

Case: *Hutto Consulting and Mark McAlpine vs. Banner Health System and Harbor Adjustment Service, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 169 (September 12, 2012)

Facts: Mark McAlpine (McAlpine) was eligible for reemployment benefits. His employer, Banner Health System (Banner), selected Tommy Hutto of Hutto Consulting (Hutto) to develop the plan. Hutto submitted two plans but the reemployment benefits administrator (RBA) did not approve either one because they failed to meet AS 23.30.041 requirements. Hutto sought payment for his services after Banner controverted payment. At the board hearing there was testimony that McAlpine was a particularly difficult employee to place in a position at a remunerative wage because he had little education, low math and reading skills and a debilitating back injury. The board ordered payment of Hutto's fees but denied that a late-payment penalty was owed. Hutto appealed the denial of a penalty and Banner appealed the payment order.

Applicable law: AS 23.30.041(k) provides in relevant part: "The fees of the rehabilitation specialist . . . shall be paid by the employer and may not be included in determining the cost of the reemployment plan."

"In construing a statute, it is always safer not to add to or subtract from the language of a statute unless imperatively required to make it a rational statute." 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:38 (6th ed. 2002).

Statutes *in pari materia* are to be construed together. Statutes are "*in pari materia* where two statutes were enacted at the same time, or deal with the same subject matter." *Underwater Constr., Inc. v. Shirley*, 884 P.2d 150, 155 (Alaska 1994).

AS 23.30.155(e) provides in part, "If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment."

A controversy must be issued in good faith in order to avoid employer liability for a penalty. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). Ordinarily, when a controversy is based on a mistake of law, it is not made in good faith, and a penalty is owed under AS 23.30.155(e). *Id.* On the other hand, a controversy that is legally plausible and raises colorable legal arguments based on undisputed facts, is not made in bad faith. *Irby v. Fairbanks Gold Mining, Inc.*, 203 P.3d 1138, 1147 (Alaska 2009).

Issues: Is payment for the development of a reemployment benefits plan contingent on approval of the plan by the RBA? Did the board err in concluding that no penalty was owed under AS 23.30.155(e)?

Holding/analysis: The commission affirmed the board. The commission concluded that because subsection (k) did not explicitly make payment of the specialist's fees contingent on plan approval that plan approval was not required. Moreover, the commission concluded that the legislature would have made an explicit distinction if it had wanted to base payment on a plan's approval because the legislature did distinguish between approved and unapproved plans elsewhere in AS 23.30.041. Thus,

the commission would not find that the statute as a whole implicitly required approval before payment of the rehabilitation specialist's fees.

The commission concluded that the legislative purposes underlying AS 23.30.041 were of limited value in construing the statute because both parties made valid arguments. Banner argued that having to pay for unapproved plans would reduce the objectivity and cost reduction the legislature intended. Hutto argued that predictability was served if employers must pay for plans irrespective of approval and it would eliminate the possibility of employers holding proposed plans hostage as a litigation tool.

No penalty was owed because Banner's controversy was made in good faith.

We believe that Banner had a plausible, colorable legal argument that it should not have to pay for an unapproved reemployment plan. It can be, at the very least, counterintuitive to think that a rehabilitation specialist should get paid for an unapproved plan that does not comply with the statutory requirements of AS 23.30.041(h) and (i). Subsections .041(h) and (j) both reference plan approval, the former subsection indicating the plan *must be* approved, and the latter indicating the RBA *shall approve* or deny a plan. With the statute placing considerable emphasis on plan approval, it is reasonable to think that plan approval is a prerequisite to payment for plan development. Dec. No. 169 at 22-23.