to shearing without success because of back pain.

Medical evidence put to the Tribunal on Wehrstedt's behalf indicated he was not fit to engage in any work which involved lifting or bending. His treating general practitioner described him as 'crippled for life'. Wehrstedt also had Bell's palsy which paralysed the right side of his face.

A general practitioner, Dr Haynes, examined Wehrstedt for the DSS in May 1991 and assessed an impairment rating of 10%. He described Wehrstedt's level of incapacity as fairly mild and said he was involved in fairly heavy manual work on his farm. He conceded he had no idea what the duties were which he considered Wehrstedt to be carrying out.

Findings

The Tribunal decided that the evidence did not support Dr Haynes' claims which it discounted. It found the medical evidence established a significant back disability which totally incapacitated Wehrstedt from returning to his former occupation of labourer or shearer. Apart from his medical impairment, he had no skills or qualifications for other work and there was no evidence of any reasonably accessible work within his capacity. He was living in an isolated area and his back impacted upon his ability to travel. The Tribunal found him to be more than 85% permanently incapacitated for work and that at least half of the incapacity was as a result of the back condition.

Formal decision

The Tribunal set aside the decision under review and substituted a decision that Wehrstedt was qualified for the purposes of s.27 of the *Social Security Act* to receive an invalid pension.

[B.W.]

KENT and SECRETARY TO DSS

(No. T90/35)

Decided: 12 August 1991 by M.D. Allen.

Kent (who was unrepresented before the Tribunal) sought review of a decision to cancel his invalid pension. He was 39 years of age, resident of Saltwater River on the Tasman Peninsula and residing with his widowed mother. He had left school at the age of 14 or 15 after having repeated first year high school. He had worked in a series of labouring jobs, as a deckhand on fishing trawlers and driving vehicles. Whilst employed as a council labourer he injured his back. A further back injury occurred when he was employed by a construction company.

Kent was able to engage in some domestic chores and had a licence to drive a semi-trailer but experienced back pain which precluded any driving work. He told the Tribunal that pain prevented him from working. He had looked for work without success in other parts of Tasmania and considered himself to be in a better financial and emotional position residing with his mother, as they depended upon each other.

His orthopaedic surgeon, who had seen him in 1982 and in 1991, reported a back injury and spinal surgery in the early 1970s with some improvement of symptoms. He considered Kent was unable to undertake heavy work as a labourer but could undertake lighter duties. He assessed an incapacity 'of the order of 50%'.

Place of residence

The Tribunal found Kent's desire to continue to live at Saltwater Peninsula 'understandable' but considered his place of residence compounded his difficulties. He resided in an area where the principal occupations are fishing, farming or timber getting all of which require a high degree of physical ability. He had no clerical or other skills—

> 'yet the medical evidence is such that he is most certainly unfit for day-to-day work in a labouring type occupation. In addition, having already been the recipient of workers compensation it is extremely unlikely that he would be able to attract an employer who is prepared to engage and remunerate him. This is all the more so in the time of economic recession (if not depression). . . . On the other hand the medical evidence makes it clear that the applicant is capable of light work if such work existed in his locality.'

The Tribunal said Kent 'cannot expect the tax-payer to subsidise his semi-retired lifestyle in an area of quiet natural beauty with low economic activity'. It said if light work was not available at Saltwater River or on the Tasman Peninsula the remedy was in Kent's own hands and he must be prepared to move to where work was available.

Formal decision

The Tribunal affirmed the decision to cancel invalid pension.

[B.W.]

Overpayment: benefits not claimed or received

FARRAR and SECRETARY TO DSS

(No. 7191)

Decided: 31 July 1991 by Mr K.L. Beddoe.

The question for decision was whether the applicant had been overpaid sickness benefits totalling $1179.

The legislation

Section 246 of the *Social Security Act* 1947 provides for recovery of overpayments made in consequence of false representations. Section 246(2) provided in part that where an amount has been paid by way of benefits under the Act that should not have been paid and the person to whom that amount was paid is receiving benefits under the Act then the amount is to be recovered by amounts deducted from those benefits.

The evidence

Between August 1982 and April 1984, 5 duplicate cheques had been issued by the DSS on Applications for Duplicate Cheque forms allegedly signed by Farrar. On each occasion, both the original and the duplicate cheques had been negotiated for cash or deposited to the credit of Farrar's bank account at branches of the Commonwealth Bank in suburban Sydney. The cheques had been endorsed with a signature purporting to be that of Farrar.

On one occasion in October 1982 a driver's licence purporting to be that of Farrar was exhibited when a duplicate cheque was negotiated. Farrar denied having held a driver's licence at the time, but this was contradicted by a letter from VicRoads certifying that Farrar's licence was re-issued in May 1982 and remained current until May 1985.

Farrar denied having received the cheques or indeed any payments from the DSS in the period. He said that he had not applied for nor received benefits. The DSS was unable to produce the relevant applications for benefit which it alleged had been lodged by Farrar.

