

IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES

No.157 of 2009

BETWEEN: **ROBERT STANLEY-TURNER**
 Plaintiff

AND: **COCKATOO DOCKYARD PTY LIMITED**
 First Defendant

AND: **BHP BILLITON**
 Second Defendant

AND: **WALLABY GRIP LIMITED**
 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 Defendants.
2. Regulation 49 of the Regulations provides, so far as is relevant:

"49(4) The contributions assessor to whom a matter is referred is to determine the contribution that each defendant is liable to make and is to make such determination on the assumption that the defendants are liable and solely on the basis of:

 - (a) The plaintiff's statement of particulars and the defendant's replies to the claim; and
 - (b) Standard presumptions as to apportionment determined by the Minister for the purposes of this clause by order published in the gazette."
3. Regulation 47(1) provides: "A reference in this Division to a defendant includes a reference to a cross-defendant."
4. It can be seen from the above that regard can only be had to the statement of particulars provided by the Plaintiff and replies as filed by the Defendants, and not to any other document

(including the statement of claim). However, in this case the Plaintiff has provided an Affidavit and given evidence before the Tribunal, and I have had regard to the Affidavit and the evidence given before the Tribunal as being part of his statement of particulars.

5. 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.
6. In the present matter Robert Stanley-Turner (hereinafter referred to as “the Plaintiff”) has brought proceedings in the Dust Diseases Tribunal by way of Statement of Claim, which have been subsequently amended on 28 July 2009. By his Statement of Claim the Plaintiff alleges that
 - Between 1948 and 1953 he was employed by Cockatoo Dockyard Pty Ltd (hereinafter referred as to “Cockatoo”) and while so employed he worked as an apprentice fitter and turner and was exposed to asbestos-containing insulation products and was thereby exposed to asbestos dust and fibre.
 - Between about 1956 and 1957 the Plaintiff was employed by BHP Billiton Ltd (hereinafter referred to as “BHP”) as a marine engineer and, in the course of his employment, was exposed to asbestos dust and fibre when he worked in areas in which other workers handled, fit, cut, installed and removed asbestos-containing insulation product.
 - The Plaintiff alleges that he has suffered mesothelioma as a result of the aforesaid exposure to asbestos.
7. On 9 July 2009 the Plaintiff provided a Statement of Particulars, which disclosed exposure to asbestos between 1948 and December 1953 with Cockatoo, and with BHP, and between 28 August 1957 and 10 March 1958. Additionally, the Plaintiff had exposure to asbestos dust and fibre while employed with other employers, who are not parties to the current litigation.
8. In relation to Cockatoo, the Plaintiff’s Statement of Particulars particularises his exposure to asbestos with that company in the following way:
 - (i) He started working for them on 18 February 1948 and completed his apprenticeship on 18 December 1952.

- (ii) His duties at Cockatoo involved working on ships and submarines in the engine rooms, boiler rooms and other parts of ships, as well as working in the fitting/machine shop. The Plaintiff worked on naval ships and on Sydney ferries.
- (iii) There was asbestos lagging on the ships and the submarines and that he had to do repairs to the pipes and boilers and often had to remove the lagging by hand with a chisel.
- (iv) When he did this work the asbestos lagging used to crumble and was very dusty.
- (v) Other workers placed new asbestos lagging when the repairs had been finished and the Plaintiff worked in their vicinity.
- (vi) The Plaintiff did not wear a mask.

9. In relation to his employment with BHP, the Plaintiff's Statement of Particulars particularises:

- (i) On 23 September 1955 he obtained employment with BHP as an engineer.
- (ii) Between 23 September 1955 and 4 January 1956 the Plaintiff sailed with the SS Iron Yampi and again from 5 January 1956 to 22 February 1956. On the SS Iron Yampi all of the pipe work was lagged with asbestos and the boiler had asbestos on it. The Plaintiff did running repairs at sea from time to time, and when he did this he had to remove asbestos lagging from the pipes and the boilers to do the repairs and then put new lagging on the pipes. The lagging was removed by hand with a chisel, and it usually crumbled and broke away.
- (iii) Between 23 February 1956 to 14 March 1956 the Plaintiff served as the third engineer on the SS Iron Warrior and performed work similar to that as he had performed on the SS Iron Yampi.
- (iv) Between 16 March 1956 and 29 October 1966 the Plaintiff served as the third engineer on the SS Iron Baron and the Plaintiff was exposed to asbestos in the same way as he had described for the SS Iron Yampi.
- (v) Between 1 February 1957 to 17 June 1957 the Plaintiff served as the third engineer on the SS Iron Duke and was similarly exposed to asbestos dust and fibre.

