Alaska Workers' Compensation Appeals Commission

Hutto Consulting and Mark McAlpine, Appellants/Cross-Appellees, vs. Banner Health System and Harbor Adjustment Service, Inc., Appellees/Cross-Appellants.	Final Decision Decision No. 169 September 12, 2012 AWCAC Appeal No. 11-016 AWCB Decision No. 11-0125 AWCB Case No. 200906835

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 11-0125, issued at Fairbanks on August 24, 2011, by northern panel members Amanda K. Eklund, Chair, and Jeff Bizzarro, Member for Labor.

Appearances: J. John Franich, Franich Law Office, LLC, for appellant/cross-appellee, Hutto Consulting; Zane D. Wilson, Cook Schuhmann & Groseclose, Inc., for appellees/cross-appellants, Banner Health System and Harbor Adjustment Service, Inc. Mark McAlpine did not participate in this appeal.

Commission proceedings: Appeal filed September 23, 2011; cross-appeal filed October 7, 2011; amended statement of points on cross-appeal filed March 14, 2012; briefing completed May 29, 2012; oral argument held on August 23, 2012.

Commissioners: James N. Rhodes, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Mark McAlpine (McAlpine) suffered a work-related injury while employed by Banner Health System (Banner),[1] and was eligible for reemployment benefits. McAlpine selected Tommie Hutto of Hutto Consulting (Hutto) to develop a reemployment benefits plan. The plan developed by Hutto was not approved by the Reemployment Benefits

[1] Banner's workers' compensation adjuster on McAlpine's claim was appellee, Harbor Adjustment Service, Inc.

Administrator (RBA), Mark A. Kemberling, because it was not in conformity with the requirements in AS 23.30.041. Hutto filed a claim for payment with the Alaska Workers' Compensation Board (board). Following a hearing, the board ruled: 1) Hutto was entitled to be compensated for services rendered in developing a reemployment plan for McAlpine; and 2) Banner did not owe a penalty under AS 23.30.155(e) for controverting payment to Hutto for those services.[2] On appeal to the Workers' Compensation Appeals Commission (commission), Hutto challenges the board's denial of a penalty, and in its cross-appeal, Banner asserts that the board was mistaken when it decided Banner owed Hutto payment for his services. We affirm the board in both respects.

2. Factual background and proceedings.

The underlying facts are not disputed. Therefore, we adopt the board's factual recitation with some paraphrasing.

On May 17, 2009, McAlpine injured his lower back while working as a medical assistant for Banner.[3] Banner did not contest the compensability of the injury and commenced paying temporary total disability (TTD) benefits.[4] On January 5, 2010, RBA designee Deborah Torgerson notified McAlpine he was eligible for reemployment benefits.[5] On March 31, 2010, Hutto was informed that McAlpine had selected him to complete a reemployment benefits plan. Hutto was notified of his responsibilities as the assigned rehabilitation specialist for McAlpine under AS 23.30.041(h): "Within 90 days after rehabilitation specialist selection under (g) of this section, the reemployment plan must be formulated and approved."[6]

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[2] *See Mark McApline and Hutto Consulting v. Banner Health System*, Alaska Workers' Comp. Bd. Dec. No. 11-0125, 23 (August 24, 2011).

[3] Exc. 046.

[4] R. 018-19.

[5] R. 204.

[6] R. 205.

On June 29, 2010, Hutto submitted a Labor Market Survey, Vocational Evaluation, and Reemployment Benefits Plan to Banner and the RBA.[7] Hutto indicated that he had evaluated McAlpine's education, work history, physical capacities, social support, and measured aptitudes, and proposed a vocational goal of Teacher Aide I.[8] Hutto stated: "[Employee's] test results recommend him for a Work Experience regimen coupled with formal training to ensure he has the requisite skills to secure entry level employment as a Teacher Aide."[9] A Teacher Aide I position, in Hutto's opinion, "would utilize the most transferable skills to provide a vocational objective that could be reached in the shortest possible time," as required under AS 23.30.041(i).[10] The vocational objective would require up to two years of training. Using McAlpine's reported hourly earnings at the time of injury of $19.00, Hutto calculated McAlpine's remunerative wage goal as $11.40 per hour. A labor market study revealed entry level wages for a Teacher Aide I position ranged from $7.75 to $11.50 per hour and therefore had the potential to meet McAlpine's remunerative wage goal.[11] Accompanying the Vocational Evaluation and Labor Market Survey was a Reemployment Benefits Plan, in which Hutto proposed that McAlpine attend the Tanana Valley Campus to pursue credits in Early Childhood Education in preparation for his work as a Teacher Aide I. He also proposed that McAlpine would work with a local early childhood education provider, "affording him work experience to compliment his education goals."[12] Hutto anticipated the required educational goal would take 60 weeks to complete. Total plan costs were $8,972.28, representing 12 credit hours in early

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7 R. 206-21.

