SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *3/00

(Northern Ireland Commissioner's File No.: C6/99(CRS))

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Mrs M Alayande
Office of the Social Security and Child Support Commissioners
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by _____2000

but note that the Commissioner has given leave to appeal to the Court of Appeal in Northern Ireland.

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

Decision No: C6/99(CRS)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (CONSEQUENTIAL PROVISIONS) (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

COMPENSATION RECOVERY SCHEME

Application by the compensator for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 20 July 1998

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an application by the compensator for leave to appeal against a decision dated 20 July 1998 of a Medical Appeal Tribunal (hereinafter called "the Tribunal") sitting at Belfast. I grant leave to appeal and with the consent of both parties treat the application as an appeal and proceed to determine all questions arising thereon as though they arose on appeal.

2. I held an oral hearing of the application which was attended by Mr Gormley, of Ronald Rosser and Company Solicitors for the compensator and Mrs Fitzpatrick Solicitor of the Department of Health and Social Services Solicitors Department, for the Department. I am obliged to both for their assistance. CLAIMANT did not attend. I had issued directions in this case in relation to certain factual issues and on the basis of the replies to those directions which were included in Mrs Fitzpatrick's letter of 31 March 1999 I am prepared to accept that DHSS paid benefit by way of Income Support to CLAIMANT from 17 October 1996 on the basis that he was incapable of work.

3. The facts of the case are that CLAIMANT had been on benefit (Income Support) for some time prior to the date of the accident on 17 October 1996. The Income Support had been paid up until that date on the basis that CLAIMANT was available for and capable of work. After that date it was paid on the basis that he was incapable of work. The accident took place when CLAIMANT was working as a driver.

4. Mr Gormley stated that the ground of appeal was that benefit (in this case Income Support) which had been paid other than in respect of the relevant injury was included in the certificate of recoverable benefits. He submitted that the essence of the case was that looking at the objective medical evidence of Mr Wallace, Orthopaedic Surgeon and Dr Allen, CLAIMANT was not incapable of work for the period of time for which benefit was paid. He informed me that both questions in Article 14(2) of the Social Security (Recovery of Benefits) (Northern Ireland) Order 1997 arose.

5. The relevant provisions of the said Order are Articles 13 and 14 which provide:-

> **"Appeals against certificates of recoverable benefits**
>
> 13.-(1) An appeal against a certificate of recoverable benefits may be made on the ground-
>
> (a) that any amount, rate or period specified in the certificate is incorrect, or
>
> (b) that listed benefits which have been, or are likely to be, paid otherwise than in respect of the accident, injury or disease in question have been brought into account.
>
> (2) An appeal under this Article may be made by-
>
> (a) the person who applied for the certificate of recoverable benefits, or
>
> (b) (in a case where the amount of the compensation payment has been calculated under Article 10) the injured person or other person to whom the payment is made.
>
> (3) No appeal may be made under this Article until-
>
> (a) the claim giving rise to the compensation payment has been finally disposed of, and
>
> (b) the liability under Article 8 has been discharged.
>
> (4) For the purposes of paragraph (3)(a), if an award of damages in respect of a claim has been made under or by virtue of paragraph 10(2)(a) of Schedule 6 to the Administration of Justice Act 1982,

(orders for provisional damages in personal injury cases), the claim is to be treated as having been finally disposed of.

(5) Regulations may make provision-

(a) as to the manner in which, and the time within which, appeals under this Article may be made,

(b) as to the procedure to be followed where such an appeal is made, and

(c) for the purpose of enabling any such appeal to be treated as an application for review under Article 12.

(6) Regulations under paragraph (5)(c) may (among other things) provide that the circumstances in which a review may be carried out are not to be restricted to those specified in Article 12(1).

Reference of questions to medical appeal tribunal

14.-(1) The Department shall refer to a medical appeal tribunal any question mentioned in paragraph (2) arising for determination on an appeal under Article 13.

(2) The questions are any concerning-

(a) any amount, rate or period specified in the certificate of recoverable benefits, or

(b) whether listed benefits which have been, or are likely to be, paid otherwise than in respect of the accident, injury or disease in question have been brought into account.

