

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF REVENUE**

IN THE MATTER OF:)

C. K.-W.)

) OAH No. 10-0088-CSS

) CSSD No. 001093571

DECISION AND ORDER

I. Introduction

The obligor, C. K.-W., appeals a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on January 15, 2010. The obligee child is T., who is 12 years old.

The formal hearing was held on March 18, 2010. Both Mr. K.-W. and the custodian, J. N. W., appeared in person. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded and the record closed on April 8, 2010.

Based on the record and after due deliberation, CSSD's Modified Administrative Child Support and Medical Support Order is affirmed; Mr. K.-W.'s child support is modified to \$238 per month, effective July 1, 2009. He did not meet his burden of proving that he is disabled and unable to work.

II. Facts

A. Procedural history

Mr. K.-W.'s child support for T. was set at \$50 per month August 2000.¹ On June 15, 2009, Ms. W. requested a modification review.² On June 24, 2009, CSSD issued a Notice of Petition for Modification of Administrative Support Order and requested income information from Mr. K.-W.³ He did not respond.⁴ On January 15, 2010, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. K.-W.'s child support to \$238 per month, effective July 1, 2009.⁵ Mr. K.-W. appealed on February 12, 2010,

¹ Exh. 1.

² Exh. 2.

³ Exh. 3.

⁴ Pre-hearing brief at pg. 1.

⁵ Exh. 4.

asserting he has been unemployed since 2008, he broke his hand in September 2009, he lives with his mother and he has no income.⁶

B. Material facts

Mr. K.-W. is a chef/short order cook. Records from the Alaska Department of Labor and Workforce Development indicate that he has worked intermittently for two different restaurants since the third quarter of 2006.⁷ His last recorded employment was in the third quarter of 2008, after which he received unemployment benefits during most of 2009.⁸ Although it is not clear why his most recent employment ended, when questioned during the hearing whether he had worked in 2009, the obligor acknowledged he worked “under the table” for the last employer reflected on the wage history report at the same time he received unemployment benefits. Mr. K.-W. added he received \$9.75 per hour as a short order prep cook for six hours per day and he affirmed he was paid “under the table” by this employer.

Mr. K.-W.’s primary basis for appealing the modification is that in September 2009, while playing basketball, he fell on and broke his right wrist. He testified he needs surgery to achieve a permanent recovery from this injury, but he does not know when that may occur because he does not have health insurance. Mr. K.-W. provided medical records that indicate there is a 20% chance his injury will not mend without surgical intervention.⁹ The latest medical record, dated December 16, 2009, indicates that his physician recommends he wear a removable wrist-thumb splint during his waking hours and “avoid heavy lifting, pushing, pulling or increased activity regarding his right upper extremity.”¹⁰ The medical records do not specify whether Mr. K.-W. is cleared to work at this time.

III. Discussion

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”¹¹ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes “material change in circumstances” has been established and the order may be modified.

⁶ *Id.*
⁷ Exh. 7 at pg. 1.
⁸ Exh. 7 at pgs. 1-3.
⁹ Exh. 8 at pg. 5.
¹⁰ Exh. 8 at pg. 1.
¹¹ AS 25.27.190(e).

The obligor parent has the burden of proving his or her earning capacity.¹² An obligor who claims he or she cannot work or pay child support because of a disability or similar impairment, must provide sufficient proof of the medical condition such as testimony or other evidence from a physician.¹³

Mr. K.-W. has not met his burden of proof in this appeal. He asserted that he is currently unemployed and not able to work because of the injury to his wrist, but he did not provide sufficient evidence from a medical professional confirming that he is unable to work. Mr. K.-W. did provide medical documents that confirm his injury, but the records are silent on his actual ability to work. His doctor made no reference to prohibiting Mr. K.-W. from working. Rather, he simply stated that the obligor should avoid heavy lifting, pushing and pulling.

CSSD's representative asked the obligor during the hearing whether he had attempted to obtain employment, such as in the fast food industry, that would not further stress his wrist injury. Mr. K.-W. responded by claiming that he is a chef and that he would not work for less than \$10 per hour.

Although there is evidence in this case that Mr. K.-W. may be voluntarily unemployed, such a finding would not be appropriate in this case because of the obligor's wrist injury. However, Mr. K.-W. still has the burden of proving by a preponderance of the evidence that CSSD's modification order is incorrect. He has not met this burden. CSSD's order calculated a child support amount from full-time minimum wage earnings of \$7.15 per hour.¹⁴ Mr. K.-W. has not proven by a preponderance of the evidence that he is unable to earn this amount.

IV. Conclusion

Mr. K.-W. did not provide evidence sufficient to prove that he has a disability or similar impairment that prevents him from working. As a result, Mr. K.-W. did not meet his burden of proving by a preponderance of the evidence that CSSD's Modified Administrative Child Support and Medical Support Order was incorrect, as required by 15AAC 05.030(h). Therefore, CSSD's order should be affirmed.

¹² *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

¹³ *Id.* at 1371.

¹⁴ Exh. 4 at pg. 7.

V. Child Support Order

- CSSD's January 15, 2010, Modified Administrative Child Support and Medical Support Order is affirmed.

DATED this 27th day of April, 2010.

By: Signed
Kay L. Howard
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Under AS 25.27.062 and AS 25.27.250, the obligor's income and property are subject to withholding. Without further notice, a withholding order may be served on any person, political subdivision, department of the State, or other entity.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 17th day of May, 2010.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

[This document has been modified to conform to technical standards for publication.]