8 R. 214.

9 R. 219.

10 R. 220.

11 Exc. 047-51.

12 R. 207.

childhood education, a 14-month work experience program, computer and printer, course materials and school supplies.[13]

On September 1, 2010, McAlpine requested that the RBA review the proposed reemployment benefits plan, as McAlpine and Banner had failed to agree on the plan.[14] On September 30, 2010, the RBA notified Hutto the proposed plan was not approved:

> I deny this plan under AS 23.30.041 (j). I do not believe the requirements of AS 23.30.041 (h) and (i) have been met.
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> The plan does not document that continuous participation is required of the employee.
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> The proposed training and apparent targeted labor market are not consistent with the DOT title selected to represent the occupational goal.
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> The employee's technical skills are not identified and the work history documentation does not appear to be complete.
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> The specialist does not identify what transferable skills options were identified, does not address all the possible training modalities and does not specify any other occupations considered and ruled out.
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> A physician has not approved an onsite job analysis for the position. Medical information is lacking regarding the employee's physical capacities and medical stability.
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> Vocational testing did not include a general measure of intelligence or academic achievement testing. There also is no documentation of the employee's prior achievement in the form of college transcripts or college placement testing.
>
> There is no rationale provided for the courses selected and the program description cited from the UAF catalog applies to three times more course content than is proposed. The few courses proposed may not all be available; the first semester schedule was not substantiated. Course descriptions were not included.
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> The plan calls for the employee to have a fourteen-month 'work experience' with an unspecified employer and schedule of attendance. The employer is to receive $5,600 for ostensibly allowing the employee to work for no compensation. There is no documentation that the employee will receive any structured training or that any skills will be acquired.

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[13] R. 207-08.

[14] R. 209.

> Mileage reimbursement was not included in the plan.
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> The documents do not show that the employee will be employable at his remunerative wage upon completion of the plan.
>
> The specialist does not state 'that the inventory under (2) of this subsection indicates that the employee can be reasonably expected to satisfactorily complete the plan and perform in a new occupation within the time and cost limitations of the plan'.
>
> Finally, I note that the plan does not assign any responsibilities to the rehabilitation specialist.
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> If either party does not agree with my decision, a written appeal may be filed within 10 days of receipt of this decision requesting a board hearing under AS 23.30.110.[15]

Neither McAlpine nor Hutto appealed the RBA's denial of the proposed plan.

Banner, through its adjuster, Molly A. Friess (Friess), filed a controversion notice dated October 7, 2010, denying payment of "[a]ll bills from Tom Hutto related to the Reemployment Plan submitted in July 2010."[16] Banner relied upon the September 30, 2010, denial letter from the RBA and stated "[w]e will pay Hutto only after a Reemployment Plan has been approved by Reemployment Benefits Administrator (RBA) Mark Kemberling and is deemed consistent with McAlpine's remunerative wage of approximately $11.00 per hour. All bills associated with the deficient plan are denied."[17]

On December 1, 2010, Hutto filed a workers' compensation claim for payment for "plan development and monitoring activities."[18] Attached to the claim were two invoices for rehabilitation services, dated June 30, 2010, and August 12, 2010, for $4,945.00 and $1,013.00, respectively.[19] On February 16, 2011, Hutto filed an amended claim, adding claims for penalty, interest, attorney fees and costs, and a finding of unfair or frivolous

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15 Exc. 008-09, 060-61.

16 Exc. 001.

17 Exc. 001.

18 R. 022-23.

19 R. 024-26.

controversion.[20] On March 8, 2011, Hutto submitted a third invoice to Banner for rehabilitation services incurred on McAlpine's behalf totaling $3,519.00.[21]

On March 9, 2011, Hutto submitted a second proposed reemployment plan to the RBA.[22] In this plan, Hutto attempted to remedy the deficiencies the RBA noted in the prior plan:

> Harbor adjustment services will apparently not support the initial plan developed with the claimant due (sic) the RBA reporting that he felt the plan was not compliant with 041. This NEW plan can achieve the same objective via 'purely' academic means, thereby removing the problematic Work Experience portion of the RBA reviewed plan.[23]

The revised plan proposed an educational goal of a certificate in Early Childhood Education, with a proposed timeline of 104 weeks and plan costs totaling $13,190.58.[24] On March 22, 2011, Banner filed an answer to McAlpine's amended claim, denying all benefits based on the RBA's September 30, 2010, denial of Hutto's proposed plan and asserting Hutto failed to comply with the requirements of AS 23.30.041.[25]

On April 19, 2011, the RBA notified Hutto that the second proposed plan was not approved because "the plan will not provide the employee with skills to be employable at his remunerative wage at entry level[,]"[26] as McAlpine's cognitive level would require he take several remedial courses prior to completing the courses required for the certificate in Early Childhood Education, and even upon completion of the certificate, it was unlikely McAlpine could obtain employment at or above his remunerative wage goal.[27]

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20 Exc. 012-13.

