

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

IN THE MATTER OF:)

D. A.)

OAH No. 10-0464-CSS

CSSD No. 001057671

DECISION AND ORDER

I. Introduction

The Obligor, D. A., appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued in his case on August 17, 2010. This order increased Mr. A.’s monthly child support obligation for two children from \$846 to \$1,890. The Obligee children are R., who is fifteen years of age, and S., who is five years of age.

A hearing was held on October 11, 2010. Mr. A. participated in person and the custodian, D. Z., participated by telephone. Erinn Brian, Child Support Specialist, represented CSSD. CSSD had originally moved for summary adjudication. However, at hearing it was determined that there was a genuine issue of material fact and an evidentiary hearing was held.

Based on the record and after due deliberation, Mr. A.’s child support is modified to \$1,260 per month for two children, effective July 1, 2010.

II. Facts

A. Background

Mr. A.’s child support obligation for R. and S. was set at \$846 per month in August 2006.¹ Ms. Z. requested a modification review on June 18, 2010.² On June 23, 2010, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ Mr. A. did not respond. On August 17, 2010, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. A.’s ongoing child support to \$1,890 per month for two children, effective July 1, 2010.⁴ Mr. A. appealed on September 13, 2010, asserting that his income was overstated.

¹ *In re Dexter A.*, OAH No. 06-0368-CSS (August 16, 2006).

² Exh. 2.

³ Exh. 3.

⁴ Exh. 4.

B. Material Facts

Mr. A. is a Journeyman Lineman. He pays monthly union dues in the amount of \$26 plus 3% of weekly gross wages. Mr. A.'s work fluctuates and it is not uncommon for him have extended periods of unemployment. In 2009 he received 21 weeks of unemployment benefits and in 2008 he received 22 weeks of unemployment benefits.⁵

Prior to hearing, Mr. A. provided his paystubs for 2010 up through September 26, 2010. He explained that his income was not representative of what he would be earning in the future because from January 25, 2010 through June 22, 2010 he was working on a project that required large periods of overtime. As of June 27, 2010 his year-to-date gross earnings totaled \$58,829.46, slightly less than his 2009 gross income that totaled \$59,724.65. For the pay period ending September 26, 2010 his year-to-date gross earnings totaled \$81,514.34. Once the project ended Mr. A.'s hours have returned to normal.⁶

Mr. A.'s wages, as reported to the Alaska Department of Labor and Workforce Development are as follows:⁷

Year	Quarter	Wages	Wages + Unemployment =Yearly Total
2010	2	\$21,134.46	\$57,369.06 + \$838 = \$58,207.06 ⁸
2010	1	\$36,234.60	
2009	4	\$10,968.90	\$51,610.65 + \$8,114 = \$59,724.65
2009	3	\$34,535.15	
2009	2	\$6,288.60	
2008	4	\$6,794.09	\$44,717.07 + \$5,664 = \$50,381.07
2008	3	\$30,103.37	
2008	2	\$7,819.61	
2007	4	\$17,881.90	\$50,330.64 + \$2,288 = \$52,618.64
2007	3	\$26,073.90	
2007	2	\$6,374.84	

⁵ Exh. 6.

⁶ A. Testimony; Exh. 5 at 2.

⁷ Exh. 6.

⁸ It is unknown why his year to date earnings exceed his Department of Labor reported earnings.

Based on information not previously available to CSSD, at hearing it agreed that the Modified Administrative Child Support and Medical Support Order issued August 17, 2010 overstated Mr. A.'s income and did not include a deduction for union dues. CSSD also agreed that Mr. A.'s earnings in the first six months of 2010 were an anomaly and that Mr. A.'s income would not remain at that level. The only area of disagreement between the parties is the amount of gross income to be used for purposes of calculating child support.

CSSD proposed Mr. A.'s child support be calculated using a combination of actual reported income and imputed income. CSSD calculated an average weekly rate of \$2,124 by dividing Mr. A.'s earnings from June 22, 2010 forward by the number of paystubs for that period (11). CSSD then took that average weekly rate times the 13 pay periods remaining for the year and estimated that Mr. A. would earn \$27,614.84 in the fourth quarter. CSSD added the estimated fourth quarter earnings to Mr. A.'s actual earnings through September 27, 2010. Using CSSD's calculation, Mr. A.'s anticipated 2010 gross income totaled \$109,129.20.⁹ CSSD reasoned that it was appropriate to include Mr. A.'s earnings from the first half of the year because the children should benefit from the increase in income.