(3) In determining any question referred to it under paragraph (1), the tribunal shall take into account any decision of a court relating to the same, or any similar, issue arising in connection with the accident, injury or disease in question.

(4) On a reference under paragraph (1) a medical appeal tribunal may either-

(a) confirm the amounts, rates and periods specified in the certificate of recoverable benefits, or

(b) specify any variations which are to be made on the issue of a fresh certificate under paragraph (5).

(5) When the Department has received the decision of the tribunal on the questions referred to the tribunal under paragraph (1), the Department shall in accordance with that decision either-

(a) confirm the certificate against which the appeal was brought, or

(b) issue a fresh certificate.

(6) Regulations may make provision-

(a) as to the manner in which, and time within which, a reference under paragraph (1) is to be made, and

(b) as to the procedure to be followed where such a reference is made.

(7) Regulations under paragraph (6)(b) may (among other things) provide for the non-disclosure of medical advice or medical evidence given or submitted following a reference under paragraph (1).

(8) In this Article "medical appeal tribunal" means a medical appeal tribunal constituted under section 48 of the Administration Act."

6. It will be seen from the above that there are two questions set out at Article 14(2) which can be referred to a Medical Appeal Tribunal.

7. Mr Gormley did not dispute that CLAIMANT received benefits of the amount stated in the certificate of recoverable benefit for the period stated in that certificate and of the type stated in that certificate. The only benefit on the certificate was Income Support. In essence his case was that CLAIMANT was not entitled to the benefit paid for the period for which he received it, or at all. He submitted that looking at the objective medical evidence from Mr Wallace and Dr Allen, CLAIMANT was not incapable of work.

8. Mr Gormley submitted that the Tribunal should be in a position to look at the periods specified, and make a finding in relation to the period for which it was reasonable to attribute benefits to the particular accident, illness or disease. The Tribunal then had to decide under Article 14(2)(b) whether or not benefit included in the certificate of recoverable benefit had been paid otherwise than in respect of the accident, injury or disease. There must be some reference to proper payment or entitlement. It was not a purely factual matter.

9. In support of this last contention Mr Gormley said that it was not by coincidence that there were two highly qualified doctors on the Medical Appeal Tribunal. If the issue was purely factual there was no need for medical expertise to be involved. The two doctors had to consider the medical issues. They had to decide if the injury, sickness or disease was suffered and for how long.

10. Mr Gormley referred also to Article 14(3) which obliges the Tribunal to take into account the decision of a court. In this particular case £3000 was the figure for the general damages. There was no record of any court order, which Mr Gormley stated had been made in this case being mentioned in the Tribunal record, but Mr Gormley confirmed that he did mention it to the Tribunal.

11. Mr Gormley referred to the case of *Donnelly -v- McCoy and McCoy* (21 June 1995); a decision of Mr Justice Girvan. In that case, the ability to claim the loss of non recoupable benefits as part of civil damages was at issue. The case was under the old 1992 Act legislation. Under the 1997 Order in his submission the general damages were ring-fenced and recoverable benefits were now paid directly by the compensator to the Department. Nonetheless in Mr Gormley's submission the principle which Girvan J enunciated in the *Donnelly* case applied equally to the 1997 legislation. In this respect he referred in particular to page 10 of the judgment and stated that Girvan J had concluded that an element of objectivity had to be interjected to determine for how long the compensator was obliged to pay the Department for damages for which it was entitled to be compensated. The compensator should not be bound by the fact that the claimant has claimed benefit for a longer period. He submitted that at pages 10 and 11 of the judgment Girvan J had set out the principles and approach to be adopted in cases of this nature. If the Department paid benefits which should not reasonably have been paid that was not, in Mr Gormley's submission, a loss which should be put at the compensator's door.

12. He further submitted that the provisions of Article 14(3) indicate that the matter is not a pure calculation, the Medical Appeal Tribunal (MAT) has to look at the medical issues. It is not just a matter of deciding what benefits are paid at a particular date and saying they must be repaid. There is an obvious qualification raised in relation to the Tribunal's findings in this particular case by virtue of Article 14(3). It was not, he submitted, the intention of the legislature that whatever the rights and wrongs of a payment those benefits should be repaid by the compensator. If that was the case there would be no need to consider a previous court judgment.

