

Alaska Workers' Compensation Appeals Commission

State of Alaska, Workers' Compensation
Benefits Guaranty Fund,
Appellant,

vs.

Charles G. West, Alaska Open Imaging
Center, and Midway Auto Park Sales &
Rentals,
Appellees.

Final Decision

Decision No. 145 January 20, 2011

AWCAC Appeal No. 10-004
AWCB Decision Nos. 10-0006 and
10-0007
AWCB Case No. 200817952

Final decision on appeal of Alaska Workers' Compensation Board Decision No. 10-0006 and Decision No. 10-0007, issued on January 15, 2010, by southcentral panel members William J. Soule, Chair, Janet Waldron, Member for Industry, and Patricia Vollendorf, Member for Labor.

Appearances: Daniel S. Sullivan, Attorney General, and Rachel L. Witty, Assistant Attorney General, for appellant, State of Alaska, Workers' Compensation Benefits Guaranty Fund; Robert A. Rehbock, Rehbock & Rehbock, for appellee, Charles G. West; appellees, Alaska Opening Imaging and Midway Auto Park Sales & Rentals, did not participate in appeal proceedings.

Commission Proceedings: Appeal filed January 28, 2010, with motion for partial stay pending appeal; opposition filed February 10, 2010; motion for stay heard on February 17, 2010; Order on Motion for Stay issued March 11, 2010; briefing completed October 7, 2010; oral argument was not requested by either participating party.

Appeals Commissioners: David Richards, Stephen T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

One of the 2005 amendments to the Alaska Workers' Compensation Act (Act), AS 23.30.001 – AS 23.30.395, was the passage of AS 23.30.082. In enacting AS 23.30.082, the Alaska legislature established the workers' compensation benefits

guaranty fund (Fund).¹ The Fund provides compensation and benefits to injured employees whose employers fail to pay them compensation and benefits.

¹ AS 23.30.082 reads:

Workers' compensation benefits guaranty fund. (a) The workers' compensation benefits guaranty fund is established in the general fund to carry out the purposes of this section. The fund is composed of civil penalty payments made by employers under AS 23.30.080, income earned on investment of the money in the fund, money deposited in the fund by the department, and appropriations to the fund, if any. However, money appropriated to the fund does not lapse. Amounts in the fund may be appropriated for claims against the fund, for expenses directly related to fund operations and claims, and for legal expenses.

(b) Every three months, the Department of Revenue shall provide the division with a statement of the activities of, balances in, interest earned on, and interest returned to the fund.

(c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter.

(d) If the fund pays benefits to an employee under this section, the fund shall be subrogated to all of the rights of the employee to the amount paid, and the employee shall assign all right, title, and interest in that portion of the employee's workers' compensation claim and any recovery under AS 23.30.015 to the fund. Money collected by the division on the claim or recovery shall be deposited in the fund.

(e) If the money deposited in the fund is insufficient at a given time to satisfy a duly authorized claim against the fund, the fund shall, when sufficient money has been deposited in the fund and appropriated, satisfy unpaid claims in the order in which the claims were originally filed, without interest.

(f) The division may contract under AS 36.30 (State Procurement Code) with a person for the person to adjust claims against the
(continued...)

Following the first hearing leading to this appeal, the Alaska Workers' Compensation Board (board) awarded compensation and benefits to the appellee, Charles G. West (West), on West's claim against his uninsured employer, Midway Auto Park Sales & Rentals (Midway).² Midway did not pay the benefits awarded by the board. After another hearing, the board issued a Final Decision & Order (FD&O) in which it construed AS 23.30.082 as requiring the Fund, the appellant, to pay West the compensation and benefits awarded him against Midway, including attorney fees, penalties, and interest.³ The same day, the board issued a Supplementary Final Order Declaring Amount of Default (SFO), in which it found Midway to be in default in the amount of \$66,583.42, plus undetermined prejudgment interest on certain medical benefits.⁴

The primary issue in this appeal is whether the Fund is liable to West for attorney fees, penalties, and interest. The commission agrees with the board that attorney fees and interest are among the compensation and benefits the Fund owes West. However, we disagree with the board that the Fund is liable for the penalties assessed against Midway. A secondary issue is when does the Fund's liability for West's compensation and benefits attach? We conclude that the Fund's liability arose once Midway failed to pay the awarded benefits, West filed a claim against the Fund for payment of those benefits, and Midway had no defenses to the claim that the Fund could have asserted.

fund. The contract may cover one or more claims.

(g) In this section, "fund" means the workers' compensation benefits guaranty fund.

² *Charles G. West v. Midway Auto Park Sales & Rentals*, Alaska Workers' Comp. Bd. Dec. No. 09-0100 (May 21, 2009)(*West I*). According to the board, the Fund was made a party to this claim in November 2008. *See West I*, Bd. Dec. No. 09-0100 at 1, 3.

