

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

IN THE MATTER OF: )

P M. P )

) OAH No. 11-0065-CSS

) CSSD No. 001062889

**DECISION AND ORDER**

**I. Introduction**

The obligor, P M. P, appealed a Notice of Denial of Modification Review that the Child Support Services Division (CSSD) issued in his case on November 5, 2010. The obligee child is D, 14. The other party is D F. B.

The hearing was held on March 15, April 13 and May 25, 2011. Mr. P appeared telephonically throughout and is represented by Jody Reausaw; Ms. B appeared telephonically and in person during the final session with counsel, Gary Eschbacher. Andrew Rawls, Child Support Specialist, represented CSSD. All three hearings were recorded.

Based on the record and after due deliberation, CSSD's Notice of Denial of Modification Review is vacated and Mr. P's child support obligation is modified to \$510 per month for one child, effective April 1, 2010 and ongoing.

**II. Facts**

*A. Procedural Background*

Mr. P's child support obligation was set at \$768 per month in June 2005.<sup>1</sup> Mr. P requested a modification review on March 18, 2010.<sup>2</sup> On March 26, 2010, CSSD notified the parties that a modification review had been requested.<sup>3</sup> Mr. P provided income and other financial information.<sup>4</sup> On November 5, 2010, CSSD issued a Notice of Denial of Modification Review for the reason that Mr. P did not respond to an earlier request for information.<sup>5</sup> Mr. P

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<sup>1</sup> Exh. 1.  
<sup>2</sup> Exh. 2.  
<sup>3</sup> Exh. 3.  
<sup>4</sup> Exh. 4.  
<sup>5</sup> Exh. 6.

appealed on February 17, 2011, asserting he had repeatedly provided the information CSSD requested.<sup>6</sup>

*B. Material Facts*

Mr. P was formerly a pile driver.<sup>7</sup> His career ended in 2008 as the result of injuries he received in an automobile accident on March 6, 2008.<sup>8</sup> With the exception of an attempt to return to light duty work in July 2008, he has not worked since his accident.<sup>9</sup> Mr. P subsequently applied for and was awarded Social Security disability benefits (SSI) in the amount of \$1,591 per month, effective September 2008.<sup>10</sup> Ms. B also applied for CIB (Children's Insurance Benefits) payments on D's behalf and the child was awarded \$851 per month, effective September 2008.<sup>11</sup> Because of the length of time between the onset of Mr. P's disability in 2008 and the payment of disability benefits, both parties received lump sum payments from Social Security. Mr. P testified that he received \$10,000 in December 2010 and approximately \$24,000 after that.<sup>12</sup> Ms. B received \$25,348 in March 2011.<sup>13</sup>

While he was waiting for his application for Social Security benefits to be acted upon, Mr. P supported himself by withdrawing his union pension and settling the personal injury action related to his automobile accident. In 2009, he withdrew all of his retirement assets consisting of \$68,303.51 from the No Name Carpenters Union, Local 0000's defined contribution plan.<sup>14</sup> Also in 2009, after attorney fees, costs, and various liens were paid, he received settlement proceeds of \$22,285.60.<sup>15</sup> In 2010, after fees, costs and a child support lien were paid, Mr. P received a second settlement of \$51,146.50.<sup>16</sup>

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<sup>6</sup> Exh. 7.

<sup>7</sup> Exh. 4 at pg. 20.

<sup>8</sup> Exh. 4 at pg. 19.

<sup>9</sup> Exh. 4 at pg. 3, 20.

<sup>10</sup> Obligor's Prehearing Brief at Exh. A; P testimony.

<sup>11</sup> Exh. 10 at pg. 1.

<sup>12</sup> These amounts were not documented, but there is no dispute that Mr. P's monthly SSI payment is \$1,591 per month. One of Ms. B's documents suggests that his total lump sum payments were \$44,548, but the source of that number is unknown. *See* Custodian's Exh. A at pg. 6.

<sup>13</sup> *Id.*

<sup>14</sup> Obligor's Notice of Filing 2009 Tax Return and Letter from Trust Fund, received on June 15, 2011.

<sup>15</sup> This is the total of two payments, one of \$16,079.82 in June 2009 and the other of \$6,205.78 in July 2009. *See* Exh. 4 at pg. 23.

<sup>16</sup> Exh. 4 at pg. 24.

Mr. P's 2010 total income for child support purposes includes his SSI payments of \$1,591 per month, D's CIB payments of \$851 per month, and the obligor's PFD of \$1,281, all of which total \$30,585.<sup>17</sup> A child support amount calculated from this income figure is \$510 per month for one child.<sup>18</sup> The retirement proceeds and personal injury payout Mr. P received in 2009 are not included in his income for 2010 and are not considered relevant, as they were received the year before this modification is effective.<sup>19</sup> Neither does Mr. P's 2010 income include the personal injury settlement payment he received in March 2010 – the specific nature of the award was not broken down into its functional parts and it cannot be said with any degree of certainty whether, and if so, what portion of the settlement may have been intended to replace Mr. P's lost income.<sup>20</sup>

Mr. P currently owns a home with his sister, who handles his financial matters. They live in the home with her boyfriend and the three of them share the household expenses on an equal basis. Mr. P testified during the first hearing that he had about \$15,000 remaining from his retirement proceeds, personal injury settlements and the lump sum Social Security payout, but at the final hearing he said he does not have any money in the bank. He said the reason is that he used most of his settlement to pay the people who had been loaning him money, mostly his sister.

Little is known of Ms. B's and D's circumstances. The custodian testified that D is disabled because he was seriously hurt in a snow machine accident two years ago and has had several surgeries since then. She did not provide any other evidence of hers or D's current situation.

