BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF REVENUE

In the Matter of	)	
	)	
N R. Q	)	OAH No. 16-1295-CSS
	)	Agency No. 001205154

DECISION AND ORDER

I. Introduction

N Q has a two-year-old daughter who lives with her mother. Mr. Q works part-time as an apprentice electrician. He does not have another job. He struggles with post-traumatic stress disorder, depression, and anxiety related to his military service.

In September 2016, the Child Support Services Division issued an amended Administrative Child Support and Medical Support Order setting Mr. Q's ongoing child support obligation at $439 per month. The Division determined that Mr. Q should work full-time to support his child, and therefore imputed additional income to Mr. Q when determining his support obligation.

Mr. Q appealed. He argued that imputing income was not appropriate because of his PTSD. Although Mr. Q clearly has issues and difficulties that affect his ability to work, the evidence in this record is not sufficient to meet his burden of proving that he cannot work full-time. Therefore, the Division's imputation of potential additional income is affirmed.

Mr. Q is correct, however, that the Division used the wrong pay period for calculating his actual wages. Recalculating his wages and imputed income based on the correct pay period results in a slight reduction of his child support obligation.

II. Facts

N Q and B D are the parents of S D, who turned two-years old in December. Ms. D has full-time custody of S. Mr. Q lives in the No Name City 1. Ms. D and S live in No Name City 2 Alaska.

Mr. Q works as an apprentice electrician for his father's firm, No Name Electric. He works about half time. He is paid $20 per hour.[1] He does not work at any other job.

Mr. Q has worked for his father since 2006, which is when he left the military. His military service included active duty under fire in Iraq. He served as a medic, and was given only one month of training as a medic before being sent into a situation that turned into a harrowing

[1] Q testimony. Division Exhibit 5 at 4.

tour of duty.[2] The experience left him with post-traumatic stress disorder, and the military treated him for depression and anxiety.[3] For his last two months of service in the Navy, he was unable to work.[4]

In 2008-09, a licensed clinical social worker with the Veteran's Administration Medical Center in No Name City 3 confirmed that Mr. Q had PTSD and performed a suicide risk assessment.[5] His health summaries noted that in 2011 he was seen and treated by a psychiatric nurse practitioner for chronic PTSD, recurrent major depressive affective disorder, and dysthymic disorder.[6]

The medical records from 2013-2015, however, do not further reference his depression and PTSD. A chart note from April 11, 2013, states that a depression screen was performed and that Mr. Q had a score of 0, which is negative for depression.[7] Nothing in this record indicates that his PTSD or other medical disability may make him medically unable to work at a full-time job.

Beginning in December 2014, Ms. D began receiving public assistance on behalf of S. As required by law, the Division opened a child support case regarding Mr. Q's obligation to support his child. It issued an administrative order, requiring the parties to provide financial and medical insurance information.[8] After reviewing the information it received, the Division issued an Administrative Child Support and Medical Support Order on June 28, 2016.[9] This order set Mr. Q's monthly ongoing child support at $379. Mr. Q requested an administrative review of this order.[10]

Following an administrative review, the Division set Mr. Q's ongoing child-support obligation at $439 per month, effective January 2016.[11] The basis for the order was an expected annual gross income of 31,562.00, computed as follows:

- Earned income of $20,020.00, based on 38.5 hours worked every two weeks at $20.00 per hour (actual income);

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2 Q Exhibit 5 at 78.
3 *Id.*
4 Q testimony.
5 Q Exhibit 5 at 20.
6 *Id.* at 24; 49-71; 78-80; 85-92; 95-102; 108-11. According to Wikipedia, dysthymia is chronic depression. *See* https://en.wikipedia.org/wiki/Dysthymia.
7 Q Exhibit 5 at 44.
8 Division Exhibit 1.
9 Division Exhibit 4.
10 Division Exhibit 5.
11 Division Exhibit 6 at 1-3.

- Imputed potential income of $10,520.38, based on an ability to work an additional 41.5 hours per pay period at a minimum-wage job (imputed income, based on a finding that he was voluntarily and unreasonably underemployed);
- Permanent fund dividend of $1,022.00.[12]

After allowing for deductions based on deductible expenses, the Division determined that his adjusted annual income for child support purposes was $26,354.96.[13] Applying the formula for child support for one child resulted in an ongoing support obligation of $5,270.99 per year, or $439 per month.[14]

Because S's public assistance dates back to December 2014, the order included an order for child support for December 2014 of $50, and $273 per month for January 2015 through December 2015, none of which is in dispute in this case. The $439 per month obligation, which is in dispute, applied for all months from January 2016 forward.

