view was whether the discretion to make that recovery should be exercised. The Tribunal said that, in deciding to make recovery under s.140(2), there were several factors to be taken into account:

- Poursanidis had received public moneys to which she was not entitled;
- Poursanidis would not suffer undue financial hardship as a result of the recovery;
- the overpayment was entirely due to DSS error;
- Poursanidis was entirely without fault and had acted in complete good faith; and
- the family allowance, from which the DSS had recovered the overpayment, was payable to Poursanidis for her daughter D: in the light of s.105, that recovery was 'inconsistent with the purpose of s.140(3)'.

The AAT decided that, in the circumstances of this case, the factors against recovery outweighed the factors in favour of recovery.

Could recovery be 'reversed'?

The AAT said that, if the present review had come up for decision before the DSS had made recovery of the overpayment, the Tribunal would have had no hesitation in setting aside the decision to recover. However, the DSS had made full recovery of the overpayment and it was, at least, doubtful whether the power to make a refund of money legally received by the Director-General. (The AAT noted that this question had also arisen in *Castronuovo*, also noted in this *Reporter*.) However, the AAT said, that problem did not directly arise here: the DSS had an obligation to pay family allowance to Poursanidis for her daughter, D; and the AAT had the power to direct that the DSS discharge that obligation – that is, pay to Poursanidis the family allowance for D which had been withheld.

The AAT then discussed the question whether it should exercise its power to make that direction:

> The money which was withheld was required to be provided to [Poursanidis] for her to spend on D. If it is paid now, she will be obliged to apply it to the maintenance, training and advancement of D; whatever obligation she may ever have had to repay the amount which was overpaid to her in respect of K will remain. As the withholding was commenced after the applicant appealed against the initial decision, was continued after the SSAT had recommended that there should be no recovery and was persisted with after the applicant had applied to the AAT for review of the affirming decision, and as the applicant was never informed that she might apply for a stay of the implementation of the decision to make the recovery, it would, I consider, be entirely appropriate for the Tribunal now to direct that the money withheld be paid to the applicant.
>
> (Reasons, para. 27)

Criticism of DSS action

The Tribunal said that the decision by the DSS to implement recovery while its decision was being reviewed by the SSAT and the AAT 'was entirely contrary to the spirit in which social welfare legislation is intended to be administered'.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction not to recover the overpayment; and a direction to pay to Poursanidis the full amount of the withheld family allowance for D.

CRAIG and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W84/4)

Decided: 21 June 1984 by G.D. Clarkson.

The AAT *affirmed* a DSS decision to recover an overpayment of sickness benefit. Craig had been paid sickness benefit between May and July 1981. In that period, his bank account had been credited with payment for consultancy work done before his illness; but Craig did not discover these payments until July 1981 when he immediately advised the DSS. The DSS at first considered waiving recovery but in August 1983 decided to pursue recovery.

The AAT said that Craig had failed to notify the DSS 'immediately on receipt of income' and this had caused overpayment of sickness benefits. The overpayment was accordingly, recoverable under s.140(1) of the *Social Security Act*.

Neither the 'inordinate' delay on the part of the DSS (in pursuing recovery), the good faith of Craig, the fact that he notified the DSS as soon as practicable nor his claim of financial hardship was sufficient ground for the exercise of a discretion to waive recovery: 'The fact remains, however,' the AAT said, 'that the applicant has been paid public moneys that he should not have received.'

Sickness benefit: total and temporary incapacity

SHEARIM and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q83/91)

Decided: 22 June 1984 by R.K. Todd.

Victor Shearim had been granted sickness benefit in November 1980 after injuring his back. He was then aged 32.

In April 1982, the DSS cancelled Shearim's sickness benefit and granted him an unemployment benefit. Shearim asked the AAT to review that decision.

Sickness benefit: temporary and total incapacity

Sickness benefit is payable to a person who satisfies the Director-General that he or she is temporarily 'incapacitated for work by reason of sickness or accident . . . and that he has thereby suffered a loss of salary, wages or other income': s.108 of the *Social Security Act*.