13. Mr Gormley expressed the view that both the 1992 and 1997 legislation only allowed for appeal of a certificate of recoverable benefits after the compensation had been paid. This, he submitted, seemed to be a specific provision to try to avoid delay and possible injustice to a plaintiff. If an appeal could take place pre settlement there could be a case of settlement being held up pending the outcome of an appeal on the certificate. It was obviously the legislature's wish to have claims dealt with quickly and efficiently. If the only matter to be taken into account was the decision of a court that would defeat the purpose of expediting settlement, for example in the case of significant injuries there could be a certificate of recoverable benefits and the sum of £20000 encompassing a number of benefits. If that certificate was in question the

appeal on recoverability could delay disposal of the case. If under Article 14(3) the Medical Appeal Tribunal could only take into account the decision of a court and if appeal against the certificate of recoverable benefit could only be brought by bringing the case to court that, he submitted, would defeat the intention of bringing cases to court quickly.

14. In response to my reference at hearing to Professor D S Greer's booklet entitled "Compensation Recovery: Substantive and Procedural issues" and in particular pages 20 and 21 thereof Mr Gormley submitted that the Medical Appeal Tribunal was not bound by the Social Security Appeal Tribunal decision dated 6 March 1998 (the Social Security Appeal Tribunal had made a determination that CLAIMANT was incapable of work). He referred to decision CCR/5336/1995 paragraph 9 as authority for the proposition that the relevant accident did not have to be the sole cause but must be an effective cause of the payment of benefit. He said that this entailed looking at the relevant medical evidence to see if at the relevant time the accident was an effective cause.

15. With regard to the slight change of wording in the 1992 and 1997 legislation Mr Gormley was of the view that the phrases "in consequence of" and "in respect of" were used interchangeably. The phrase "in consequence of" was issued in the 1992 legislation on recoupment of benefits and the phrase "in respect of" in the 1997 Order which was applicable to the present case.

16. Mrs Fitzpatrick submitted that the Medical Appeal Tribunal in reaching its decision did not err in law. In accordance with Article 14 the case was properly referred to the Medical Appeal Tribunal which considered all the evidence including medical reports submitted by the compensator.

17. Mr Wallace's report was merely an estimate of how long it would take for settlement of the condition.

18. With regard to the *Donnelly* case, the case was more concerned with the 1992 legislation and the question of whether or not there could be a special head of damages of non recoupable benefits.

19. Mrs Fitzpatrick also referred to the judgment of Mr Justice Pringle in the case of *Mitchell -v- Department of the Environment for Northern Ireland and Another* and the judgment of the Court of Appeal in England the case of *Hassall & Pether -v- Secretary of State for Social Security*, 15 December 1994.

20. Mrs Fitzpatrick submitted that the new legislation of 1997 specifically inserted a new head of non recoupable benefits. She said that the *Donnelly* case which was considered by the Medical Appeal Tribunal was not on point. She said that the issue before the Medical Appeal Tribunal was whether CLAIMANT was receiving benefit due to the accident for the length of time and the amount comprised in the certificate. CLAIMANT had been in receipt of Income Support prior to the accident. From 18 October 1996 until January 1998 this was paid in place of Incapacity Benefit (for which he did not satisfy the contribution conditions) due to the

relevant accident. The Tribunal found that it was bound by the decision of a Social Security Appeal Tribunal to the effect that CLAIMANT was incapable of work due to the relevant accident. Benefit was paid from after 17 October 1996 on a different basis than it had been paid earlier.

21. In response to my question, Mr Stewart of the Compensation Recovery Unit who attended with Mrs Fitzpatrick confirmed that no standard enquiry is made in relation to the existence of court orders in connection with certificates of recoverable benefit.

