

**Case:** *State of Alaska, Workers' Compensation Benefits Guaranty Fund vs. Charles G. West, Alaska Open Imaging Center, and Midway Auto Park Sales & Rentals*, Alaska Workers' Comp. App. Comm'n Dec. No. 145 (January 20, 2011)

**Facts:** Charles West (West) was injured and the board found his employer, Midway Auto Park Sales & Rentals (Midway), liable for benefits. Midway was uninsured and did not pay the benefits owing. West filed a claim for compensation and benefits from the Workers' Compensation Benefits Guaranty Fund (the Fund). The parties disputed whether the Fund was liable for attorney fees, interest, and penalties assessed against Midway. The board concluded that the Fund was liable for all the fees, interest, and penalties and the Fund appealed.

**Applicable law:** AS 23.30.082 provides in relevant part:

(a) . . . 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.

. . . .

(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.

. . . .

(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.

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

AS 23.30.075(a) 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."

AS 23.30.045(a) provides in relevant part: "An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, . . . 23.30.050, 23.30.095, 23.30.145, and 23.30.180 – 23.30.215."

AS 23.30.395(12) provides that "compensation" is "the money allowance payable to an employee . . . as provided for in this chapter[.]"

**Issues:** Does “compensation and benefits” within the meaning of the statute include attorney fees and costs, interest, and penalties assessed against the uninsured employer? When does the Fund’s liability to West for benefits and compensation attach?

**Holding/analysis:** Because there was no statutory definition of “compensation and benefits” for the purposes of AS 23.30.082(c), the commission construed the statute together with others enacted dealing with the same subject matter, namely AS 23.30.045 and AS 23.30.075. AS 23.30.045(a) listed the compensation that an employer is liable for, including AS 23.30.145, the statute on attorney fees. In addition, the supreme court concluded that “attorney’s fees are compensation in the context of employer liability” in *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1067 (Alaska 1991). Thus, the commission concluded that attorney fees were included among compensation and benefits the Fund owed West. The commission rejected the Fund’s argument that the reference to “legal expenses” in AS 23.30.082(a) referred solely to the legal expenses of the Fund and thus excluded paying a claimant’s attorney fees.

The commission concluded that “compensation and benefits” for purposes of guaranty fund payment did not include penalties assessed against an uninsured employer for three reasons: (1) none of the penalty statutes, AS 23.30.070(f), AS 23.30.085(b), or AS 23.30.155(e), were referenced in AS 23.30.045(a) as compensation payable, (2) no supreme court decisions characterized penalties as “compensation”, and (3) one of the purposes of the 2005 amendments, which included the creation of the guaranty fund, was to make injured workers whole through payment of compensation and benefits. Penalties are meant to punish and deter wrongdoing, rather than to make an injured employee whole. Punishing the Fund for Midway’s wrongdoing would serve no purpose.

The commission concluded that the Fund owed interest as part of “compensation and benefits.” The commission rejected interpreting AS 23.30.082(e) as a total ban on the payment of interest, instead concluding that subsection applies only to the one circumstance it describes. The commission characterized interest as compensation because (1) once it accrues under AS 23.30.155(p), it forms part of the money allowance owed an employee, and (2) payment of interest helps make an injured party whole by compensating for loss of the use of the money from the date of injury.

The commission concluded that the Fund’s liability 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. The commission rejected the board’s conclusion that the Fund’s obligation to pay arose at the same time as Midway’s obligation. However, the commission noted “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.” Dec. No. 145 at 21.