### **III. Discussion**

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”<sup>21</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. As the person who filed the appeal in this

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<sup>17</sup> See *Pacana v. State*, 941 P.2d 1263 (Alaska 1997); Civil Rule 90.3, Commentary III.A.

<sup>18</sup> Exh. 11.

<sup>19</sup> See AS 25.27.190(a).

<sup>20</sup> See Exh. 4 at pgs. 19-24.

<sup>21</sup> AS 25.27.190(e).

case, Mr. P has the burden of proving by a preponderance of the evidence that CSSD issued the Notice of Denial of Modification Review in error.<sup>22</sup>

A modification is effective beginning the month after the parties are served with notice that a modification has been requested.<sup>23</sup> In this case, the notice was issued on March 26, 2010, so the modification is effective as of April 1, 2010.<sup>24</sup> Ms. B expressed interest in Mr. P's 2009 income for the child support modification, but use of that income is not allowed. The purpose of a modification is to calculate an obligor parent's "future periodic support payments."<sup>25</sup> To accomplish this, CSSD generally must determine the parent's "expected *future* income."<sup>26</sup> Even though Mr. P's 2009 income was higher than it was in 2010, the relevant inquiry for the 2010 modification is his 2010 income.

Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources." CSSD initially denied Mr. P's request for modification on the basis that he did not respond to a request for information, but during the hearing process CSSD acknowledged that Mr. P had provided income information. The agency recommended that its Notice of Denial of Modification Review be vacated in favor of a modification effective April 1, 2010.

CSSD calculated the proposed modified child support amount at \$510 per month.<sup>27</sup> This figure was derived from CSSD's determination that Mr. P's 2010 income totaled \$30,585 – a combination of his annual disability benefits of \$19,092, plus D's annual CIB payments of \$10,212, and Mr. P's PFD of \$1,281.<sup>28</sup>

Mr. P agrees with CSSD's calculation and consented to its adoption as the modified child support amount. Ms. B, on the other hand, does not agree. Ms. B contends that the definition of "income" in Mr. P's case is one of first impression. She maintains essentially that the settlement proceeds constitute a windfall for Mr. P and that they should be included in his income for the

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<sup>22</sup> 15 AAC 05.030(h).

<sup>23</sup> 15 AAC 125.321(d).

<sup>24</sup> See Exh. 3.

<sup>25</sup> AS 25.27.190(a).

<sup>26</sup> Civil Rule 90.3, Commentary III.E (emphasis added).

<sup>27</sup> Exh. 11, found in CSSD's Second Submission to Record received on April 12, 2011.

<sup>28</sup> *Id.* Although there is significant disagreement as to which specific figures should be included in Mr. P's income, there is no dispute that the correct methodology for a child support calculation where the child receives CIB payments is to combine the obligor's and child's benefits to determine the obligor's income. See n.17.

purpose of calculating his modified child support. In the alternative, she was open to having the modification be effective in 2011, not 2010, but the correct modification date is April 1, 2010.

Ms. B presented the testimony of a financial planner who had prepared several proposed child support calculations, all of them including as income either Mr. P's 2010 or 2009-2010 averaged personal injury settlements, or his total SSI lump sum payments attributed to him as income for a 2011 modification.<sup>29</sup> These calculations are not particularly useful because they make incorrect assumptions as to what constitutes Mr. P's income for child support purposes in 2010.

Contrary to Ms. B's assertion, this appeal does not represent a case of first impression regarding whether undifferentiated settlement payments from personal injury actions should be included in an obligor parent's income for child support purposes. *In the matter of H.D.*, a 2008 appeal before the OAH, addressed identical issues. In that case, a lump sum payment of \$42,000 from a personal injury action was not included in the obligor parent's income because the specific nature of the award was unknown.<sup>30</sup> A worker's compensation settlement of \$35,330 was included in the obligor's income because it was specifically designed to replace his lost wages.<sup>31</sup> This case is remarkably similar and should be followed. Ms. B has not shown why this decision should depart from *H.D.*'s example.

Finally, there has been a suggestion that the provisions of Civil Rule 90.3(c) apply here regarding a good cause variation from the presumptive child support amount of \$510 per month. As correctly pointed out by Mr. P, that analysis would not be fruitful, as Ms. B has not presented meaningful testimony or documentary evidence of her financial circumstances.<sup>32</sup>

#### **IV. Conclusion**

Mr. P met his burden of proving by a preponderance of the evidence that CSSD's Notice of Denial of Modification Review was issued in error. CSSD has now correctly calculated Mr. P's modified child support at \$510 per month, effective April 1, 2010. This figure should be adopted.

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<sup>29</sup> Custodian's Exh. A at pgs. 1-7.

<sup>30</sup> *In the Matter of H.D.*, OAH No. 08-0169 (Department of Revenue, August 11, 2008).

<sup>31</sup> *Id.*

<sup>32</sup> See Civil Rule 90.3(c)(1); see also, Civil Rule 90.3, Commentary VI.B.

**V. Child Support Order**

- The Notice of Denial of Modification Review CSSD issued in Mr. P's case on November 5, 2010, is vacated;
- Mr. P's child support obligation for D is modified to \$510 per month, effective April 1, 2010;
- Mr. P is entitled to a CIB credit in the amount of \$851 per month, effective April 1, 2010;
- All other provisions of the prior order in effect in Mr. P's case, the Decision and Order *In the Matter of P M. P*, OAH No. 04-0227-CSS, adopted as a final decision on June 17, 2005, remain in full force and effect.

DATED this 17<sup>th</sup> day of July, 2011.

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 11<sup>th</sup> day of August, 2011.

By: Signed  
Signature  
Jerry Burnett  
Name  
Deputy Commissioner  
Title

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