22. Mrs Fitzpatrick cited various cases dealing with the situation where someone had been in receipt of benefit prior to and post accident - these were C2/92(CRS) paragraphs 9 and 11 and C1/93(CRS) paragraph 6. In support of her contention that the accident had to be an effective but not necessarily the sole cause for the payment of benefit she referred to C1/92(CRS) paragraph 10 and CCR/001/93 (the Commissioner's decision leading to the *Hassall & Pether* appeal) paragraphs 7, 10 and 11. She also referred to CCR/5336/1995 paragraph 9, stating that it was not enough that benefit was paid, the cause of payment had to be considered but the view on entitlement to benefit was one for the statutory authorities.

23. Mrs Fitzpatrick said that the Medical Appeal Tribunal had taken the evidence into consideration. She conceded there was no record of consideration of the court order but the Tribunal did take into consideration the *Donnelly* case. The Tribunal would not be interested in how the £3000 was made up. She submitted that the benefits as certified were properly recoverable.

24. Mr Gormley submitted that it was clear that CLAIMANT had been less than truthful in his various dealings in connection with the claim and with the DHSS. CLAIMANT suggested at various times that he had not worked since 1981, then since 1991, yet he was working on the day of the accident. He submitted a claim for damage to his lorry and a recovery charge. The MAT should have taken all those matters into account in coming to its conclusion.

25. Mrs Fitzpatrick referred to medical certificates sent in by CLAIMANT to support his claim and in particular one by Dr Dorman dated 16 January 1998. She submitted said there was medical evidence right up to the date of the settlement saying CLAIMANT was unfit for work and Income Support was paid on this basis and was therefore recoverable.

26. Mrs Fitzpatrick asked me to uphold the Tribunal's decision but if not to substitute my own decision. Mr Gormley asked that I substitute my own decision for that which the Tribunal should have made.

27. As part of the papers in front of me I had the decision dated 6 March 1998 of a Social Security Appeal Tribunal (SSAT) allowing CLAIMANT'S appeal against a determination of an Adjudication Officer dated 22 December 1997 that CLAIMANT was not incapable of work. The SSAT allowing CLAIMANT'S appeal found him to be incapable of work and scored him 15 points on the All Work Test (the test used to determine incapacity for work in this case.) The SSAT's findings

on the All Work Test were also before me. The SSAT had recorded difficulties which CLAIMANT experienced in walking up and down stairs, sitting in an upright chair, standing, rising from sitting and bending and kneeling. It appears that CLAIMANT continued to complain of back pain, neck, shoulder and knee pain. The knee pain did not appear to be related to the accident. The others did. He complained of the back pain affecting him if he sat or stood too long and of the knee pain affecting his walking. The SSAT scored CLAIMANT 15 points. If he had scored any less points he would not have been considered to be incapable of work. It is quite apparent from the scoring which the SSAT recorded that some part of that score of 15 points was attributable to the complaints made coming out of the accident and that therefore the SSAT accepted that he still had some functional limitations as a result of that accident. In other words the accident was an effective cause of the award of Income Support.

28. It was on the basis of the Social Security Appeal Tribunal's decision that benefit continued to be paid from 22 December 1997 on the basis of Incapacity for Work.

29. What then was the jurisdiction of the instant Tribunal (a Medical Appeal Tribunal) in dealing with the compensation recovery element? That Tribunal had to determine the amount, rate or period specified in the certificate of recoverable benefits. It does not appear that there was any issue that benefits had not been paid at the amount, rate or periods specified in the certificate. The issue appears to have been whether the benefits were paid otherwise than in respect of the accident, injury or disease in question. The Tribunal decided that they were not paid otherwise but were paid because of the accident, injury or disease in question. In deciding this the Tribunal considered itself bound by the decision of the SSAT referred to above. I consider that it was correct to do so. The Tribunal was not in a situation to re-try the issue of whether or not CLAIMANT was incapable of work. It did not have jurisdiction in this respect. That jurisdiction was reserved to the Adjudication Officer and the SSAT. The SSAT therefore having determined that CLAIMANT was incapable and having found at least one of the effective causes of that incapacity to be a condition resulting from the accident, the Tribunal could not decide differently. The benefit was paid on the basis which it was paid as a result of the SSAT decision.

