cation for review of an earlier decision to reject a claim for invalid pension lodged in March 1986, which had been considered by the SSAT in March 1987.

**Rate of rent assistance**

The SSAT had ordered that, subject to lodging a claim, Knezevik be paid disability support pension including a component of rent assistance, from 1 February 1989. Knezevic claimed he had been underpaid rent assistance from that date. The AAT found that the calculations of his entitlement by the DSS were not in accordance with the Rate Calculator in s.1064-D5 of the *Social Security Act* 1991. Furthermore, the DSS had purportedly applied that Rate Calculator to calculate his rent assistance from 1 February 1989, although the Rate Calculator only came into effect in 1992.

As well as applying the wrong formula, the DSS had also erred in taking the amount of weekly rent paid by Knezevic to be $45 from 1 February 1989 to 10 January 1993, although there was evidence on the DSS file that he had been paying $65 a week from September 1992 or earlier.

The AAT ordered that the rent allowance be recalculated according to the correct tables and taking account of the correct amounts of rent paid throughout the arrears period.

**Rate of special benefit**

There was a further issue arising from the SSAT decision, concerning the calculation of special benefit to be paid to Knezevic between 22 November 1988 and 30 January 1989. Knezevic pointed out at the hearing that the amount calculated by the DSS was more than twice his entitlement. The DSS acknowledged their error.

**The extension of time**

In March 1987 the SSAT recommended the dismissal of the appeal by Knezevic against the rejection of his invalid pension claim lodged on 18 March 1986. Knezevic was informed by letter dated 28 April 1987 that his appeal was dismissed and that he had 28 days to appeal to the AAT. The delegate adopted the SSAT's reasons and Knezevic was sent a copy. Knezevic did not dispute having received the letter. Up to the date of the AAT hearing, he had not applied for review of the decision. At the AAT's suggestion, he did so in the course of the hearing.

Section 29(1) and (2) provide that an application shall be lodged not later than the 28th day after the applicant is furnished with written reasons for decision. The application for review lodged during the hearing was out of time. However, the AAT is empowered by s.29(7) of the *Administrative Appeals Tribunal Act* 1975 to extend the time for making an application, if the applicant applies in writing for an extension. Knezevic applied in writing during the hearing for an extension.

The AAT referred to the decision of the Federal Court in *Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment* (1984) 58 ALR 305 in which Wilcox J distilled from earlier decisions on extensions of time, a number of principles to guide the exercise of the discretion to extend time. The AAT proceeded to apply the six factors identified by Wilcox J.

***1. Whether there is an acceptable explanation for the delay and whether it is fair and equitable to extend time.***

Knezevic said that he had sought advice from a Legal Aid Office after receiving the letter of 28 April 1987, but was unable to obtain an appointment until after the 28-day period had passed. He thought there was no point seeing the solicitor at that time and did not apply to the AAT. He did not know that he could lodge an application himself and seek an extension of time.

Knezevic had from at least December 1988 complained to DSS officers about the SSAT's decision but had not been told that he could apply to the AAT for an extension of time for lodging an application for review. The AAT concluded that he did have an acceptable reason for the delay.

As to the second aspect which requires a consideration of the balance of fairness, Knezevic argued that it was fair and equitable to extend time because he had protested for many years about the decision and because his medical condition in 1986 was the same as in 1989 when he was found to be entitled to invalid pension.

***2. Action taken by Knezevic to show he continued to contest the decision.***

Knezevic had complained about the decision to DSS officers but had not actively pursued his claim for invalid pension when advised by DSS officers to do so.

***3. Prejudice suffered by the respondent due to the delay.***

The AAT accepted a submission by DSS that it would not be possible to obtain further medical evidence to resolve the issue of fact as to whether the applicant's medical condition in 1986-8 was the same as in 1989.

***4. Unsettling of other people or of established practices.***

The AAT said that because of the five-year delay it would need to be very 'positively satisfied' that it was fair and equitable to extend time before it would do so.

***5. The merits of the substantial application.***

On examining the medical reports on the DSS file relating to his 1986 invalid pension claim, the AAT concluded that while his claim for invalid pension

> 'was not without merit, the substantial merits do not appear so clear as to satisfy us that fairness requires the grant of the extension of time, more than five years out of time.'

(Reasons, para. 45)

***6. Considerations of fairness between the applicant and other people in a like position.***

The AAT referred to remarks by Fitzgerald J in *Lucic v Nolan* (1982) 45 ALR 411 at 416 with respect to a similar discretion in the *Administrative Decisions (Judicial Review) Act* which identified the matters of public concern that must be balanced against the interests of the applicant. These concerns include the 'need for finality in disputes, the efficient use of public resources, the appropriate allocation and expenditure of public funds'. The AAT concluded that there was no consideration of fairness requiring that Knezevic should be allowed to apply five years out of time.

**Formal decision**

The application for leave to apply for review out of time was refused.

**[P.O'C.]**

# Compensation preclusion: income or compensation

**MARTIN and SECRETARY TO DSS**
**(No. 8720)**

**Decided:** 20 May 1993 by P.W. Johnston, S.D. Hotop and J.G. Billings.

Martin's husband claimed the disability support pension (DSP) on 21 May 1992, and Martin claimed wife pension.

