While the Tribunal had no jurisdiction in respect of subsequent years, it noted that the evidence of the drawings suggested that no finding in favour of Sheridan would be made if put to the test.

Formal decision

The AAT affirmed the decision under review.

[B.W.]

Compensation award: preclusion

KOVACEVIC and SECRETARY TO DSS

(No. 5366)

Decided: 5 September 1989 by R.A. Balmford.

The AAT *affirmed* a DSS decision that Joseph Kovacevic was precluded from receiving an invalid pension, through the operation of s.153(1)(b) of the *Social Security Act*, following his receipt of a compensation payment of $30 000 in October 1987.

In particular, the AAT agreed with the DSS decision that the whole of the $30 000 compensation, paid under the *Accident Compensation Act* 1985 (Vic.) was a payment in respect of incapacity for work.

This was because the *Accident Compensation Act* limited the grounds on which compensation could be awarded, following an industrial injury, to compensation for death, compensation for specified injuries and compensation for incapacity for work. The Act made no provision for compensation for pain and suffering or for loss of enjoyment of life. In the present case, Kovacevic's claim for compensation had not related to death or to one of the specified injuries; accordingly, the only possible finding was that the whole of the award made in his favour had been for incapacity for work. It followed that, under s.152(2)(c)(ii) the whole of that lump sum payment should form the basis of the calculation of any preclusion period under s.153(1).

The AAT also declined to find 'special circumstances' within s.156 of the *Social Security Act*, which would justify disregarding all or part of the compensation payment. In particular, the AAT said that the fact that Kovacevic's wife had given up her full-time employment in the expectation that Kovacevic would be granted an invalid pension was not a 'special circumstance', when balanced against his financial position.

[P.H.]

HARLAND and SECRETARY TO DSS

(No. 5422)

Decided: 11 October 1989 by R.A. Balmford.

Roy Harland sought review of a DSS decision precluding him from receipt of invalid pension for a period of 134 weeks, from the day after the cessation of weekly compensation payments on 24 May 1987 to 15 December 1989.

The facts

Harland had suffered a back injury in a motor vehicle accident in November 1984, and he stopped working in August 1985. On 23 May 1987 he settled both his workers' compensation and common law claims against his employer by executing a release on receipt of $90 000.

He lodged a claim for invalid pension on 4 October 1988 and was found to be permanently incapacitated for work on 25 November 1988. Subsequently, however, it was determined that he was precluded from receipt of pension for a period of 134 weeks, to 15 December 1989.

The legislation

Section 152(2)(e) of the *Social Security Act* provides for the calculation of the lump sum payment period, taking into account the 'compensation part of the lump sum payment' as defined in s.152(2)(c).

Since the settlement took place prior to 9 February 1988, s.152(2)(c)(ii) requires the Secretary to form an opinion as to the amount of the lump sum payment which is in respect of an incapacity for work.

After considering a number of cases where the lump sum payment was made under a statutory scheme where payments were expressly limited by reference to economic losses (see, eg *Krzywak* (1988) 45 *SSR* 580), the AAT noted that this was a settlement of both common law and workers' compensation claims and hence no such limitation could be presumed. Accordingly, the AAT needed to determine what part of the $90 000 settlement represented compensation in respect of an incapacity for work.

Benefit of the doubt

The AAT had before it a letter to Harland from his solicitors, outlining the breakdown as follows: $25 000 for general damages; $20 000 for past economic loss, $40 000 for future economic loss; and $5000 for costs and disbursements.

Since s.152(2)(c)(ii) makes no distinction between past and future economic loss, the DSS had determined the amount in respect of an incapacity for work to be $60 000.

However, shortly before the hearing in the AAT, Harland received advice from the Transport Accident Commission, which stated that $30 000 was assessed as general damages, with $15 000 for past and $40 000 for future economic loss, a total of $55 000.

The AAT found that the latter advice was more likely to be an accurate reflection of the composition of the award. Applying the principle from *Tiknaz* (1981) 5 *SSR* 45, that social welfare legislation should be administered beneficially, the Tribunal decided that, in view of the discrepancy, the amount most favourable to the applicant should be taken to be the compensation part of the lump sum payment, namely $55 000.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that the amount of the lump sum payment of compensation in respect of an incapacity for work was $55 000.

[R.G.]