(a) begins on the day on which the loss of earnings or loss of capacity to earn began; and

(b) ends at the end of the number of weeks worked out under subsections (4) and (5).

Szczerban argued that, although he continued to work immediately after his accident, that was with some difficulty. He argued that his working capacity was reduced as a result of the accident, and that he used his sick leave, annual leave and rostered days off to receive treatment. He argued that this constituted a 'loss of earnings or loss of capacity to earn' for the purposes of s.1170(3), and that consequently, the preclusion period should commence on the 25 September 1998, the day of the accident.

The respondent argued that Szczerban did in fact continue to work and maintained his level of earnings after the accident and until his retrenchment. The respondent also noted that there was evidence that Szczerban only had medical certificates to cover 21 days absence between the date of the injury and the redundancy.

The AAT considered and distinguished the decisions in *Robinson and Secretary, Department of Family and Community Services* (1999) AATA 398 and *Workcover Corporation of SA and Marina* (1996) 66 SASR 24. In *Robinson* it was held that a person could have a loss of earning capacity notwithstanding the fact that an individual remained in employment. The Tribunal however, stated:

> But that depends on the circumstances and having examined the *Robinson* decision, the Tribunal finds there are considerable differences from Mr Szczerban's case. He was in a situation to maintain earnings, whereas in the Robinson case, the individual suffered complications from the outset, sought compensation for many workdays lost and was on sick leave at the time of retirement.

(Reasons, para.38)

The AAT also noted that in the *Marina* case, the applicant went back to work, but not in the same employment as previously. Instead, the Tribunal found the matter of *Nixon and Secretary, Department of Social Security* (1998) 52 ALD 129, where it was found that there was no specific evidence regarding any loss of earnings or earning capacity, more analogous to Szczerban's situation.

The AAT decided that Szczerban did not suffer a 'loss of earnings or capacity to earn' until the day he was retrenched, and affirmed the decision under review.

[E.H.]

Compensation: whether Court-approved compromise subject to '50% rule'

WELCH and SECRETARY TO THE DFaCS (No. 2003/905)

Decided: 15 September 2003 by M. Allen.

Background

Welch suffered catastrophic injuries in a car accident in 1995. His parents were appointed joint plenary administrators pursuant to an order made by the Guardianship and Administration Board of WA. The question of liability came before the District Court in 1997 and Welch's claim was dismissed. A successful appeal to the Supreme Court resulted in the Court deciding that Welch was 65% liable for the accident and the other driver 35% responsible.

On 10 May 2002, the District Court made an 'order to compromise' by consent and ordered Welch have leave to compromise his claim for the sum of $1,408,213. Centrelink applied the statutory formula and deemed 50% of the lump sum as representing economic loss and calculated a preclusion period to run from 11 March 1995 to 20 January 2018.

The SSAT decided the '50% rule' did not apply and remitted the matter with a direction that the sum of $304,174, an amount calculated by Welch's Counsel as representing 35% as total past loss of earnings and future loss of earning capacity, be applied as the economic loss component, thereby shortening the period to end on 21 January 2005.

The law

Section 17(3) of the *Social Security Act 1991* ('the Act') defines a 'compensation part of a lump sum compensation payment' as follows:

> (a) 50% of the payment if the following circumstances apply:
>
> (i) the payment is made (either with or without admission of liability) in settlement of a claim that is, in whole or in part, related to a disease, injury or condition; and
>
> (ii) the claim was settled, either by consent judgement being entered in respect of the settlement or otherwise; or
>
> (ab) 50% of the payment if the following circumstances apply:
>
> (i) the payment represents that part of a person's entitlement to periodic compensation payments that the person has chosen to receive in the form or a lump sum; and
>
> (ii) the entitlement to periodic compensation payments arose from the settlement (either with or without admission of liability) of a claim that is, in whole or in part, related to a disease, injury or condition; and
>
> (iii) the claim was settled, either by consent judgement being entered in respect of the settlement or otherwise; or
>
> (b) if those circumstances do not apply — so much of the payment as is, in the Secretary's opinion, in respect of lost earnings or lost capacity to earn, or both.

The issue

The AAT needed to determine whether s.17(3)(a) of the Act applied, and in particular, whether the payment was made 'in settlement of a claim' as required by s.17(3)(a)(i). Furthermore, the AAT needed to decide whether 'special circumstances' existed to invoke s.1184K.

The preclusion period

The AAT turned its mind to whether a 'settlement' could be distinguished from a 'compromise', the latter term having been employed by Counsel and the Court. After considering the *Oxford Dictionary* definition and relevant authorities, the AAT concluded that:

> It seems to me that it would require a considerable torturing of the language to arrive at a conclusion other than that the payment that was made to Bryce was made 'in settlement of a claim' as required by s17(3)(a)(i). Once the Supreme Court had established the percentage of liability to be used in the calculation of Bryce's damages claim, his claim was thereafter the subject of negotiation between Bryce's representatives and the representative of the insurer of the other driver. A provisional agreement about the amount of damages to be awarded to Bryce (and also about other amounts to be paid to other persons) was arrived at. It is clear that Bryce personally played no part in those negotiations but his parents obviously did. Counsel, in his Opinion at paragraph 83, records that '*I am given to understand by the solicitor for [Bryce] that his parents do in fact support the proposed compromise*'. All concerned were, of course, aware that Bryce's claim could not actually be validly finalised without the Court's approval.
>
> Although described as a compromise in counsel's opinion and in the order of the Court, the process that lead to the payment was in every real sense a settlement of Bryce's claim. In my opinion the requirements of s17(3)(a)(i) are satisfied.

