

# Administrative Appeals Tribunal decisions

## Recovery of sickness benefits: looking behind award of damages

SECRETARY TO DSS and WHELAN  
(No.5565)

Decided: 22 December 1989 by D.P. Breen

The Secretary applied to the AAT for review of an SSAT decision setting aside a DSS decision to recover sickness benefits of \$4946 paid to Graeme Whelan.

Whelan had been injured in a car accident in the course of his employment in 1984. He received sickness benefits from the DSS and repaid these when he received a lump sum compensation payment in January 1987.

Whelan returned to work for some 9 months and then suffered glandular fever, hepatitis and jaundice, unrelated to his 1984 injuries. He received sickness benefits from the DSS between December 1987 and July 1988.

Meanwhile, Whelan was pursuing a common law damages claim in relation to the 1984 car accident. On 14 October 1988, Legoe J. of the South Australian Supreme Court awarded some \$154 715 in damages to Whelan.

The DSS then decided that \$58 959 was the incapacity component of the damages award lump sum, that the sickness benefits paid between December 1987 and July 1988 should be recovered and imposed a preclusion period lasting until 1 September 1989.

On review, the SSAT decided that s.152 of the *Social Security Act* applied; but that 'special circumstances' existed to disregard payment of compensation (s.156); so that the DSS should repay the sickness benefits already recovered.

### The legislation

The AAT concentrated on the question whether the 'compensation part' of Whelan's damages award could be identified. Section 152(2)(c) of the *Social Security Act* provides that the

'compensation part' of a lump sum compensation payment is:

'(i) if the lump sum payment was made (whether with or without admission of liability) in settlement of a claim that is, in whole or in part, related to disease or injury and:

(A) in a case where a judgment by consent was entered in respect of the settlement — the judgment was entered on or after 9 February 1988; or

(B) in any other case — the settlement was made or entered into on or after 9 February 1988;

50% of the lump sum payment; or

(ii) in any other case — so much of the lump sum payment as is, in the opinion of the Secretary, in respect of an incapacity for work.'

### Not a 'settlement'

The AAT decided that the damages awarded by Legoe J. did not amount to a 'settlement' within s.152(c)(i), but a judgment: therefore, s.152(c)(ii) applied. The question was, accordingly, how much of the damages was 'in respect of an incapacity for work'.

The AAT noted that Legoe had, when calculating the amount of damages, expressly excluded the period between December 1987 and July 1988 because Whelan's inability to work then had not been due to the 1984 car accident.

The AAT said that the situation could be looked at in one of two ways:

- The decision of Legoe J., being a judgment (rather than a settlement) in a court of competent jurisdiction, meant 'that the preclusion period created by ss.152 and 153 did not apply to the relevant period at all'; or
- The specific judgment, awarded in a court of competent jurisdiction, created 'a special circumstance of hardship in that it would be the recovery of compensation money paid in respect of a back injury to repay sickness benefits paid for glandular fever, hepatitis and jaundice': Reasons, para. 11.

On either approach, the recovery of the sickness benefits from Whelan 'would be unacceptable'. However, in the AAT's view, the first approach was 'the applicable one', which led it to decide that the sickness benefits were not recoverable.

### Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

## Recovery of benefits: looking behind the compensation award

HUNT and SECRETARY TO DSS  
(No.5599)

Decided: 21 December 1989 by S.A. Forgie.

Gary Hunt appealed against a decision of the DSS to recover \$1414 from his compensation award.

Hunt had been injured at work in July 1986, and received weekly compensation payments until March 1987. He then received special and unemployment benefits from the DSS.

On 23 November 1987, Hunt received a lump sum payment under the *Workers' Compensation Act* 1971 (SA) of \$28 500. The DSS decided that \$6032.77 of this award was paid for an incapacity for work, and that Hunt was therefore precluded from receipt of a pension or benefit from 30 April 1987 to 29 July 1987 and owed the DSS some \$1414, which he had received as special benefit.

### The legislation

At the time of the decision under review, s.153(2) of the *Social Security Act* provided that the Secretary could decide to recover pension paid to a person, where that person had received a lump sum compensation payment and pension had been paid to the person during the 'lump sum period'.

Section 152(2)(e) defined a 'lump sum period' as a number of weeks calculated by dividing 'the compensation part of the lump sum payment' by average weekly earnings. This period was to begin on 'the first day of the period in respect of which the [lump sum] payment was to be made'.

For a compensation award made before 9 February 1988 (such as the award made to Hunt), s.152(2)(c) provided that 'the compensation part of a lump sum payment' was that part of the compensation award which was, 'in the opinion of the Secretary, in respect of an incapacity for work'.