21 Exc. 044-45.

22 R. 230-35.

23 R. 230.

24 R. 231-34.

25 R. 087-88.

26 R. 247.

27 R. 239-48.

On April 25, 2011, J. John Franich (Franich), Hutto's attorney, filed an affidavit of attorney fees, seeking $2,100.00 in attorney's fees and costs.[28] On May 2, 2011, Franich filed an updated affidavit of attorney fees, seeking an additional $4,295.00 in fees and costs incurred in preparation for and representation at the hearing.[29] Banner did not object to these submissions.

At the board hearing on May 2, 2011, Daniel LaBrosse (LaBrosse), a rehabilitation specialist in Fairbanks, testified about the general rehabilitation process. He stated typical rehabilitation specialist rates in Fairbanks range from $180 to $185 per hour. He had reviewed Hutto's invoices and opined they represented usual and customary charges. When asked about McAlpine's case, it was, in his opinion, a particularly difficult one, as McAlpine had little education, low math and reading skills, and a debilitating orthopedic injury. Such an employee is particularly difficult to rehabilitate and place in a position at a remunerative wage. LaBrosse further testified he had cases in which the RBA denied his proposed plan, but an employer had never refused to pay his fees because a plan had been denied. He testified he had never appealed the denial of a plan, and in his opinion it is the right of the employee, not the rehabilitation specialist, to appeal the denial of a proposed reemployment plan.[30]

Hutto testified regarding his work with McAlpine to develop a proposed reemployment plan. He stated that in his opinion, McAlpine's cognitive disabilities coupled with his severe back injury made him extremely difficult to retrain and place. He testified he submitted his initial invoice to Banner's adjuster on June 30, 2010. At that time, the adjuster notified him a 2-3 month plan was appropriate, but in Hutto's opinion such a plan would never work because of McAlpine's extremely low intelligence. McAlpine attended special education classes in high school, has learning disabilities, and lives with his parents. Hutto believed it would be unfair to McAlpine to run him through

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28 R. 145-48.

29 R. 152-56.

30 Hr'g Tr. 9:24–43:14, May 2, 2011.

a short plan because it simply would not work for him. He stated, my task is not just to flush him out of the Workers' Comp system, but to make sure he has the skills to retain a job. Hutto stated Banner's adjuster withheld payment of his fees because she did not approve of the proposed plan, even before it was denied by the RBA. Finally, he testified he has always been paid, even in cases where an employee refused to participate in a proposed plan.[31]

Robert Weeden (Weeden), director of Fairbanks Montessori School, testified about his hiring practices and teacher aide positions in his program. He stated he had four openings for teacher aides in August 2010, at which time he spoke with Hutto about a potential placement for McAlpine. Starting wages for teacher aides in his program was $11.50, and the position required no education, training, or experience. When asked what qualities he considered necessary in a teacher aide, Weeden stated the position required someone who likes working with children, is energetic, respectful, and can get along with staff; someone bright with a friendly personality. It has a lot to do with an individual's personality. When asked whether he would hire someone with a cognitive disability for a teacher aide position, Weeden stated he would have to evaluate the individual on a case-by-case basis.[32]

Friess, Banner's adjuster, testified regarding her work on McAlpine's case. She noted since McAlpine was still in the reemployment process, he was being paid biweekly benefits. Friess testified she had never received a reemployment plan from Hutto that complied with AS 23.30.041, and therefore did not pay his fees. She stated she would have paid Hutto's fees if she had received a plan complying with statutory requirements. When asked to identify her authority for not paying rehabilitation specialist fees until plan approval, Friess admitted she didn't know, but that when she received the first invoice, she knew the plan that Hutto was preparing would not conform to the statute. She stated she did not know until September 2010, whether the RBA would approve the plan, but

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[31] Hr'g Tr. 43:25–86:5, May 2, 2011.

[32] Hr'g Tr. 87:11–99:9, May 2, 2011.

knew she herself would not approve it, and therefore denied payment of Hutto's fees. Friess further testified that in her opinion the obligation to pay fees arises when a plan is approved by either the employer or the RBA. In her opinion, Hutto did not select the shortest plan to help McAlpine achieve his remunerative wage goal, as required by AS 23.30.041(i), as a teacher aide position was available at Fairbanks Montessori School in August 2010, which paid $11.50 per hour, and that position required no training or education. When asked whether she would pay rehabilitation specialist fees in a case where the RBA approved the plan but the employee refused to participate, Friess testified she would pay the fees and attempt settlement with the employee.[33]

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[34] We exercise our independent judgment when reviewing questions of law.[35] However, for legal questions involving agency expertise or fundamental policy questions, the commission applies the reasonable basis standard and defers to the agency if its interpretation is reasonable.[36]

4. Discussion.

a. Applicable law.

