

IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES

DDT No. 267 of 2009

BETWEEN: **ALEXANDER JAMES HEYCOTT**
 Plaintiff

AND: **BLUESCOPE STEEL (AIS) PTY LIMITED**
 Defendant

AND: **WALLABY GRIP LIMITED**
 First Cross-Defendant

AND: **WALLABY GRIP (BAE) PTY LIMITED**
 Second Cross-Defendant

CONTRIBUTIONS ASSESSMENT DETERMINATION

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me pursuant to clause 49(1) of the *Dust Diseases Tribunal Regulations 2007* ("the Regulations") for a determination of apportionment as between the Defendant and Cross-Defendants.
2. Regulation 49 of the Regulations provides that I am to determine the contribution on the assumption that the Defendant and the Cross-Defendants are liable, and to do so on the basis of the Particulars and Replies, and thereafter apply the Standard Presumptions as to apportionment.
3. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as "the Standard Presumptions Order") provides that apportionment is to be in accordance with the Table set forth in paragraph 5(1) of the Standard Presumptions Order.
4. In the present matter, the Plaintiff issued a Statement of Claim on 14 September 2009 against Bluescope Steel (AIS) Pty Ltd (hereinafter referred to as "Bluescope") alleging that the Plaintiff was employed by Bluescope as a ship's painter and docker at Bluescope's shipping department between 1965 and 28 April 1971 and while so employed he was exposed to

asbestos dust and fibre, as a consequence of which he has sustained an asbestos-related pleural disease.

5. On 14 September 2009 the Plaintiff filed a document entitled Statement of Particulars in Personal Injury Proceedings, which merely sets forth the injuries and disabilities allegedly sustained by the Plaintiff.
6. On 24 December 2009 the Plaintiff filed a Statement of Particulars which, so far as is relevant, provides as follows:
 - (i) Between 1965 and 1972 while working as a ship's painter and docker, the Plaintiff worked on vessels including the Iron Clipper, the Old Iron Monarch, the Iron Duke and the Iron Endeavour, the Iron Knight, Iron Flinders and Iron Dampier.
 - (ii) Part of the Plaintiff's duties was to do lagging around steam pipes which involved putting up asbestos material to suit the pattern and sew it together.
 - (iii) While performing this work there were thick clouds of asbestos particles floating in the air.
 - (iv) When vessels came back into port, the Plaintiff removed all the damaged sections of lagging by physically pulling it apart and most of this work was done in the engine rooms inside the ships.
 - (v) As old asbestos was removed, dust was created.
 - (vi) After removing old lagging, the pieces removed were put into rubbish bins.
 - (vii) Thereafter, new asbestos, which had previously been prepared in the work shed, was applied and the new lagging was applied around the pipes.
 - (viii) The material that the Plaintiff used came in rolls and was a grey-blue colour, and there was also a material like "Kapox" which was used to mix up in a bucket and applied around the pipes.

7. On 26 November 2009 the Bluescope filed a Reply which *inter alia* provides:
- (i) The Plaintiff suffers pleural plaques, an asbestos pleural disease.
 - (ii) Bluescope occupied and controlled areas on land but did not occupy and control BHP ships.
 - (iii) The Plaintiff was employed between 10 February 1966 to 2 May 1972 as a painter and docker at Port Kembla.
 - (iv) Bluescope be categorised Category 2, Wallaby Grip Ltd (hereinafter referred to as "WGL") be in Category 1 and Wallaby Grip BAE Pty Ltd (hereinafter referred to as "BAE") be in Category 1.
 - (v) The Standard Presumptions should not be varied.
 - (vi) According to the history of Professor Breslin, only 65% of the Plaintiff's exposure occurred while employed by Bluescope.
 - (vii) The entire period falls within period B of the Standard Presumption, which apportions liability to Category 1 Defendants at 65%, and Category 2 Defendants at 35%.
 - (viii) Apportionment should be split at to Bluescope 35%, WGL 9.4%, and BAE 55.6%.
 - (ix) Professor Breslin provided to Bluescope a report dated 22 October 2009, which sets forth a more complete working history than that contained in the Plaintiff's statement. According to Professor Breslin, the Plaintiff's employment was to maintain the ships and the Plaintiff estimated that he spent 90% of his time working on the ships and 10% on the port itself. On the ships the Plaintiff had to pull lagging off and then pre-form lagging and asbestos cloth was put on.
 - (x) A statement by the Plaintiff dated 5 September 1996 indicates that the Plaintiff's duties were mainly to paint the ship's sides and on top of the ships and ship parts, clean

bilges and clean out ship water tanks and fuel tanks and doing lagging around steam pipes and pipe work on the ships.