10. The Plaintiff does not describe in detail in his Statement of Particulars the period of exposure, the number of occasions of exposure, and/or the frequency of his exposure, nor to the intensity of exposure.

11. The Plaintiff provided an affidavit sworn on 27 July 2009 which relevantly provides as follows:
- (i) On 18 February 1948 he commenced employment with Cockatoo and completed his apprenticeship there on 18 December 1952.
 - (ii) The Plaintiff's duties at Cockatoo involved working on ships and submarines in the engine rooms, boiler rooms and other parts of the ship as well as working in the fitting/machine shop.
 - (iii) The Plaintiff alleges that he spent 80% of his time working on the ships and submarines and almost always in the engine rooms and boiler rooms of ships.
 - (iv) The Plaintiff worked on a number of ships and submarines including naval vessels such as the daring class destroyers, HMAS Arunta, HMAS Voyager, MV Palana and submarines HM Tactician and HM Telemachos. The Plaintiff worked on other ships, but cannot remember their names.
 - (v) On every ship and submarine the Plaintiff worked on at Cockatoo asbestos insulation was used to insulate boilers, steam pipes, diesel lines and other hot vessels, and there was more asbestos insulation on the steam powered ships than the diesel powered submarines and the Plaintiff mostly worked on steam powered ships.
 - (vi) As an apprentice fitter and turner throughout his employment with Cockatoo, the Plaintiff worked closely with other tradesmen including master fitter and turners, electricians and ladders repairing and maintaining boilers, steam pipes and marine engines. The Plaintiff alleges that he had "almost daily" contact with and exposure to asbestos dust and fibre, and that the work was performed in enclosed spaces including boiler rooms, engine rooms as well as the double bottoms of a number of vessels.
 - (vii) In performing his work as an apprentice fitter the Plaintiff removed asbestos lagging with his hands, a hammer and chisel creating clouds of dust and other fitters and turners performed similar work next to the Plaintiff, and they also created clouds of dust. The asbestos lagging was left on the floor and was stirred up creating more dust when people walked on it.
 - (viii) The Plaintiff alleges that every day for an average of a few hours a day the Plaintiff was exposed to asbestos.
 - (ix) In performing his work, once the asbestos was removed, other fitters and turners repaired the metal surface or other parts.

- (x) In the course of the Plaintiff's employment he was exposed to asbestos dust and fibre when ladders mixed and re-applied asbestos to the boilers, steam pipes and other metal surfaces on which he had worked.
 - (xi) On 20 September 1955 the Plaintiff obtained employment with BHP as a marine engineer and while working for BHP the ships upon which he worked were all steam powered and carried iron ore from Yampi Sound to Port Kembla and finished steel from Port Kembla to Sydney. The Plaintiff's duties involved him maintaining and repairing boilers, steam pipes and engines and as a result was exposed to asbestos dust and fibre in the same fashion as he described in doing his work at Cockatoo. The Plaintiff describes his exposure aboard SS Iron Yampi, SS Iron Warrior, SS Baron and SS Iron Duke.
 - (xii) The Plaintiff does not describe the level of asbestos, the intensity of exposure or any other aspects of his asbestos exposure during his employment other than as particularised above.
12. On 6 August 2009 Cockatoo provided a reply and the relevant facts asserted by Cockatoo are as follows:
- (i) Cockatoo admits that employed the Plaintiff as an apprentice fitter from 18 February 1948 to 18 December 1952.
 - (ii) While asbestos was used at Cockatoo and on vessels during the material period, Cockatoo is unable to determine that the Plaintiff was exposed as alleged to asbestos.
 - (iii) Cockatoo disputes the Plaintiff's allegations as to exposure, given that it is inconsistent with the rigid demarcation between trades at the dockyard and disputes particular allegations of exposure including HMAS Voyager which did not have work carried out during the Plaintiff's period of employment.
 - (iv) The potential exposure of the Plaintiff was minimal.
 - (v) The Plaintiff was employed between 18 February 1948 to 11 January 1950 in the "apprentice training department" and that during such a period there was no potential exposure to asbestos dust and fibre.
 - (vi) Between 12 January 1950 to 19 March 1950 the Plaintiff was employed in the "machine shop" and Cockatoo believes that there would have been no potential exposure to asbestos dust and fibre during that portion of the material period.