Two statutes have a bearing on our decision. They read as follows, with the portions that are of particular importance to our analysis italicized:

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
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> . . . .

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[33] Hr'g Tr. 100:4–116:3, May 2, 2011.

[34] Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

[35] *See* AS 23.30.128(b).

[36] *See, e.g., Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 858 (Alaska 2010) (footnote and citation omitted).

(g) Within 30 days after the employee receives the administrator's notification of eligibility for benefits, an employee shall file a statement under oath with the board, on a form prescribed or approved by the board, to notify the administrator and the employer of the employee's election to either use the reemployment benefits or to accept a job dislocation benefit under (2) of this subsection. The notice of the election is effective upon service to the administrator and the employer. The following apply to an election under this subsection:

(1) an employee who elects to use the reemployment benefits also shall notify the employer of the employee's selection of a rehabilitation specialist who shall provide a complete reemployment benefits plan; failure to give notice of selection of a rehabilitation specialist required by this paragraph constitutes noncooperation under (n) of this section; if the employer disagrees with the employee's choice of rehabilitation specialist to develop the plan and the disagreement cannot be resolved, then the administrator shall assign a rehabilitation specialist; the employer and employee each have one right of refusal of a rehabilitation specialist;

. . . .

(h) *Within 90 days after the rehabilitation specialist's selection under (g) of this section, the reemployment plan must be formulated and approved*. The reemployment plan must require continuous participation by the employee and must maximize the usage of the employee's transferrable skills. The reemployment plan must include at least the following:

(1) a determination of the occupational goal in the labor market;

(2) an inventory of the employee's technical skills, transferrable skills, physical and intellectual capacities, academic achievement, emotional condition, and family support;

(3) a plan to acquire the occupational skills to be employable;

(4) the cost estimate of the reemployment plan, including provider fees; and the cost of tuition, books, tools, and supplies, transportation, temporary lodging, or job modification devices;

(5) the estimated length of time that the plan will take;

(6) the date that the plan will commence;

(7) the estimated time of medical stability as predicted by a treating physician or by a physician who has examined the employee at the request of the employer or the board, or by referral of the treating physician;

(8) a detailed description and plan schedule;

(9) a finding by the rehabilitation specialist that the inventory under (2) of this subsection indicates that the employee can be reasonably expected to satisfactorily complete the plan and perform in a new occupation within the time and cost limitations of the plan; and

(10) a provision requiring that, after a person has been assigned to perform medical management services for an injured employee, the person shall send written notice to the employee, the employer, and the employee's physician explaining in what capacity the person is employed, whom the person represents, and the scope of the services to be provided.

(i) Reemployment benefits shall be selected from the following in a manner that ensures remunerative employability in the shortest possible time:

(1) on the job training;
(2) vocational training;
(3) academic training;
(4) self-employment; or
(5) a combination of (1) – (4) of this subsection.

(j) *The employee, rehabilitation specialist, and the employer shall sign the reemployment benefits plan. If the employer and employee fail to agree on a reemployment plan, either party may submit a reemployment plan for approval to the administrator; the administrator shall approve or deny a plan within 14 days after the plan is submitted; within 10 days of the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110*; the board shall uphold the decision of the administrator unless evidence is submitted supporting an allegation of abuse of discretion on the part of the administrator; the board shall render a decision within 30 days after completion of the hearing.

(k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the process to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability or permanent partial impairment benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability or permanent partial impairment benefits would have ceased, had those benefits been

paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. *The fees of the rehabilitation specialist or rehabilitation professional shall be paid by the employer and may not be included in determining the cost of the reemployment plan.*

AS 23.30.155. Payment of compensation. (a) Compensation 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. . . .

(b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.

. . . .

(d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.

(e) *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.* 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.

. . . .

(h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

. . . .

(o) *The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter.* After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

b. Is payment for the development of a reemployment benefits plan contingent on approval of the plan by the RBA?

AS 23.30.041(h) states in pertinent part: "Within 90 days after the rehabilitation specialist's selection . . . , the reemployment plan must be formulated and approved." AS 23.30.041(j) reads in part:

> The employee, rehabilitation specialist, and the employer shall sign the reemployment benefits plan. If the employer and employee fail to agree on a reemployment plan, either party may submit a reemployment plan for approval to the administrator; the administrator shall approve or deny a plan within 14 days after the plan is submitted; within 10 days of the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110[.]