³ *Charles G. West, et al. v. Midway Auto Park Sales & Rentals, et al.*, Alaska Workers' Comp. Bd. Dec. No. 10-0006 (Jan. 15, 2010)(*West II*).

⁴ *Charles G. West, et al. v. Midway Auto Park Sales & Rentals, et al.*, Alaska Workers' Comp. Bd. Dec. No. 10-0007 (Jan. 15, 2010)(*West III*).

2. *Factual background and proceedings.*

Following a hearing on May 21, 2009, the board issued a final decision on West's claim against Midway.⁵ The board found that West was an employee of Midway on October 17, 2008,⁶ the date that West suffered a covered injury when he slipped and fell on steps on Midway's premises.⁷ The board also found that Midway did not have workers' compensation insurance when it employed West.⁸ The board awarded West temporary total disability (TTD) benefits, certain medical benefits, interest, various penalties, attorney fees in the amount of \$15,624.25, and legal costs of \$531.74.⁹ These rulings were not appealed.

West did not file a lawsuit against Midway for his injuries.¹⁰ On July 2, 2009, he sought an order that the Fund pay him the benefits he was awarded against Midway in *West I*.¹¹ In its answers,¹² the Fund took the position that there was no finding by the board that Midway was in default, and that until a supplementary order of default was

⁵ See *West I*, Bd. Dec. No. 09-0100.

⁶ *Id.* at 34.

⁷ *Id.* at 3, 38-39.

⁸ *Id.* at 46.

⁹ *Id.* at 53.

¹⁰ See AS 23.30.055, which permits actions at law against employers who fail to secure the payment of compensation as required by the Act.

¹¹ See *West II*, Bd. Dec. No. 10-0006 at 1.

¹² Appellee's Exc. 293-98.

issued, the Fund was not “duly authorized”¹³ to pay West’s claim.¹⁴ The Fund also asserted it was not liable for attorney fees, penalties, and interest on his claim.

The board held a hearing on September 23, 2009.¹⁵ No witnesses testified.¹⁶ The record was left open for supplemental briefing until October 9, 2009.¹⁷ The board issued two decisions as a result of this hearing, the FD&O in *West II* and the SFO in *West III*.¹⁸ In *West II*, the board concluded that: 1) “[t]he Fund’s obligation to pay Employee’s benefits arises at the same time an uninsured employer’s obligation to pay benefits arises, with or without an award[;]” 2) “[t]he Fund must pay all compensation and benefits to which Employee is entitled with and without an award[;]” and 3) West

¹³ AS 23.30.082(e).

¹⁴ See AS 23.30.170, which reads in part:

Collection of defaulted payments. (a) In case of default by the employer in the payment of compensation due under an award of compensation for a period of 30 days after the compensation is due, the person to whom the compensation is payable may, within one year after the default, apply to the board making the compensation order for a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in AS 23.30.110, the board shall make a supplementary order declaring the amount of the default. . . .

(b) If the payment in default is an installment of the award, the board may, in its discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of the supplementary order with the clerk of the superior court. The supplementary order is final. The court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if it is in accordance with law. Any time after a supplementary order by the board, the attorney general, when requested to do so by the commissioner, shall take appropriate action to assure collection of the defaulted payments.

¹⁵ See *West II*, Bd. Dec. No. 10-0006 at 1.

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ See n.3 and n.4, *supra*.

was “entitled to an additional award of penalty, interest, and . . . attorney’s fees and costs against [Midway].”¹⁹ The board also concluded that West was entitled to a supplementary order declaring the amount of Midway’s default.²⁰ The board’s conclusions in *West II* are the subject of this appeal by the Fund.²¹

3. *Standard of review.*

The issues presented in this appeal require the commission to interpret AS 23.30.082. Interpretation of a statute is a question of law to which the commission applies its independent judgment.²²

4. *Discussion.*

a. *Applicable law.*

The Fund contends that the board was mistaken in its interpretation of AS 23.30.082, where the board members interpreted the statute to require the Fund to pay attorney fees, penalties, and interest to West. West maintains that the board correctly interpreted the statute in concluding that the Fund is liable for attorney

¹⁹ *West II*, Bd. Dec. No. 10-0006 at 50.

²⁰ *See id.*

²¹ In *West III*, the board issued a supplementary order declaring that Midway was in default of payment in the amount of \$66,583.42, plus undetermined prejudgment interest on the balance of “stipulated medical benefits” of \$15,265.04, not documented in the agency file, as of September 23, 2009. See *West III*, Bd. Dec. No. 10-0007 at 7. This order was not appealed.

