heath believes he was exposed to asbestos when opening heat proofed doors that were lined with asbestos. Exposure also occurred when ignition hoods were changed.
14. In 1991 Mr Heath worked for 4 months as a casual trade's assistant for Allmen Industries. He worked at the BHP Port Kembla steelworks to reline the blast furnace. He swept up dust removed from the interior of the blast furnace. It was a very dusty and dirty job.
15. For the next 7 years he worked as a trade's assistant with Garnock Engineering. He performed the "*same duties in assisting the boilermakers and fitters on the ships at the AI & S and in the workshop*". He believes he was exposed to asbestos while working with the boilermakers and fitters in the engine rooms and holds of the ships. He believes pipes being taken apart in the engine rooms were lagged with asbestos. That was his last recollection of exposure to asbestos.

BlueScope's Reply

16. Bluescope filed its Reply on 18 November 2011. I received by email an unsealed Supplementary Reply on 8 December 2011.
17. At the time of preparing the Supplementary Reply it had not yet verified Mr Heath's diagnosis.
18. Bluescope denies that it occupied or controlled the Port Kembla Steelworks. It says the premises were "*relevantly occupied by the plaintiff's own employer, who was an independent contractor not subject to BlueScope's direction or control*".
19. Bluescope next says that any exposure post 1977 was as a result of Mr Heath's colleagues and the fault of his employer.

20. Bluescope admits that it knew or ought to have known of the dangers of exposure to asbestos at the time of Mr Heath's exposure.

21. Bluescope says that its conduct did not attract the operation of statutory duties to Mr Heath.

22. The additional defences Bluescope proposes to rely on are:

(a) Due to the lapse of time it is not possible to obtain a fair trial.

(b) Mr Heath's alleged exposure during 1970 – 1990 was not a cause of his mesothelioma.

(c) Mr Heath was guilty of contributory negligence by smoking 1 packet of cigarettes a day. This, it is submitted, reduced his ability to "*deal with asbestos inhalation and he knew or ought to have known of the potential for malignancy related to smoking*".

23. Bluescope submits the parties should be categorised as follows:

Klinger – proceedings discontinued.

Vero and CGU – category 1 and 2.

GIO (as insurer of Garnock) – category 1 and 2.

Bluescope – Category 2.

24. The submission in respect of Vero and CGU is that the insureds carried on the business of installing products plant or equipment containing asbestos. They were also Mr Heath's employer. The submission in respect of Bluescope is that it was a steelmaker and the use of asbestos in its facilities was ancillary to that business venture. Bluescope was in the process of removing asbestos from its facilities at this time.

25. The highest that Bluescope puts its submission in respect of GIO is that "*Its business was likely to have involved installation of plant containing asbestos*".

26. Bluescope submits that the Standard Presumptions should be varied as against Hodges Fabrications on the basis that it had control over the plaintiff and his working environment between 1979 and 1989. It does not nominate the amount the Standard Presumption should be adjusted by.
27. Bluescope makes no calculation of the parties' liabilities.

Klinger's Reply

28. Klinger filed a reply on 18 November 2011. By reason of the agreement reached with Bluescope to resolve the cross claim and as it is not a defendant to the plaintiff's claim I do not need to consider that document.

GIO's Reply

29. GIO is a defendant to Mr Heath's claim and a cross defendant to BlueScope's cross claim.
30. GIO does not admit that Garnock employed Mr Heath but is making further inquiries. It says that it does not know whether Garnock had actual knowledge of the dangers of exposure to asbestos. It does admit that if Mr Heath was employed by Garnock that it owed him a common law duty of care. It does not admit breach of the duty owed.
31. GIO submits that Mr Heath is not entitled to damages "*because of the plaintiff's inability to establish that the exposure alleged with Garnock Engineering was causative: Amaca v Ellis 240 CLR 111*". That submission may be hard to sustain in circumstances where the only known cause of mesothelioma is asbestos exposure. That differs from the facts in *Ellis* where the plaintiff suffered lung cancer, was a long time smoker and had some exposure to asbestos and sought to establish that the asbestos exposure was the cause of his lung cancer.

32. GIO submits that all parties should be placed into category 2. It submits that each category 2 defendant should be fixed with constructive knowledge of the dangers of asbestos.

