

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

IN THE MATTER OF:	)	
	)	OAH No. 10-0621-CSS
L. P. J.	)	CSSD No. 001111158
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**DECISION AND ORDER**

**I. Introduction**

The obligor, L. P. J., appeals a Modified Administrative Child Support and Medical Support Order that CSSD issued in his case on November 23, 2010. The obligee children are T., age 16, and K., age 11. The custodian is F. B. W.

The formal hearing was held on January 10, 2011. Mr. J. appeared in person; Ms. W. participated by telephone. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. J.'s child support is modified to \$1,295 per month for two children, effective October 1, 2010, and further modified to \$1,057 per month for two children (\$783 per month for one child), effective January 1, 2011.

**II. Facts**

*A. History*

Mr. J.'s child support obligation for T. and K. was set at \$497 per month in 2008.<sup>1</sup> Ms. W. filed a petition for modification on September 14, 2010.<sup>2</sup> On September 17, 2010, CSSD issued a Notice of Petition for Modification of Administrative Support Order to the parties.<sup>3</sup> Mr. J. did not provide income information.<sup>4</sup> On November 23, 2010, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. J.'s child support to \$1,295 per month for two children, effective October 1, 2010.<sup>5</sup> He appealed on December 14, 2010.<sup>6</sup>

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1 Exh. 1.  
2 Exh. 2.  
3 Exh. 3.  
4 Pre-Hearing Brief at pg. 1.  
5 Exh. 5.  
6 Exh. 6.

*B. Material Facts*

Mr. J. is a truck driver and heavy equipment operator. He is dispatched out of Local 302 of the Operating Engineers and usually works seasonally for multiple employers during the year such as D. S. and the M. of A.<sup>7</sup>

Prior to 2010, Mr. J.'s earnings were relatively consistent: in 2008 he earned \$48,048.30 plus unemployment benefits of \$4,464, for total income of \$52,512.30.<sup>8</sup> In 2009, he earned \$40,239.40 and unemployment benefits of \$7,444, for total income of \$47,683.40.<sup>9</sup> However, in 2010, Mr. J. earned a significantly higher amount from wages – \$78,374.82.<sup>10</sup> He testified the increase was due to working on a short-term job during the third quarter for the Federal Emergency Management Agency (FEMA), which pays higher wages commonly referred to Davis-Bacon wages. E. S., the office manager of Mr. J.'s employer, D.S., confirmed his testimony that it was unusual for him to work that much overtime in just two months. She said the company tries to limit the amount of employee overtime but that the government needed the work done and the pay rate of \$34.76 per hour justified that one job.<sup>11</sup>

The average of Mr. J.'s income from 2008 through 2010 is \$55,554.18.<sup>12</sup> When this figure is used in a child support calculation, it results in a support amount of \$1,057 per month for two children (\$783 per month for one child).<sup>13</sup>

The children in this case, T. and K., live full-time with their mother. Ms. W. has another child, but she is older than T. and K. and no longer lives in the home. Ms. W. testified that she has not worked for over a year. She stated she suffers from degenerative disk disease and fibromyalgia and is in the process of applying for disability benefits. She currently receives \$527 in food stamps every month and Medicaid to cover the family's health care needs. Ms. W. reported having regular monthly expenses that consist of \$600 for rent and utilities; \$630 for food; \$16 for water service; \$55 for a cell phone; \$45-\$50 for public transportation; and \$47.50 for each carton of cigarettes (10 packages). Ms. W. presented testimony asserting Mr. J. treated

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7 Exh. 11.

8 Exh. 11 at pgs. 1-2.

9 *Id.*

10 Exh. 11 at pg. 1.

11 Exh. 10.

12  $\$48,048.30 + \$40,239.40 + \$78,374.82 = \$166,662.50 \div 3 = \$55,554.18.$

13 Exh. 13.

her badly in the past, but that testimony was found to be largely irrelevant to this modification action.

### **III. Discussion**

#### *A. Child Support Calculation*

Mr. J. has appealed CSSD's calculation of his modified child support obligation. He has the burden of proving by a preponderance of the evidence that the Modified Administrative Child Support and Medical Support Order is incorrect.<sup>14</sup> A modification is effective beginning the month after the parties are served with notice that a modification has been requested, so this modification is effective as of October 1, 2010.<sup>15</sup>

Child support orders may be modified upon a showing of "good cause and material change in circumstances."<sup>16</sup> 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 a person has "erratic" income from year to year, CSSD may calculate child support based on an average income figure taken from several years' income.<sup>17</sup> In most cases, CSSD uses the average income from a three-year period of time.

