

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

No 91 of 2011

BETWEEN

WINSTON HORACE LEWIS
Plaintiff

AND

AMACA PTY LIMITED
Defendant / Cross-Claimant

COMCARE
First Cross-Defendant

SELTSAM PTY LIMITED
Second Cross-Defendant

STATE OF VICTORIA
Third 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 (hereinafter referred to as "the Regulations") for a determination of apportionment.
2. Regulation 47(1) provides: "A reference in this Division to a defendant includes a reference to a cross-defendant."
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. **Winston Horace Lewis** (hereinafter referred to as "the Plaintiff") commenced proceedings in the Dust Diseases Tribunal of New South Wales on 6 April 2011 alleging in his Statement of Claim that, from about 1952 to about 1979 he was employed as a carpenter/joiner and master of works in the State of New South Wales and the Australian Capital Territory and during the course of his work he cut edge chamfered, drilled, screwed, installed and otherwise handled AC building products which were manufactured and/or supplied by **Amaca Pty Ltd** (hereinafter referred to as "Amaca").
5. The Plaintiff claims that as a result of his exposure to asbestos dust and fibre he has developed a mesothelioma.
6. The Plaintiff's particulars were filed on 20 May 2011 which purports to set forth his exposure to asbestos dust and fibre, and relevantly alleges:
 - (i) From 1952 to the end of the 1950s the Plaintiff worked for Superior Decorators who were contracted to build homes for the Housing Commission of New South Wales. The homes were all fibro homes and the wet areas of the homes were all lined with asbestos cement fibro sheets internally and the external sheets of the homes were clad with asbestos cement sheets.

The eaves of the home were constructed from asbestos cement sheets. The Plaintiff had to cut sheets to size and usually used fibro cutters for the job. Other workers worked in the vicinity of the Plaintiff. The asbestos cement sheets were manufactured either by Hardies or Wunderlich and depended upon the supplier used, although the Plaintiff recalls the brand name "Fibrolite". The Plaintiff additionally used Fibrolite standard corrugated sheets and Fibrolite roofing accessories. Asbestos cement sheets were used in the down pipes and such pipes were cut to length.

- (ii) In the late 1950s the Plaintiff was employed by G.H. Thomas as a carpenter/joiner around the Parramatta and Ryde areas in Sydney and built colleges mainly for ex-servicemen contracted by New South Wales Housing Commission. The Plaintiff again refers to the asbestos cement fibro sheets internally for the wet areas as well as exterior cladding and eaves, which the Plaintiff had to cut to size. The Plaintiff mainly used fibro cutters and other workers were working around him.
- (iii) In the early 1960s the Plaintiff built several asbestos cement fibro homes working for Masters Homes in the Blue Mountains area, which homes had an outside toilet shed, which was built with asbestos cement fibro. The Plaintiff used Super 6 corrugated asbestos cement sheets for the roofs in the cottages, which were cut with fibro cutters.
- (iv) In about 1963 the Plaintiff moved to Canberra doing construction work as well as carpentry and joinery and this included construction of government housing as well as government buildings in the Canberra region. Much of the housing the Plaintiff was involved in was constructed using asbestos cement flat sheets for the eaves, internally in wet areas and externally as cladding. Super 6 asbestos corrugated sheets were used on some of the roofs. The Plaintiff alleges that he was exposed to asbestos dust and fibre. In addition, the Plaintiff used compressed ¾ inch thick asbestos cement sheets for the floors of bathrooms on some of the homes that were built in Canberra. The Plaintiff drilled holes into such sheets.
- (v) After graduating as a clerk of works, the Plaintiff was employed directly by architect firm Leith & Bartletts as a contract manager on behalf of the National Capital Development Commission, which involved the Plaintiff in refurbishing the Attorney General's building, construction of the Weights and Measures Building in the Remand Centre and the Taxation Office. The Attorney-General's building involved quite a lot of exposure to asbestos because two ½ inch or ¾ inch compressed asbestos cement sheets were used as well as sheets for sound proofing. The sheets were cut to size with electric grinders. The Plaintiff supervised the work and was in the vicinity of the workers who did this work. The Plaintiff supervised the partition work in the Australian Tax Office headquarters and that work involved the use of ½ inch thick asbestos sheets as partitions and the Plaintiff was in the vicinity of workers who performed this work.
- (vi) From about 1979 until 1986, the Plaintiff was employed by Loy Yang Power Station in Victoria as a structural supervisor and was exposed to asbestos insulation or lagging on steam pipes. The insulation was in the form of a solution that was sprayed onto the pipes with spray guns. The Plaintiff was in the vicinity of workers while the pipes were being sprayed with the insulation.