33. I summarise GIO's submission in respect of contribution as follows:

Period	Employer	Duration	% liability
1967 – 1972	Klinger	5 years	21.74% (5/23)
1979 – 1990	Various	11 years	47.83% (11/23)
1991 – 1998	Garnock	7 years	30.43% (7/23)

34. GIO makes no submission in relation to apportionment of the various employers and occupier in the period 1979 to 1990. GIO submits that the liability for the Garnock employment period should be shared 50/50 as between GIO and Bluescope. The final liabilities then are:

Klinger	21.74%
Bluescope	63.05%
GIO	15.21%

CGU's Reply

35. CGU admits the plaintiff's diagnosis. It does not admit that Mr Heath was exposed to asbestos in the manner he alleges.

36. CGU's principal submission is that the transcript of his evidence does not support the contentions he makes in his Statement of Particulars. It also refers to Professor Breslin's notes where Mr Heath states his belief that there was some exposure to asbestos after the mid 1980s. On that basis Mr Heath experienced minimal, if any, exposure to asbestos dust and fibre when employed by its insured Stadup.

37. CGU submits that Bluescope should be placed into category 2 as an occupier.
38. The insurers (Vero, CGU and GIO) should be placed into category 2 on the basis that the insureds were Mr Heath's employers.
39. CGU submits that the Standard Presumptions should be varied to "*the maximum amount permissible against Bluescope*". It makes that submission on the basis that Bluescope had actual knowledge of the dangers of asbestos and refers to *BlueScope Steel v Amaca Pty Ltd (Re Floro)*. It further submits that the Standard Presumptions should be varied to the maximum amount as against Bluescope by reason of its size and sophistication.
40. In making its calculation as to liability CGU submitted that a differential weighting should be given for the different periods of Mr Heath's exposure. It separates the periods of exposure into the Hodges Period (1978 to mid 1986), the Stadup period (mid 1986 to September 1989) and the Garnock Period (1991 to 1998).
41. CGU submits that, taking into account the transcript of Mr Heath's evidence and the notes taken by Professor Breslin that the Hodges Period should receive an "x3" loading by comparison with the Stadup period. For the Garnock Period it should be attributed a one third loading. Applying those assumptions the relative exposures are:
- Hodges period: 79%
- Stadup period: 12%
- Garnock period: 9%
42. Next CGU submits that it is appropriate to exercise discretion to apportion heavier exposure to Bluescope by 20% resulting in apportionment of 70% to Bluescope and 30% to each insurer (rather than 50 / 50). This submission results in the following final liabilities:

Hodges Period

Vero: 30% of 79% = 23.7%

Bluescope: 70% of 79% = 55.3%

Stadup Period

Stadup/CGU: 30% of 12% = 3.6%

Bluescope: 70% of 12% = 8.4%

Garnock Period

GIO: 30% of 9% = 2.7%

Bluescope: 70% of 9% = 6.3%

Vero's Reply

43. I was advised today that the solicitors for the fifth defendant were served as recently as yesterday. I received a sealed copy of the Fifth Defendant's Reply by email today.

44. Vero was the insurer of Mrs Hodges. Vero notes that she was an individual and an unincorporated entity. It submits, then, that the employer was a small, unsophisticated entity of limited capacity. It goes on to submit:

"Given these circumstances, it cannot be considered that the employer of which the Fifth Defendant is indemnified knew or ought to have known that exposure to asbestos gave rise to a risk of personal injury at the time of the alleged exposure".

45. Although an employer may be small and unsophisticated I do not consider that absolves that employer (and hence her insurer) from the employer's legal liability. The employer undoubtedly had a statutory and common law obligation to maintain a safe workplace. Absence of knowledge (whether actual or imputed) is no answer to the existence of those duties.

46. Vero's principal submission as to apportionment of liability is that it is an innocent defendant pursuant to CI 53 of the Regulations and says "*Therefore, the Fifth Defendant maintains that it is not in any way liable to the Plaintiff and should be attributed no apportionment due to the facts and circumstances*". On my reading of CI 49(5) the defendants may agree between themselves that a party is an innocent defendant (which has not occurred here). It is not a matter which I can unilaterally determine. Accordingly, I do not accept that submission.

47. Vero submits that the parties should be categorised as follows:

Bluescope	category 1 and category 2
Stadup	category 1 and category 2
GIO	category 1 and category 2
Vero	category 2
Klinger	N/A

48. Vero next submitted that if its submission as to the innocent defendant is not accepted I should apportion evenly between defendants in the same category, unless I am satisfied a variation should be made. It reiterates that its insured was small and unsophisticated in comparison to the other defendants.

49. Vero made no submissions as to the actual calculation of apportionment.

Assessment

50. This has been a difficult matter to make a final determination in. Mr Heath's evidence was descriptive of his experience of exposure but did not shed great light on to the duration or intensity of each respective period. I have had the benefit of reading a short transcript of cross examination of Mr Heath but the duration and intensity of exposure was not investigated to any significant extent.

