

all parties with an opportunity to respond to the documents and the explanation provided by Mr. K.

The supplemental hearing was held on August 5, 2010. Mr. K. again appeared by telephone. He presented the testimony of two witnesses: T. F., AES Pioneer General Superintendent, and J. B., CPA. Ms. P. could not be reached for the hearing. A telephone call was placed to her contact number but the call was not answered. A message was left on Ms. P.'s voice mail that informed her the proceeding would commence and she should contact the Office of Administrative Hearings regarding participation.

This revised decision on remand replaces the original decision and order in its entirety. Based on the record and after due deliberation, Mr. K.'s 2010 income for purposes of child support is estimated \$91,877.50. When calculated pursuant to Civil Rule 90.3, his child support for one child is modified to \$1,120 per month, effective February 1, 2010; and further modified to \$1,005 per month, effective August 1, 2010, and ongoing.⁴

II. Facts

A. Background

Mr. K.'s child support obligation for L. was set at \$429 per month effective July 1, 2005.⁵ Ms. P.'s request for modification was made on January 5, 2010.⁶ On January 6, 2010, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order requesting current financial information.⁷ Mr. K. provided the requested information.⁸ On March 24, 2010, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. K.'s ongoing child support to \$804 per month, effective February 1, 2010.⁹ CSSD determined Mr. K.'s 2009 income to be \$62,583. It arrived at this figure by taking Mr. K.'s reported W-2 earnings plus the 2009 PFD.¹⁰ It was from this order that Mr. K. appealed.

⁴ Exh. 9b; Exh. 10b.

⁵ Exh. 1.

⁶ Exh. 2.

⁷ Exh. 3.

⁸ Exh. 4.

⁹ Exh. 5. The effective date of a modification is the first month after CSSD issues the notice that a petition for modification has been filed. 15 AAC 125.321(d).

¹⁰ Exh. 4; Exh. 5.

B. Material Facts¹¹

There are no material facts in dispute. In 2008, Mr. K. worked in California as an equipment operator. When he became unemployed he moved to Idaho where his father resides. In July 2009, Mr. K. began working for ARSC E. S. on the North Slope as a carpenter. He works a two week on/two week off schedule that allows him to continue to reside in Idaho. His starting pay was \$28 per hour. He now earns \$30 per hour. Mr. K. is regularly scheduled to work 80 hours of regular time and 84 hours of overtime during his two week shift. He also receives paid holidays and travel days. Additional overtime is available but it is voluntary and may be turned down.¹² There is no anticipated change in the availability of overtime.¹³

Prior to the hearing on remand and as directed in the Order Setting Supplemental Hearing on Remand, Mr. K. provided additional pay stubs. He has “regular” pay stubs representing his regular shift and “small” pay stubs representing additional pay for travel that may fall outside of his “regular” shift depending upon the pay period:

Pay Date	Reg Hours	Reg Pay	OT Hours	OT Pay	Holiday Hours	Holiday Pay	Total Gross Pay
1/8/10 ¹⁴	40	\$1,680	43	\$1,204	8	\$224	\$3,108
1/15/10 ¹⁵	40	\$1,120	49.5	\$2,079	0	0	\$3,199
1/22/10 ¹⁶	10.5	\$294	0	0	0	0	\$294
One time	Retro Pay ¹⁷						\$439
4/2/10 ¹⁸	42.5	\$1,275	47	\$2,115	0	0	\$3,390
4/9/10 ¹⁹	40	\$1,200	46.5	\$2,092.5	0	0	\$3,292.5
4/16/10 ²⁰	10.5	\$315	0	0	0	0	\$315
4/30/10 ²¹	43	\$1,290	48	2,160	0	0	\$3,450
5/2/10 ²²	40	\$1,200	45	\$2,025	0	0	\$3,225
5/14/10 ²³	10	\$300	0	0	0	0	\$300

¹¹ Some of the testimony and evidence received at the May 2010 hearing and discussed in the May Decision and Order is not relevant to the single issue remaining on appeal and those facts are no longer in dispute. For this reason some of the facts contained in the May Decision are not presented in this Decision and Order on Remand.

¹² Exh. A; F. Testimony.

¹³ F. Testimony

¹⁴ Exh. 4 at 13.

¹⁵ Exh. 4 at 12.