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." Subsections (h), (j), and (k) of section .041 were all enacted as part of the 1988 amendments to the statute. The question arises whether they link payment of the rehabilitation specialist with approval of the specialist's reemployment

plan. In order to answer that question, it is necessary for the commission to construe section .041.

When construing a statute, the Alaska Supreme Court (supreme court) instructs that we are to look at the language of the statute, its legislative history, and the legislative purpose behind the statute.[37] In terms of just the language of AS 23.30.041, and the last sentence in subsection .041(k) in particular, there is no distinction between *payment* for approved and unapproved plans. If we interpret this sentence in isolation from other subsections of .041, the rehabilitation specialist's fees are to be paid by the employer, irrespective of plan approval by the RBA. In contrast, while still focusing on the language of AS 23.30.041, if we adopt a more expansive view and construe the last sentence in subsection .041(k) in relation to subsections (h) and (j) of the statute, which reference plan approval, the inference lies that the rehabilitation specialist's fees are to be paid by the employer, provided that the reemployment plan is approved by the RBA.

Coincidentally, there are principles of statutory construction that provide some guidance to our analysis. One principle states that "[i]n 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."[38] Applying this principle, we might interpret the last sentence of subsection .041(k) restrictively, and not add language that would entail plan approval as a prerequisite to payment of the rehabilitation specialist. On the other hand, a different principle provides that statutes *in pari materia* are to be

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[37] *See, e.g., Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010). However, the legislative history of a statute is to be considered only when construing an ambiguous statute. *See Tesoro Petroleum Corp. v. State,* 42 P.3d 531, 537 (Alaska 2002).

[38] 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:38 (6th ed. 2002)(hereinafter *Sutherland*) (citing *Lyons v. Ohio Adult Parole Authority,* 105 F.3d 1063 (6th Cir. 1997), *cert. denied* 520 U.S. 1224, 117 S. Ct. 1724, 137 L. Ed. 2d 845 (1997)). Given the remedial purposes of AS 23.30.041 and the 1988 amendments thereto, we conclude the statute is rational.

construed together.[39] According to the supreme court, statutes are "*in pari materia* where two statutes were enacted at the same time, or deal with the same subject matter."[40] Subsections .041(g), (h), and (k) were enacted by the Alaska legislature at the same time, 1988.[41] In construing them together, we note that provision for plan approval is introduced in the language of subsections .041(g) and (h), thus payment of the rehabilitation specialist might be contingent on whether the plan is approved.

The commission's view is that the language of the statute, and the principles we have cited for construing that language, are somewhat helpful to our inquiry. Nevertheless, under the circumstances, as the supreme court instructed[42] and the board incorporated in its analysis,[43] we should also consider the legislative purposes of the 1988 amendments to AS 23.30.041 in an effort to interpret that statute. For guidance, there is supreme court authority that takes into account the legislative purposes of the 1988 amendments in construing the statute.[44] In *Konecky*, the issue was whether

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[39] *See* 2B *Sutherland* § 51:02.

[40] *Underwater Constr., Inc. v. Shirley,* 884 P.2d 150, 155 (Alaska 1994) (citing, *inter alia*, 2A *Sutherland* § 51:01-.02 (5th ed. 1992)).

[41] We perceive no distinction between construing *statutes* enacted at the same time and construing *subsections* of statutes enacted at the same time.

[42] *See* n.37, *supra*.

[43] *See Hutto*, Bd. Dec. No. 11-0125 at 12-13.

[44] *See Konecky v. Camco Wireline, Inc.*, 920 P.2d 277 (Alaska 1996).

Konecky was eligible for reemployment benefits under subsection .041(e).[45] Konecky was working as a "hoistman" for Camco when he injured his back in July 1988.[46] Following treatment, Konecky's physical capacities were characterized as "medium."[47] In order to determine eligibility, subsection .041(e) required the board to assess the physical demands of Konecky's job in accordance with the United States Department of Labor's *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* (*SCODDOT*).[48] *SCODDOT* listed the physical demands of a "hoist operator" as "medium work level,"[49] even though, in actuality, the physical demands of Konecky's job were at the "very heavy" level.[50] The provisions of subsection .041(e) notwithstanding, the RBA found Konecky eligible for reemployment benefits. Camco appealed to the board, which overturned the RBA's decision and remanded to the

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[45] At the relevant time, AS 23.30.041(e) read:

> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" for
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> (1) the employee's job at the time of injury; or
>
> (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles."

[46] In the interest of brevity, we have taken the liberty of streamlining our recitation of the factual and procedural background of *Konecky*.

[47] *See Konecky*, 920 P.2d at 279.

[48] *See* n.45, *supra*.

[49] *See Konecky*, 920 P.2d at 279.