Evidence given by medical specialists and by an occupational therapist established that Shearim was permanently incapacitated for work. The occupational therapist, upon whose evidence the AAT relied, said that Shearim 'would not be capable of going back to any type of employment, either on a full-time or even a part-time basis.'

The AAT said that Shearim's eligibility for sickness benefit should be looked at in the light of his situation in April 1982. (The AAT distinguished this approach from the approach involved in review of invalid pension decisions, where 'the criterion of permanent incapacity would make it most undesirable for the Tribunal not to have regard to the progress of the applicant's medical condition and employment prospects up to the date of hearing.')

The Tribunal said that it was doubtful whether, in April 1982, Shearim was qualified for sickness benefit: his incapacity for work had not been total, as s.108 required. Moreover, it was likely that, at that time, Shearim's incapacity had not been temporary but permanent.

The AAT said that, in assessing eligibility for sickness benefit, the real question was 'a global one' rather than a series of questions (dealing with 'incapacity', 'sickness or accident', and the 'temporary' character of the incapacity):

> Was the applicant for any period prior to the date of cancellation temporarily incapacitated for work by sickness or accident? So stated, concentration is focused on whether he fell within the total parameters of entitlement to sickness benefit , a benefit intended for those suffering short-term loss of income because they are too sick or injured to work but who can be expected to recover: See the citation from *Re Alchin* paragraph 13 above. As far as the present applicant is concerned, he was no doubt an appropriate beneficiary of sickness benefit in these terms for some time after his initial accident. But at some later stage a situation must on the evidence have been reached in which his condition was static and the extent of his incapacity crucial. At this point, whenever it was, the appropriateness of sickness benefit was exhausted, and the options were unemployment benefit or invalid pension. This point of exhaustion had in my view plainly been reached by April 1982, and probably much earlier. Cancellation of sickness benefit was thus a proper course and the decision so to cancel must be affirmed, but on the footing that it should probably have been made some time earlier. But the real difficulties flow from there. When it was cancelled the assumption was made that reversion to unemployment benefit was appropriate, but it would in my opinion have been preferable to inform the applicant that while it was intended to return him to unemployment

benefit the option was available to him to apply for invalid pension.

(Reasons, para. 19)

Eligibility for invalid pension

The AAT said that when a sickness benefit was cancelled because the beneficiary was no longer fully incapacitated for work, the question of eligibility for invalid pension could arise.

In Shearim's case, the nature of his injury ('structural problems of the spine . . . do not heal readily') and the long period of his receipt of sickness benefits (17 months) strongly suggested that he should at least have been invited to apply for invalid pension.

The AAT expressed the opinion that Shearim was qualified for invalid pension: the nature of his physical impairment and his limited work skills (confined to heavy physical work) combined to produce at least 85% permanent incapacity for work. However, the AAT said that it could not direct payment of an invalid pension because Shearim had lodged no claim for invalid pension; and s.145 could not be exploited because, at the time when his sickness benefit had been cancelled, Shearim had been granted unemployment benefit without lodging a claim.

The Tribunal noted that Shearim intended to lodge an invalid pension claim and expressed the hope that the DSS would take account of the Tribunal's views on Shearim's eligiblity.

Formal decision

The AAT affirmed the decision under review.

Sickness benefit: recovery from compensation

CASTRONUOVO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/388)

Decided: 15 May 1984 by J.O. Davies, J., R. Balmford and I. Prowse.

Fernando Castronuovo had been injured in an industrial accident in 1976. He received weekly worker's compensation payments until February 1980, when his employer denied any further liability. He was paid sickness benefits totalling $11 878 by the DSS from February 1980 to December 1982.

In September 1981, the NSW Worker's Compensation Commission awarded Castronuovo lump sum of $27 500. The terms of this award (which represented a settlement between Castronuovo and his employer) were that the employer should pay Castronuovo weekly compensation at the rate of $2.00; and that the employer's liability for that weekly compensation as well as the employer's liability for medical expenses and bodily injury should be redeemed by the payment of $27 500.

In November 1981, the DSS decided that $11 878 of that award was recoverable by the DSS. The DSS served a notice to this effect on the employer's insurer and requested the insurer to pay the sum of $11 878 direct to the DSS. That payment was made in January 1982.