¹⁶ Exh. 4 at 11.

¹⁷ The retro pay was not on the January pay stubs but did appear on the April pay stubs. Therefore, it is reasonable to conclude it was received sometime between February and the end of March. It appears to be a one time catch-up payment to Mr. P.

¹⁸ Exh. F-1. This is the first pay stub showing a \$30 per hour base wage.

¹⁹ Exh. F-2.

²⁰ Exh. F-3.

²¹ Exh. F-4.

²² Exh. F-5.

²³ Exh. F-6.

5/28/10 ²⁴	43	\$1,290	46.5	\$2,092.5	0	0	\$3,382.5
6/4/10 ²⁵	40	\$1,200	50	\$2,250	0	0	\$3,450
6/11/10 ²⁶	10.5	\$315	0	0	8	\$240	\$555
6/25/10 ²⁷	43	\$1,290	51	\$2,295	0	0	\$3,585
7/2/10 ²⁸	40	\$1,200	45	\$,2025	0	0	\$3,225
7/9/10 ²⁹	10	\$300	0	0	0	0	\$300
7/23/10 ³⁰	42	\$1,260	42	\$1,890	0	0	\$3,150
Total as of 7/23/10		\$21,007		\$31,183.5		\$464	\$53,093.5

III. Issue on Appeal

At the supplemental hearing the scope of the appeal was narrowed significantly. Mr. K. provided his most recent pay stub (July 23, 2010) and a confirmation that he was now contributing 10% of his pretax income to a retirement account. Under Civil Rule 90.3, union dues and voluntary retirement contributions not to exceed 7.5% of gross wages are to be deducted from an obligor's gross income when calculating child support.³¹ Mr. K. and CSSD agree he is entitled to a deduction for union dues actually paid and, effective August 1, 2010, a deduction for his retirement contributions. Mr. K. agrees that he is not entitled to a deduction for travel between Spokane, Washington and Anchorage. Accordingly, the only remaining issue for resolution on appeal is the calculation of Mr. K.'s gross income for purposes of child support.

IV. Discussion

Typically, child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. Child support calculations are somewhat speculative because the relevant income figure is expected future income.³² The starting point is the "parent's total income from all sources."³³ The Commentary instructs that the phrase "total income from all sources" is to be broadly construed "to include benefits which would have been available for support if the family had remained intact."³⁴ This includes wages

²⁴ Exh. F-7.

²⁵ Exh. F-8.

²⁶ Exh. F-9.

²⁷ Exh. F-10.

²⁸ Exh. F-11.

²⁹ Exh. F-12.

³⁰ July 28, 2010 P. Filing.

³¹ Ak. Rule Civ. P. 90.3 (a)(1)(A)(iv), union dues, and (a)(1)(B), voluntary retirement.

³² Civil Rule 90.3, Commentary III. E.

³³ Civil rule 90.3(a)(1).

³⁴ Civil Rule 90.3, Commentary III. A.

and many income items that may vary from year to year such as overtime, tips, commissions, bonuses, profit sharing, interest, dividends, prizes and awards.³⁵

Mr. K. and CSSD each presented their calculation methodology.³⁶ Mr. K. believes an average annualized day rate should be used. His proposed calculation is based on an estimated average wage per day worked. Ms. B. explained how she calculated Exh. B, a spread sheet estimating Mr. K.'s gross pay for 2010. She calculated his average daily wages for the first six months of 2010 based on Mr. K.'s actual earnings less any holiday pay or retro pay divided by the number of days worked year to date for a specific pay period.³⁷ Ms. B. explained that her calculation for the second six months uses the same formula but limits future earnings to 80 hours of regular pay and 84 hours of overtime per pay period. Using Mr. K.'s calculation, as of December 13, 2010, his average day rate is \$440.11 for 195 days worked. This results in an annual expected gross income of \$85,820. When calculated pursuant to Civil Rule 90.3(a) using CSSD's online child support calculator, Mr. K.'s monthly child support obligation for one child would be \$1,052 per month from February 2010 through July 2010 and \$944 per month effective August 1, 2010 and ongoing.

CSSD's methodology also uses on an averaging of past earnings and excludes retro pay. The difference is that CSSD utilized "total income from all sources."³⁸ Its calculation includes overtime and holiday pay and carries the established earnings forward as directed by Civil Rule 90.3(a)(1).