- (vii) From 20 March 1950 to 13 January 1952 the Plaintiff was employed in the turbine shop and the Plaintiff would have spent the majority of the period working within the turbine shop and not on board vessels. During this period if there were exposure to asbestos it would only be of a "minor or bystander nature" and of short duration.
 - (viii) From 14 January 1952 to 18 December 1952 the Plaintiff was employed in the "engineering drawing office" and there was no potential exposure to asbestos dust and fibre during that period.
 - (ix) The transcript of the proceedings of 31 July 2009 reveal that the Plaintiff's allegations as to exposure, intensity and duration are incorrect and, in particular, did not spend 80% of his time working in the engine or boiler rooms of ships and submarines.
 - (x) In his evidence the Plaintiff alleged that he spent about 20% of his time while working for Cockatoo in the fitting and turbine shops and that 80% of his time was spent on ships.
 - (xi) When in his oral evidence the Plaintiff was confronted with the use of the 80% figure of time being spent on ships and submarines the Plaintiff persisted in asserting that it was approximately 80% of his time that he was on ships.
 - (xii) Cockatoo and BHP should be placed in Category 2, and WGL should be placed in Category 1.
 - (xiii) The standard presumption should not be varied on the basis of the identity, capacity, size or status of any particular Defendant.
 - (xiv) Cockatoo's period of employment represents 55.24% of the total time and risk, and BHP employment represents 44.76% of the time and risk.
 - (xv) The apportionment should be Cockatoo 13.81%, WGL 41.43% and BHP 44.76%.
13. BHP provided a reply dated 6 August 2009 which asserted the following:
- (i) BHP should be regarded as an innocent Defendant.
 - (ii) Cockatoo and BHP should be placed in Category 2. WGL should be placed in Category 1.
 - (iii) The standard variation should not be varied in relation to Category 2 Defendants and indeed all parties.
 - (iv) The BHP exposure was minimal.
 - (v) Cockatoo's exposure was 48 months on a daily intense basis.
 - (vi) On a temporal basis BHP's exposure was 18 months, and therefore the exposure should be split with Cockatoo as to 70% and 30%.

- (vii) On the BHP ships his exposure at most would have occurred only on occasions by reason of boiler requiring repair. This does not take into account the Plaintiffs presence on board ship while under steam, in confined areas, and the consequent exposure on a daily basis to asbestos dust and fibre.
 - (viii) BHP exposure should be dismissed as de minimis, although by way of concession 1% apportionment is appropriate.
14. Cockatoo issued a Cross-Claim against Wallaby Grip Ltd (hereinafter referred to as "WGL"). Cockatoo alleges that WGL supplied products containing asbestos and those products were used at Cockatoo and on vessels on which the Plaintiff claims to have worked and, accordingly, seeks contribution under s.5 of the *Law Reform (Miscellaneous Provisions) Act 1946*.
15. WGL has provided a reply dated 6 August 2009 and the relevant facts are asserted as follows:
- (i) The only Bells product, which the Plaintiff was familiar with, was a form of gasket or sealer, which was only used when "joining pipes".
 - (ii) At no point in the Plaintiff's affidavit, Statement of Particulars or transcript of evidence does the Plaintiff state that the asbestos composition to which he was exposed was supplied by WGL.
 - (iii) WGL should be placed in Category 1.
 - (iv) Cockatoo was a sophisticated builder and repairer of large marine vessels in that it employed its own lagging installation should be placed in Category 1 as an installer and Category 2 as an employer/occupier.
 - (v) BHP should be placed in Category 2.
 - (vi) The standard presumption should be varied as against Cockatoo as a Category 2 Defendant to the maximum of 20 percentage points. In support of this, reliance is placed upon the decision of *David Charles Browne v Cockatoo Dockyards Pty Ltd* (1999) NSWDDT 22 per Johns J at paragraph 22.
16. 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.