For the modification review, CSSD calculated Mr. J.'s modified child support based on the income reported to him by the Alaska Department of Labor and Workforce Development for the first three quarters of 2010. The division divided the total for three quarters by three, then multiplied the result times four to reach an estimated annual income amount of \$75,119.88.<sup>18</sup> CSSD inserted this figure into its online child support calculator and reached a modified child support amount of \$1,295 per month for two children and \$959 per month for one child.<sup>19</sup>

CSSD correctly calculated Mr. J.'s modified child support for October through December of 2010, as his earnings last year were significantly higher than in prior years. However, the modified child support amount going forward in 2011 should not be based on his actual 2010 income, as the evidence shows that 2010 was an atypical earnings year for him that will not continue into 2011. Mr. J. had a unique short-term job working for FEMA that paid Davis-

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<sup>14</sup> 15 AAC 05.030(h).

<sup>15</sup> 15 AAC 125.321(d). In this case, the notice was issued on September 17, 2010. Exh. 3.

<sup>16</sup> AS 25.27.190(e).

<sup>17</sup> Civil Rule 90.3, Commentary III.E.

<sup>18</sup> Exh. 5 at pg. 7.

<sup>19</sup> Exh. 5 at pg. 6.

Bacon level wages at the end of 2010. It is highly unlikely that Mr. J. will continue to receive what he earned in 2010, as verified by his employer. Thus, it would be unfair to calculate his 2011 and ongoing child support from 2010 earnings that exceeded his usual income by nearly \$30,000.

CSSD is authorized by Civil Rule 90.3 to average income over a several year period of time in order to ameliorate the effect of an obligor parent having erratic income during a several-year period of time. In this case, not averaging Mr. J.'s income will significantly overstate his child support obligation to T. and K. at the current time and into the future. Averaging will reflect his higher income in 2010, but it will also take into account the fact that his income has returned to pre-2010 levels because he is no longer working for Davis-Bacon wages at a short-term, high-overtime work assignment.

After the hearing, CSSD averaged Mr. J.'s income from 2008 through 2010, which resulted in a figure of \$55,554.18.<sup>20</sup> When this average income amount is used in a child support calculation, it results in a support amount of \$1,057 per month for two children and \$783 per month for one child.<sup>21</sup> These are the correct amounts, based on Mr. J.'s income. Whether they should be varied due to other circumstances in this appeal is discussed below.

*B. Good Cause Variation*

The second issue in this case concerns whether Mr. J.'s child support obligation should be adjusted. Based on Ms. W.'s testimony, CSSD inquired into her financial circumstances to determine whether Mr. J.'s child support should be increased from the amount calculated under Civil Rule 90.3.

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. A parent wishing to increase or lower the support amount calculated must show that "good cause" exists for the change. In order to establish good cause, the parent must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."<sup>22</sup> It is appropriate to consider all relevant evidence,

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<sup>20</sup> \$48,048.30 + \$40,239.40 + \$78,374.82 = \$166,662.50 ÷ 3 = \$55,554.18.

<sup>21</sup> Exh. 13.

<sup>22</sup> Civil Rule 90.3(c).

including the circumstances of the custodian and obligee child(ren) to determine if the support amount should be set at a different level than under the schedule in Civil Rule 90.3(a).<sup>23</sup>

Based on the evidence presented, this case does not present good cause. There is no clear and convincing evidence that manifest injustice would result if the child support calculated under Civil Rule 90.3 were not increased. Mr. J.'s support obligation has increased at least two-fold as of October 2010. Although Ms. W. was not working at the time of the hearing, the calculated child support amount is adequate to meet Mr. J.'s responsibility to support his children. Ms. W.'s health issues are indeed unfortunate, but Mr. J.'s legal obligation is limited to his children.

#### **IV. Conclusion**

Mr. J. met 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 15 AAC 05.030(h). That order, which modified Mr. J.'s child support to \$1,295 per month for two children, was correct from October 2010 through December 2010, but it should be adjusted slightly as of January 2011 and ongoing, to \$1,057 per month for two children (\$783 per month for one child), based on a three-year average of his earnings from 2008 through 2010. CSSD's calculation should be adopted.

#### **V. Child Support Order**

- Mr. J. is liable for modified child support for T. and K. in the amount of \$1,295 per month, effective October 1, 2010, and further modified to \$1,057 per month for two children (\$783 per month for one child), effective January 1, 2011, and ongoing;
- All other provisions of the Modified Administrative Child Support and Medical Support Order dated November 23, 2010, remain in full force and effect.

DATED this 15<sup>th</sup> day of March, 2011.

By: Signed  
Kay L. Howard  
Administrative Law Judge

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<sup>23</sup> Civil Rule 90.3, Commentary VI.E.1.

**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 4<sup>th</sup> day of April, 2011.

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

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