intermittent sexual relationship, which ceased towards the end of 1981.

In support of its claim that Rayner was living in a de facto relationship with D, the DSS pointed to the fact that she had adopted D's surname, had given birth to two children fathered by him and had occupied premises rented in his name.

The DSS also relied upon a statement allegedly made by Rayner and recorded by a DSS field officer. The field officer had interviewed Rayner in February 1982 and, from notes recorded during the interview, had prepared a written statement. According to this statement, Rayner admitted that she had been living in a de facto relationship with D since January 1980 and that she had falsely concealed this relationship from the DSS.

However, Rayner had refused to sign this statement, which she said was inaccurate and, in July 1982, she had provided the DSS with a signed statement, prepared by a community legal centre, in which she denied that there was a de facto relationship between her and D.

Rayner told the AAT that she had denied the existence of a de facto relationship during the interview with the DSS field officer; and that she had been quite upset during the interview. A medical report, produced to the Tribunal, described Rayner as lacking security and maturity and 'quite able to accept guilt from authoritarian figures'. The AAT noted that, during Rayner's evidence to the Tribunal, 'she was frequently overcome by storms of emotion and . . . had obvious difficulty in expressing herself clearly and in concentrating on the questions asked'. On the other hand the DSS field officer said that Rayner had been 'quite calm and collected throughout the interview' in February 1982.

The AAT said that it could not accept the statement prepared by the DSS field officer as a satisfactory record of the interview:

> '. . . having observed the applicant for some hours in the witness box and having heard other evidence about her, the Tribunal is quite unable to accept that she would have been cool and collected during the interviews and would have expressed herself in the way she was represented to have done in the unsigned statement and in what [the field officer] said was a record of the conversation.'

(Reasons, para. 23)

The AAT noted that, during the relevant period, D had given Rayner no financial support, that D and Rayner had not lived together, that D had other women friends and other residences and that Rayner did not see D for quite long periods. The Tribunal said that, in view of this evidence, D 'could not be considered to be a member of a family unit' with Rayner: Reasons, para. 27. The relationship between Rayner and D during the relevant period was not, the AAT said, 'one of persons living together as spouses on a *bona fide* domestic basis. It was more like some husband and mistress relationships': Reasons, para. 29.

Accordingly, during the period in question, Rayner had been entitled to receive supporting parent's benefit and there had been no overpayment.

[P.H.]

Compensation payment: preclusion

CRISTALLO and SECRETARY TO DSS
(No. V88/55)

Decided: 7 October 1988 by J.R. Dwyer.

Vincenzo Cristallo claimed sickness benefit on 21 May 1987. On 13 May 1987, a consent worker's compensation award had been made, under which Cristallo was to be paid $30 000. The DSS decided that Cristallo was precluded from receiving payment of sickness benefit from 13 May 1987 to 23 August 1988 because of the operation of s.153(1) of the *Social Security Act* in relation to this lump sum payment.

Cristallo asked the AAT to review that decision.

Preclusion

The legislation in issue was the same as that considered in *Grima*, set out in this issue of the *Reporter*.

The AAT applied the same reasoning, and followed its decision, in *Krzywak* (1988) 45 *SSR* 580 on the effect of amendments made to s.153(1) in December 1987 and June 1988, the second of which was expressed to operate retrospectively from 1 May 1987.

It therefore came to the same decision, namely that, even though the retrospective amendments did not apply to the applicant until after 16 December 1987, 'once s.153 applies to Mr. Cristallo's lump sum payment, the preclusion period applicable is the same, no matter when s.153 first applied to him': Reasons, para. 21.

The AAT noted that different reasoning was applied in the recent case of *Jovanovic* (1988) 45 *SSR* 581, which did not refer to *Krzywak*, but said that there was no difference in the result, whether one or the other was applied.

Commencement date of the preclusion period

The DSS had used 13 May 1987 as the starting date for the preclusion period, because periodic compensation had been paid to that date.