²² See, e.g., *Anderson v. Alyeska Pipeline Service Co.*, 234 P.3d 1282, 1286 (Alaska 2010) and AS 23.30.128(b).

fees,²³ penalties,²⁴ and interest.²⁵ In the process of interpreting AS 23.30.082, we must determine whether attorney fees, penalties, and interest are “compensation and

²³ AS 23.30.145(b) reads:

If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

²⁴ The penalties awarded by the board were based on the provisions of AS 23.30.070(f), AS 23.30.085(b), and AS 23.30.155(e). *See West II*, Bd. Dec. No. 10-0006 at 50; *West I*, Bd. Dec. No. 09-0100 at 53.

AS 23.30.070(f) reads:

An employer who fails or refuses to send a report [of injury to the division of workers' compensation] required of the employer by this section or who fails or refuses to send the report required by (a) of this section within the time required shall, if so required by the board, pay the employee or the legal representative of the employee or other person entitled to compensation by reason of the employee's injury or death an additional award equal to 20 percent of the amounts that were unpaid when due. The award shall be against either the employer or the insurance carrier, or both.

AS 23.30.085(b) provides:

If an employer fails, refuses, or neglects to comply with the provision of this section, [requiring filing evidence of compliance with the insurance provisions of the Act], the employer shall be subject to the penalties provided in AS 23.30.070 for failure to report accidents; but nothing in this section may be construed to affect the rights conferred upon an injured employee or the employee's beneficiaries under this chapter.

AS 23.30.155(e) states:

If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of
(continued...)

benefits," within the meaning of the statute. Second, the commission must decide at what time the Fund becomes liable for payment of a claim. The Alaska Supreme Court has not had occasion to interpret AS 23.30.082. However, following its lead, we are to interpret AS 23.30.082 "according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose."²⁶

Subsection (c) of AS 23.30.082²⁷ provides that an employee whose employer fails to meet the requirements of AS 23.30.075 and fails to pay "compensation and benefits" due the employee, has a claim for payment against the Fund. While this language indicates that an employee can file a claim against the Fund for compensation and benefits that the employer fails to pay, AS 23.30.082 does not specify what is included in "compensation," or what is included in "benefits," for purposes of Fund payment of a claim. Moreover, we note that 1) the Act's definition of "compensation" as "the money allowance payable to an employee . . . as provided for in this chapter,"²⁸ is broadly worded, and 2) the term "benefits" is not defined in the Act, although it is

this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.

²⁵ AS 23.30.155(p) states: "An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due."

²⁶ *Anderson*, 234 P.3d at 1286.

²⁷ *See* n.1, *supra*.

²⁸ AS 23.30.395(12).

used throughout the Act in a variety of contexts. *See, e.g.*, AS 23.30.001(1),²⁹ AS 23.30.010 (coverage for compensation or benefits), AS 23.30.030(4) (insurer liability for benefits), AS 23.30.041 (reemployment benefits), AS 23.30.095 (medical and related benefits), and AS 23.30.224 (coordination of benefits).

Our consideration of statutory language in construing AS 23.30.082 is not necessarily restricted to the language of that statute, or interpreting the meanings of the terms “compensation” or “benefits.” The Alaska Supreme Court “construes statutes *in pari materia* where two statutes were enacted at the same time, or deal with the same subject matter.”³⁰ Statutes *in pari materia* are to be construed together.³¹ Several sections of the Act, AS 23.30.082, AS 23.30.075, and AS 23.30.045 among them, are *in pari materia* because they deal with the same subject matter, namely employer or Fund liability for compensation and benefits. These statutes should be construed together.

First, AS 23.30.075(a), which is expressly referenced in AS 23.30.082(c), requires an employer to “either insure and keep insured for the employer’s liability under” the Act, or demonstrate “the employer’s financial ability to pay directly the compensation provided for.” In other words, under subsection .075(a), an employer must either have insurance, or the financial ability to pay the “compensation” for which it is liable under the Act. The “compensation” for which an employer is liable is set forth in AS 23.30.045(a). This subsection states in relevant part that “[a]n employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, . . . 23.30.095, 23.30.145, and 23.30.180 — 23.30.215.” Furthermore,

²⁹ AS 23.30.001(1) reads: “It is the intent of the legislature that . . . this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter[.]”

³⁰ *Underwater Const., Inc. v. Shirley*, 884 P.2d 150, 155 (Alaska 1994) (citing, *inter alia*, 2A Norman J. Singer, *Sutherland Statutory Construction* § 51.01-.02 (5th ed. 1992) (hereinafter *Sutherland*)) (emphasis added).

