Looking behind the award

Hunt's compensation award had been made, by consent between Hunt and his former employer, by the South Australian Industrial Court. The order of the court described almost all of the award as made under ss.69 and 70 of the *Workers' Compensation Act* (the balance was a payment for medical expenses and consideration for Hunt waiving any common law rights).

Sections 69 and 70 of that Act provide for compensation for certain permanent injuries; and s.69(2) provides that any compensation paid under these sections does not include compensation for any prior incapacity arising out of the worker's injuries.

Despite the terms of Hunt's award, and the specific provision in s.69(2) of the *Workers' Compensation Act*, the DSS maintained that the Secretary could treat part of Hunt's compensation award as a payment 'in respect of an incapacity for work', so as to allow the DSS to calculate a 'lump sum period' and recover the benefits paid to Hunt. That is, the DSS argued that the terms of the award were not conclusive, and the Secretary (and the AAT) could look behind the award to determine the real basis for the compensation.

The AAT referred to the Federal Court's decision in *Siviero* (1986) 68 ALR 147, which the Tribunal said required that the compensation award and the social security benefits received by a person be paid for the same incapacity and the same period, before the benefits could be recovered from the person.

The Tribunal referred to the decision in *Cocks* (1989) 48 *SSR* 622, where the AAT had said it was proper for the Secretary to go behind the terms of a compensation award (particularly one made by consent), to see if the compensation was really paid for the same incapacity and the same period as any social security benefits.

A different view had been expressed by the AAT, the Tribunal noted, in *Littlejohn* (1989) 49 *SSR* 637. In that case, the AAT had said that the Secretary could not go behind the compensation award if it gave the appearance of having been made under a statutory scheme of compensation and the facts known at the time of the award provided a basis on which it could have been made.

However, in the present case, the Tribunal rejected the approach taken in *Littlejohn*: 'I do not consider that the Tribunal's decision in *Cock's* case bears this more narrow interpretation': Reasons, para. 21. The power of the Secretary and the AAT to determine the real basis of a compensation payment could not be restricted by a consent award, which only bound the parties who had agreed to the award. The Tribunal said that it adopted 'the wider view' of the Secretary's power expressed in *Cocks*: Reasons, para. 22.

The Tribunal's assessment

The Tribunal then examined the medical evidence relating to Hunt's condition at the time of the consent award. It accepted the opinion of Hunt's treating doctors that Hunt had some residual incapacity in his back at the time of the award; but this was a temporary disability and not a permanent injury. The AAT said that it was satisfied that Hunt had received compensation for the same incapacity as his payments of special benefit, and that the award had included compensation for lost earnings between March and November 1987 — the period in which he had been paid special benefit.

It followed that the benefits paid to Hunt were recoverable under s.153(2) of the *Social Security Act*.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Recovery of sickness benefit: compensation for 'same incapacity'

SECRETARY TO DSS and MANATAKIS
(No. 5569)
Decided: 21 December 1989 by B.H. Burns, B.C. Lock and D.B. Williams.

The DSS appealed against an SSAT decision to vary a DSS decision made in September 1988 that $8606 was recoverable from Artemis Manatakis because he had received sickness benefit and a compensation payment.

The legislation

At the time of the decision, s.115B(3A) of the *Social Security Act* gave the Secretary power to recover sickness benefits paid to a person for an incapacity, where the Secretary was of the opinion that the person received a compensation payment which was in whole or in part 'in respect of that incapacity'.

The evidence

Manatakis was injured at work in July 1986. He was paid sickness benefit from 4 August 1986 until 9 December 1987. On 10 December 1987, he was granted an invalid pension.

Manatakis settled a worker's compensation claim on 9 March 1988. The terms of the consent order provided that $40 000 be paid to Manatakis as assessment of compensation under ss.69 and 70 of the *Workers' Compensation Act* (SA) for the injury and $100 as redemption of liability for future expenses (ss.72 and 59); all past medical expenses were to be paid by the employer and claims for past weekly payments were to be dismissed; and $7400 was to be paid in consideration of Mantakis not bringing any common law proceedings.

The question before the Tribunal was whether the $47 500 was 'in whole or in part a payment by way of compensation in respect of the same incapacity for which sickness benefits were paid'.

The AAT referred to *Siviero* (1986) 68 ALR 147 and *Cocks* (1989) 48 *SSR* 622. It noted that payments under ss.69 and 70 of the South Australian Act were, *prima facie*, paid for injury rather than incapacity for work. However, the AAT said that its role was to assess all the available evidence to decide whether the consent award was made in respect of the same incapacity for which sickness benefit had been paid.

The AAT held that Manatakis had suffered injuries causing him severe restriction of movement in his right arm, hand, shoulder and neck and that he suffered from a severe depression in consequence of his inability to find work. These injuries were, in the Tribunal's view, permanent at the time the consent award was made and resulted in an incapacity for work.