17. Based on the material available to me, the periods of exposure can be seen to be:
- (i) Between 18 February 1948 and 18 December 1952 Cockatoo employed the Plaintiff. This represents a period of 4 years and 10 months (58 months).
 - (ii) Between 23 September 1955 and 17 June 1957 the Plaintiff was employed by BHP. This period is a period of 21 months.
18. The total periods of employment do not have regard to the duration of and the intensity of exposure to asbestos present in each such period.
19. In respect of the Cockatoo period of employment, the Plaintiff asserts 80% of his time being directly exposed to asbestos dust and fibre. Cockatoo disputes this, and provided cogent reasons as to why there should be a substantial reduction in the 80% assessment. On the basis of the material presently before me, but having regard to the Plaintiff's assertions, I have concluded that the period of exposure, having regard to the duration of and the intensity of exposure to asbestos is approximately 40 months.
20. In so far as WGL is concerned, on the information before me, only half of the Plaintiff's exposure can be brought home to WGL. WGL cannot be said to be the only supplier to Cockatoo. Doing the best I can, 50% of the supply to WGL was provided by Cockatoo and the balance either unknown or from other sources which are otherwise known to Cockatoo. Accordingly, of Cockatoo's exposure, 50% of it is to be borne by Cockatoo as a Category 2 Defendant and 50% is to be divided between Cockatoo as to 25% and 75% to WGL.
21. In respect of the BHP period of employment, the Plaintiff asserts being directly exposed to asbestos dust and fibre. BHP disputes this, and provided cogent reasons as to why there should be a substantial reduction in the Plaintiff's assessment. On the basis of the material presently before me, but having regard to the Plaintiff's assertions, I have concluded that the period of exposure, having regard to the duration of and the intensity of exposure to asbestos is approximately 10 months.
22. Thus, the total period of exposure in relation to the Defendants in the present proceedings is a period of 55 months and the contribution between the two periods is determined as to:

- (i) The period of employment with Cockatoo is approximately 80% having regard to the duration of and the intensity of exposure to asbestos; and
 - (ii) The period of employment with BHP is 20% of the total period of exposure having regard to the duration of and the intensity of exposure to asbestos.
23. Both periods of employment fall within period A.
24. In respect of the periods of employment being within period A of the Standard Presumptions Order and thus the Category 1 Defendants are presumed to be 75% liable and the Category 2 Defendants 25% liable.
25. I determine that Cockatoo and BHP each fall into Category 2 and WGL falls into Category 1.
26. The question then arises as to the contribution between Category 1 and Category 2 Defendants, which, according to the standard presumption, is to be on the basis of 75% and 25%.
27. In the present case, the standard presumptions take into account the various aspects of the liability of Cockatoo and WGL and, accordingly, there should be no variation in the standard presumptions.
28. On the basis of the determinations as to exposure above, it seems to me that the following calculation can be made:
- (i) The period of employment with Cockatoo represents approx 40 months.
 - (ii) The period of exposure with BHP is approximately 10 months.
29. Thus, the following calculation can be made:
- (i) Cockatoo bears
 - a. $25\% \text{ of } 50\% \text{ of } 80\% = 10\%$

b. 50% of the 80% = 40%

Thus Cockatoo bears 10% + 40% = 50%


(ii) WGL bears 75% of 50% of 80% = 30%.

(iii) BHP has a total of 20%.

30. I therefore determine the total liability of the Defendants and Cross-Defendants as follows:

Cockatoo	50%
WGL	30%
BHP	20%

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



J.L. Sharpe

10 August 2009