The AAT noted that this was not in accordance with s.152(3)(b), which required the use of 'the day after the day on which the last' periodical compensation payment was made. So, if the payments to Cristallo had been made fortnightly in advance, the preclusion period as calculated by the DSS would end two weeks later than the legislation provided. However, despite this observation, the AAT did not remit this matter to the DSS to calculate the correct commencement date of the preclusion period.

Calculating the preclusion period

The calculation of the period during which payment of benefit is precluded is governed by s.152(2), which is detailed in *Grima* (above). The crucial issue to be determined here was what part of the lump sum payment was 'in respect of the incapacity for work' (referred to as 'the compensation part of the lump sum payment').

Unlike in *Krzywak* and *Grima*, Cristallo had not issued common law proceedings. However, his worker's compensation award of $30 000 was, in relevant parts, the same as that in *Krzywak* and *Grima*, being described as 'in settlement of all other forms of future compensation'.

A memorandum of advice from Cristallo's worker's compensation barrister was tendered to the AAT, in which it was said that $20 000 of the settlement sum was calculated by the barrister as representing compensation for pain and suffering and past loss of wages.

That barrister also gave evidence to the AAT, in which he explained how the insurers sought to take the maximum number of common law settlements through the compensation tribunal in order to recoup some of the cost of awards from the Insurers Guarantee and

Supplementation Fund. However, the barrister admitted that settlement negotiations had not expressly included any mention of a component for pain and suffering or past loss of earnings and that the express words of the award indicated it was entirely a redemption of future weekly payments.

Relying on the same cases as were referred to in *Krzywak* namely, *Walker* (1987) 41 *SSR* 517, *Siviero* (1986) 68 ALR 147 and *Castronuovo* (1984) 20 *SSR* 218, the AAT decided it could not go behind the express words of the award. The AAT commented:

> 'The award represents a formal statement by consent of the parties. The [memorandum] or evidence of the applicant's lawyers represents the view of only one party to the settlement. There is no evidence that the employer's lawyer saw the settlement in the same way . . . If the practice has grown up . . . of wrongly characterising all of a settlement as by way of compensation, in order to obtain a greater rebate from an insurance fund . . . it is not surprising that the practice should cause complications in other areas . . . I consider that in the absence of error on the face of the award, officers of the department, this Tribunal and the applicant should accept the award at face value.'

(Reasons, paras 22, 34)

Therefore the AAT decided that the whole of the worker's compensation award of $30 000 was 'the compensation part of the lump sum payment' as such awards could not, under the *Accident Compensation Act* 1985 (Vic), include a provision for pain and suffering or for past loss of wages.

Discretion to ignore part of the award

Under s.156 of the *Social Security Act*, whole or part of a lump sum compensation payment may be disregarded 'in the special circumstances of the case'. In this case the AAT decided that the circumstances were not sufficient to justify the exercise of the s.156 discretion.

The AAT held that the retrospective legislative amendments did not operate so harshly or unjustly as in *Krzywak*. This was because Cristallo had applied for sickness benefit, the payment of which, up until 1 May 1987, was affected by compensation preclusion provisions in the former s.115B - very similar to the current s.153.

The relevant part of s.115B(2A) read as follows: 'Where a person who is qualified to receive a sickness benefit receives . . . lump sum payment . . . by way of compensation . . .' a preclusion period would operate.

According to the AAT, the June 1988 retrospective amendment simply restored the legislative position that existed in regard to sickness benefit prior to 1 May 1987 and 'therefore applied less harshly to persons claiming sickness benefit than to those applying for invalid pension (such as *Krzywak*) which was not covered by s.115B': Reasons, para.43.

Cristallo's worker's compensation barrister gave evidence that he did not worry about advising Cristallo of the effect of the settlement on his social security entitlements because he was not receiving sickness benefit at the time of the settlement. As this 'was not strictly incorrect' on the basis of the legislation as it then was, the AAT did not regard it as constituting a special circumstance, even though Cristallo should perhaps have been more fully advised.