Mr. Q appealed. A hearing was convened on November 30, 2016. Mr. Q represented himself. Child Support Specialist Brandi Estes represented the Division. Ms. D represented herself. At the end of the hearing, the record was held open for Mr. Q to supplement the record with a statement from his employer and documentation of his medical condition. The Division and Ms. D were then provided an opportunity to respond to any supplemental submission.

On December 8, 2016, Attorney C R submitted an entry of appearance for Mr. Q. The deadline for Mr. Q's supplemental filing was extended to December 20, with the Division and Ms. D given until December 30 to respond. On December 20, Mr. Q filed a brief, supported by an extensive exhibit of medical records and affidavits from his parents. On December 30, the Division submitted its response. The record closed on December 30, 2016.

III. Discussion

A parent is obligated both by statute and at common law to support his or her children.[15] The primary purpose of child support orders under Civil Rule 90.3 is "to ensure that child support orders are adequate to meet the needs of children, subject to the ability of parents to pay."[16] Under Civil Rule 90.3(a)(1), an obligor's child support obligation is calculated based on "total

12 *Id.*
13 Division Exhibit 6 at 12.
14 *Id.*
15 *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.
16 Alaska R. Civ.P. 90.3 Commentary at I.B.

income from all sources." The commentary to the rule explains that "the relevant income figure is expected future income."[17]

In this hearing, Mr. Q initially identified three issues that he believes are errors. His counsel's post-hearing briefing focused on only one issue: whether the Division erred by imputing income to him for hours that he did not work based on a finding that he was voluntarily and unreasonably underemployed. Mr. Q also argued that the Division erred by concluding that Mr. Q could work as a journeyman and by computing his wages based on his being paid biweekly instead of twice per month. These three issues are discussed below.

A. Is Mr. Q voluntarily and unreasonably underemployed?

The major issue in this hearing is whether Mr. Q is voluntarily and unreasonably underemployed. An obligor can be underemployed if he or she is working fewer hours, or at a lower-wage job, than would be expected for a parent with the obligor's experience, training, or ability. Under Civil Rule 90.3(a)(4), if a noncustodial parent is voluntarily and unreasonably underemployed, the Division may impute a potential income for the parent based on work history, qualifications, and job opportunities, and calculate child support based on that income.[18] If an obligor is not voluntarily and unreasonably underemployed, the Division will use actual income to compute the child support obligation.

The inquiry into whether a person is voluntarily and unreasonably underemployed includes whether the obligor took action "for the purpose of becoming or remaining unemployed [or underemployed]."[19] Also important is whether the parent's underemployment is a result of "economic factors," such as being laid off, or of "purely personal choices. "[20] 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.[21] The decision to impute income must be based on "the totality of the circumstances."[22]

Mr. Q objected at the hearing that it is not right to expect him to work full time. Ms. Estes explained, however, that in cases involving less than full-time employment, the courts have instructed that a parent's obligation is to support the parent's child as if the parent were employed

17 Alaska R. Civ.P. 90.3 Commentary at III.E.
18 *See, e.g., In re TC,* OAH No. 13-1858-CSS (Dep't of Rev. 2014);
19 *Bendixen v. Bendixen,* 962 P.2d 170, 172 (Alaska 1998).
20 *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).
21 *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991)
22 Civil Rule 90.3, Commentary III.C.

on a full-time basis. Under the cases that approve imputing income a primary goal of imputing income is to encourage 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.[23]

In cases where the obligor has a good reason other than purely personal choice for working part-time, however, the Commissioner has found that the obligor is not voluntarily or unreasonably underemployed. For example, in some cases involving obligors living in remote villages with high unemployment, the Division may be required to use the obligors' actual income to their compute child-support obligation, even though the obligors were not working full-time.[24]

Mr. Q argued at the hearing that the expectation that he work full time was not appropriate because his employer did not have enough work to employ him on a full-time basis. Here, however, the Division did not require that Mr. Q work full time at his electrician's job. It imputed income based on 41.5 additional hours worked on a minimum-wage basis. This approach is based on the theory that Mr. Q could obtain part-time work at an entry-level job to flesh out his hours up to the full-time level.

Mr. Q also argued that he cannot work a second job because sometimes he must travel for No Name Electric. He admitted, however, that he had to travel out of town only once during the construction season this year. He failed to prove that he could not obtain entry-level work with a flexible job schedule.