On 27 October 1992 the SSAT affirmed the DSS decision to reject both claims on the basis that Martin's husband was precluded from receiving DSP because compensation payments were being paid to his wife. Martin requested review by the AAT of the decision to reject her claim for wife pension.

**The facts**

Martin commenced full time employment in 1986 with the Ministry of Education (WA) as a teacher's aide. On the 8 August 1990 Martin injured her neck, arms and shoulders, and received workers' compensation payments for one month. In 1991 she returned to work but was unable to continue because of her injury. Payments of workers' compensation recommenced, and in August 1991 Martin asked the Ministry to place her on a rehabilitation program. She began a gradual return to work in September 1991, increasing her hours until she was working full time by the end of December 1992.

In June 1992 the Ministry attempted to discontinue payments of compensation to Martin. This decision was overturned by the Workers' Compensation Board after Martin supplied medical certificates which stated that she was totally unfit for work. She continued to supply these certificates until she returned to full time work.

Whilst on the rehabilitation program, Martin was paid her pre-injury wage, and her pay slips did not indicate that she was receiving compensation payments. A relief teacher's aide was employed for the whole period Martin was receiving compensation payments. The Ministry classified these payments as compensation and recovered the full amount from its insurer.

In 1989 Martin's husband was injured in a car accident. He claimed DSP in May 1992.

**Income or compensation**

The first issue the AAT had to address, was whether the payments to Martin between 21 May 1992 and 16 December 1992 were compensation or income. Income is defined in s.8 of the *Social Security Act* 1991 as an amount 'earned derived or received', and income from personal exertion is defined as an amount earned, derived or received from personal exertion, but not including any amount received as compensation for a person's inability to work. Compensation is defined in s.17 of the Act as a payment of damages under a scheme of insurance etc., or any other compensation or damages payments made wholly or partly in respect of lost earnings or lost capacity to earn.

According to s.98(1), a DSP is not payable if a person or the person's partner is subject to a compensation preclusion period, or if the rate of payment of the pension would be nil. Section 148 provides that a wife's pension is not payable if the rate of payment would be nil.

If a person is receiving periodical payments the rate a pension is paid to that person is calculated by referring to s.1168.

On behalf of Martin it was submitted that part of the payments made to her in the relevant period should be classified as income and not compensation payments. Income was that part of the payments representing earnings for the hours actually worked by Martin during the rehabilitation program. The balance of the payments was compensation. The AAT was urged to take into consideration the social consequences of deciding that the total amount paid was compensation. Applicants would not undertake rehabilitation programs because there would be no financial incentive to do so. The consequence of this would be that the person would remain unfit for longer, and thus possibly receive a social security benefit for a longer period.

The AAT decided that the question of whether the payments were compensation or income should be determined objectively according to the facts and the relevant provisions of the Act. The evidence indicated that payments to Martin during the relevant period were compensation payments made under the *Workers' Compensation and Rehabilitation Act* 1981 (WA), because she was certified as medically unfit for her pre-accident employment. The payments were made under a scheme of insurance as provided by s.17(2), but according to Martin the payments were not made wholly or partly in respect of lost earnings. The payments were made because Martin was involved in a rehabilitation program, which demonstrated a capacity to work and a capacity to earn. The AAT rejected this argument and found that the payments were made because Martin was unfit for work and her involvement in the rehabilitation program did not influence whether or not she was paid. The AAT found some merit in the argument that persons in Martin's position would lack financial incentive to join a rehabilitation program because of this interpretation of the Act. An amendment to the Act would be required to change this interpretation of the Act.

**Payability of wife's pension**

The AAT applied s.1168(3) and calculated the rate at which DSP was payable to Martin's husband. Because the payments to Martin were compensation, the rate of payment was reduced on a 'dollar for dollar' basis for every dollar of compensation received by Martin in weekly payments. The rate of DSP payable to Martin's husband was nil, and thus Martin was not qualified for wife pension.

**Special circumstances**

According to s.1184 of the Act the whole or part of a compensation payment can be considered as not having been made in the special circumstances of the case. On behalf of Martin, it was submitted that the following matters were special circumstances. The Martins' household income had been reduced from $55,000 to $18,000 a year causing financial hardship. Great stress had been placed on their marriage which aggravated their respective medical conditions. Martin's husband had received a compensation settlement as a result of his car accident, and this had enabled him to pay off the family home. The AAT found that special circumstances should be determined by comparing the particular circumstances of a person with the circumstances of most welfare recipients. The Martins' circumstances were no worse than those of most welfare recipients.

**Formal decision**

The AAT affirmed the decision under review.

**[C.H.]**

# Compensation preclusion: special circumstances

**SECRETARY TO DSS and LEE (No.8670)**

**Decided**: 18 April 1993 by B.H. Burns.

Lee's husband was in receipt of compensation payments, when she claimed the invalid pension on 17 September 1991. The DSS decided to treat her husband's compensation payments as