³¹ *See* 2B *Sutherland* § 51.02 (7th ed. 2010).

although AS 23.30.045(a) cites these statutes as providing for “compensation” that is payable, some of the statutes themselves use the term “benefits,” rather than “compensation,” to describe what is to be paid. *See, e.g.*, AS 23.30.041 (reemployment benefits), AS 23.30.095 (medical and related benefits), and AS 23.30.180 — 23.30.215 (indemnity, disability, and death benefits).³² Finally, attorney fees, provided for in AS 23.30.145, are considered compensation that is payable under AS 23.30.045(a). Construing these statutes together, we conclude that, for the purposes of AS 23.30.082, “compensation and benefits” encompass the compensation or benefits for which the employer is liable under AS 23.30.045(a), including AS 23.30.041, AS 23.30.095, AS 23.30.145, and AS 23.30.180 — 23.30.215.³³

Second, when interpreting AS 23.30.082, we are to consider the legislative history of that section. As previously noted, the enactment of AS 23.30.082 was a part of the 2005 amendments to the Act. However, while other amendments may have been the subject of considerable debate by the Alaska legislature, Sec. 22 of Senate Bill (SB) 130,³⁴ the proposed amendment adding AS 23.30.082 to the Act, was not. Consequently, the legislative history is of limited guidance to us in our effort to interpret AS 23.30.082.

Third, we are to consider the purpose of AS 23.30.082 in construing it. One purpose of the 2005 amendments to the Act was to lessen the threat to jobs and workers’ benefits caused by workers’ compensation insurance premiums increasing at

³² All of these statutes use the word “benefits” except for AS 23.30.190 and AS 23.30.195 dealing with permanent partial impairment, and AS 23.30.205 concerning the second injury fund (SIF).

³³ Based on this interpretation of these statutes, we reject the Fund’s arguments that it should not be liable for attorney fees because the fee statute, AS 23.30.145(b), refers only to the employer’s, not the Fund’s, liability for fees and because the board wrongly imputed the employer’s resistance to West’s claim to the Fund, in deciding to award fees against the Fund. *See Appellant’s Br.* at 13.

³⁴ SB 130, 24th Leg. (Alaska 2005). As it made its way through the legislature, SB 130 was later identified as CSSB 130 (FIN) am, and the proposed amendment adding AS 23.30.082 was identified as Section 23.

ever-escalating rates.³⁵ Identification of this purpose does not advance the analysis here, however, because AS 23.30.082 addresses circumstances in which the employer is uninsured. It is clear that an obvious concern of the Alaska legislature, when debating the 2005 amendments, was to make injured workers whole, so they could return to work.³⁶ Presumably, the legislature intended the Fund to fill the void and make whole an injured employee of an uninsured employer.

From these sources we are able to garner an intent on the part of the Alaska legislature, in passing the 2005 amendments to the Act, including AS 23.30.082, to insure that injured workers are paid compensation and benefits, either by their employers, or by the Fund, if and when employers have failed to pay them. The questions still to be answered are whether the Fund is liable for everything in the way of compensation and benefits for which an uninsured employer is liable, in particular, whether the Fund is liable for attorney fees, penalties, and interest, and when does its liability arise.

b. Attorney fees are "compensation" for which the Fund is liable.

We have already noted that AS 23.30.045(a) expressly includes attorney fees under AS 23.30.145, as among the "compensation payable" to employees. Likewise, in construing AS 23.30.155(j),³⁷ the Alaska Supreme Court made the same observation.³⁸ In *Croft*, the majority held that "attorney's fees are compensation in the context of

³⁵ See Appellant's Exc. 95, Senate Judiciary Committee Minutes, April 5, 2005, summary by Paul Lisankie, director, Division of Workers' Compensation.

³⁶ "[T]his isn't about a bill, or a section of law, or a political process that's between the employee and the employer. This is about a system for making injured workers whole, so that they can get back to work." House Special Session, Tr. 17, May 20, 2005, remarks by Rep. David Guttenberg.

³⁷ AS 23.30.155(j) reads in relevant part: "If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed" by withholding a percentage out of future installments of compensation.

³⁸ See *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1067 (Alaska 1991).

employer liability.”³⁹ Moreover, it held that the phrase “payable to an employee[,]” in the definition of compensation, “does not limit ‘compensation’ to payments made directly to the employee, but includes attorney’s fees paid on behalf of the employee.”⁴⁰ Accordingly, we conclude that attorney fees are compensation within the meaning of AS 23.30.082, for which the Fund is liable when payment of them by an employer is not forthcoming.⁴¹

The Fund argues that it is not liable for a claimant’s attorney fees based on two sources of law. It points to the legislative history of AS 23.30.082 and a board decision, *Jay L. Tucker v. Charles Hennager/Sunshine Services, Inc.*,⁴² in support of its argument. When the 2005 amendments to the Act were under consideration by the legislature, the Department of Law (Department) prepared a section-by-section analysis of the amendments.⁴³ With respect to the section which ultimately passed as AS 23.30.082, part of the Department’s analysis was a pronouncement that “[t]he reference to ‘legal expenses’ in subsec. (a) is intended to refer to the legal expenses of the [F]und, not those of the claimant against the [F]und.”⁴⁴ In *Tucker*, the basis for the board’s conclusion that the Fund was not liable for the claimant’s attorney fees and legal costs

³⁹ *Croft*, 820 P.2d at 1067.

