

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

In the Matter of:)	
)	OAH No. 13-1178-CSS
B B. P)	CSSD No. 001175054
_____)	

DECISION AND ORDER

I. Introduction

The obligor, B B. P, appealed an Administrative Review Decision that the Child Support Services Division (CSSD) issued on July 16, 2013. The obligee child is Q, 2 years old. The other parent is D E. H.

The hearing was held on October 3, 2013. Both parties participated by telephone, in addition to Ms. H's mother, N H. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. P is found to be voluntarily and unreasonably underemployed. As a result, Mr. P's child support is set at \$320 per month for March 2011 through February 2014, and ongoing.

II. Facts

A. Procedural Background

Ms. H applied for and began receiving public assistance for Q in March 2011.¹ CSSD initiated a paternity action against another individual, who was found not to be Q's father.² Ms. H was incarcerated in January 2013, so Ms. H's mother, who had custody of Q at the time, applied for child support services.³ Mr. P's paternity of Q was established by CSSD pursuant to an administrative order issued on May 14, 2013.⁴ On May 15, 2013, CSSD issued an Administrative Child Support and Medical Support Order that set his ongoing child support at \$346 per month for one child, with arrears of \$10,352 for the period from March 2011 through

¹ CSSD's Pre-Hearing Brief at pg. 1.
² *Id.*
³ Exh. 1.
⁴ Exh. 5.

May 2013.⁵ Mr. P requested an administrative review. On July 16, 2013, CSSD issued an Administrative Review Decision that affirmed its earlier order.⁶ Mr. P appealed on August 13, 2013.⁷

*B. Material Facts*⁸

In 2009, Mr. P's right hand was severely injured in a commercial fishing accident. He had at least four surgeries in the next two years, going back and forth to Seattle for numerous treatments. Mr. P testified that as a result of the injury, the tendon of his middle finger is frozen into a "hook" position. In the spring of 2011, Mr. P received a settlement of \$65,000 for the injury to his hand, and he was cleared for work sometime between October 2011 and April 2012.⁹

Mr. P has been unemployed most of the time since his injury, but he has done some work. He has done some painting for his stepfather, and in the winter of 2012, he started working for No Name. The job pays \$15 per hour, but it is a seasonal position, so in the three quarters ending in mid-2013, he had earned only about \$1,600 total from that employer.¹⁰ In addition to plowing snow, Mr. P went back to fishing in the 2013 season. He claimed he only received \$500 for his crew share because the boat captain essentially cheated him out of the bulk of his earnings. There is no evidence in the record that Mr. P cannot return to commercial fishing, although the condition of his hand might limit him to working on a small boat.

Mr. P's explanation for his inability to find permanent, full-time work is that he is a convicted felon and he also has domestic violence in his background. He said he has considered employers such as Best Buy and local Holiday gas stations, but other than seeking employment from No Name, he has not applied for work, nor has he sought the assistance of Job Service.

Mr. P and his girlfriend live with his mother and stepfather. At the time of the hearing his girlfriend was on unemployment and both she and Mr. P's mother were receiving food stamps. It appears that the "household" is supporting Mr. P. They provide his food and

⁵ Exh. 6.

⁶ Exh. 10.

⁷ Exh. 11.

⁸ The material facts are taken from the parties' hearing testimony and the documentary evidence, as cited.

⁹ This approximation is based on Mr. P's testimony that he was cleared for work between one-and-one-half and two years prior to the hearing.

¹⁰ Exh. 12.

transportation when necessary, and he does not pay rent. He said he buys food when he has money, but he obviously is not able to contribute much in the way of cash.

Mr. P has three children older than Q. The oldest is L, who is 10 years old and is in the custody of Mr. P's mother, so essentially L lives in the same household. The obligor's son, E, is 7 years old and lives with his birth mother. Mr. P has an order to pay support for E, but the only payments come from the garnishment of his PFD every year. Finally, Mr. P and his girlfriend have a daughter named O who is 3 years old and lives with them in her grandmother's home.

III. Discussion

Mr. P filed the appeal in this matter. As the party who filed the appeal, he has the burden of proving by a preponderance of the evidence that CSSD's Administrative Review Decision is incorrect.¹¹

A parent is obligated both by statute and at common law to support his or her children.¹² By regulation, CSSD collects support from the date the custodial parent requested child support services, or the date public assistance or foster care was initiated on behalf of the child(ren).¹³ In this case, Ms. H began receiving public assistance on Q's behalf in March 2011, so that is the first month in which Mr. P is obligated to pay support in this administrative child support action.¹⁴

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," minus mandatory deductions such as taxes and Social Security. The obligor parent has the burden of proving his or her earning capacity.¹⁵

Mr. P's testimony that he has not been actively seeking work raises the issue of voluntary underemployment. If a parent is found to be voluntarily and unreasonably unemployed or underemployed, his or her child support amount may be calculated from that parent's "potential income," which is based on his or her "work history, qualifications and job opportunities."¹⁶ Mr. P currently earns at least some income during the year doing snow removal, and in the summer

¹¹ 15 AAC 05.030(h).