Farrar gave evidence, corroborated by his uncle, that he was at all relevant times in employment in Victoria, and that he had seen his wife's father forging documents.

Discussion

The AAT found that it was more likely than not that the benefits paid between 1982 and 1984 were all paid to some person or persons unknown (not being Farrar) as a result of fraud on the part of that person or those persons. Since there had been no payment to Farrar, there was no amount to be recovered from him.

Formal decision

The AAT set aside the decision under review and substituted a decision that Farrar was not liable to repay any overpayment of benefits in relation to the period August 1982 to April 1984.

[P.O'C.]

Sickness benefit: otherwise qualified for unemployment benefit

KELVIN WALKER and SECRETARY TO DSS

(No. Q89/145)

Decided: 21 June 1991 by Bulley, J.

This was the rehearing by the AAT of the application following the decision of Spender J. of the Federal Court given 30.10.91 to set aside the AAT's decision of 31 January 1991 and to remit for rehearing.

The AAT and the SSAT had affirmed the Department's decision to refuse sickness benefits. The applicant had claimed sickness benefit on 8 November 1988. In support of his claim he had furnished a medical certificate stating that he was suffering from chronic anxiety depression and would be unfit for work up to 13 January 1989.

The applicant had received sickness benefits from 1979 until October 1987, when he worked for 10 days under contract as a supervising diver. He then registered with the CES, but did not claim any further benefit until 8 November 1988. Whether he was unemployed and seeking work in that intervening period was one of the issues raised by the Department.

The Department's case was that the applicant had not established that he was incapacitated for work, nor that he was genuinely willing to work and genuinely seeking work. However the Federal Court found that this case had not been put to the applicant in cross-examination by the respondent.

The legislation

Section 117(1) relevantly provided that a person is qualified to receive sickness benefit if the person satisfies the Secretary that throughout the relevant period he was temporarily incapacitated for work by reason of sickness or accident and that he would, but for the incapacity, be qualified to receive unemployment benefit.

To be qualified for unemployment benefit the person had to satisfy the Secretary that

> '(i) throughout the relevant period he was unemployed and was capable of undertaking, and was willing to undertake, paid work that, in the opinion of the Secretary, was suitable to be undertaken by the person; and
>
> (ii) he had taken, during the relevant period, reasonable steps to obtain such work' (s.116(1)(c).

The rehearing by the AAT

On the rehearing, the applicant was cross-examined and the Department's case put to him. The AAT was impressed by his responses and found that he was not involved in any work-related activity after October 1987 due to illness. The tribunal accepted Walker's evidence that

> '... he had a genuine willingness to work, to undertake work, and to seek work - a willingness not able to be fulfilled only due to his incapacity to work because of his illness.'

The AAT set aside the decision under review and substituted a decision that Walker be paid sickness benefit from 20 October 1988.

[P.O'C.]

Unemployment benefit: reducing employment prospects

SECRETARY TO DSS and CLEMSON

(No. A91/89)

Decided: 2 August 1991 by P.W. Johnston.

Sandra Clemson was working in Sydney until 27 February 1991, when she was retrenched. The following day she moved to Young because she did not wish to continue to live with her parents and because her boyfriend and his parents lived in Young.

On 8 March 1991, Clemson lodged a claim for unemployment benefits at the Orange Regional Office of the DSS. The DSS decided that Clemson had reduced her employment prospects by moving her place of residence and imposed a 12 week non-payment period on her.

On review, the SSAT set aside that decision; and the DSS asked the AAT to review that decision.

The legislation

Section 116(6A) of the *Social Security Act* 1947 provided that a person was not qualified for unemployment benefit 'on a day on which the person reduces his or her employment prospects by moving to a new place of residence without sufficient reasons for the move'.

Section 126(1)(aa), with s.126(4), had the effect of providing that unemployment benefit was not payable to a person for a period of 12 weeks where the person 'has reduced his or her employment prospects by moving to a new place of residence without sufficient reasons for the move'.

The range of reasons which are accepted as sufficient for moving residence was set out in s.116(6B) of the Act. Those reasons did not include the reasons which prompted Clemson's move to Young.

The SSAT's decision

The SSAT had allowed Clemson's appeal and set aside the DSS decision on the ground that neither s.116(6A) nor s.126(1)(aa) was intended to apply to a person who changed her or his place of residence prior to claiming unemployment benefits.

The SSAT said that the meaning of the provisions was obscure because there was 'no relationship in time expressed in the sections between the change of residence on the one hand and making of the claim for UB on the other', so that s.15AB of the *Acts Interpretation Act* 1901 permitted reference to the explanatory memorandum and the Minister's second reading speech which had accompanied the Bill which added the provisions to the *Social Security Act*.

The explanatory memorandum had referred to the DSS cancelling a person's unemployment benefit from the day of the person's move to a new place of residence, as did the Minister's sec-