The AAT did not find sufficient financial hardship to constitute a special circumstance. The $30 000 award was spent on moving to a larger and better home. Cristallo and his wife had not tried sufficiently to sell a second car, worth about $12 000, which they did not really need. From May 1987 until about June 1988, the family was supported at the maximum level of unemployment benefit - which had been incorrectly paid to Mrs Cristallo, and the DSS was not going to seek to recover it.

After unemployment benefits ceased, Mrs Cristallo earned $60 a week from part-time employment but she had not really tried to find additional work. Relatives had lent them money on which they did not expect interest and were not pressing for payment.

The only factor that constituted a special circumstance was that s.152(2)(c)(i), which limits the compensation part of a lump sum payment to 50% of the lump sum payment, did not apply to Cristallo because his award was made before 9 February 1988. However, this and some harshness caused by the retrospective amendments were not considered sufficient to warrant exercise of the s.156 discretion.

Formal decision

The AAT affirmed the decision to preclude payment from 13 May 1987 to 23 August 1988

[D.M.]

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GRIMA and SECRETARY TO DSS (No. V88/181)

Decided: 11 October 1988 by R.A. Balmford.

Anthony Grima suffered an industrial injury in July 1985, as a result of which he stopped working. He then began common law and workers compensation proceedings against his employer.

On 18 May 1987, the Victorian Accident Compensation Tribunal made a consent order which involved payment to Grima of $44 000 in settlement of Grima's claims for future compensation.

Grima subsequently (that is, some time after the receipt of his compensation but before 16 December 1987) claimed sickness benefit, invalid pension and unemployment benefit from the DSS. These claims were rejected by the DSS on the ground that payment to Grima was precluded during 'the lump sum payment period' - the period calculated by dividing the amount of his compensation by average weekly earnings, as provided in s.152(2)(e) of the *Social Security Act*. Grima asked the AAT to review that decision.

The legislation

At the time of the DSS decision, s.153(1) of the *Social Security Act* provided that a pension was not payable to a person 'during the lump sum payment period' (the period calculated under s.152(2)(e)), where that person, while 'receiving a pension', received a lump sum compensation payment.

However, from 16 December 1987, s.153(1) was amended so that it precluded payment of pension during the lump sum payment period where a person or the person's spouse, while 'qualified to receive a pension', received a lump sum compensation payment. That amendment took effect from 16 December 1987.

The *Social Security Amendment Act* 1988 amended s.153(1), effective from 1 May 1987. The result of this retrospective amendment was that, between 1 May and 16 December 1987, s.153(1) precluded payment of pension where a 'person who is receiving a pension receives or has received (whether before or after becoming so qualified) . . . a lump sum payment by way of compensation'; and, from 16 December 1987, s.153(1) precluded payment of pension 'where a person or the spouse of a person who is qualified to receive a pension receives or has received (whether before or after

becoming so qualified) . . . a lump sum payment by way of compensation'.

Payment of pension precluded

The AAT referred with approval to the earlier Tribunal decision in *Krzywak* (1988) 45 *SSR* 580; and decided that the amendments made in 1988 to the post-16 December 1987 version of s.153(1) caught Grima even though he had received his compensation payment and had applied for a pension (a term which included unemployment and sickness benefit) before 16 December 1987.

Calculating the preclusion period

Section 152(2) provides that the 'lump sum payment period' (that is, the period during which payment of pension is precluded) is to be calculated by dividing 'the compensation part of the lump sum payment' by average weekly earnings.

Where a compensation claim was settled before February 1988, 'the compensation part of the lump sum payment' was to be that part of the lump sum payment which was, in the opinion of the Secretary, 'in respect of the incapacity for work'.

In the present case, the Victorian Accident Compensation Tribunal had said in its order that the sum of $44 000 was to be paid to Grima in settlement of all forms of future compensation, other than medical and similar expenses.