Given the power to award compensation for injury under ss.69 and 70 of the South Australian *Workers' Compensation Act*, the AAT concluded that no part of the lump sum award of $40 000 was 'in respect of incapacity, let alone the same

incapacity for which sickness benefits were paid'. The $100 paid in respect of Manatakis' future medical expenses was justified, and was not a sum paid 'in respect of the same incapacity for which sickness benefits were paid'.

The AAT concluded that the $7400 paid in consideration of Manatakis not bringing common law proceedings was also not a payment in respect of the same incapacity for which sickness benefits were paid. To conclude that this speculative common law claim could include a claim for economic loss did not allow any realistic assessment of its success or the amount for which a claim could be made. (This was contrary to the SSAT decision which had decided that some portion of the claim would be for economic loss).

Formal decision

The Tribunal set aside the SSAT decision and subsitituted for it a decision that no part of the $47 500 lump sum was in whole or in part a payment by way of compensation in respect of the same incapacity for which sickness benefit was paid.

[J.M.]

Compensation award: looking behind award

SECRETARY TO DSS and CAVALERI (No.5573)

Decided: 21 December 1989 by B.H. Burns, D.B. Williams and D.J. Trowse.

The Secretary appealed against an SSAT decision setting aside a DSS decision to preclude Cavaleri from receiving invalid pension for 26 weeks from the date Cavaleri had received a lump sum compensation payment from his employer.

The South Australian Industrial Court had ordered by consent that Cavaleri's employer pay him $25 000 for an injury received in a car accident. The DSS had taken 50% of this amount to reach the 26-week preclusion period.

The legislation

Sections 152 and 153 of the *Social Security Act* govern pension payments that commence after 1 May 1987 and payments by way of compensation that are wholly or partly in respect of an incapacity for work received after 1 May 1987 (s.152(1) & (2)(a)).

Section 152(2)(e) provides that where a lump sum payment was made 'in settlement of a claim' on or after 9 February 1988, 50% of that amount is to be considered as the 'compensation part of a lump sum payment'. Otherwise, the 'compensation part' is to be determined by the Secretary.

Section 152(2)(c) provides for the calculation of a lump sum payment period by dividing the compensation part of a lump sum by average male weekly earnings.

Section 153 provides that a person will be precluded from receiving pension during a period calculated on the basis of the 'compensation part' of any lump sum compensation payment, whether before or after becoming qualified for pension.

A 'payment by way of compensation'?

The AAT found that Cavaleri was entitled to receive an invalid pension at all relevant times; that he received a lump sum compensation payment prior to his application for invalid pension and that the money he received was a 'payment by way of compensation' given that it was a payment under a scheme of compensation provided by South Australia (see s.152(2)(a)(ii) and (iii)).

A 'lump sum'?

The AAT then went on to consider whether Cavaleri had received a 'lump sum' by way of compensation. It noted that 'lump sum' was not defined in the Act but after checking the definition (which defined lump sum as a number of items taken together or in the lump), found that Cavaleri had recieved such a lump sum because the $25 000 had included components paid for different purposes under ss.69, 70 and 72 of the South Australian *Workers' Compensation Act*.

A payment for 'incapacity for work'?

The crucial question was whether the payment was in whole or in part 'in respect of an incapacity for work'.

The AAT relied on the Federal Court decision in *Siviero* (1986) 68 ALR 147, which had considered ss.69 and 70 of the *Workers' Compensation Act*. The Court had decided that payments under these sections were in respect of injury, not in respect of incapacity for work; 'injury' and 'incapacity for work' were separate concepts.

The AAT said that the *Social Security Act* required that the payments would be 'in respect of an incapacity for work' if —

> 'the incapacity for work has directly resulted in some form of financial loss either actual or potential which in turn has been compensated.'

(Reasons, p. 8)

The AAT said that, on its face, the award did not evince this connection. However, it noted with approval the decision in *Cocks* (1989) 48 *SSR* 622 which, according to the Tribunal, allowed it to go behind the award and look at all the evidence (regardless of whether either party asked it to do so).

In examining the medical evidence the AAT found that Cavaleri had suffered extensive injuries in a car accident and had some permanent residual disabilities. Given these injuries, the amounts said to be awarded under ss.69 and 70 of the *Workers' Compensation Act* were not excessive. It concluded therefore, that the amount awarded by consent by the South Australian Industrial Court was in respect of injury rather than in respect of incapacity for work.

Formal decision

The Tribunal affirmed the decision of the SSAT.

[J.M.]

Residence in Australia: time limit for appeal to AAT

SECRETARY TO DSS and PESU (No. 5614)

Decided: 21 December 1989 by S.A. Forgie, J.D. Horrigan and W.A. De Maria.

The Secretary asked the AAT to review an SSAT decision to pay Martta Pesu age pension from the date of her claim in June 1984.

As well as challenging the substantive issue of whether Mrs Pesu was residentially qualified for payment of age pension, the Secretary also sought review of the SSAT decision to pay arrears, on the ground that she had not lodged her application for review to