



HIGH COURT OF AUSTRALIA

22 June 2011

DASREEF PTY LIMITED v HAWCHAR [2011] HCA 21

Today the High Court upheld findings by the Dust Diseases Tribunal of New South Wales ("the Tribunal") and the Court of Appeal of New South Wales that a company (Dasreef Pty Limited) was liable to pay compensation to one of its former workers (Mr Hawchar) for silicosis. The High Court found that the Court of Appeal had erred in rejecting complaints by Dasreef about the admission of opinion evidence by the Tribunal and the Tribunal's reliance on its own experience as a "specialist tribunal". However, the High Court held that in light of other uncontradicted evidence before the Tribunal the Court of Appeal was right to uphold the finding that Dasreef was liable to Mr Hawchar.

Mr Hawchar worked for Dasreef as a labourer and stonemason over a period of around five and a half years between 1999 and 2005. He was diagnosed with early stage silicosis in 2006. He brought proceedings in the Tribunal, claiming that he had been exposed to unsafe levels of silica dust while working for Dasreef. Mr Hawchar relied on opinion evidence from Dr Kenneth Basden, a chartered chemist, chartered professional engineer and retired academic. At the time Mr Hawchar was working for Dasreef, a standard prescribing the maximum permitted exposure to respirable silica was applicable. In his report, Dr Basden spoke of an operator of an angle grinder cutting sandstone being exposed to levels of silica dust "of the order of a thousand or more times" the prescribed maximum. The Tribunal and the Court of Appeal took this evidence as expressing an opinion about the numerical or quantitative level of exposure to respirable silica encountered by Mr Hawchar, in the sense that it could form the basis of a calculation of the level of exposure.

Section 79(1) of the *Evidence Act* 1995 (NSW) ("the Evidence Act") provides that "[i]f a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge." The "opinion rule" contained in s 76(1) of the Evidence Act provides that "[e]vidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

For a witness to give admissible evidence of an opinion about the quantitative level of Mr Hawchar's exposure in the conditions under which he worked it would have to be shown that the witness had specialised knowledge based on their training, study or experience that permitted them to measure or estimate such a figure and that the opinion about the level of exposure was wholly or substantially based on that knowledge. In this case, Dr Basden did not give evidence asserting that his training, study or experience permitted him to provide anything beyond a "ballpark" figure estimating the amount of respirable silica dust to which a worker, when cutting stone with an angle grinder, would be exposed. The witness had seen an angle grinder used in that way only once before. He gave no evidence that he had ever measured, or sought to calculate, the amount of respirable dust to which such an operator would be exposed. The evidence was not admissible to establish the numerical or quantitative level of exposure.

The Tribunal also stated in its reasons that it was, as a "specialist tribunal", permitted to take into account its "experience" that silicosis is "usually caused by very high levels of silica exposure" in determining what caused Mr Hawchar's silicosis. The *Dust Diseases Tribunal Act 1989* (NSW) provided that, subject to specific exceptions in that Act or the *Dust Diseases Tribunal Rules* (NSW), proceedings in the Tribunal are governed by the rules of evidence. The High Court held that no exception was engaged in this case and that the Tribunal therefore erred in taking its "experience" into account in determining the cause of Mr Hawchar's silicosis. The Court of Appeal had erred in reaching the same conclusion as the Tribunal.

Notwithstanding the findings of error in the approach of the Tribunal and the Court of Appeal, the High Court dismissed Dasreef's appeal. It held that, in light of the undisputed expert evidence that Mr Hawchar was suffering silicosis, evidence as to the cause of the silicosis and the short latency of the disease, and evidence of readily available means of avoiding injury, the Court of Appeal was correct, in the event, to dismiss Dasreef's appeal against the finding of liability.

Dasreef was ordered to pay Mr Hawchar's costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*