When the DSS refused to pay him sickness benefits for this period, he appealed to the AAT.

The legislation

Section 117(1) of the *Social Security Act* provides that a person is qualified for sickness benefit if *inter alia*, the person satisfies the Secretary that, throughout the relevant period, he or she was temporarily incapacitated for work and had suffered a loss of income.

Section 124(1) provides that a claim for sickness benefit shall 'be supported by the certificate of a medical practitioner', unless the Secretary otherwise directs 'in special circumstances'.

Section 3(1) of the Act defines a 'medical practitioner' as 'a person registered or licensed as a medical practitioner under a law of a State or Territory'.

Section 168(1) authorises the Secretary to cancel a benefit by reason of the failure of any person to comply with a provision of the *Social Security Act*.

'Medical certificates' not adequate

The Tribunal said that it could not accept the documents produced by Simic and originating in Yugoslavia because the Tribunal was not satisfied that those certificates had been provided by a 'medical practitioner' as defined in s.3(1) — namely one who was registered or licensed under the law of a State or Territory.

Nor could the AAT accept the certificate provided in January 1988 by the Australian doctor:

> 'As the applicant was in Yugoslavia during the period referred to in the certificate the Tribunal cannot accept that Dr K would have examined him at that time to be able to give such an opinion of his own knowledge.'

(Reasons, para. 8)

The AAT said that Simic's failure to provide medical certificates after November 1987 had inevitably led to the cancellation of his sickness benefit. The lodging of such certificates was necessary so that the DSS could —

> 'be sure of a claimant's continuing incapacity for work: without such knowledge the Department has no authority to continue to pay the benefit and pursuant to s.168(1), it must be cancelled. Entitlement to the benefit does not revive until the lodgment of another claim in the proper form.'

(Reasons, para. 12)

The AAT also said that the decision in *Freeman* (1988) 45 *SSR* 587 made it clear that there could be no restoration of a cancelled benefit until the person had lodged a further claim in accordance with the Act. As Simic had not lodged his claim following cancellation of his sickness benefit until August 1987, there was no basis on which he could be paid benefit for the period prior to August 1987.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Compensation award: preclusion

ABBATE and SECRETARY TO DSS
(No. 5285)

Decided: 1 August 1989 by R.A. Balmford.

The AAT *affirmed* a DSS decision that Maria Abbate was precluded from receiving pension from June 1987 to March 1988, following her recovery of a compensation payment of $17 500.

The AAT found that this compensation award was made under the *Accident Compensation Act* 1985 (Vic.), which allowed compensation to be awarded for incapacity for work, for specified injuries, and for medical expenses. In the present case, it was clear that the award had related to incapacity for work, and, accordingly, the whole of that award was to be used as the basis for calculating the preclusion period. This was in line with the approach taken in *Littlejohn* (1989) 49 *SSR* 637 and *Emetlis* (1989) 50 *SSR* 660.

The AAT noted that Abbate had used the compensation award to finance the purchase of a holiday house and that the house in which she and her husband lived was fully paid for. Her husband was in full time employment. The AAT said that it could find nothing 'special' in Abbate's circumstances to support the exercise of the s.156 discretion.

[P.H.]

RAFFAI and SECRETARY TO DSS
(No. 5276)

Decided: 21 July 1989 by G.L. McDonald.

Attila Raffai suffered 2 industrial injuries in 1970 and 1977. Each of these left him with a partial incapacity for work.

It was not until September 1987 that he recovered a lump sum compensation payment (of $20 000) for the first injury — the delay being due to the inefficiency of his solicitors.

On the same day, Raffai also recovered a lump sum compensation payment (of $40 000) for his second injury.

The DSS then added those 2 payments together and calculated a preclusion period under s.153(1) of the *Social Security Act*. As a result, the DSS decided that he could not be paid pension until March 1990.

Raffai asked the AAT to review that decision.

Can separate compensation payments be aggregated?

The AAT noted that s.152(2) and (3) of the *Social Security Act* provided that a preclusion period, imposed under s.153(1), was to run from a date which depended upon the particular circumstances surrounding the lump sum payment.

In the present case, the AAT said, Raffai had received 2 compensation payments for different injuries occurring at different times whilst employed by different employers. They were separate matters which had been treated separately under the NSW *Workers' Compensation Act* 1987. The only common factor was that the awards of compensation had been made on the same day.

The Tribunal said that, in the absence of any legislative authority authorising the aggregation of the compensation awards when calculating the preclusion period, the relevant provisions of the Act should be applied to each award separately, so that 'the preclusion periods should run concurrently': Reasons, p.8.

Discretion to disregard part of compensation awards

The AAT decided that there were, in the present case, 'special circumstances' which would support the discretion to disregard part of the compensation payments. This discretion is given by s.156 of the *Social Security Act*.

