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

period commencing in February 1980 and continuing for the balance of Castronuovo's working life.

The Tribunal then consulted standard mortality tables, and discounted (at the rate of 3%) the present capital value of the award. On that basis, it decided that $2292 should be apportioned to the period between February 1980 and December 1981; and $18 843 should be apportioned to the remainder of Castronuovo's life time. (Castronuovo was 52 years of age.)

It followed that the proper amount to be received by the DSS from the lump sum compensation award was only $2290.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that $2292 should be treated as a payment by way of compensation for the same incapacity and the same period as the payments of sickness benefit to Castronuovo.

BESGROVE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/125)

Decided: 29 June 1984 by R.C. Jennings.

Timothy Besgrove had been injured in motor accidents in March and June 1976. The DSS paid him sickness benefits between March 1976 and November 1976. Following a third accident in May 1977, the DSS paid Besgrove sickness benefits from May 1977 until October 1978 and from June 1979 until August 1980.

Besgrove commenced two common law actions for damages for the injuries suffered in the first and third accidents; and these actions were settled in May 1980 – the first action for $100 000 and the second action for $110 000.

The DSS served a notice on the third party insurer involved in the first action and recovered, out of the settlement of $100 000, the sum of $504 which represented part of the sickness benefits paid following the first accident.

The DSS also served a notice on the insurer involved in the second action (the GIO), informing the insurer that the DSS intended to recover from the insurer the payments of sickness benefit which were being paid to Besgrove following the third accident. (This notice was served on the insurer under s.115(5) of the *Social Security Act*.)

However, the DSS did not follow up that notice to the insurer by informing it of the precise amount of sickness benefit which the DSS regarded as recoverable from the insurer and, when the second action was settled, the insurer did not withhold any money from the settlement of $110 000 to cover the refund of sickness benefits.

In March 1981, the DSS informed Besgrove that, because the damages had been 'released before the payment of sickness benefit could be recovered', the DSS intended to recover from Besgrove the sum of $7417.35, representing sickness benefits paid to him after the third accident.

Besgrove asked the AAT to review that decision.

The legislation

The relevant terms of s.115 (which was in force when the decision under review was made) are set out in *Castronuovo*, noted in this issue of the *Reporter*.

Discretion to waive recovery

In its review, the AAT focused on the discretion to waive recovery in s.115(4A) of the Act. It decided that, in view of the 'special circumstances' of this case, 'it would be unjust, unreasonable and inappropriate to enforce liability against the applicant 4 years after he has received his award of damages.'

The AAT based that conclusion on a series of factors:

- **First**, the DSS still had a right to recover the sickness benefits from the GIO which had contravened s.115(8) by paying out the settlement moneys.
- **Secondly**, the August 1982 amendments had introduced a new legal protection for sickness beneficiaries. They could only be liable to refund sickness benefit after receiving damages or compensation if they had received a notice from the DSS: ss.115B(3) and 115(F(a). No such notice had been given to Besgrove. Although such a notice was not legally necessary under the old s.115(4), it was 'proper to the exercise of the discretion today under s.115(4A) to have regard to the protection now given to such persons as the applicant, as if the amendments now in force were applicable to him': Reasons, para. 29.
- **Thirdly**, Besgrove did not learn of the DSS claim until April 1981, by which time he had spent much of the settlement moneys – on a motor vehicle and real property. Subsequently, he had further reduced his capital on living expenses.
- **Fourthly**, Besgrove's financial circumstances had been aggravated by the DSS decision to withhold from him (pending the outcome of this review) payment of an invalid pension granted from September 1982.
- **Finally**, while Besgrove might have a claim against his legal advisers for their failure to provide for the DSS recovery when they settled Besgrove's second action, Besgrove should not be forced to take action against those advisers when the DSS was clearly entitled to recover the sickness benefits from another source.

The amount recoverable

The AAT said that, in view of the exercise of the s.115(4A) discretion, it was not necessary to deal with the difficult question of the amount of sickness benefit which could be recovered out of the damages settlement. [That complex issue was reviewed in *Castronuovo*, noted in this issue of the *Reporter*.]

The AAT noted that, according to the settlement of Besgrove's second action, its terms were not to be disclosed – a restriction which served 'no real purpose in this type of action'. The GIO and other insurers had an obligation, the AAT said.

> to make settlements which will assist the Director-General to exercise his discretion under s.115(2) or its present equivalent s.115B. Consideration deserves to be given to the adoption of procedures which will facilitate rather than hinder the objects of the legislation.

(Reasons, para. 34)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that special circumstances existed to justify the release of Besgrove from the whole of any liability to refund sickness benefits paid to him prior to 15 August 1980.

Unemployment benefit: extra benefit for child

QAZAG and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. A83/42)

Decided: 13 May 1984 by E. Smith.

Qazag had married in Jordan in 1975 and his daughter was born in November 1976. He and his wife were divorced in October 1977 and, under Jordanian law, Qazag could not obtain custody of his daughter until she reached the age of 11 years. It was his intention to bring his daughter to Australia when she reached that age, that is, in November 1987.

In December 1981, Qazag migrated to Australia. He was paying maintenance for his daughter in Jordan at the rate of $50 a month. He applied to the DSS for family allowance in respect of his daughter and, when he was granted unemployment benefits, for additional benefit in respect of his daughter. The DSS rejected both these applications.

Qazag asked the AAT to review that refusal.

Family allowance

Section 95(1) of the *Social Security Act* provides that a family allowance is payable to 'a person who has the custody, care and control of a child'.

The AAT said that Qazag was not qualified for family allowance in respect of his daughter because, although Australian law might treat him as having joint custody of his daughter, he could not be regarded as having the care and control of his daughter.