Mr. A. disagreed with CSSD's calculation reasoning that it was an overstatement of his income and he has regular periods of unemployment that were not considered by CSSD. However, Mr. A. did not propose an alternative calculation.

Ms. Z. participated in the hearing but did not have any testimony to put on the record.

III. Discussion

A. Mr. A.'s Income

A parent is obligated both by statute and at common law to support his or her children.¹⁰ 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. If the 15% change has not been met, CSSD may, but

⁹ \$27,614.84 + \$81,514.34.

¹⁰ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹¹ AS 25.27.190(e).

is not required, to modify the child support obligation. A modification is effective beginning the month after the parties are served with notice that a modification has been requested.¹²

Typically, child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. "The primary purpose of Rule 90.3 is to ensure that the child support orders are adequate to meet the needs of children, subject to the ability of parents to pay . . . The amount of support a child is entitled to receive from a particular parent is determined by that parent's ability to provide for the child."¹³ The "ability to provide" is a function of a parent's income which will be earned when the support is to be paid.¹⁴ Because the relevant amount is expected future income, the figure is necessarily speculative. The tribunal "must examine all available evidence to make the best possible calculation."¹⁵

Mr. A.'s child support was set at \$846 per month for one child in 2006. In this modification review, CSSD originally calculated his new child support at \$1,890 per month for two children effective July 1, 2010.¹⁶ At the hearing, using current information, CSSD revised the child support figure to \$1,743 per month for two children. This revised calculation does not take into the undisputed fact that Mr. A.'s earnings for the first half of the year were unusually high and not likely to repeat. Nor does it take into account that the effective date of the order is July 1, 2010, after the period of increased earnings ceased.

When 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.¹⁷ Here, the best indicator of future earning capacity is Mr. A.'s average weekly pay as calculated from the 11 pay periods after his work returned to normal multiplied by the number of weeks in a year that, based on past patterns, he is likely to work plus unemployment. The evidence presented establishes that it is more likely than not that the historical work patterns of 2009 and 2008 will continue into the future.

The 11 pay periods are representative because they are representative of the work schedule to which Mr. A. testified and range in amounts from a low of \$1,411.72 per week to a

¹² 15 AAC 125.321(d). In this case, the notice was issued on November 16, 2009. Exh. 3.

¹³ Civil Rule 90.3, Commentary I B.

¹⁴ Civil Rule 90.3, Commentary II, III E.

¹⁵ Civil Rule 90.3, Commentary III E.

¹⁶ Exh. 4.

¹⁷ *Coghill v. Coghill*, 836 P.2d 921, 926 (Alaska 1992).

high of \$3,845 per week. As set forth in CSSD's Affidavit of Department of Labor, in 2009 Mr. A. has regular periods of unemployment. The first half of 2010 Mr. A. worked but this was not typical and is not likely to repeat itself. Therefore, in keeping with his past earning pattern, it is more likely than not that Mr. A. will receive unemployment for 20 weeks of the year. Therefore Mr. A.'s annual gross income for purposes of child support should be \$76,354.¹⁸ This results in an adjusted gross income, after allowable deductions, including union dues¹⁹ in the amount of \$56,019.64. Using the CSSD's online child support calculator, Mr. A.'s monthly child support obligation for two children should be \$1,260.²⁰

IV. Conclusion

Mr. A. met his burden of proving by a preponderance of the evidence that CSSD's Modified Administrative Child Support and Medical Support Order was incorrect. Mr. A.'s modified child support is now correctly calculated at \$1,260 per month, and that figure should be adopted.

V. Child Support Order

- Mr. A. is liable for modified ongoing child support in the amount of \$1,260 per month, effective July 1, 2010;
- All other provisions of CSSD's August 17, 2010, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 28th day of October, 2010.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

¹⁸ (\$2,124 average weekly wage x 32 weeks = \$67,974) + (\$419 per week unemployment x 20 = \$8,380). Mr. A. received \$419 per week in January 2010. Exh. 6 at 2.

¹⁹ \$67,974 x 3% = \$2,039.22; \$2,039.22/12 = \$169.94; \$169.94+26 = \$195.94.

²⁰ Attachment A.

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 15th day of November, 2010.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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