[50] *See id*.

RBA.[51] On remand, Konecky was again found eligible by the RBA and Camco again appealed to the board, which reversed the RBA.[52] Konecky appealed to the superior court, which affirmed the board, and then appealed to the supreme court.[53]

In its construction of the statute, similar to its pronouncement in *Shehata* referenced above, the court advises that we are to "look to 'the language of the statute construed in light of the purpose of its enactment.'"[54] If the language of the statute is unambiguous and expresses the intent of the legislature, and if no ambiguity is revealed by the legislative history, we are not to modify or extend the statute by judicial construction.[55] The supreme court found that the language of AS 23.30.041(e) was clear. The board was required to compare the physical demands of a specific job as found in *SCODDOT* with the employee's physical capacities. Later in its decision, the supreme court reiterated: "The legislature's language is plain, and demands that reemployment benefit eligibility be determined by the *SCODDOT* job descriptions. The legislature neither expressed nor implied any exceptions."[56]

Later in its analysis, the supreme court noted the purposes of the 1988 amendments to AS 23.30.041, as recognized by the board:

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[51] Camco referred to Konecky's position as "hoistman." *SCODDOT* had no listing for "hoistman," although it did have a listing for "hoist operator." The matter was remanded to determine whether the position of "hoistman" existed in the labor market. However, as the supreme court explained, the board used the terms "hoistman" and "hoist operator" interchangeably and Konecky did not object. *See Konecky*, 920 P.2d at 279 n.7.

[52] *See Konecky*, 920 P.2d at 280.

[53] *See id*.

[54] *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69, 72 (Alaska 1993) (quoting *J & L Diversified Enter. v. Municipality of Anchorage*, 736 P.2d 349, 351 (Alaska 1987)).

[55] *See Yahara*, 851 P.2d at 72 (citing *Alaska Public Employees Ass'n v. City of Fairbanks*, 753 P.2d 725, 727 (Alaska 1988)).

[56] *Konecky*, 920 P.2d at 282 (italics in original).

> 1) to *create a less expensive system* with fewer employees participating in it; 2) to *reduce the use of vocational rehabilitation as a litigation tool;* 3) to encourage the use of vocational rehabilitation services for employees 'most likely to benefit and who truly desire and need them'; [and] 4) to speed up the vocational rehabilitation process in the expectation of producing more successful outcomes.[57]

In *Konecky*, in recognition of the foregoing legislative purposes, the parties argued for and against the strict application of the *SCODDOT* job descriptions, prompting the court to comment:

> If the court were to accept Konecky's argument, each time an injured worker applies for these benefits, questions would arise about the accuracy of the *SCODDOT* job descriptions. Employees could be expected to argue that *SCODDOT* underestimates the physical demands of the job, or that the job listed in *SCODDOT* is not available in the labor market. Employers could be expected to counter with arguments that *SCODDOT* exaggerates the physical demands of the job, or that actual demands of the job are less than those listed in *SCODDOT.* As a result, the predictability, objectivity, and cost reduction that the legislature intended would be greatly reduced.[58]

Given the language of the statute and the purposes of the 1988 amendments, the supreme court 1) declined to modify or extend the requirement in subsection .041(e) that the *SCODDOT* job descriptions were to be used; and 2) did not identify any express or implied exceptions to their use. Because Konecky's physical capacities were not "less than the physical demands of [his] job as described in [*SCODDOT*,]" the court affirmed the superior court, finding Konecky was not eligible for reemployment benefits.[59]

Here, as in *Konecky*, the parties have presented arguments in support of their respective positions, based on the purposes of the 1988 amendments to AS 23.30.041. Predictably, Banner argues that requiring an employer to pay for an unapproved reemployment plan is contrary to the purposes of the statute.

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[57] *Konecky*, 920 P.2d at 283 (italics in original).

[58] *Id.*

[59] *See Konecky*, 920 P.2d at 278.

> Requiring an employer to pay a rehabilitation specialist for whatever they do and for whatever amount they charge, with no check on the rehabilitation specialist whatsoever, will not create a less expensive or speed[ier] vocational rehabilitation process. To the contrary, without any method whatsoever for holding the rehabilitation specialist accountable, employers wind up in a situation similar to this case – without a rehabilitation plan and still paying the employee time loss benefits because the rehabilitation specialist has not done their job. Requiring the employer to pay the rehabilitation specialist, regardless of whether they have done their job, encourages rehabilitation specialists to drag out the process, run up additional fees, ignore the statutory mandates for a rehabilitation plan and all the while hold the employer fully accountable for, and without any defenses to, unreasonable conduct, incompetence and excessive fees.
>
> Had the Board held that the rehabilitation specialist was not entitled to be paid fees for a plan that did not comply with the law, despite two attempts, the rehabilitation specialist would have been motivated to comply with Alaska law[.][60]

Just as predictably, Hutto argues that the rehabilitation specialist should be paid for development of a reemployment plan regardless of its approval.