¹² *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹³ 15 AAC 125.105(a)(1)-(2).

¹⁴ See Exh. 6 at pg. 11.

¹⁵ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

¹⁶ Civil Rule 90.3(a)(4).

of 2013 he got a job on a commercial fishing vessel, so the question is whether he is voluntarily and unreasonably underemployed.

In cases in which voluntary underemployment is raised, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct “for the purpose of becoming or remaining unemployed [or underemployed].”¹⁷ In addition to the question whether the parent’s lack of work is voluntary, it is also necessary to determine whether the parent’s underemployment is unreasonable. An integral part of the analysis is whether the parent’s lack of employment is a result of “economic factors,” as in being laid off, or of “purely personal choices.”¹⁸ It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a parent.¹⁹ The commentary to Civil Rule 90.3 directs that tribunals adjudicating child support “shall consider the totality of the circumstances in deciding whether to impute income to a party based on voluntary unemployment [or underemployment].”²⁰

After careful consideration, this decision finds that Mr. P is voluntarily and unreasonably underemployed. There is no dispute in this appeal that Mr. P suffered a serious injury to his hand in 2009. However, at some point between October 2011 and April 2012, Mr. P was released to return to work. Since then, he has done painting for his stepfather, plowed snow, and worked as a commercial fisherman. It is obvious, based on his testimony, that Mr. P is physically capable of working, yet he acknowledged during the hearing that he has not really sought employment. He claimed he doesn’t look for work because his felony record makes it too hard. But the truth of the matter is that Mr. P *has* found work since he injured his hand. Therefore, he is more likely than not capable of finding more work. At a minimum, he is capable of performing a thorough and systematic job search.

Alaska law is clear that a parent has a duty to support his or her children, and this duty takes priority over lifestyle decisions such as choosing not to seek employment.²¹ Because his choice not to seek work is voluntary, Mr. P’s lack of income should not be transferred to Q as a

¹⁷ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

¹⁸ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

¹⁹ *Kowalski*, 806 P.2d at 1371.

²⁰ Civil Rule 90.3, Commentary III.C.

²¹ *See Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

loss of support. An obligor parent is free to change jobs and careers, and even to be unemployed for a time, but his or her children should not have to finance a continued interruption in the obligor parent's income.²²

Because Mr. P has been found to be voluntarily and unreasonably underemployed, his child support amount may be calculated from his "potential income," which is based on his "work history, qualifications and job opportunities."²³ A primary goal of imputing income, according to the Alaska Supreme Court, is to compel the parent to find full-time employment:

An important reason -- if not the chief reason -- for imputing income to a voluntarily underemployed parent is to goad the parent into full employment by attaching an unpleasant consequence (a mounting child support debt or, in certain cases of shared custody, a reduced child support payment) to continued inaction. Indeed, in primary and shared custody situations alike, an order imputing income often yields no tangible benefits to the children unless and until it impels the underemployed parent to find a job.^[24]

CSSD calculated Mr. P's child support based on the wage of \$15 per hour that he was earning at No Name. However, since his job there is seasonal, he clearly cannot earn that hourly wage on a full-time basis. However, he should be capable of earning \$10 per hour, which, on an annual basis, would provide him with total earnings of about \$20,800 per year.²⁵ A child support amount calculated from this income figure is \$320 per month for one child.²⁶ It is reasonable to apply this income figure to Mr. P.

One final issue should be addressed regarding the time period during which this support amount is being attributed to Mr. P. Were it not for the \$65,000 settlement he received in 2011, he would be entitled to a \$50 per month minimum order for 2011 because he was not yet cleared for work, and the imputed amount would start in 2012. However, with funds in that amount available to him in 2011, a minimum order is not appropriate for that year. Thus, the \$320 per month child support amount should begin with the start of public assistance in March 2011.

²² *Olmstead v. Ziegler*, 42 P.3d 1102, 1105 (Alaska 2002).

²³ Civil Rule 90.3(a)(4).

²⁴ *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

²⁵ This income amount is derived from an hourly wage of \$10 per hour x 2080 hours, the amount of time a full-time employee works in one year (40 hours per week x 52 weeks = 2080 hours).

²⁶ Attachment A.

IV. Conclusion

Mr. P is voluntarily and unreasonably underemployed. Therefore, it is reasonable to impute income to him in the annual amount of \$20,800, which is based on a wage figure of \$10 per hour for full-time employment. This yields a child support amount of \$320 per month for one child. This support amount should be adopted as of March 2011, and ongoing.

V. Child Support Order

- Mr. P is liable for child support for Q in the amount of \$320 per month for March 2011 through February 2014, and ongoing.
- All other provisions of the Administrative Review Decision remain in full force and effect.

DATED this 10th day of February, 2014.

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 3rd day of March, 2014.

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

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