30. Mr Gormley has made mention of there being two consultant doctors on the Tribunal and of why it was so constituted. He said that this would not be necessary if the matter was purely a question of fact. He is of course correct in that respect, but the issues which can arise in relation to compensation recovery are many and varied. For example the claimant could suffer from a pre existing condition for which he has been on benefit and found incapable of work, he could meet with a non-industrial injury for which he receives compensation. Had that non-industrial injury worsened for a period, the pre existing condition, and the worsening then resolved but the claimant remained incapable of work and in receipt of benefit as a result there could be an area of dispute as to the cause of the incapacity for work even though it was accepted that the claimant was still incapable. If that was so the input of the doctors on the Tribunal would be considerable as would be the reasons why they would take into consideration the court order. In this case the claimant had been considered fit for work prior to the injury. He was unfit for work after it in the view of the statutory

authorities and there is no doubt that that view was based on the effects of the injury. The fact that there are doctors on the Tribunal does not alter the jurisdiction of the statutory authorities (and incidently there is no medical membership of the SSAT). It is also noteworthy that had the appeal been based solely on the amount, rate or period specified in the certificate of recoverable benefits the matter would still have been referred to a Medical Appeal Tribunal and in that case the medical input could well have been negligible.

31. The Tribunal has not recorded that it took any court decision into account. Mr Gormley informed me that he had told the Tribunal there was a court order. I have no reason to doubt this. Since there was no written decision it would appear that the court only made an order. It is the decision of the court and not a mere order which the Tribunal must take into account. I can find no error in this respect.

32. As regards the decision of Girvan J in the *Donnelly* case I am in agreement with Mrs Fitzpatrick that that decision was, in so far as relevant to this case, dealing with whether the plaintiff was entitled by way of special damages to a sum for loss of what were described as non recoupable benefits. Indeed Girvan J so states at page 6 of the judgment. The plaintiff had been in receipt of income support prior to the accident. He argued that (p8 of the judgment):-

> "... Having been injured he was from the date of the accident effectively deprived of that income support since he was from that point on in receipt of benefits which would have to be refunded to the Department from his damages."

This was under the 1992 Act. The judgment by Girvan J at pages 8 & 9 makes it abundantly clear that he was separating the perceived fairness and unfairness of the statutory provisions in the legislation on recoupment of benefits from the principle of restitutio in integrum on which he would award damages.

33. At pages 10 and 11 Girvan J states:-

> "In this case the defendant argues that if the plaintiff had been an ordinary working man he could only have justified a period of three months off work in consequence of his injury and that, if lost benefits are an allowable head of claim, the claim can relate only to that period since after that period the plaintiff could not agree <u>as against the defendant</u> [my underlining] that he has lost benefits "in respect of the accident". This, in my view, is the correct approach to the calculation of the allowable period for the lost benefits for which the plaintiff should be compensated ... In the period after the accident I find on the facts that it would be reasonable to assume that he should have been fit for work six months from the date of the accident and that after six months he could no longer claim benefits related to the consequences of the accident. If he has received benefits (as he appears to have) on the basis that the disability attributable to the accident has extended well beyond

the six months period and his damages are reduced because of the compensator's obligation to repay them to the Department, the loss which he suffers as a result of the recoupment provisions is a loss of his own making and cannot be visited on the defendant".

34. It will be clearly seen from the above that Girvan J was making a clear distinction between the benefits recoupable by DHSS as being paid as attributable to the accident and the period for which he considered the plaintiff suffered the effects of the accident and of which he could recover damages. The judge was not saying that DHSS was not entitled to recover benefits which it had paid attributable to the accident, quite the reverse. Under the 1992 legislation that recovery was made from the plaintiff/victim. Under the present legislation it is made from the defendant/ compensator. I have considerable reservations about the fairness of certain aspects of the wording of the legislation and I can understand Mr Gormley's concerns. I have, however, no doubt that if the competent adjudicating authority (in this case a Social Security Appeal Tribunal) finds a claimant/victim incapable of work and attributes that incapacity at least in part to a relevant accident or injury, neither the courts dealing with damages, nor a Medical Appeal Tribunal in an appeal or recoupable benefits) can oust that authority's jurisdiction and essentially re-try the matter of entitlement to benefit.