(xi) A statement from Ronald Marstaeller states that in performing work for Bluescope of a type performed by the Plaintiff, the following asbestos items would have been encountered:

- (a) Asbestos rope definitely being a product of Bestobell;
- (b) Asbestos cloth which was a product of Bestobell;
- (c) Blankets known as flexible mattresses were the product of Bestobell.

8. On 20 April 2010 a Reply was filed by WGL and BAE which relevantly provides as follows:

- (i) At no stage did WGL and BAE operate simultaneously. WGL and BAE should be treated as one entity for the purpose of calculating apportionment and, accordingly, should be referred to collectively as "Wallaby Grip".
- (ii) Wallaby Grip admits that between 10 February 1966 and 28 April 1971 it was one of a number of companies that supplied asbestos composition in Australia and, accordingly, Wallaby Grip does not know whether the composition to which the Plaintiff was exposed at Bluescope was supplied by Wallaby Grip.
- (iii) Wallaby Grip denies that it manufactured asbestos cloth but admits that between 10 February 1966 and 28 April 1971 it was one of a number of suppliers of asbestos cloth within Australia. Wallaby Grip does not know whether Wallaby Grip supplied the cloth to which Mr Heycott was exposed at Bluescope.
- (iv) WGL ceased operations on 3 September 1966 from which time BAE operated.
- (v) Wallaby Grip should be placed in Category 1.
- (vi) Bluescope should be considered to be placed in Category 1 and also in Category 2 as employer/occupier.
- (vii) The Standard Presumptions should be varied against Bluescope by 20%.

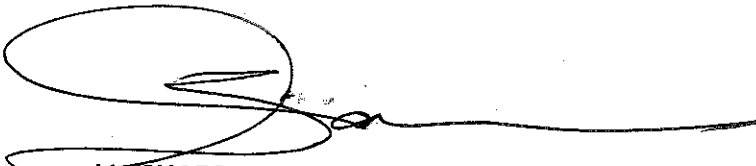
- (viii) The empty chair period of 35% should be taken into account.
9. Initially the Contributions Assessor must determine the existence of any separate periods of exposure pursuant to clause 5(8) to make a determination of what proportion of the whole each separate period bears having regard to the number of such periods, the length of each period, the duration of and intensity of exposure to asbestos present in each such period.
 10. In the present case, the Plaintiff relies upon and asserts that he only had exposure while working for Bluescope. However, Dr Breslin obtains a history at variance as to exposure. Given the provisions of Regulation 49, I must have regard to the Plaintiff's particulars and, accordingly, if there be periods of exposure other than those upon which he relies, then that is a matter for another place.
 11. The Plaintiff's condition is a divisible one and, accordingly, this determination will be based upon the claims made by the Plaintiff in respect of the period of employment with Bluescope.
 12. In respect of the period of employment with Bluescope, this falls within period B of the Standard Presumptions, and thus Category 1 Defendants are presumed to be 65% liable and Category 2 Defendants 25% liable.
 13. Notwithstanding the submissions made by Wallaby Grip, I determine on the basis of the Statement of Particulars and Replies that Bluescope falls into Category 2, while Wallaby Grip comes into Category 1.
 14. I determine that Wallaby Grip be treated as one defendant and not as separate defendants.
 15. Accordingly, the contribution between Category 1 and Category 2 Defendants, according to the Standard Presumptions Order, is to be assessed on the basis of 65%/35%.
 16. In the present case, the Standard Presumptions do not take into account the various aspects of the Plaintiff's employment with Bluescope, including the nature and size of the operation of Bluescope, the instructions provided by Bluescope and the failure of any warnings or the taking any steps to minimise that Plaintiff's exposure to asbestos dust and fibre. Accordingly, there

should be a variation of 10% in the standard presumption. In other words, Category 1 Defendants are to pay 55% and Category 2 Defendant is to pay 45%.

17. Turning to the factual matters, it is clear that the Plaintiff was involved in both the removal of old asbestos lagging and the replacement of new asbestos lagging. Doing the best I can on the information present before me, I assess that 40% of the asbestos work related to old asbestos lagging, and 60% related to new asbestos lagging. In respect of the removal of the old lagging, this cannot be brought home to Wallaby Grip, on the information presently before me,
18. Thus, in relation to the 60% of the asbestos lagging, there should be an apportionment on the basis of 55%/45%, while the remaining 40% is to be borne solely by Bluescope.
19. Therefore, I determine the total liability of Bluescope and WGL and BAE as follows:

Bluescope - 40% + 27% [45% of 60%]	67%
Wallaby Grip - 55% of 60%	33%

20. Pursuant to clause 61 of the Regulations, I appoint Bluescope as the Single Claims Manager as it is the primary defendant defined under clause 61(9).



J.L. SHARPE

Contributions Assessor

21 April 2010