CSSD explained that it first divided Mr. K.'s pay stubs into two categories: large checks and small checks. It then totaled each category and divided by the number of checks for an average figure for large checks and an average for small checks. Finally, CSSD annualized his earnings from February 2010 thru July 2010 by multiplying the average by the applicable pay period: 26 for large checks and 13 for small checks. This methodology results in an annual gross income totaling \$91,877.50. When calculated pursuant to Civil Rule 90.3(a), Mr. K.'s monthly child support obligation for one child would be \$1,120 per month from February 2010 through July 2010. As of August 2010 Mr. K. is contributing 10% of his income to a retirement account, so he is entitled to an additional deduction from income for that purpose, but at the

³⁵ Civil Rule 90.3, Commentary III. A.

³⁶ There is a third possible approach – taking Mr. P.'s first six months of reported earnings and doubling it for an annual income figure. Neither party offered this approach.

³⁷ For example, for the shift ending April 5, 2010, Mr. P. had worked year to date, 60 days; for the shift ending May 3, 2010, he had worked year to date 75 days. Exh. B.

³⁸ Civil Rule 90.3(a)(1).

maximum rate of 7.5%. This reduces his adjusted annual income and the child support calculated under Civil Rule 90.3(a)(1)(B) to \$1,005 per month, effective August 1, 2010 and ongoing.³⁹

In determining earning capacity for purposes of calculating child support, the tribunal has the discretion to choose “the best indicator of ... future earning capacity” based on the evidence before it.⁴⁰ Here, the best indicator of future earning capacity is Mr. K.’s past income actually received, including overtime and holiday pay.⁴¹

Mr. K.’s position limiting future overtime is speculative and therefore it will be disregarded for purposes of this calculation.⁴² His pay stubs reflect that more often than not Mr. K. works some voluntary overtime in each pay period. Therefore, any child support calculation should be based on the premise that Mr. K.’s acceptance of voluntary overtime will continue into the future.⁴³

Not only does Mr. K.’s proposed calculation fail to include overtime, but it also disregards holiday pay and paid travel time. These should be included because they are benefits that would have been available for support had the family remained intact. Mr. K. is paid for travel time as regular time. For the shift ending April 5, 2010, Mr. K. was paid for 93 hours of regular time.⁴⁴ For the shift ending May 3, 2010, he was again paid for 93 hours of regular time.⁴⁵ This pattern is repeated in his pay stubs and should have been reflected in his estimated future pay rather than a presumed 80 hours per work period. Therefore, Mr. K.’s proposed calculation is not the best indicator of future earnings and should not be used. CSSD’s calculation includes total income from all sources and is therefore the best indicator of Mr. K.’s earnings during the period in which support will be paid.

V. Conclusion

CSSD’s methodology is the best indicator of future earnings because it includes total income from all sources and best reflects the resources available for support during the period in which support is to be paid. Accordingly, when calculated pursuant to Civil Rule 90.3(a), Mr.

³⁹ Exh. 9b; Exh. 10b.

⁴⁰ *Coghill v. Coghill*, 836 P.2d 921, 926 (Alaska 1992).

⁴¹ *Virgin v. Virgin*, 990 P.2d 1040, 1049 (Alaska 1999).

⁴² *Id.*

⁴³ Should Mr. P.’s income fall and he is unable to meet his support obligations or there is a change in circumstance satisfying Civil Rule 90.3(h), he may petition for modification. *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 n. 6 (Alaska 1991).

⁴⁴ Exh. F- 1 (42.5 hours), F-2 (40 hours), F-3 (10.5 hours).

⁴⁵ Exh. F-4 (43 hours), F-5 (40 hours), F-6 (10 hours).

K.'s modified child support obligation for one child should be \$1,120 per month from February 2010 through July 2010 and \$1,005 per month effective August 1, 2010 and ongoing.⁴⁶

VI. Child Support Order

- The obligor's child support for one child is modified to \$1,120 per month effective February 1, 2010 and further modified to \$1,005 per month effective August 1, 2010, and ongoing;
- All other provisions of CSSD's March 24, 2010, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 1st day of September, 2010.

By: Signed
Rebecca L. Pauli
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 2nd day of September, 2010.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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

⁴⁶ Exh. 9b: Exh. 10b.