35. I am, as mentioned above, concerned at the possible injustice which can be wrought on a compensator in a case such as the present where the compensator is being asked to pay for a benefit and he has had no opportunity for input into the decision awarding same.

36. The main area where the compensator might wish to be involved would appear to be in relation to whether or not the claimant is entitled to the benefit in question or entitled to it for the period in question. ie. in the area of jurisdiction of the competent statutory adjudicating authorities. The proceedings of these authorities at the relevant times were governed by the Social Security (Adjudication) Regulations (Northern Ireland) 1995. Those Regulations provide at regulation 1, definitions of claimant and party to the proceedings.

A "claimant" is defined as: -

> "... a person who has claimed benefit under the Acts (including, in relation to an award or decision, a beneficiary under the award or a person affected by the decision) or from whom benefit is alleged to be recoverable, and, in relation to statutory sick pay and statutory maternity pay, includes both the employee alleged to be entitled to, and the employer alleged to be entitled to be liable to pay, such pay"

"Party to the proceedings" is defined as:-

> "(a) the claimant;

(b) in proceedings before an appeal tribunal or a disability appeal tribunal, the adjudication officer

...

(e) any other person appearing to the Department, the adjudicating authority or, in the case of the tribunal or board, its chairman or, in relation to an inquiry, the person appointed to hold the inquiry, to be interested in the proceedings."

37. Regulation 18 provides that a claimant is to be informed of a decision of an Adjudication Officer.

Is the compensator within the definition of claimant? He certainly is not a person who has claimed benefit but the definition of a person who has claimed is widened to include a person affected by the decision. The decision in question I take to be the decision on the claim to benefit. It could be *prima facie* argued that the likely compensator is a person affected by that decision as he may have to repay a sum equivalent to the amount of the benefit to the Department.

38. Is however, the interpretation of the phrase "a person affected by the decision" to be governed by the preceding phrase "a beneficiary under the award"? It seems to me equally arguable that the entire phrase " a beneficiary under the award or a person affected by the decision" is to be read as an alternative scenario, the "beneficiary" being applicable when an award is made (though the award itself would be subject of a decision). The "person affected by the decision" would be applicable when an award is refused as being either the actual claimant or someone with a direct interest in the decision on the claim, rather than an interest in it only if and when a further step or steps is taken ie. the seeking of compensation and the payment or proposed payment of compensation taking place.

39. I am strengthened in this view by the fact that both the "beneficiary" and the "person affected" are within an extended category of person who has claimed benefit. On balance therefore I think "person affected by the decision" is to be given a restrictive construction and to include only persons directly affected by the decision. I therefore consider the compensator cannot fall within this part of the definition of a claimant.

40. The definition, however, continues to include as a claimant a person "from whom benefit is alleged to be recoverable". Can the compensator fall within this category of claimant? The compensator is only liable to repay an amount equivalent to the total amount of recoverable benefits. In addition his liability only exists immediately before the compensation payment or if there is more than one, the first compensation payment is made. (Article 8 of the Order) I do not consider there is any indication that benefit or an amount equivalent thereto (which I think must amount to the same thing) is recoverable from the compensator unless and until such liability arises ie. immediately before the compensation payment (or first) payment is made. It is also arguable, in light of section 20(5) of the Social Security (Administration) Act (Northern Ireland) 1992 that benefit alleged to be recoverable under section 69 or 72

of that Act is included, but in light of my views indicated above I do not have to decide on that matter.

41. In this case there is no indication that any payment was made until 27 January 1998 and any relevant liability could only have arisen immediately prior to that (at the earliest on 26 January 1998). The decision to treat CLAIMANT as having satisfied the All Work Test pending assessment was made by the Adjudication Officer. I am not quite certain of the date thereof but it certainly pre-dated 14 November 1997. There was therefore no question that the compensator was a person from whom benefit was recoverable at the time the decision awarding Income Support on the basis of incapacity for work was made. This was the decision on foot of which the recoverable benefit was paid.

42. I can therefore see no way in which the compensator could have been entitled to have any input into the Adjudication Officer's decision to award benefit as the compensator was not a claimant when that decision was made.