Despite the terms of the award, Grima's solicitors had written to the DSS, advising that $24 000 of the settlement figure represented an estimate of Grima's pain and suffering and loss of enjoyment of life; and that only $20 000 represented 'compensation . . . in respect of any incapacity for work'.

The AAT said that it would not go behind the terms of the compensation award. It pointed out that the *Accident Compensation Act* 1985 (Vic.) did not authorise the Accident Compensation Tribunal to award payment of compensation for matters such as pain and suffering or loss of enjoyment of life. Accordingly, the AAT decided, the whole of the amount of compensation awarded to Grima (namely $44 000) should be used for the purpose of calculating 'the lump sum payment period'.

The AAT also decided that there were no 'special circumstances' in this case which could support an exercise of the discretion in s.156 to disregard all or part of the compensation payment.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Special benefit: rate of benefit

ALAI and SECRETARY TO DSS (No. V88/22)

Decided: 2 November 1988 by H.E.Hallowes,H.C.Trinick and G.F.Brewer.

Abdool Alai came to Australia in November 1986 on a 1-month temporary visa. In December 1986, he applied to the Department of Immigration and Ethnic Affairs (DIEA) for permanent resident status; and was eventually granted that status in November 1987.

Meanwhile, in December 1986, Alai applied to the DSS for a special benefit (having been told by the DIEA that it would be an offence under the *Migration Act* for him to engage in employment).

Initially, the DSS rejected Alai's application; but eventually the DSS granted him special benefit at one-third of the unemployment benefit rate between December 1986 and November 1987, when he was granted unemployment benefit. Alai asked the AAT to review that decision.

The legislation

Section 129(1) of the *Social Security Act* gives the Secretary a discretion to grant a special benefit, where the Secretary is satisfied that the person is 'unable to earn a sufficient livelihood'.

Section 130 gives the Secretary a discretion to fix the rate of special benefit, 'but not exceeding the rate of unemployment benefit or the sickness benefit which could be paid to that person if he were qualified to receive it.'

From 1 October 1987, s.129(3) provides that a special benefit was not payable to a person when the person was not a resident of Australia or was a prohibited non-citizen within the meaning of the *Migration Act*. However, that amendment did not apply to a person who was receiving special benefit immediately before 1 October 1987: s.4(14), *Social Security and Veterans' Entitlements Act* (No. 2) 1987.

The rate of benefit

Alai had come to Australia with his wife. He had savings of $1000. He bought a car and, by the time he claimed special benefit, he had only $144 left. Alai and his wife stayed with his sister, but were obliged to borrow $6060 from her in order to support themselves, of which he had managed to repay $2060. During the period in question, Alai's wife fell pregnant and had a miscarriage, which involved then in unforeseen expense.

The AAT referred to earlier AAT decisions on the rate of special benefit - *Macapagal* (1984) 20 *SSR* 236; and *Bahunek* (1985) 24 *SSR* 287. The AAT said that the s.130 discretion should be exercised to pay special benefit at the rate of unemployment benefit which would have been payable to Alai. On the date of his application he had only $144 in his bank account:

> 'We are satisfied that he had no sufficient livelihood after that date. His sister could not provide for him out of her own resources. It is unreasonable to expect her to continue to provide board and lodgings in her own home beyond the one month period she had anaticipated providing for her brother and sister-in-law. The applicant's dependent wife had unforeseen medical expenses.'

(Reasons, para.12)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Alai be paid special benefit at the rate of unemployment benefit that would have been paid to him if he were qualified for that benefit, from 23 December 1986 to 17 November 1987.

[P.H.]

Overpayment: recovery

GREEN and SECRETARY TO DSS (No. S88/87)

Decided: 31 October 1988 by R.A.Layton

Between 1978 and 1980, Dawn Green received unemployment benefits to which she was not entitled, as a result of false representations. Green was then single and childless. In October 1980, she was convicted in a magistrate's court of 15 offences under the *Crimes*