51. In my view all parties should be placed into category 2. Bluescope did submit that CGU and Vero's insured "*probably*" carried on business installing products plant and equipment containing asbestos. There was no convincing evidence to support that submission. The transcript of evidence describes Hodges Fabrications undertaking maintenance work which involved "*changing plates, changing wear plates, changing doors...change gaskets*": T 3 line 22, 23. Mr Heath agreed with BlueScope's counsel that Garnock Engineering was a "*specialist contractor doing maintenance work*": T 4 line 50. I do not infer from those descriptions that Hodges or Garnock were in the business of asbestos installation. In the absence of direct evidence that Hodges and Garnock installed asbestos I decline to place them in category 1. Bluescope should be placed in category 2 as an occupier.
52. The next matter is whether the Standard Presumptions should be adjusted against any of the defendants. The exposure occurred in Periods C and D of the Standard Presumptions (post Jan 1979). BlueScope had actual knowledge of the dangers of asbestos at the relevant time: *BlueScope Steel v Amaca Pty Ltd (Re Oswald)* [2009] NSWDDT 5. It was also a large and sophisticated organisation. Those factors would normally point to increasing the Standard Presumptions against it. However, there are factors against doing so. Bluescope was not Mr Heath's employer. His employers were responsible for providing him with protective clothing and masks (and generally failed to do so). It appears from the transcript that his employers were also responsible for directing the work he undertook at the Bluescope facility.
53. I reject BlueScope's submission that Mr Heath's only exposure occurred due to the activities of the fellow workers employed by the plaintiff's employer. Mr Heath does say his exposure occurred while in the vicinity of other workmen at BlueScope's facility. It is not clear who employed those other workmen. It may have been his colleagues but it also may have been workers employed by either Bluescope or third party contractors.

54. Weighing those respective matters and applying them to the facts of this case I consider it is appropriate to make no change to the Standard Presumptions.

55. Mr Heath suffers from mesothelioma. That is an indivisible disease. The Standard Presumptions apply to the whole of the claim unless I am satisfied that by reference to separate periods of exposure, a differential determination of the contribution of each such period of exposure should be made.

56. Mr Heath describes his exposure to asbestos at the Bluescope facility between 1979 and 1990 as *“regular and heavy”*. Whilst working for Garnock Mr Heath says that he *“performed the same duties in assisting the boilermakers and fitters on the ships at the AI & S and in the workshop”*. He says that he noticed dust in his work environment and noticed it on his clothing at the end of the day.

57. CGU has pointed out that Mr Heath told Professor Breslin that his exposure at Garnock was de minimis. That does not accord with Mr Heath’s evidence given under oath where he said that the work at Garnock involved *“... a lot of sweeping up – sweeping up and shovelling up, you know, relining the blast furnace. There was a heck of a lot of dust there then”*. He was warned of the dangers of asbestos in that role. I prefer Mr Heath’s evidence under oath to Professor Breslin’s report in this regard.

58. On the evidence (the Statement of Particulars, Mr Heath’s affidavit, the transcript of evidence and Professor Breslin’s report) I am not satisfied that a differential determination of the contribution of each period of exposure should be made.

59. By reference to the Third Further Amended Statement of Claim Mr Hodges employment history is as follows:

Period	Years	Employer	Insurer	Location
1979 – mid	6.5 years	Joan Hodges	Vero	Bluescope

1986		t/as Hodges Fabrications		
Mid 1986 – Nov 1989	3.5 years	Stadup Pty Ltd	CGU	Bluescope
1991 - 1998	7 years	Garnock Engineering Co Pty Ltd	GIO	Bluescope
	17 years			

60. As there are only category 2 defendants and I do not propose to adjust the Standard Presumptions the liability is borne equally for each respective period. Accordingly, the liabilities are as follows:

Joan Hodges Period 6.5/17 (38.2%)

Vero 19.1%

Bluescope 19.1%

Stadup Pty Ltd 3.5/17 (20.6%)

CGU/Stadup 10.3%

Bluescope 10.3%

Garnock Period 7/17 (41.2%)

GIO 20.6%

Bluescope 20.6%

61. In his letter of appointment the Registrar did not ask me to appoint a Single Claims Manager (**SCM**). In the event that that was an omission that occurred due to the urgency required to comply with Judge Kearns' order I indicate that I would have appointed Bluescope as the SCM pursuant to CI 61(4) of the Regulations.

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David Jay

Contributions Assessor

9 December 2011