43. On 22 December 1997 an Adjudication Officer decided that CLAIMANT was not to be treated as incapable of work as he had failed the All Work Test upon assessment. That decision CLAIMANT appealed to a SSAT which on 6 March 1998 allowed his appeal and found him to be incapable of work from and including 22 December 1997.

44. The SSAT was therefore dealing only with a short part of the period before the payment of compensation ie. from 22 December 1997 to 27 January 1998. Had the compensator any entitlement to be notified of the SSAT hearing and/or decision? Under regulation 4 of the Social Security (Adjudication) Regulations (Northern Ireland) 1995 (the Regulations in force at the time of the SSAT proceedings) notice had to be given to every "party to the proceedings"

"Party to the proceedings" is defined at Regulation 1 of those Regulations as

> "(a) the claimant;
>
> ...
>
> (e) any other person appearing to the Department, the adjudicating authority or, in the case of a tribunal or board, its chairman or, in relation to an inquiry, the person appointed to hold the inquiry, to be interested in the proceedings."

45. Because the definition of claimant already includes a person affected by the decision, albeit, I consider, in the narrow manner outlined above, I think the person appearing to be interested in the proceedings may have wider application. Otherwise there would no need for a separate category of person appearing to be interested in the proceedings. The definition of claimant would have covered the category.

46. I think it is arguable that a person who would be liable to make payments once the certificate of recoverable benefits was issued was a person interested in the proceedings. A compensator was, after all, likely to have to repay the benefit awarded if it was awarded because a claimant/victim was incapable of work, and if that incapacity was decided to be at least in part due to the relevant accident. It all depends on the construction to be given to "person appearing... to be interested in the proceedings".

47. However I do not find it necessary to decide on this matter for purposes of this case because even if the likely compensator was such a person, I do not consider that failure to notify that person rendered the SSAT decision a nullity or void *ab initio*.

48. Regulation 4(2) of the Adjudication Regulations provides that if notice has not been given to a person to whom it should have been given the hearing or inquiry may proceed only with the consent of that person. How the person not notified is to know of the hearing or inquiry in order to give the relevant consent, is not dealt with.

49. If the wider construction of "person appearing to be interested" is taken, it is certainly arguable that the Department at least was well aware of the interest of the compensator in the proceedings. There is no indication that the Adjudication Officer who made the decision on Income Support, the Tribunal, Social Security Appeal Tribunal or its Chairman was aware of any such interest.

50. If that wider construction is correct and the Department was so aware, it appears to me arguable though I express no concluded view that the Department should have ensured that notification of the hearing was given to the compensator.

51. I do not, however, consider that failure to notify any party to the proceedings rendered the SSAT Tribunal decision a nullity. It might possibly create a procedural irregularity in that it is arguable that the hearing proceeded without a consent which should have been obtained and it was only entitled to proceed with that consent. The SSAT was, however, properly constituted and convened and reached a decision which was within its jurisdiction. The SSAT decision might be set aside on the application of any party who had not been properly notified or consulted as provided in regulation 4(2). It might be appealed on the basis of a breach of the rules of natural justice. However, unless and until such decision was set aside or appealed it was effective and binding.

52. There has been no such setting aside in this case and so, on the basis that the, SSAT decision was properly made I consider the Tribunal was bound by it. CI/79/1990 (a Tribunal of Commissioners decision) sets out, at paragraph 34, reasons, which I follow, for this conclusion.

53. I therefore consider that CLAIMANT was awarded Income Support on the basis of the decision of the SSAT, the effects of the relevant accident being considered by it as the competent adjudicating authority to be one of the effective causes of entitlement to the said Income Support. As the instant Tribunal did not have jurisdiction to re-try the issue of entitlement to Income Support, Income Support was not paid otherwise than in respect of the relevant accident, injury or disease.

54. The certificate of recoverable benefits therefore listed no benefit paid otherwise than in respect of the relevant accident, injury or disease. The Tribunal was correct in its decision and I dismiss the appeal.

(Signed): Mary J. Logan
COMMISSIONER

(Date): 20th October 1999

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