> Contrary to its own argument, Banner's position actually runs afoul of the legislative goal "to reduce the use of vocational rehabilitation as a litigation tool." Its position would allow a recalcitrant adjuster to refuse to sign a proposed plan, demand review by the RBA, and delay payment of a legitimate bill in the meantime. While waiting to get paid, the Employment Specialist might be tempted to give in to demands by the Adjuster to make changes to the proposed plan as a condition of the Adjuster's approval.[61]

Both Banner and Hutto make good arguments. From Banner's perspective, employers should not have to pay for plans that are not in compliance with the statute. Having to pay for such plans, in the words of the supreme court in *Konecky*, would greatly reduce the objectivity and cost reduction the legislature intended in enacting the 1988 amendments to AS 23.30.041. Reemployment plans that are not approved by the RBA are objectively unreasonable, and employers would have to continue to pay

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[60] Banner's Br. 7.

[61] Hutto's Reply Br. 5.

benefits, with no plans in place, thus increasing the costs of providing benefits under the system. On the other hand, from Hutto's point of view, predictability is served if employers must pay for reemployment plans, irrespective of approval. Moreover, it would eliminate the possibility of employers holding proposed plans "hostage," as a litigation tool.

The commission is unable to say that one party's arguments in this regard are demonstrably more compelling than the other's arguments. Thus, the legislative purposes underlying AS 23.30.041 are of limited value in deciding whether the statute requires payment for unapproved reemployment plans. Instead, we rely more on the language of section .041 in order to interpret the statute. Following the supreme court's lead in *Konecky*, based on the language of subsection .041(k), should we modify or extend through judicial construction the provision for payment of the rehabilitation specialist by the employer to exclude payment for unapproved plans? Should we find the legislature expressed or implied an exception to payment for unapproved reemployment plans?[62] We think not.

The commission concludes that, in construing subsection .041(k), we should not modify it to exclude payment for unapproved reemployment plans, nor should we recognize an express exception to payment if a plan is not approved by the RBA. The more difficult question is whether there is an implied exception. However, our analysis whether the legislature implied an exception to payment for unapproved plans in the last sentence of subsection .041(k) is similar to the analysis whether it expressed an exception to payment for such plans. Elsewhere in AS 23.30.041, certain subsections of the statute refer to approved and unapproved plans;[63] thus, the legislature distinguished between them in the statute. However for the purposes of payment under subsection .041(k), there is no distinction. Therefore, the stronger implication is,

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62 *See Konecky*, 920 P.2d at 282.

63 *See* Part 4(a), *supra*, quoting AS 23.30.041(g) and (j).

that for approved and unapproved plans alike, the rehabilitation specialist's fee must be paid by employers.

Had the legislature wanted to limit payment to approved plans, it would have been a straightforward matter to have said so in the last sentence of subsection .041(k). However, it might be that the circumstances of the present case were not within the contemplation of the legislature when the 1988 amendments to AS 23.30.041 were enacted. We would encourage the legislature to address the issue in the future, if its intent is to exclude unapproved plans from payment.

Finally, the board cited one of its own decisions as authority for its conclusion that Banner is required to pay for Hutto's unapproved reemployment plan.[64] It reasoned: "[T]he rehabilitation specialist should not be put in the difficult position of having to guess whether its fees will be paid, and by whom. We find that the uncertainty, expense and delay associated with this lack of clarity would run contrary to the legislative intent articulated in *Konecky*."[65] For legal questions involving agency expertise or fundamental policy questions, the commission is to apply the reasonable basis standard and defer to the board if its interpretation is reasonable.[66] Although the underlying circumstances in *Davis* are distinguishable from those here, we conclude that the board's interpretation of AS 23.30.041(k) is reasonable and we defer to the board's decision holding that Banner must pay for Hutto's reemployment plans.

c. Is a penalty owed for Banner's controversion of payment for the development of the reemployment plan?

Here, Friess, Banner's adjuster, controverted payment of Hutto's invoices for development of a reemployment plan for McAlpine because the plan did not comply

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[64] *See Hutto*, Bd. Dec. No. 11-0125 at 13 (citing *Davis v. UIC Development Co.*, Alaska Workers' Comp. Bd. Dec. No. 08-0152 (August 26, 2008)).

[65] *Davis*, Bd. Dec. No. 08-0152 at 8.

[66] *See, e.g., Burke*, 222 P.3d 851, 858 (Alaska 2010) (footnote and citation omitted).

with AS 23.30.041 and was not approved by the RBA.[67] We must decide whether this is a good faith controversion. If it is, Hutto is not entitled to a penalty under AS 23.30.155(e).