⁴⁰ *Id.* Since *Croft* was decided, the definition of “compensation” in the Act was renumbered from AS 23.30.265(8) to AS 23.30.395(12).

⁴¹ *Contra Providence Washington Ins. Co. v. Busby*, 721 P.2d 1151, 1152 (Alaska 1986) (holding compensation does not include attorney fees for the purposes of SIF reimbursement, because the statutory language of “compensation liability for *disability*” and the provision determining employer contributions to the SIF based on the employee’s entitlement to *disability* demonstrated an intent to limit reimbursement to disability payments). The SIF still may be required to pay attorney fees when it, rather than the employer, pursues litigation. *Second Injury Fund v. Arctic Bowl*, 928 P.2d 590, 597 (Alaska 1996).

⁴² Alaska Workers’ Comp. Bd. Dec. No. 07-0362 (Nov. 30, 2007).

⁴³ Appellant’s Exc. 100-120.

⁴⁴ *Id.* 110-11 and 145.

was this pronouncement by the Department.⁴⁵ The board apparently inferred that the Fund did not owe any legal expenses other than its own.⁴⁶

We are not persuaded by the Fund's argument. First, even though there is precedent for using the Department's analysis when construing a statute,⁴⁷ if the analysis is ambiguous, as it is here, its value in construing a statute is diminished. Second, in the *Tucker* decision, the board's reliance on the Department's analysis, in our opinion, is misplaced. That analysis should not be construed as declaring that AS 23.30.082 operates to prohibit the Fund from paying a claimant's attorney fees in every instance.

The context of the reference to "legal expenses" in AS 23.30.082(a) is important. Among other things, that subsection identifies amounts the Fund may pay, which are: 1) claims against the Fund, 2) expenses directly related to Fund operations, and 3) legal expenses. Based on this language in the statute, it is clear that the Fund may pay: a) claims against it, and b) its operational expenses. On the other hand, it is not clear from the statutory language alone that the reference to "legal expenses" is to the Fund's legal expenses. As distinguished from claims and operational expenses, the statute does not expressly link the Fund and the reference to legal expenses. Accordingly, the purpose of the Department's pronouncement may have been to simply clarify that the reference to "legal expenses" in subsection .082(a) is to the Fund's. Without more, the Department's analysis is too ambiguous to infer from it that AS 23.30.082 otherwise bars the Fund from paying a claimant's attorney fees.

In *Tucker*, the board denied the employee's claim for attorney fees against the Fund.⁴⁸ Its sole source of legal authority for this denial was the Department's pronouncement that the reference to "legal expenses" in subsection .082(a) is to the

⁴⁵ See Bd. Dec. No. 07-0362 at 14.

⁴⁶ *Id.*

⁴⁷ See *State v. Patterson*, 740 P.2d 944, 947 (Alaska 1987).

⁴⁸ See Bd. Dec. No. 07-0362 at 14.

Fund's legal expenses, not the claimant's.⁴⁹ However, the Department's analysis of this subsection does not stand for the proposition the board is attributing to it, that AS 23.30.082 precludes the Fund from paying a claimant's attorney fees. Even though the analysis includes the observation that the Fund may pay its legal expenses, pursuant to subsection .082(a), it does not follow that the Fund is not liable for a claimant's attorney fees and there is no other language in AS 23.30.082 from which such a conclusion can be drawn.

The objective here is to determine the compensation and benefits for which the Fund is liable. Because relevant rules of statutory construction and the holding in *Croft* indicate that a claimant's attorney fees are compensation, we conclude that the Fund owes those fees when an employer fails to pay them. The commission is not persuaded by the argument that the Fund is not liable for attorney fees, on the basis of the Department's analysis of AS 23.30.082(a) and the board's misapplication of that analysis in *Tucker*. We affirm the board with respect to the attorney fees issue in West's case.

c. Penalties are not "compensation" or "benefits" which the Fund owes.

As we did with the attorney fees issue, we begin our analysis of the issue whether the Fund is liable for penalties by considering statutory language. AS 23.30.082 is silent on the penalties issue. It neither expressly authorizes the Fund to pay penalties assessed against an uninsured employer, nor expressly precludes the Fund from paying penalties. However, as we stated earlier,⁵⁰ our consideration of statutory language is not limited to the language of AS 23.30.082. Statutes that are *in pari materia*, that is, statutes that deal with the same subject matter, are to be construed together.⁵¹ Because AS 23.30.082, AS 23.30.075(a), and AS 23.30.045(a)

⁴⁹ See Bd. Dec. No. 07-0362 at 14.

⁵⁰ See discussion, *supra* at 8-9.

⁵¹ See *Underwater Const., Inc.*, 884 P.2d at 155.

deal with the same subject matter, that is, employer or Fund liability for compensation or benefits, we construe them together.

