

servation of Stanisavljevic, her behaviour was consistent with the condition diagnosed by Dr Dinnen.

The trips to Yugoslavia were not inconsistent with her incapacity especially as she was seeking treatment for her illness.

The member dissenting applied s.27 and concluded that, on the basis of Stanisavljevic's language difficulties, age, lack of work skills, time out of the workforce and the depressed state of the labour market as well as her medical incapacity, Stanisavljevic had an incapacity for work of at least 85%.

Formal decision

The Tribunal by majority affirmed the decision under review.

[C.H.]

Compensation recovery: part of lump sum payment by way of compensation

SECRETARY TO DSS and ZANIN
(No. S89/255)

Decided: 15 February 1991 by J.A. Kiosoglous.

The DSS sought review of an SSAT decision that for the purposes of recovering sickness benefit and rehabilitation allowance pursuant to the compensation recovery provisions of the former s.115B of the *Social Security Act 1947*, the lump sum payment period be calculated by using a figure of \$10 000, being the past economic loss component of the compensation settlement.

The facts

At the age of 16 Ms Zanin suffered severe injuries in a motor vehicle accident on 27 November 1983. She was paid, in respect of incapacity arising from that accident, sickness benefit from 2 January 1984 to 22 February 1984, rehabilitation allowance from 23 February 1984 to 14 November 1985, sickness benefit from 20 January 1986 to 17 February 1986 and from 1 May 1986 to 27 May 1987, unemployment benefit from 28 May 1987 to 21 July 1987 and sickness benefit from 5 October 1987 to the date of the AAT hearing.

Ms Zanin brought Supreme Court proceedings claiming damages for the injuries caused by the accident. Part way through the trial, the claim was settled for \$185 000 plus costs on 16 November 1988.

Initially, the DSS applied s.152 of the *Social Security Act 1947* using a \$92 500 incapacity component of the lump sum settlement to derive a lump sum payment period from 27 November 1983 to 1 August 1987 and sought recovery of \$14 165.02. This amount was paid to the DSS by the insurer.

Upon internal review, the DSS decided it should apply the former s.115B of the Act rather than the current provisions and sought advice on the composition of the lump sum settlement.

The insurers advised that their breakdown consisted of: \$14 165.02 payable to DSS; \$18 352.59 payable to the Department of Community Services; \$10 000 for past economic loss; \$45 000 future economic loss; \$90 000 general damages; \$5000 future care and \$2482.39 interest.

Ms Zanin's solicitors advised that the damages claim was settled after the judge hearing the case remarked that she was fit for work as a receptionist. The solicitor's opinion was that the settlement amount covered pain and suffering, medical expenses, interest and a nominal amount for past economic loss.

After receiving this information the Department decided on 5 June 1989 to treat \$69 165.02 of the settlement as being in respect of the respondent's incapacity for work and calculated that \$10 464.82 was recoverable. The \$69 165.02 figure was derived using the insurer's breakdown and adding together \$10 000 for past economic loss, \$45 000 for future economic loss and the \$14 165.02 DSS refund which was also regarded as economic loss.

The legislation

The old compensation preclusion and recovery provisions of the Act were said to be preserved by s.42(2) of the *Social Security and Veterans' Affairs (Miscellaneous Amendments) Act 1986*, because sickness benefit commenced to be paid to Ms Zanin before 1 May 1987. Under s.115B(2A) of those provisions:

'where a person who is qualified to receive a sickness benefit in respect of an incapacity receives . . .

(b) a lump sum payment that is . . . in whole or in part a payment by way of compensation in respect of that incapacity'

the amount of sickness benefit payable is to be reduced by the average weekly earnings for the period calculated under s.115B(2B). That period is calculated by dividing average weekly earnings into 'that part of the lump sum payment that is, in the opinion of the Secretary, by way of compensation in respect of that incapacity'.

The AAT's reasons

The AAT said it took into account the cases of *Cavaleri* (1989) 53 SSR 700, *Cocks* (1989) 48 SSR 622, *Gundogdu* (AAT 21.5.87) and *a'Beckett* (Fed. Crt) (1990) 57 SSR 779.

It then applied the Federal Court's decision in *a'Beckett* saying:

'The Tribunal . . . is satisfied that the relevant payment was a payment in respect of an incapacity for work. The Tribunal is satisfied and finds that the lump sum award included components for past and future economic loss.'

(Reasons, para. 15)

No other reasons were given by the AAT for its decision.

Formal decision

The AAT set aside the SSAT decision and reinstated the DSS internal review decision of 5 June 1989.

[D.M.]

SECRETARY TO DSS and
GARDINER

(No. S90/215)

Decided: 6 May 1991 by R.A. Balmford, D.J. Trowse and D.B. Williams.

Claims for invalid pension and sickness benefit were lodged by Gardiner on 11 June 1987. The DSS decided on 31 July 1987 that he was precluded from receiving a pension or benefit from 31 May 1987 to 13 September 1991 because he had settled a claim for damages for personal injury against his former employer on 6 June 1987 for \$145 000, of which \$100 000 was for future economic loss.

The SSAT varied the DSS decision by terminating the preclusion period as at the date of its decision, 22 August 1990. DSS sought review of the SSAT decision.

The legislation

This case was sufficiently old to require consideration of the complex and confusing 1987 and 1988 amendments to the compensation preclusion provisions of the *Social Security Act 1947*.

