require that the impairment must not prevent a person from:

- doing the person's usual work or work for which they are currently skilled s.94(2)(a); and
- undertaking educational or vocational training during the next 2 years which would be likely to equip the person within the next two years to do work for which the person is currently unskilled s.94(2)(b).

Impairment

The AAT found that Haouchar suffered from gout, hypertension, headaches, pain in the neck, back and knees and sciatica. His gout condition was assessed by the AAT according to Table 26 as having an impairment rating of 5%. This was because his gout attacks were prolonged (lasting more than 4 hours) and affected him more than 20 days a year.

His hypertension was assessed under Table 25 and he was given an impairment rating of 10% as he was undergoing intensive therapy and his condition was potentially life threatening. Haouchar's headaches were under Table 26 an 'Intermittent Impairment'. As his headaches were more than 4 hours in duration and occurred almost daily, he was given an impairment rating of 10%. His pain in the neck, back and knees was assessed according to Table 6 (joint pain, deep referred somatic pain or sciatica) and was rated at 10%.

In relation to Haouchar's claim that he suffered from sciatica the evidence disclosed that he had first complained of it to his general practitioner in March 1993. The AAT found that it should confine itself to determining his eligibility for a pension at the date of cancellation. As sciatica was not complained of at 3 August 1992, this was not taken into consideration. The AAT was bound by the Federal Court decision of *Freeman and the Secretary to DSS* (1988) 15 ALD 671.

Haouchar was found to have a total impairment of more than 20% in satisfaction of the requirements of s.94(1)(a) and (b).

Continuing inability to work

The DSS argued that although Haouchar might not be able to do his normal work, he was able to do work for which he was currently skilled. The DSS relied on the report of a disability support officer who concluded that he was capable of some employment such as process work, machine operating, or assembling work. The report indicated that most of this work would require on-the-job training and acknowledged that vocational training was not likely to equip Haouchar for work for which he was not currently skilled. The DSS accepted that on the basis of this opinion Haouchar was not likely to become equipped to do work in the next two years for which he was currently unskilled: s.94(2)(b).

The AAT found that it was highly unlikely that Haouchar would be able to do work for which he was currently skilled such as light, unskilled work. Haouchar suffers from chronic pain, hypertension, intermittent attacks of gout and frequent headaches, all of which make him virtually unemployable.

Formal decision

The decision of the SSAT was set aside and the decision that Haouchar was eligible for a DSP was reinstated.

[H.B.]

Compensation: one lump sum or two?

SECRETARY TO DSS and ABDELAHAD

(No. 9281)

Decided: 1 February 1994 by J.R. Dwyer, L.S.Rodopoulos and R.C. Gillham.

The AAT was asked to review a decision of the SSAT setting aside a DSS decision to preclude payment of job search allowance (JSA) to Abdelahad from 6 March 1993 to 17 September 1993. The DSS had calculated the preclusion period on a lump sum of $34,030. The SSAT directed that the calculation of the preclusion period be based on a lump sum of $4030.

The facts

Abdelahad injured his right shoulder at work in November 1989. He received weekly payments of compensation until 19 March 1993. Abdelahad commenced a common law claim for damages which settled on the 9 March 1993 for $30,000. The release signed by both parties clearly stated that the settlement was for non-pecuniary damages only.

On the same day Abdelahad signed a second release accepting $4030 in full settlement of any entitlement to future weekly payments of compensation in accordance with s.115A *Accident Compensation Act 1985* (Vic.). Abdelahad received weekly payments of compensation until 5 March 1993.

Ms Sdrinis, the solicitor who had represented Abdelahad in the above matters, gave evidence at the AAT hearing. She had advised Abdelahad to reject the offer of $30,000. However, when the possible costs penalty of going to trial was explained to Abdelahad, he had instructed her to accept the offer. At the same time an offer was made pursuant to s.115A which was the equivalent to 13 weeks compensation payments. Ms Sdrinis pointed out that Abdelahad would have been entitled to payments until 1 December 1993. She advised him to reject this offer too. Abdelahad instructed her to accept the offer because he wanted to get out of the compensation system. The AAT noted: 'Ms Sdrinis stresses that the two payments were negotiated separately and made separately': Reasons, para.12.

A cheque for $30,000 was sent by the solicitors for the insurer to Ms Sdrinis. The insurer sent the cheque for $4030 directly to Abdelahad.

The law

Section 1165(1), (2), (4) and (5) of the *Social Security Act 1991* provide that where a person has received a lump sum of compensation, the person is precluded from payment of JSA for the lump sum preclusion period. The lump sum preclusion period is calculated by dividing the compensation part of the lump sum by average weekly earnings. 'Compensation' is defined in s.17(2) as a payment of damages, or a payment under a scheme of insurance etc. made wholly or partly in respect of lost earnings or lost capacity to earn. The compensation part of a lump sum is 50% of the payment made in settlement of a claim.

Section 135A of the *Accident Compensation Act 1985* restricts damages payments at common law to non-pecuniary loss, and s.115A does not allow for payment of common law damages after paying out a claim for weekly payments.

Lump sum compensation payment

DSS submitted that as both payments, $30,000 and $4030, arose out of the one injury and are essentially the one claim, both payments can be treated as part of a lump sum compensation payment even if paid by separate cheques. It was conceded that the $30,000 payment did not include an amount for lost earnings or lost capacity to earn.