The statute pertaining to attorney fees, AS 23.30.145, is expressly referenced in AS 23.30.045(a), which designates, by statute number, the “compensation payable” to employees. Our conclusion that attorney fees are compensation that the Fund owes, within the meaning of AS 23.30.082(c), is based in part on construing those two statutes to that effect. In contrast, on the issue whether the Fund owes penalties, as provided in AS 23.30.070(f), AS 23.30.085(b), and AS 23.30.155(e), none of these statutes are referenced in AS 23.30.045(a) as “compensation payable.” Moreover, there is no Alaska Supreme Court authority that characterizes penalties as “compensation,” as the court did with attorney fees in *Croft*.⁵² Thus, there is no reason for us to consider penalties as compensation pursuant to case law.

Next, we consider the purposes of the 2005 amendments, including passage of AS 23.30.082, one of which is to insure that injured workers are made whole through payment of compensation and benefits, either by their employers, or the Fund. Compensation and benefits, including reemployment benefits, medical and related benefits, indemnity, and disability benefits, can readily be viewed as necessary to make an injured employee whole. On the other hand, penalties are not compensatory, nor do they make an injured employee whole. Instead, they are similar to punitive damages in civil litigation; they serve to punish and deter wrongdoing.⁵³ Here, there has been no wrongdoing on the part of the Fund, only Midway. Therefore, the rationale for the payment of penalties is missing where the Fund is the obligor. Furthermore, as a practical matter, the legislature may not have considered the Fund’s payment of

⁵² *But see Phillips v. Nabors Alaska Drilling, Inc.*, 740 P.2d 457, 459 (Alaska 1987) (although not deciding whether penalties are compensation, the decision contrasts “the penalty decision” with the “compensation award”).

⁵³ *See, e.g., Anderson v. State ex rel. Central Bering Sea Fishermen’s Ass’n*, 78 P.3d 710, 717 (Alaska 2003).

penalties as advancing its goal of making injured workers whole, especially where the source of the money to pay claims against the Fund, in part, is the public coffers.⁵⁴

Thus, based on statutory language, case law, and legislative intent, the commission concludes that the Fund is not liable for penalties. We reverse the board in this respect.

d. Interest is "compensation" which the Fund owes.

Under Alaska law, in civil litigation, prejudgment interest serves two purposes: 1) to compensate an injured party for the loss of the use of money from the date of injury until the date of judgment; and 2) to deprive the other party of unjust enrichment resulting from the use of money from the date of injury.⁵⁵ Prejudgment interest is considered an element of damages.⁵⁶ A money judgment gives rise to a debt on which postjudgment interest accrues.⁵⁷ Postjudgment interest is "true" interest.⁵⁸ In the commission's view, the interest provided for in AS 23.30.155(p)⁵⁹ at times resembles prejudgment interest because it requires an employer to pay interest on compensation that is not paid when due, without an award from the board. However, once the board enters an award, which is roughly analogous to a judgment in civil litigation,⁶⁰ the interest that accrues is akin to postjudgment interest.

⁵⁴ See AS 23.30.082(a).

⁵⁵ See, e.g., *Anchorage Asphalt Paving Co. v. Lewis*, 629 P.2d 65, 69 (Alaska 1981).

⁵⁶ See, e.g., *Davis v. Chism*, 513 P.2d 475, 481 (Alaska 1973).

⁵⁷ See, e.g., *Dixon v. Dixon*, 747 P.2d 1169, 1172 (Alaska 1987); *Guin v. Ha*, 591 P.2d 1281, 1287 (Alaska 1979).

⁵⁸ See, e.g., *Hughes v. Harrelson*, 844 P.2d 1106, 1108 (Alaska 1993) (Moore, J., dissenting opinion) (citing *Allstate Ins. Co. v. Allen*, 797 P.2d 46, 49-50 (Colo. 1990)).

⁵⁹ See n.25, *supra*.

⁶⁰ See *Olsen Logging Co. v. Lawson*, 856 P.2d 1155, 1159 (Alaska 1993) (comparing the board's power to set aside awards to a court's authority to set aside final civil judgments).

Here, it is undisputed that Midway did not pay West compensation when it was due. Thus, interest in the nature of prejudgment interest had been accruing on the TTD and other benefits prior to the board's award of those benefits against Midway on May 21, 2009, in its decision in *West I*.⁶¹ It is also undisputed that to date, neither Midway nor the Fund has paid the amounts awarded West. However, since the decision in *West I*, the interest accruing on the benefits the board awarded is similar to postjudgment interest.

Against this backdrop, we are to decide whether the compensation and benefits for which the Fund is liable under AS 23.30.082 include interest on the compensation and benefits. Starting with the statutory language, we note that, as distinguished from penalties, AS 23.30.082 includes a reference to "interest."

