Accident Compensation Act precluded claims for damages for loss of earnings or loss of earning capacity. The other payment made under the *Accident Compensation Act* was for loss of function under the Table of Maims and not for loss of earnings or loss of capacity to earn. Thus these two payments did not meet the criteria in s.17(2) of the *Social Security Act*.

The AAT's view

The AAT referred to the decision of the Federal Court in *Banks* (1990) 56 *SSR* 762 which stated the purpose of the provisions as being to prevent double-dipping by providing a rule of thumb which calculated which part of the payment was for lost earnings or lost earning capacity. Without such a provision there might be a problem in determining which part of a lump sum payment was for loss of earnings. This was exemplified in cases where there were claims under different heads of damage and a consent judgment inflated the amount awarded under one head of compensation in order to understate compensation for lost earning capacity so as to defeat the provisions in the *Social Security Act*. The AAT commented that the effect of the SSAT decision was to negate the attempt of the legislation to prevent this occurring.

The Tribunal referred to the decisions in *Hulls* (1991) 22 ALD 570, *Graham* (1993) 75 *SSR* 1093 and *Chidiac* (1992) 67 *SSR* 961 which had dealt with aggregated payments made under different heads or in separate processes. In those case the separate amounts were either regarded as arising out of the claimant's employment or paid in respect of the same incapacity. The Tribunal then concluded:

> 'Having regard to the history of the statutory provisions which preceded those with which we are concerned in the present case, we are satisfied that the amount of $90,573.52 was a lump sum compensation payment. It was paid as the result of negotiations which effectively settled both claims at the same time. Although the precise amount to be paid by way of redemption of the employer's liability to continue to pay compensation for future incapacity or loss of earnings had still to be calculated, that was little more than a formality. What really determined how much it would be was the agreement that the respondent should make formal application for his weekly payments of compensation to be reduced to $30.15 and to request the redemption payment. It was not a matter of chance that the two claims were settled together. That is clear from the two-page agreement and deed of release, which the respondent's solicitors had him sign. The payment of the amounts agreed to was made to give effect to the settlement of the two claims. That they should have been paid together, aggregated into one lump sum, was a natural consequence of those circumstances. It was, we are satisfied, a lump sum compensation payment.'

Loophole?

The AAT commented on the problem that might have arisen if the payments had been made separately. It asked whether that might have prevented the payments being considered as a lump sum. The Tribunal said:

> 'We express no opinion on that question but would suggest that consideration should be given to amending the Act appropriately to ensure that what may be, or at least appear to some to be, a loophole in the provisions intended to prevent "double-dipping" is closed before attempts are made to exploit it, setting off another round of litigation which has dogged those provisions and the provisions which preceded them.'

Formal decision

The AAT set aside the SSAT decision and substituted a decision that the lump sum preclusion period due to the receipt of compensation is to be calculated on the basis that there was a lump sum compensation payment of $90,573.52 of which the compensation part is 50% of that amount.

[B.S.]

Comment

Double dippers or two-time losers?

Victoria's Workcover and the preclusion provisions

The issues raised in *Kilinc* (p. 1125) and *Booker* (p. 1126) are familiar to those working in the compensation and social security jurisdictions in Victoria. Following substantial amendments to the *Accident Compensation Act* (1985) (Vic.) in December 1992, many workers receiving weekly compensation payments were made offers by the workers compensation authority to settle their claims. Often settlement of a workers compensation claim will occur at the same time as any common law settlement, or within a few days. As alluded to in *Kilinc*, a worker must settle the common law claim either at the same time or before settlement of the workers compensation proceedings, or lose common law rights. The DSS has determined that a common law settlement and a workers compensation settlement is one lump sum. Even though at common law a worker is only entitled to non-pecuniary damages, the DSS assesses that payment together with the workers compensation payment as 'compensation'. In *Booker* the AAT agreed with the DSS because the two lump sums were paid in one cheque and 'agreement in respect of each was essential to the overall settlement'. In *Kilinc* the two settlements were paid in two separate cheques, and so the common law settlement was treated separately. The AAT in *Kilinc* did not consider whether the 'agreement in respect of each was essential to the overall settlement'.

In *Kilinc* the AAT suggested that the *Social Security Act* 1991 should be amended to overcome the 'loophole' in the legislation exposed by this case. The Minister proposed to do this by means of the *Social Security (Budget and Other Measures) Legislation Amendment* Bill 1993. In the Senate certain sections were deleted from the Bill and it was eventually passed to become the *Social Security (Budget and Other Measures) Legislation Amendment Act* 1993, No. 121. The sections of the Bill removed by the Senate would have overcome the 'loophole' referred to by the AAT. These sections redefined 'compensation' so that it was no longer connected to loss of income or capacity to earn. However the following sections of the Bill which also amended the compensation preclusion provisions remained in the Bill and became part of the amending Act. A number of these sections refer to the new definition of 'compensation' which is not a part of the Act. Consequently a number of the compensation preclusion provisions are nonsense!

[C.H.]