The 'special circumstances' which the Tribunal found included the substantial delay on the part of Raffai's solicitors in settling his compensation claims — if the claims had been settled promptly, Raffai would not have been affected by the preclusion rule introduced from May 1987.

The Tribunal also found that the conflicting advice given to Raffai, by his solicitors and a DSS officer, and an improper recovery from Raffai of moneys which were not recoverable from him, contributed to the 'special circumstances' in this case.

Taking into account those circumstances, the AAT decided to disregard one-half of each of the 2 lump sum compensation payments.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with directions that the 2 compensation payments should not be aggregated and that one-half of each of the 2 payments should be disregarded in calculating the preclusion periods (which would run concurrently).

[P.H.]

SECRETARY TO DSS and PAZIOS
(No. 5206)

Decided: 3 July 1989 by W.J.F. Purcell.

In June 1988, Peter Pazios received a lump sum compensation payment of $77 500. The DSS then calculated the period during which Pazios was precluded from receiving pension payments by taking half of that compensation award, namely $38 750.

Pazios appealed to the SSAT, which varied the DSS decision by deducting $10 000 from the $77 500 before calculating the preclusion period.

The DSS applied to the AAT for review of the SSAT decision.

The legislation

Section 153(1) of the *Social Security Act* provides that a person who has received a lump sum compensation payment is precluded from receiving pension 'during the lump sum payment period'.

The 'lump sum payment period' is calculated under s.152(2) by taking 50% of any lump sum compensation payment made on or after 9 February 1988.

The *Workers' Compensation Act* 1971 (SA) provides for payment of compensation for incapacity for work and, in s.70, for the loss of use of various parts of the body.

Could $10 000 be deducted?

In Pazios' case the compensation award made in his favour had included $10 000 under s.70 of the *Workers' Compensation Act*, for the loss of the use of his back and neck. The SSAT had decided that this amount should be deducted from his compensation payment before taking 50% of that compensation payment as the basis for the calculation of the preclusion period in accordance with s.152(2) of the *Social Security Act*. The SSAT said that this deduction was supported by s.156 of the *Social Security Act*, which permits all or part of a compensation payment to be disregarded in 'special circumstances'.

The AAT disagreed with the approach adopted by the SSAT:

> '13. I consider that it was not open to the SSAT to reduce the compensation part of the lump sum by deducting the s.70 payment, in a purported exercise of discretion under s.156 of the Act. The current legislation provides specifically for calculation of the compensation part of the lump sum payment by way of formula. Once it is established that a person has received a lump sum payment (after 9 February 1988) the compensation part must be assessed at 50% of the lump sum.'

Formal decision

The AAT set aside the decision under review and affirmed the decision of the Secretary.

Compensation award: discretion to disregard

YOUSSEF and SECRETARY TO DSS
(No. 5170)

Decided: 22 June 1989 by J.A. Kiosoglous.

The AAT *affirmed* a DSS decision to recover $1933 paid to Youssef by way of sickness benefit, following his receipt of a compensation payment.

The DSS had refused to exercise the discretion, conferred by s.115E of the *Social Security Act*, to disregard the compensation payment received by Youssef.

In support of his claim that there were 'special circumstances' which would support the exercise of the s.115E discretion, Youssef told the Tribunal that he was 'in dire financial straits'. The AAT accepted this, but noted that Youssef had lent $900 to his sister and spent $500 on a wedding present for his nephew:

> 'Thus it appears to the Tribunal that the applicant's financial distress has been contributed to quite considerably by these voluntary actions of the applicant himself.'

(Reasons, para. 8)

The AAT concluded with the following comments:

> 'The only ground on which the applicant relies in his application for the discretion to be exercised in his favour is that of financial hardship which, as the authorities made quite clear, does not of itself establish special circumstances, distressing though it undoubtedly is. To adopt the words of *Re Ivovic* (1981) 3 *125* the Tribunal sees no reason "within the scope and object of the Act why the applicant should be allowed to retain the double advantage of sickness benefit and damages in respect of the same period of incapacity".'

(Reasons, para. 10)

[P.H.]

MICHOR and SECRETARY TO DSS
(No. 5180)

Decided: 23 June 1989 by P.M. Roach.

The AAT *affirmed* a DSS decision that Michor was precluded from receiving pension for 99 weeks, following his receipt of a lump sum compensation award.

The DSS had refused to exercise the s.156 discretion to disregard all or part of the compensation award because of what Michor claimed were 'special circumstances'.

The AAT agreed that there were not, in the present case, 'special circumstances' within s.156 to justify an exercise of that discretion. The fact that Michor was suffering from a 'crippling disability' was not special because this was the circumstance which made him eligible for invalid pension:

> 'It is not a circumstance so "special" as to confer on the applicant entitlements greater than others similarly qualified by such disabilities. The second consideration which