If the money deposited in the fund is insufficient at a given time to satisfy a duly authorized claim against the fund, the fund shall, when sufficient money has been deposited in the fund and appropriated, satisfy unpaid claims in the order in which the claims were originally filed, without interest.⁶²

The Fund and the board in *Tucker*⁶³ contend that the Fund is relieved of having to pay any interest, by virtue of the provisions of subsection .082(e).

This argument notwithstanding, the reference to interest in subsection .082(e) should be read in context. It provides that when there is insufficient money in the Fund to pay "duly authorized" claims, once sufficient money is deposited, the Fund is to pay the claims, without interest. We find that a reasonable, practical, common sense⁶⁴ interpretation of this language in subsection .082(e), is that the one circumstance in which the Fund does not owe interest on claims, is when its payment of claims is

⁶¹ The board characterized the interest that had been accumulating on these unpaid benefits as prejudgment interest. *See West III*, Bd. Dec. No. 10-0007 at 4.

⁶² AS 23.30.082(e).

⁶³ *See Tucker*, Bd. Dec. No. 07-0362 at 14.

⁶⁴ *See Anderson*, 234 P.3d at 1286.

delayed because there is not enough money in the Fund. To construe this subsection as a total ban on the Fund paying interest is inappropriate.

However, the Fund urges us to construe AS 23.30.082 together with AS 23.30.155(p). It argues that “interest” cannot be considered “compensation” because interest under AS 23.30.155(p) is calculated on compensation that is not paid when due. The gist of this argument is that, by statute, interest is always interest and compensation is always compensation. Interest can never be compensation. It is our opinion that the Fund is taking too narrow a view on this issue.⁶⁵ By definition, “compensation” is “the money allowance payable to an employee . . . as provided for in this chapter[.]”⁶⁶ Once interest accrues under AS 23.30.155(p), with or without a board award, it forms part of the money allowance payable to an employee. At that point, it can be considered compensation.

Even though this construction of these statutes lends itself to a conclusion that interest is a form of compensation, in our view, a better reason for characterizing interest as compensation is the intent behind the 2005 amendments to the Act. It is to make the injured employee whole through payment of compensation and benefits by the employer, or the Fund. When we consider that one of the purposes of prejudgment

⁶⁵ We note that the Alaska Supreme Court and this commission have interpreted “compensation” differently depending on context, so that even if “interest” is distinct from “compensation” in subsection .155(p), interest may be considered “compensation and benefits” for the purposes of subsection .082(c). See *Childs v. Copper Valley Elec. Ass’n*, 860 P.2d 1184, 1191-92 (Alaska 1993) (holding that compensation includes medical benefits for the purposes of awarding interest and for assessing a statutory penalty for late payments under AS 23.30.155(e)); *Providence Washington Ins. Co.*, 820 P.2d at 67 (holding medical benefits and attorney fees are not compensation for purposes of reimbursement from the SIF); *Moretz v. O’Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989) (holding medical benefits are compensation for the purposes of computing prejudgment interest); *Fred Meyer, Inc., v. Updike*, Alaska Workers’ Comp. App. Comm’n Dec. No. 120, 11-12 (October 29, 2009) (defining compensation as not including medical benefits for the purposes of AS 23.30.110(g), and thus, the board could not order a second independent medical examination under subsection .110(g) where claimant sought only medical benefits).

⁶⁶ AS 23.30.395(12).

interest is to compensate an injured party for the loss of the use of money from the date of injury,⁶⁷ and that prejudgment interest is an element of damages,⁶⁸ prejudgment interest has all the characteristics of compensation that makes an employee whole.

In our view, postjudgment interest on a workers' compensation award is like interest on a money judgment. Once the award is entered, similar to a money judgment, the award represents a type of debt on which interest accrues.⁶⁹ The debt is owed to the employee.

The board ruled that interest, whether it is characterized as prejudgment or postjudgment, is compensation payable to West, either by the employer, Midway, or the Fund. We agree. The Fund's liability for the payment of interest arises pursuant to the provisions of AS 23.30.082 and AS 23.30.155(p).

e. The Fund's liability for the payment of compensation and benefits arises when 1) the employer fails to pay compensation or benefits, 2) a claim for payment by the Fund is filed, and 3) the employer has no defenses that the Fund can assert.

AS 23.30.155(a) states in part that "[c]ompensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer." AS 23.30.082(c) provides in relevant part that "an employee employed by an employer . . . who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund." It also states that "[t]he fund may assert the same defenses as an insured employer under this chapter." These two subsections are *in pari materia*; they deal with the same subject matter, payment of

⁶⁷ See *Anchorage Asphalt Paving Co.*, 629 P.2d at 69.

⁶⁸ See *Davis*, 513 P.2d at 481.