Castronuovo asked the AAT to review the DSS decision to recover the sum of $11 878.

The legislation

The relevant legislation was s.115 of the *Social Security Act*, as it stood before the 1979 amendments came into force in 1982.

Section 115(1) provided that the weekly rate of sickness benefit payable to a person should be reduced by the amount per week of compensaton which the person was receiving or entitled to receive, so long as the sickness benefit and the compensation covered the same incapacity and the same period of time.

Section 115(2) provided that:

> Where a person is or has been qualified to receive a sickness benefit in respect of an incapacity and the Director-General is of opinion that the whole or part of a payment by way of a lump sum that that person has received, or is qualified or entitled to receive, can reasonably be regarded for the purpose of this section as being a payment that –
>
> (a) is by way of compensation in respect of the incapacity; and
>
> (b) is in respect of a period during which that person is or was qualified to receive that sickness benefit,
>
> the payment, or that part of the payment, as the case may be, shall, for the purpose of this section, be deemed to be such a payment.

Section 115(4) provided that, where a person had received a payment of compensation for the same incapacity and the same period as a sickness benefit paid to that person, the DSS could recover any overpaid sickness benefit from that person.

Section 114(4A) gave the Director-General a discretion to release a person, from the liability to repay overpaid sickness benefit, in 'special circumstances'.

Section 115(6) authorized the DSS to recover any overpayment of sickness benefit direct from the person liable to pay compensation to the sickness beneficiary.

Section 115(8) provided that the person liable to pay compensation should not pay out that compensation (after receiving a notice that the DSS proposed to recover sickness benefit) until the DSS informed the person of the amount of sickness benefit involved.

Apportionment of lump sum

The central question to be decided in this review was whether any part of the lump sum award of $27 500 could be regarded as a compensation payment for the same incapacity and the same period as the payments of sickness benefits.

To decide that question, the AAT said, it was necessary to apportion the lump sum award so as to identify which part of it related to loss of earning capacity (rather than medical expenses and bodily injury) and which part of it related to the period between February 1980 and December 1981 (rather than the period from January 1982 on). The Tribunal said:

> 26. In the present case, there was no evidence given to the Tribunal as to how such an apportionment could reasonably be made, as to a fair and equitable means of apportioning between the liability to make weekly payments and the liability to pay for the injured hand, as to the practices adopted in proceedings before the Workers' Compensation Commission, or even as to the rate of interest which is commonly adopted in that jurisdiction in calculating a figure for the redemption of weekly payments. In the circumstances, we have felt it necessary to err in favour of the applicant when considering the apportionment. It is necessary to give the benefit of a doubt to the applicant, for s.115(2) confers a discretion, not an obligation, upon the Director-General and that discretion is a discretion to identify a sum that can be reasonably be regarded as a payment of a prescribed kind. That discretion ought not to be exercised unless the sum that is identified gives reasonable satisfaction as being a sum of the type described.

In the present case, the AAT said, the decision of the DSS to treat the lump sum award as including a payment, for incapacity during the period February 1980 to December 1981, equal to the amount of sickness benefit received had no foundation; and such an approach had been rejected in *Edwards* (1981) 3 *SSR* 26.

The Tribunal said that it 'would be totally fanciful' to read the lump sum award as based on weekly payment for loss of earning capacity of only $2.00 a week: there was, the AAT said, 'no perceivable relationship between $2.00 per week and the $27 500. We therefore think it reasonable to disregard the $2.00 per week when apportioning the $27 500': Reasons, para. 37.

The Tribunal decided that, of the lump sum award, $170 represented medical expenses and $6195 represented bodily injury. After deducting these sums from the award, the balance ($21 135) represented the part of the award which was paid for the same incapacity as the sickness benefit. That sum of $21 135 had to be apportioned between the period during which Castronuovo received sickness benefit and the balance of the period of his incapacity.

The evidence showed that Castronuovo's incapacity was likely to persist for the rest of his life. Accordingly, the period of incapacity for which the sum of $21 135 had been awarded was the