During the period May to December 1987, s.153(1) of the Act was stated to apply 'where a person who is receiving a pension receives' a compensation payment. However, by virtue of the retrospective operation of the *Social Security Amendment Act 1988* (which received royal assent on 15 June 1988), s.153(1) must be taken to have applied for the period 1 May 1987 to 15 December 1987 'where a person who is receiving a pension receives or has received (whether before or after becoming so qualified) a compensation payment.

The significance of this is that s.153(1), as it was written at the time of Mr Gardiner's claim and the Department's decision, did not apply to him; but he was ultimately caught by the retrospective operation of the amendments.

To calculate the lump sum preclusion period it is necessary first to ascertain the 'compensation part of the lump sum payment' in accordance with s.152(2)(c). As the lump sum in this case was paid prior to 9 February 1988, the compensation part was 'so much of the lump sum as is, in the opinion of the Secretary, in respect of an incapacity for work': s.152(2)(c)(ii).

It was not disputed that the \$100 000 future economic loss component of Mr Gardiner's settlement was the 'compensation part' of his lump sum and that the correct application of ss.152 and 153 produced the 224 week preclusion period calculated by the DSS.

The only issue was the application of s.156 of the Act, which permitted the Secretary to treat the whole or a part of a compensation payment that has been made as not having been made 'in the special circumstances of the case'.

The facts

In 1981 Gardiner injured his back at work. After a period during which he received regular compensation payments, he returned to work until 30 May 1987. His damages claim against his employer was settled on 6 June 1987 and on 11 June 1987 he lodged claims for invalid pension and sickness benefits at the Port Augusta office of the DSS.

Gardiner's doctor had told him his damages payment might preclude receipt of pension or benefit but a DSS officer told him it would make no difference.

On 31 July 1987 the Adelaide office of the DSS made the original preclusion decision under review in this case and informed the Port Augusta office by

telex on 4 August 1987. However, it appears that Gardiner was not advised verbally of this decision until 28 September 1987 and did not receive written advice dated 9 November 1987 until 17 December 1987.

Meanwhile, Gardiner received the balance of his settlement moneys (\$134 000) on 31 July 1987. He invested \$50 000 of this and within a month had spent all but \$718 of the balance on an LTD car for himself, a car for his mother, bills, a loan to a friend, furniture, a caravan, loan repayments, repairs to the LTD and living expenses.

On 5 August 1987 Gardiner called at the Port Augusta DSS office to notify receipt of the settlement moneys but was not advised of the preclusion decision which had been made.

Gardiner was married and, at the time of the AAT hearing, had 4 young children. Since 1987 he had had several jobs as an unqualified motor mechanic and operated an unsuccessful kangaroo shooting business between July 1988 and April 1989. Since May 1990 the family had been supported by Mrs Gardiner's earnings from employment, family allowance and family allowance supplement. Gardiner still had back pain.

By the time of the AAT hearing, nothing remained of the settlement moneys although the family still owned some of the items which had been purchased. Gardiner gave evidence that had he known he would not receive the pension, he would have purchased a cheaper car than the LTD, would not have bought the caravan for \$6223 in late August/early September 1987 and would not have set up the kangaroo shooting business in 1988. Most of the other expenses were necessary.

'Special circumstances'

The AAT applied the Tribunal's decision in *Krzywak* (1988) 49 SSR 580 in relation to the meaning of 'special circumstances'; and decided that the circumstances of the delay until 29 September in notifying Gardiner of the 31 July preclusion decision had 'the particular quality of unusualness that permits them to be described as special'; Reasons, para. 19.

The AAT then considered which expenditures by Gardiner 'were directly attributable to the Department's delay in notifying Gardiner of the decision which had been made'; Reasons, para. 21. It concluded that only the \$6223 spent on the caravan was such an expenditure. The purchase of the LTD was not, because all arrangements to buy it were made prior to the date of the DSS decision of 31 July 1987 and the pur-

chase was completed on 31 July, the date when Gardiner received the settlement moneys. The AAT was also of the opinion that Gardiner had said he would have bought a cheaper car rather than the LTD chiefly because of defects which became apparent in the LTD after its purchase.

At the time of the original decision of 31 July 1987 the DSS in fact incorrectly interpreted s.153(1): see *Tallon* (1988) 43 SSR 544. In relation to this factor the AAT commented:

'The making of the wrong decision, however, cannot be described as "special" in terms of the legislation: we are satisfied that similar decisions were made in respect of many other applicants who were not "receiving a pension" at the time.'

(Reasons, para. 19)

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS for reconsideration in accordance with the direction that it was appropriate, in the special circumstances of the case, to treat an amount of \$6223 of the payment by way of compensation to Gardiner as not having been made, pursuant to s.156 of the Act.

[D.M.]



Sickness benefit: 'decision' to reject a claim

MECOZZI and SECRETARY TO DSS

(No. 7047)

Decided: 13 June 1991 by P. Gerber.

Tony Mecozzi was injured in a motor vehicle accident in November 1989. On 1 February 1990, he lodged a claim for sickness benefit at the West Ryde DSS office in NSW.

Mecozzi visited the DSS office again on 6 February 1990 and withdrew his claim, apparently because he was concerned about whether receipt of sickness benefit might compromise any other claim he had in respect of the accident. Having been unable to obtain sufficient advice on this matter from the office staff, he withdrew his claim in writing.

On 9 February 1990, Mecozzi received a letter from the DSS stating 'You will not be paid sickness benefit