⁶⁹ See, e.g., *Guin*, 591 P.2d at 1287.

compensation or benefits, either by an employer, or by the Fund. We construe them together.⁷⁰

Pursuant to AS 23.30.155(b),⁷¹ an employer's liability for compensation arises 14 days after being apprised of an employee's injury. West filed a claim against the Fund in November 2008, shortly after he filed his claim against Midway.⁷² In response, the Fund alleged that West may not have been Midway's employee, and that the Fund was not required to pay him benefits until Midway was found to be in default and a supplementary order entered.⁷³ When the board handed down its decision in *West I* on May 21, 2009, the issue whether West was Midway's employee was determined.⁷⁴

We conclude that it was not until May 21, 2009, that the three statutory prerequisites for Fund liability in AS 23.30.082(c) were satisfied. In this case, they are: 1) that Midway, the employer, was uninsured and had failed to pay compensation and benefits; 2) that West, the employee, had filed a claim for payment by the Fund; and 3) that Midway had no defenses to West's claim that the Fund could assert.⁷⁵ Therefore, we cannot agree with the board's holding that, with or without an award, the Fund's obligation to pay compensation or benefits to West arose at the same time Midway's obligation to pay compensation or benefits arose.⁷⁶

On the other hand, we do not construe AS 23.30.082(c) as requiring compliance with AS 23.30.170⁷⁷ before the Fund's liability attaches, as the Fund argues. First, we

⁷⁰ See discussion, *supra* at 8-9.

⁷¹ AS 23.30.155(b) reads in part: "The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury[.]"

⁷² See *West I*, Bd. Dec. No. 09-0100 at 3.

⁷³ Appellee's Exc. 275-76.

⁷⁴ See *West I*, Bd. Dec. No. 09-0100 at 34.

⁷⁵ We are assuming, for the purposes of this discussion, that there is sufficient money deposited in the Fund to satisfy West's claim.

⁷⁶ See *West II*, Bd. Dec. No. 10-0006 at 50.

⁷⁷ See n.14, *supra*.

assume that the Alaska legislature passed AS 23.30.082 knowing that AS 23.30.170 provided a procedure whereby an employee could obtain a judgment in superior court against an employer that failed to pay compensation or benefits.⁷⁸ Yet there is no reference in section .082 to section .170, or to any requirement that employees obtain a default or supplementary order, in order to pursue payment from the Fund. Second, we view AS 23.30.082 as providing employees with a different remedy than the procedure found in AS 23.30.170 for reducing compensation awards against employers to enforceable judgments. Third, as the board pointed out,⁷⁹ placing more obstacles in the path of employees who have not been paid compensation and benefits is antithetical to the Act's purpose of ensuring "the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers[.]"⁸⁰

Finally, we note that our decision only affects the timing of the Fund's liability to pay. Under AS 23.30.155(p) and (b), interest began to accrue against Midway when it failed to pay West the compensation due him. We have concluded that the Fund owes interest to the same extent that Midway would.⁸¹

⁷⁸ See *Morgan v. State*, 661 P.2d 1102, 1104 (Alaska App. 1983) ("It is presumed that when a legislature drafts a statute it does so with full knowledge of existing law . . .") (citation omitted). See also *Peter v. State of Alaska*, 531 P.2d 1263, 1267 (Alaska 1975) (discussing presumption against implied repeals, which was "classically founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation, and, therefore, if a repeal of the prior law is intended," it would expressly do so but ultimately rejecting the presumption against implied repeals); *Matthews v. Quinton*, 362 P.2d 932, 946 (Alaska 1961) (presuming constitutional delegates "knew the nature and effect of [existing territorial] laws") (Dimond, J., dissenting opinion).

⁷⁹ See *West II*, Bd. Dec. No. 10-0006 at 37-38.

⁸⁰ AS 23.30.001(1).

⁸¹ Here, because there is sufficient money deposited in the Fund to pay West's claim, we are not confronted with the issue whether the Fund is relieved of its obligation to pay interest pursuant to AS 23.30.082(e).

5. *Conclusion.*

We affirm the board's decision that the Fund is liable for attorney fees and interest; we reverse its decision that the Fund is liable for penalties and that its liability arises at the same time as Midway's. We remand this matter to the board to calculate the amount the Fund owes West in conformity with this opinion.

Date: 20 January 2011

Alaska Workers' Compensation Appeals Commission



Signed

David Richards, Appeals Commissioner

Signed

Stephen T. Hagedorn, Appeals Commissioner

Signed

Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirmed the board's decision that the Fund was liable for attorney fees and interest. The commission reversed the board's decision that the Fund was liable for penalties and that the Fund's liability arises at the same time as the employer's. The commission remanded this matter to the board to calculate the amount the Fund owes West in conformity with this opinion. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. See AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission within 30 days of this decision being distributed or mailed. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of the Final Decision No. 145 issued in the matter of *State of Alaska, Workers' Compensation Benefits Guaranty Fund v. West, et al.*, AWCAC Appeal No. 10-004, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 20, 2011.

Date: January 25, 2011



Signed

B. Ward, Appeals Commission Clerk