- (vii) At no stage was the Plaintiff warned of the dangers of exposure to asbestos insulation.
 - (viii) When the Plaintiff was actually involved in performing work, he was also exposed to work when it was cleaned up.
 - (ix) The Plaintiff is unable to estimate the percentage of the proportion of his exposure and is unable to state the level of intensity of his exposure.
7. Amaca issued a Cross-Claim on 17 June 2011 joining as Cross-Defendants **Comcare, Seltsam Pty Ltd** (hereinafter referred to as "Seltsam") and the **State Electricity Commission of Victoria** (hereinafter referred to as "SECV") claiming contribution or indemnity from Comcare and/or Seltsam and/or SECV in respect of any damages payable to the Plaintiff
8. By reason of the fact that in the particulars as filed by the Plaintiff he alleges that between 1979 and 1986 he worked as a structural supervisor on the construction of the Loy Yang Power Station site in Victoria and was exposed to asbestos dust and fibre, it can be seen that the Plaintiff's claim is larger than that presently pleaded. However, by reason of Regulation 49 (4) of the Regulations, I am directed to have regard to the Statement of Particulars.
9. As against Comcare, Amaca alleges that
- (i) Between 1963 and the early 1970s the Plaintiff worked for a number of employers as a carpenter and joiner, and
 - (ii) During this period his work included construction of government housing and buildings in the Canberra region.
 - (iii) Additionally, between the early 1970s and 1979 the Plaintiff was employed as a contract manager with an architectural firm which was retained on behalf of Comcare to supervise the quality of the workmanship and material on government projects, in the course of which the Plaintiff supervised a number of large jobs in Canberra, including the refurbishment of the Attorney-General's building, the construction of the Rates and Measures Building in the Remand Centre and the Taxation Office.
 - (iv) Comcare exposed the Plaintiff to asbestos dust and fibre.
10. As against Seltsam, Amaca alleges that
- (i) Between 1952 and 1979 the Plaintiff was employed as a carpenter joiner and master of works in the State of New South Wales and Australian Capital Territory and that Seltsam exposed the Plaintiff to asbestos dust and fibre from asbestos-containing building products manufactured by Seltsam.
11. As against SECV Amaca alleges that:
- (i) Between 1971 and 1976 the Plaintiff worked as a structural supervisor on the construction of the Loy Yang Power Station site in Victoria and was exposed to asbestos dust and fibre and
 - (ii) SECV was the owner/occupier of the site where the Plaintiff was exposed to asbestos.

12. Amaca filed a Reply on 4 July 2011 which relevantly alleges:

- (i) The terms "asbestos cement fibro sheet", "asbestos cement flat sheets" and "asbestos cement pipes" are generic descriptions of products manufactured and/or supplied by several companies. Specifically, Amaca denies that it manufactured the product Villaboard during the period of the Plaintiff's exposure.
- (ii) Amaca identifies the type of asbestos product it manufactured.
- (iii) Amaca disputes foreseeability prior to 1965.
- (iv) Amaca, Seltsam, SECV and Comcare should be placed in Category 1.
- (v) SECV and Comcare should each be placed in Category 2 as the employer/occupier.
- (vi) The standard presumption should be varied by the maximum percentage points against the Category 2 Defendants. Amaca submits that the apportionment between the Defendants and Cross-Defendants should be as follows:

SECV	38.75%
Comcare	38.75%
Amaca	11.25%
Seltsam	11.25%

13. Comcare has filed a Reply on 13 July 2011 and it submits as follows:

- (i) Amaca and Seltsam should be placed in Category 1;
- (ii) Comcare and the SECV should be placed in Category 2.
- (iii) There should be no variation in the Standard Presumption.
- (iv) Liability should be apportioned as follows:

Category 1 Defendants (namely Amaca and Seltsam)	32.5725% each
Category 2 Defendants:	
Comcare	11.33%
SECV	23.53%

14. Neither SECV nor Seltsam have filed a Reply. Since there is no Reply from either these parties, I have had to determine this matter on the material before me.

15. Initially, the Contributions Assessor must determine the existence of any separate periods of exposure pursuant to clause 5(8) and 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 the intensity of exposure to asbestos present in each such period. It is thus not appropriate to determine the relative contributions simply on the basis of the elapsed years between the various periods of exposure.
16. Based upon the material available to me, I determine the contributions periods as follows;
- (i) From 1952 until 1963 (11 years) the Plaintiff was exposed to the products of Amaca and Seltsam. This accounts for approximately 34% of the Plaintiff's total exposure.
 - (ii) From 1964 until 1978 (14) years the Plaintiff was exposed to the products of Amaca and Seltsam while working on the projects of Comcare. This accounts for approximately 44% of the Plaintiff's exposure.
 - (iii) From 1979 until 1986 (7 years) the Plaintiff was working for SECV. On the information before me, it is not possible to identify the manufacturer/supplier of such products. This accounts for approximately 22% of the Plaintiff's exposure.
17. On the information before me, I determine that the nature and extent of the exposure during each of the periods was roughly comparable.
18. I determine that Amaca, and Seltsam each fall into Category 1 and that, Comcare and SECV each fall into Category 2.
19. Insofar as the Category 1 defendants are concerned, the liability should be divided 70% to Amaca and 30% to Seltsam.
20. The question then arises as to the contribution between Category 1 and Category 2 defendants during the period from 1964 until 1978. Under the Standard Presumption Order Category 1 Defendants are presumed to be 65% liable, while the Category 2 Defendants are deemed to be 35% liable.
21. In the present case, the standard presumptions do not take into account the various aspects of each of the liability of Comcare and, accordingly, there should be a variation (increase) in the standard presumptions in respect of Comcare by 15%.
22. Thus, the following calculation as to liability can be made:
- (a) Amaca. – $34\% \times 70\% (23.8\%) + 44\% \times 70\% \times 50\% (15.4\%) = 39.2\%$
 - (b) Seltsam. – $34\% \times 30\% (10.2\%) + 44\% \times 30\% \times 50\% (6.6\%) = 16.8\%$
 - (c) Comcare. – $44\% \times 50\% = 22\%$

(d) SECV – 22%

23. Therefore, I determine the total liability of the Defendants and Cross-Defendants as follows:

(i)	Amaca	39.2%
(ii)	Seltsam	16.8%
(iii)	Comcare	22%
(iv)	SECV	22%

24. Pursuant to clause 61 of the Regulations, I appoint the First Defendant as the Single Claims Manager as it is the primary Defendant defined under clause 61(9).



26th July 2011

J.L. SHARPE
Contributions Assessor