The Tribunal accepted the Department's argument and found that the SSAT was wrong in directing that the moneys already recovered from Rowe should be refunded to him.

In view of the inadequacy of the material placed before it by the DSS, the Tribunal chose not to make any finding that 'an amount has been paid by way of benefit . . . that should not have been paid'. The Tribunal remarked that it was unclear that the Secretary had power to make such a determination.

At the time of the hearing, Rowe was not receiving or entitled to receive any pension, benefit or allowance and therefore recovery under s.246(2) was not available. The AAT decided that any recovery action should be deferred until such time as that condition of s.246(2) should be met. At that time the Secretary would need to consider whether to exercise the power of waiver under s.251(1).

[P.O'C.]

Compensation award: recovery of sickness benefits

MORGANTE and SECRETARY TO DSS
(No. 6136)
Decided: 24 August 1990 by S.A. Forgie.

Pasqualeno Morgante suffered a work injury in 1984 and 1985. He received worker's compensation payments until April 1985, when he was granted sickness benefit, which continued until May 1987.

In March 1987, Morgante settled a claim for a lump sum worker's compensation for $5 000, made up as follows:
- $40 000 for compensation under ss.69 and 70 of the *Workers' Compensation Act* 1971 (SA);
- $5000 for redemption of the employer's liability to pay future medical expenses; and
- $10 000 for redemption of Pilgrim's right to bring a common law action against the employer.

The DSS then decided that $22 856 of the compensation award was a payment for the same incapacity for which Morgante had received sickness benefit; and that he should repay $5949.40 of the benefit payments.

After an unsuccessful appeal to the SSAT, Morgante asked the AAT to review the DSS decision.

The legislation

At the time when Morgante received his sickness benefit and the compensation award was made, s.115B(3A) of the *Social Security Act* provided that a person, who received sickness benefit payments for an incapacity and also received (after June 1986) compensation payments 'in respect of that incapacity', was liable to repay part of those sickness payments to the DSS. The part to be repaid was to be calculated under s.115B(2A), (2B) and (2C).

A payment in respect of the same incapacity?

On behalf of Morgante, it was conceded that he had received sickness benefit payments and a payment of compensation. But it was argued that the compensation payments were for Morgante's 'degree of disability' rather than an incapacity for work. This argument was based on the Federal Court decision in *Siviero* (1986) 68 ALR 147.

On the other hand, the DSS relied on the AAT decision in *Cocks* (1989) 48 *SSR* 622, to the effect that the Tribunal could go behind the terms of the compensation award, and conclude that it had included a component for past incapacity for work. It also relied on a 'concession' made by Morgante's legal representative before the SSAT, that the compensation award may have included a component for past economic loss.

After referring to the AAT decision in *Hunt* (1989) 53 *SSR* 698, the Tribunal examined the available evidence. This included medical opinions, the bulk of which declared that Morgante had a continuing disability from his work injury which prevented him from returning to his former occupation.

The AAT pointed out that ss.69 and 70 of the *Workers' Compensation Act* 1971 (SA) did not allow for payment in respect of past periods of incapacity. The medical evidence of Morgante's continuing disability was sufficient to support a claim under s.69 of the *Workers' Compensation Act*. There was, the AAT said, no evidence upon which it could be satisfied on the balance of probabilities that part of the compensation payment was paid for the same incapacity as that for which Morgante had received sickness benefits.

Formal decision

The AAT set aside the decision under review and decided that the sum of $5949.40 was not recoverable from Morgante under s.115B.

[P.H.]

Compensation payment: preclusion

SECRETARY TO DSS and PILGRIM
(No. 6134)
Decided: 20 September 1990 by R.A. Balmford.

Harold Pilgrim was injured in a motor car accident in October 1985. In November 1988, he settled an action for damages for the sum of $80 902.55, from which $60 902.55 was deducted as a refund of payments received by Pilgrim under the *Accident Compensation Act* (Vic).

Two days after this settlement, Pilgrim applied for unemployment benefit. The DSS accepted that he was qualified for unemployment benefit; but decided that he was precluded from receiving benefit until March 1989.

On review, the SSAT set aside that decision. The DSS then applied to the AAT for review of the SSAT decision.

The legislation

Section 153(1) of the *Social Security Act* provides that where a person, qualified to receive a pension under the Act, has received a lump sum payment by way of compensation, pension is not payable to the person during the lump sum payment period.

Section 152(1) defines 'pension' to include unemployment benefits.

Section 152(2)(a) defines a payment by way of compensation as including a payment in settlement of a claim for damages, being a payment made after 1 May 1987 in whole or in part 'in respect of an incapacity for work'.

Section 152(2)(e) requires the lump sum payment period to be calculated on the basis of 'the compensation part of the lump sum payment'.

Section 152(2)(c)(i) defines the compensation part of a lump sum payment, where the payment is made in settlement of a claim on or after 9 February 1988, as 50% of the lump sum payment.

Section 156 gives the Secretary a discretion to treat the whole or a part of a lump sum payment as not having been made, 'if the Secretary considers it appropriate to do so in the special circumstances of the case'.

Payment received

The AAT decided that Pilgrim had received a payment in settlement of a claim for damages within s.152(2)(a), and this payment amounted to $20 000.