

received sickness benefit. However, the AAT said that it still had to determine 'whether or not the opinion can be held that the lump sum compensation payment . . . is in whole or in part a payment by way of compensation in respect of the same incapacity for which the Sickness Benefit was paid' (Reasons, para. 8). The Tribunal decided that in determining the answer to this question, the Tribunal could take account of any evidence that indicated that some part of the award had been made for past incapacity.

The Tribunal noted that it would often be quite difficult for the DSS (or the AAT) to find relevant evidence. For example, if an award had been made in a contested hearing, the DSS delegate would be likely to follow the award. But, where a consent order had been made, the delegate could go beyond this. However, even in that case, the DSS might still be unable to form the opinion that the compensation award and sickness benefit were paid for the same incapacity.

This approach is apparently at odds with that of the full Federal Court in *Siviero* (1986) 68 ALR 147. That decision suggested that the Tribunal and the Department could not go behind the terms of an award. The AAT distinguished *Siviero* on the ground that no request had been made in that case to go behind the award, and there had been no apparent reason to do so.

Thus, according to the AAT in the present case) *Siviero* did not decide that the DSS (and the AAT) were never warranted in going behind an award. The AAT went on to discuss the effect of consent awards, noting that they bind only the parties thereto.

The AAT said that the delegate in this case was alerted to go behind the award because there was no evidence that *Cocks* had suffered any permanent incapacity: the terms of the award, being for partial permanent incapacity, were factually incorrect. There was also no further evidence presented to the Tribunal indicating a permanent incapacity and the Tribunal concluded, on the balance of probabilities, that the compensation award had been made for a past period - that is for the same incapacity as sickness benefit. It followed that sickness benefit was recoverable from the compensation award.

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Preclusion: is compensation award conclusive?

WALSH and SECRETARY TO DSS (No. 4921)

Decided: 13 February 1989

by J. Dwyer.

Veronica Walsh applied for review of a decision to preclude her from receiving invalid pension from 29 July 1987 to 25 July 1989 because she had received a lump sum compensation payment.

Retrospective preclusion

Walsh had settled her compensation claim on 28 July 1987, the Accident Compensation Tribunal ratifying an award of \$46 500 for future compensation. Walsh also received \$26 000 as a common law settlement.

The AAT confirmed the approach taken in a series of previous decisions (e.g. *Tallon* (1988) 43 SSR 544) that, although Walsh had not been covered by the preclusion clause when she received her compensation payment, the retrospective amendments made in 1988 to s.153(1) of the *Social Security Act* 'caught' compensation awards made after 1 May 1987.

The same incapacity?

The Tribunal went on to determine what part of the workers compensation award was 'in respect of an incapacity for work' as provided by s.152(2)(c) of the *Social Security Act*.

On its face the award was expressed to be for all other forms of future compensation, meaning other than medical or like expenses. The only other form of compensation available under the relevant Victorian legislation was weekly compensation payments for incapacity for work.

Walsh argued that the lump sum had also included an amount for future medical treatment. Walsh's legal representative said that there was no provision in the worker's compensation legislation for redemption of medical expenses so they were 'disguised as part of the redemption of weekly payments'.

The Tribunal responded to this argument by suggesting that, whilst this may be a possibility, it was also possible that the employer was prepared to pay a relatively generous amount as

redemption of weekly compensation payments, in order to be released from liability for future medical claims. The Tribunal concluded:

'Rather than guess what has happened I consider it appropriate for the Tribunal to accept the Award at face value'

(Reasons, para. 15)

The Tribunal referred to the recent AAT decision in *Cocks* (noted in this issue of the *Reporter*), noting that it had construed *Siviero* (1986) 68 ALR 147 more narrowly than other AAT decisions had. However, the AAT said it was not necessary to decide whether *Siviero* only applied where no request to go behind the award had been made, as the facts in the present case were quite different from those in *Cocks*.

The Tribunal said that here the evidence was not inconsistent with accepting the award at face value. It noted that Walsh clearly continued to be incapacitated for work, the employer's legal advisers gave no evidence as to what their view of the facts underlying the award were and it was certainly possible, given the evidence of Walsh's legal representative, that Walsh had agreed to not to pursue future medical costs in return for a generous amount for future lost earnings.

The Tribunal saw one further distinction between this case and *Cocks*. In *Cocks* it had been the Secretary who sought to go behind the award, whereas here Walsh, one of the parties to the award, was seeking to go behind it. The Tribunal concluded that there was nothing in *Cocks* to lead it not to accept the present award at face value.

'Special circumstances'

Finally, the Tribunal dealt with an argument that the discretion in s.156, to regard all or part of the compensation payment as not having been made in 'special circumstances' should be exercised in Walsh's favour. The Tribunal decided that a relevant special circumstance was that an operation Walsh had undergone in 1985 had developed post-operative complications requiring further unexpected treatment. The likely cost of this treatment was \$1000, and that amount of the compensation payment should be disregarded.

Formal decision

The AAT varied the decision under review to the extent of disregarding \$1000 of the compensation payment. Otherwise it affirmed the decision.

[J.M.]