Abdelahad submitted that his case could be distinguished from the AAT decision of *Secretary to DSS and Booker* (1993) 77 *SSR* 1126. 'The two claims were negotiated and settled separately and it was a "matter of chance" that the two releases were signed on the same day': Reasons, para.17. In *Booker* the payment was made in one cheque and only one release was signed.

After referring to the Federal Court authorities of *Secretary to DSS v Banks* 20 ALD 19 and *Secretary to DSS* v *Hulls* 22 ALD 570, the AAT concluded there is:

> 'No provision in the Act requiring that two separate payments made in respect of separate proceedings arising out of the same incident be treated as one lump sum compensation payment'.

(Reasons, para.28).

In *Banks* and *Hulls* the Court was dealing with one lump sum only. The lump sum in *Banks* included a number of heads of damages not all of which related to loss of earnings or loss of capacity to earn. *Hulls* referred to the situation where a number of lumps sums are made each of which relates to incapacity for work. Neither of these situations applied here.

The AAT was concerned that its interpretation frustrated the object of the relevant legislative provisions, which was to eliminate 'double dipping' in a practical straightforward manner. In the AAT's opinion there was a loophole in the provisions which the Government might consider amending along the lines mentioned by the AAT in *Secretary to DSS and Kilinc* (1993) 77 *SSR* 1125.

Formal decision

The AAT affirmed the SSAT decision.

[C.H.]

[**Note**: This decision has been followed in a recent decision of the former President of the AAT, Justice O'Connor in *Secretary, Department of Social Security and Ward* decided on 4 March 1994. A full note of this decision will be included in the June edition.]

Overpayment – validity of recipient notification notice

SMYTH and SECRETARY TO DSS (No. 9267)

Decided: 21 January 1994 by D.P. Breen.

Smyth requested review of an SSAT decision which affirmed a DSS decision to raise and recover an overpayment of sickness allowance (SA) and job search allowance (JSA) paid from 30 October 1991 to 10 March 1992. It was considered that Smyth's assets exceeded the asset test limit initially, and then his combined income exceeded the income test limit.

The facts

Smyth was entitled to $120,000 in superannuation after he resigned from the police force on 23 September 1991. Smyth advised the DSS that he was owed this money when he applied for SA. The DSS recorded that the money would be paid in 2 months. The DSS was advised by Smyth on 9 January 1992 in a SA review form that he had received the money. Smyth had actually received $106,153 on 30 October 1991.

On 6 January 1992 Smyth's wife commenced work part time, and on 15 January Smyth sold the family home and bought another one. Smyth transferred to JSA on 20 February 1992 and advised the DSS of his wife's employment and his change of address at the same time. He also recorded that he had $75,000 invested. In answer to a request for further information from the DSS, Smyth advised that he had purchased real estate (a block of land) with the rest of the money.

After a number of contacts with the DSS an officer came to Smyth's home to interview him. On 7 July 1992 the DSS raised an overpayment of $3,469.83.

The law

Section 1224 of the *Social Security Act 1991* provides that a debt due to the Commonwealth has been incurred where an amount has been paid by way of an allowance which was paid as a result of a failure to comply with a provision of the *SSA*. The DSS argued that Smyth had failed to comply with a recipient notification notice.

Pursuant to s.727(1) of the *Social Security Act*, the DSS may give a person who is receiving SA a notice requiring that person to inform the DSS if an event or change of circumstances occurred. Section 727(3) provides:

> '(3) A notice under subsection (1):
>
> (a) must be in writing; and
>
> (b) may be given personally or by post; and
>
> (c) must specify how the person is to give the information to the Department; and
>
> (d) must specify the period within which the person is to give the information to the Department; and
>
> (e) must specify that the notice is a recipient notification notice given under this Act.'

Section 727(5) provides for imprisonment if a person unreasonably refuses to comply with a notice. Similar provisions apply for a person receiving JSA.

Validity of the notice

The AAT stated that if the notice issued to Smyth was invalid then no debt could be raised as he could not fail to comply with an invalid notice. The validity of notices had been referred to in the AAT decision of *Gellin and Secretary to DSS* (1993) 76 *SSR* 1101. It was decided that the intention of the legislature was that the requirements set out above were mandatory, but that a notice did not have to strictly comply with the requirements. A recent AAT decision of *Secretary to DSS and Carruthers* (1993) 76 *SSR* 1100 also considered this issue. The President of the AAT decided that statutes are to be construed strictly where penalties apply. A penalty applies if a person does not comply with a notice, and therefore the requirements for issuing a notice set out in the *SSA* must be strictly complied with.

The AAT followed the decision in *Carruthers* and concluded that this notice was invalid because it did not strictly comply with the requirements of s.727(3). Simply stating that the notice had been issued under a certain section of the *SSA* was not enough. It must also state that it is a recipient notification notice.

Formal decision

The AAT set aside the decision under review and substituted a decision that there was no overpayment.

[C.H.]

[Note: The AAT did not refer to a specific notice sent to Smyth, and did not specifically state what the defect in the notice was.

The *Social Security Act 1991* and the *Social Security Act 1947* were amended by ss.90-93 (and Shedule 8) of the *Social Security (Budget and Other Measures) Legislation Amendment Act* 1993 (No. 121). Sections 90, 91 and Schedule 8 amend the notice sections of the *Social Security Act 1991* so that a notice which does not specify how a person is to give information to the DSS or that it is a recipient notification notice, is not invalid. These amendments were made retrospective to 1 July 1991. Section 92 amended the notice provisions of the *SSA* 1947, so that a notice is not invalid if it does not specify how a person is to notify the DSS. This amendment was made retrospective to 1 January 1988.]