A controversion notice must be issued in good faith in order to avoid employer liability for a penalty.[68] Hutto argues that the controversion is based on a mistake of law[69] and Banner appears to concede that it is.[70] Ordinarily, when a controversion 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).[71] On the other hand, a controversion that is legally plausible and raises colorable legal arguments based on undisputed facts, is not made in bad faith.[72]

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

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67 Exc. 001; Hr'g Tr. 100:4–116:3, May 2, 2011.

68 *See Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992).

69 Hutto's Br. 9.

70 Banner's Br. 9-10.

71 *See Harp*, 831 P.2d at 358.

72 *See Irby v. Fairbanks Gold Mining, Inc.*, 203 P.3d 1138, 1147 (Alaska 2009). Banner argues in its briefing that, on the issue whether a controversion based on a mistake of law is in bad faith, the holdings in *Harp* and *Irby* are irreconcilable. Banner's Br. 10. The commission believes that the supreme court is in the best position to explain these holdings, however, we perceive that there is a distinction between mistakes of law that are based on implausible legal arguments and mistakes of law that are based on plausible, colorable legal arguments.

for plan development. Moreover, the facts in *Davis*[73] are distinguishable from the facts in this case. In *Davis*, the rehabilitation specialist was not notified to stop working on a plan because the employer objected to the specialist.[74] The *Davis* decision would not have provided definitive authority on the issue whether a rehabilitation specialist should be paid for an unapproved plan. Thus, even though it was, in hindsight, a misjudgment in terms of the law for Friess to controvert payment for an unapproved plan, we conclude she acted in good faith.[75]

There is a second criterion in order to impose a penalty under AS 23.30.155(e). "[T]he compensation on which the penalty is based must also be paid late."[76] Here, Hutto argues that the compensation due him in the form of payment for developing a rehabilitation plan was paid late.[77] Because the controversion was in good faith, which criterion alone negates any penalty, we do not reach the issue whether it was paid late.

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[73] *See* n.64, *supra*.

[74] *See Davis*, Bd. Dec. No. 08-0152 at 8.

[75] The board, in its decision, and Hutto, in his briefing, proceed to analyze the issue whether Hutto is entitled to a penalty under AS 23.30.155(e) by applying the law pertaining to unfair or frivolous controversions. *See Hutto*, Bd. Dec. No. 11-0125 at 21-22 and Hutto's Br. 8-9. As Hutto pointed out, the purpose of a finding of unfair or frivolous controversion under AS 23.30.155(o) is so that the board can refer the employer's insurer to the division of insurance. Hutto's Br. 9-10. Subsection .155(o) has no bearing on whether a penalty is owed. Prior commission authority to the contrary notwithstanding, *see State of Alaska v. Ford*, Alaska Workers' Comp. App. Comm'n Dec. No. 133, 37-38 (April 9, 2010) (*Ford*), and *Mayflower Contract Services, Inc. v. Redgrave*, Alaska Workers' Comp. App. Comm'n Dec. No. 141 (December 14, 2010) (*Redgrave*), we conclude that the supreme court, in *Harp* and *Irby*, has set forth the appropriate analysis for determining whether a *legally-based* controversion is in good faith, and decline to follow *Ford* and *Redgrave*, to the extent that they depart from that analysis.

[76] *Ford*, App. Comm'n Dec. No. 133 at 17-18 (citing *Sumner v. Eagle Nest Hotel*, 894 P.2d 628, 632 (Alaska 1995)).

[77] Hutto's Reply Br. 7-8.

The board ruled that Hutto was not entitled to a penalty with respect to the controversion of payment for a reemployment plan.[78] We agree, but our analysis is different than the board's.

5. Conclusion.

For the reasons stated, we AFFIRM the board's decisions that Hutto was entitled to be paid for his services in developing a reemployment plan for McAlpine, even though the plan was not approved by the RBA; and Banner's controversion of Hutto's invoices for those services was in good faith, and no penalty is owed under AS 23.30.155(e).

Date: *12 September 2012* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board, as set forth above. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska

[78] *See Hutto*, Bd. Dec. No. 11-0125 at 23.

Supreme Court are instituted (started).[79] For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed[80] 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 is not a party.

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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

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 no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final

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[79] A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

> **Additional Time After Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

[80] *Id*.

decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting, this is a full and correct copy of the Final Decision No. 169 issued in the matter of *Hutto Consulting and Mark McAlpine v. Banner Health System and Harbor Adjustment Service, Inc.*, AWCAC Appeal No. 11-016, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on September 12, 2012.

Date: *September 18, 2012*

Signed

B. Ward, Commission Clerk