(Reasons, paras 46, 47)

The AAT was also satisfied that the Court's order was a 'consent judgement', or in the alternative an agreed

compromise followed by the Court's approval constituting a claim being settled 'otherwise', for the purposes of s.17(3)(a)(ii). The Tribunal therefore took the view that Centrelink had correctly calculated the preclusion period to expire on 20 January 2018. Before turning its mind to s.1184K, the AAT noted:

> I should record that shortly before the hearing in this case I became aware that the SSAT in five other (unreported) cases had taken a contrary view about the applicability of s17(3)(a) in the context of cases involving the approval of the Supreme Court of Victoria to compromises under the Victorian provision equivalent to Order 70: see Booth, *'Centrelink preclusion periods: interpreting the 50 per cent rule'* in Plaintiff, Issue 55, February 2003. My examination of the SSAT's reasons in those of the decisions I have been able to peruse has not, with respect to the various Members of the SSAT concerned, caused me to change the conclusions I have set out above.

(Reasons, para. 52)

Special circumstances

The AAT opined that the mere fact that the statutory formula created a discrepancy between what was offered and accepted by way of economic loss and the amount the statute assumed to be the case could not, of itself, be regarded as special. The AAT was, however, persuaded by Welch's personal circumstances:

> In my opinion, having regard to Bryce's medical conditions (which I consider to be exceptional and out of the ordinary), his complete inability to provide for himself physically or financially (other than through the trust fund), his parent's age and declining ability to care for him (physically and financially), and his probable need for increasingly expensive care arrangements, Bryce's situation can indeed be described as out of the ordinary and exceptional. It would, therefore, be appropriate, in my opinion, to treat some part of the compensation payment as not having been made.

(Reasons, para. 62)

The AAT considered that the amount of economic loss carefully calculated by Welch's advisers reflected the amount that could reasonably have been expected to be awarded by a Court. The AAT decided that a preclusion period which reflected the reality was, in the special circumstances of the case, a fair outcome. The AAT decided that the amount of $304,714 should be used to calculate the preclusion period, which was observed to be the same outcome as the SSAT, but for quite different reasons.

Formal decision

The AAT set aside the SSAT decision and determined s.17(3)(a) was applicable for the purpose of determining the compensation part of the lump sum and for the calculation of the preclusion period, but in the special circumstances of the case, it was appropriate to treat as not having been made that part of such amount as exceeded $304,174.

[S.L.]

Compensation preclusion period: inclusion of medical expenses forgone in the 'lump sum' compensation amount

BROAD and SECRETARY TO THE DFaCS (No. 2003/ 1017)

Decided: 10 October 2003 by R.G. Kenny.

Background

Broad sustained a workplace injury on 1 September 1998, and claimed compensation. He received periodic compensation payments from 1 September 1998 to 22 June 1999, and thereafter received disability support pension. On 2 August 2002 Broad entered a Deed of Discharge with WorkCover and his former employer, under which he would receive a lump sum payment of $232,500. WorkCover agreed to forgo $50,419.45 comprising medical, hospital, rehabilitation and disability payments made by WorkCover in relation to Broad's care management.

Centrelink calculated a preclusion period of 220 weeks, to apply from the day after the last day of periodic payments. The sum used to calculate the period was $261,695.92: the lump sum of $232,500, plus the $50,419.45 forgone by WorkCover, less periodic WorkCover payments of $21,223.53. Centrelink, on behalf of the DFaCS also sought recovery of $22,223.47, being disability support pension paid to Broad during the preclusion period.

The issues

Broad submitted that the sum used to calculate the preclusion period should have been $232,500, as that was the amount he had agreed to settle for. He considered the $50,419.45 in care expenses should not have been included in the lump sum. He also argued that the preclusion period should commence on the date of his injury, not the day after periodic payments ceased, and that he should be entitled to a pensioner concession card because the cut-out income figure used in the calculation was less than the relevant income threshold for the concession card.

The legislation

Section 1169 of the *Social Security Act 1991* ('the Act') states that a *compensation affected payment* is not payable during a *lump sum preclusion period*. The formula to work out a *lump sum preclusion period* is found in s.1170. Section 17(1) defines *compensation affected payment*, which includes disability support pension. The definition of *compensation* in s.17(2) requires that a payment is made wholly, or in part, for lost earnings or lost earning capacity arising from personal injury. Section 17(3) provides that, where a claim is settled, the *compensation part* of a lump sum compensation payment is 50% of the payment. Section 17(4) provides that periodic payments are removed from the calculation of the preclusion period, if they are liable to be repaid on receipt of the lump sum.

Of particular relevance in this case is s.1171, which reads:

> (1) If:
>
> (a) a person receives 2 or more lump sum payments in relation to the same event that gave rise to an entitlement of the person to compensation (the multiple payments); and
>
> (b) at least one of the multiple payments is made wholly or partly in respect of lost earnings or lost capacity to earn;
>
> the following paragraphs have effect for the purposes of this Act and the Administration Act:
>
> (c) the person is taken to have received one lump sum compensation payment (the single payment) of an amount equal to the sum of the multiple payments;
>
> (d) the single payment is taken to have been received by the person:
>
> (i) on the day on which he or she received the last of the multiple payments; or
>
> (ii) if the multiple payments were all received on the same day, on that day.
>
> (2) A payment is not a lump sum payment for the purposes of paragraph (1)(a) if it relates exclusively to arrears of periodic compensation.

Discussion

It was noted that the care management expenses forgone by WorkCover ($50,419.45) did not come within the definition of *compensation*, having no