

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

DDT No.330 of 2009

PATRICIA GWENDOLINE PRESTON

Plaintiff

**BHP BILLITON LONSDALE INVESTMENTS PTY LIMITED
(FORMERLY KNOWN AS AUSTRALIAN INDUSTRIAL REFRACTORIES)**

First Defendant

AMACA PTY LIMITED

Second 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 the apportionment as between the Defendants.
2. Regulation 49 of the Regulations provides that, in making my determination, I can only have regard to the Statements of Particulars provided by the Plaintiff and any replies by the Defendants.
3. In determining the contributions I am also required to have regard to the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 (hereinafter referred to as the "Standard Presumptions Order") which requires 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, Patricia Gwendoline Preston (hereinafter referred to as "the Plaintiff") issued a Statement of Claim on 4 November 2009 which, insofar as is relevant, alleges:

- (i) That between approximately 1974 and 1986 Jack Preston (hereinafter referred to as "the husband") was employed by BHP Billiton Lonsdale Investments Pty Ltd (hereinafter referred to as "BHP") as a tally clerk/liaison officer.
- (ii) While so employed the husband was exposed to substantial amounts of asbestos dust and fibres.
- (iii) Between 1974 and 1986 while the husband was employed by BHP the Plaintiff laundered the husband's soiled clothes.
- (iv) Between 1949 and 2003 the Plaintiff was present during and assisted with various renovations in and about the family home at 8 Lloyds Road at Lambton.
- (v) During the course of the aforesaid renovations the Plaintiff was exposed to asbestos dust and fibre emanating from the products used which were manufactured by Amaca Pty Ltd (hereinafter referred to as "Amaca").
- (vi) The Plaintiff has contracted peritoneal mesothelioma.

5. On 4 November 2009 the Plaintiff filed a Statement of Particulars which, so far as is relevant, provides:

- (i) The Plaintiff washed the husband's clothes at least once per week and sometimes twice per week between 1949 and 1986.
- (ii) The Plaintiff asserts that in about 1967 the husband was promoted to the position of tally clerk and that thereafter his clothes were less dusty than before.
- (iii) As part of handling her husband's overalls the Plaintiff got dust on her hands and breathed in the asbestos fibre.
- (iv) Insofar as working for BHP, the husband was working in the vicinity of others having commenced as a machinist and then worked as a tally clerk. The husband worked 5 days

per week. The husband was exposed to asbestos dust and fibre in such employment

- (v) In relation to the home renovation, the Plaintiff identified probably 10 or more occasions over the years when she was so exposed. The Plaintiff described high exposure to dust on each occasion, especially when various bathroom renovations were performed. The Plaintiff recalls the use of Tilux, as well as flat asbestos sheets being used extensively.

6. On 1 December 2009 BHP filed a Reply which, so far as is relevant, alleges the following:

- (i) BHP is a Category 2 Defendant and Amaca is a Category 1 Defendant.
- (ii) There is no reason for any variation.
- (iii) BHP did not employ the Plaintiff until 1974 and thus the period of exposure could only be from 1974-1986.
- (iv) The exposure in relation to the home renovations occurred in the early '60s and then in the '80s and finally in the 2000s, and that exposure in the 2000s could be dismissed, presumably because such exposure could not be causative.
- (v) BHP should be responsible for 37.5% and Amaca responsible for 62.5%.

7. On 9 December 2009 Amaca filed a Reply which, so far as is relevant, provides the following:

- (i) Amaca admits that between 1955 and 1965 it manufactured Hardies genuine Fibrolite flat sheets, Hardies Fibrolite flat sheet and Fibrolite flat sheet.
- (ii) Between 1937 and 1962 Amaca admits that it manufactured Tilux.
- (iii) Between 1977 and 1982 Amaca manufactured Villaboard.
- (iv) Prior to 1977 Amaca did not manufacture Villaboard as it was a product provided and supplied by Seltsam Pty Ltd.

- (v) Amaca should be placed in Category 1 and BHP in Category 2.
 - (vi) The Standard Presumptions should be varied as against BHP by 20% (the maximum percentage points) in favour of Amaca given the size, sophistication and state of knowledge of BHP during the Claimant's husband's period of employment with BHP.
 - (vii) During the period of the husband's employment between 1974 and 1986 BHP would have known of the risks and dangers associated with use of asbestos-containing materials given the nature and size of its organisation and the number of employees employed by BHP during that period.
8. It is against the above background that this determination is to be made.
9. I determine that BHP is Category 2 and Amaca is a Category 1 Defendant.
10. In the period between 1949 and January 1962, according to the Standard Presumptions, a Category 1 Defendant is liable to 75% and Category 2 Defendant liable for 25%; in period B between 1 January 1961 and 31 December 1978 a Category 1 Defendant is presumed to be 65% liable and a Category 2 Defendant 35% liable and thereafter in Period C the break-up is 60%/40% respectively.
11. In the present case, there is overlapping in the period from 1974 to 1986. In other words, part during period B and part during period C.
12. Having regard to the size and operation of BHP and its presumed state of knowledge, it seems to me that there should be a variation of the Standard Presumptions.
13. While the Plaintiff was exposed to asbestos dust and fibre while performing home renovations, it is more likely than not that the substantial exposure to which the Plaintiff was subjected was as a result of work performed by her husband at BHP.
14. I determine that the Plaintiff's exposure to Amaca's products [as a percentage of the whole of her exposure] was as follows:
- (i) 1949 – 1974 20%

- (ii) 1974 - 1986 20%
- (iii) Post 1986 20%

15. Thus in the period between 1974 and 1986, the Plaintiff's exposure to dust amounted to 60%, of her total exposure. Of this, 20% came from Amaca's products and 80% from her husband's work clothes at BHP.

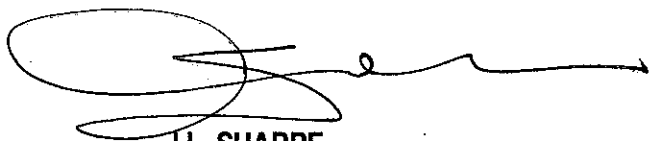
16. In order to determine the liability in this matter, I have had regard to the periods of exposure with each of the Defendants and weighed the intensity and severity of each exposure, and then I have applied the Standard Presumptions and varied them so that in the final analysis, I determine that the Standard presumptions should be varied as against BHP by increasing it by 20%. Of course such variation in the presumptions only applies to the 20% of the Plaintiff's exposure while her husband was employed by BHP.

17. Thus I determine the liability of the Defendants (after rounding off the figures) as follows:

(i) **Amaca** – 20% [being exposure prior to 1974] + 20% (being percentage of period of exposure 1974 to 1986) x 33% (time of exposure in Period B) x 45% (percentage after varying standard presumptions) + 80% (being period of exposure) x 66% (time of exposure in Period C) + 20% [exposure after 1986] = 52%

(ii) **BHP** - 48% [60% of 80% (being period of exposure) x 33% (time of exposure in Period B) x 55% (percentage after varying standard presumptions) + 60% (being period of exposure) x 66% (time of exposure in Period C) x 60% (percentage after varying standard presumptions) + 40% of the 80% of the Plaintiff's total exposure = 48%

18. Pursuant to clause 61(9) of the Regulations, I appoint Amaca as the Single Claims Manager.



J.L. SHARPE

Contributions Assessor

27 January 2010