Moreover, when Mr. Q was asked about the availability of work at No Name Electric, he testified that of the 10 electricians employed at No Name Electric, only three were part time—himself, and two older electricians who were semi-retired. He explained that electricians with spouses and children had first priority at the work, leaving him with only part-time work. This explanation was wholly unpersuasive. It shows that Mr. Q chooses to ignore that he, too, has a child whom he is obligated to support. Moreover, his father's testimony (submitted by sworn

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

[24] *In re H.E.U.*, OAH No. 13-1577-CSS (Dep't of Rev. 2014); *In re B.J.O.*, OAH No. 13-0068-CSS (Dep't of Rev. 2013).

statement) states that "[he] works when he can. There is no one who would like to see [him] be back to old self more than I."[25] This statement implies that if Mr. Q requested more work from his employer, he likely could work additional hours at his father's firm. I conclude that if he was willing to work additional hours, he could find additional work, either at his current job, or at an entry-level job. This evidence, combined with the lack of evidence that he could not obtain at least an entry-level minimum wage job, shows that Mr. Q is voluntarily underemployed when he chooses to work only half-time.

This does not mean, however, that Mr. Q is necessarily *unreasonably* underemployed. At the hearing, when asked if he had any health problems that might prevent him from working full-time, Mr. Q admitted that he suffered from PTSD. He was provided an opportunity to place additional documentation into the record, and the documentation he provided confirms a diagnosis of PTSD. Although the records are not current and the most recent records seem to indicate no depression, I believe that this could be an artifact of Mr. Q's reluctance to admit and seek treatment for his illness. Moreover, Mr. Q's father stated in a sworn affidavit that on "[m]any days [Mr. Q] is unable to cope and unable to work."[26] In Mr. Q's father's view, Mr. Q continues to suffer from depression or anxiety or both.[27] Based on the evidence as a whole, I conclude that Mr. Q continues to suffer from some form of mental impairment that makes it difficult for him to cope with aspects of day-to-day life.

Thus, I agree that Mr. Q's mental disability makes working full-time difficult. These facts do not, however, prove that he cannot work full-time. Even though he struggles, many people with mental issues are, in fact, able to work full-time. In the absence of testimony from a medical or vocational rehabilitation expert, I cannot assume that his impairment prevents him from working full-time.

Here, Mr. Q's father has testified that Mr. Q is doing the best he can and that he would be unable to function in a normal work environment.[28] Mr. Q's father believes that no one other than a family business that is tolerant of Mr. Q's problems would employ Mr. Q.[29]

I respect Mr. Q's father's opinion. Mr. Q's father, however, is not an expert. Although I recognize that Mr. Q will have difficulty working full-time, he has a child to support. Unless evidence from a medical or other expert shows that Mr. Q is unable to work full-time, the law

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25 Q Exhibit 3 at 1.
26 Q Exhibit 3 at 1.
27 *Id.*
28 *Id.*
29 *Id.*

requires that the Division impute additional income to Mr. Q in determining his child-support obligation.[30]

The evidence of Mr. Q's mental disability does, however, support the compromise approach taken by the Division when imputing Mr. Q's income. Here, the Division's approach gives Mr. Q a break. The Division has calculated Mr. Q's imputed income at an unskilled labor rate, even though he is capable of earning income at a higher rate as an apprentice electrician. In a normal case, the Division's approach would be considered unfair to the child, whose interests would be better served if Mr. Q worked full time at the skilled occupation for which he is qualified.

It appears that the Division adopted its approach based on Mr. Q's explanation that employment opportunity as an apprentice electrician was limited. At the hearing, however, when it started to become clear that availability of work was not a valid reason for working part-time, a concern arose that perhaps Mr. Q might be hiding income by working under the table. This concern was cleared up later in the hearing. Mr. Q's testimony under oath that he suffered from PTSD as a result of his military service, which he admitted somewhat reluctantly, convinced me that Mr. Q was not hiding any income.[31] Mr. Q's medical records confirm his testimony.

Mr. Q's disability is a valid reason for affirming the Division's approach to imputing income at a lower level than would normally be required for a skilled worker. Moreover, both the Division and Ms. D stated on the record that they were satisfied by the Division's methodology and were not seeking to have that amount increased. The compromise that the Division has adopted here gives him considerable flexibility—he could meet his obligation to his child, earn enough to meet his own needs, and still take sufficient time off to pursue therapy for his PTSD by simply working some additional hours at No Name Electric. In the alternative, he could work some additional hours at a low-stress, entry-level job.

In sum, the Division must impute full-time work to Mr. Q because Mr. Q is voluntarily and unreasonably underemployed. On this record, the imputation of additional hours at a minimum-wage basis is required.

B. Did the Division incorrectly conclude that Mr. Q could work as a journeyman?

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[30] *Kowalski*, 806 P.2d at 1371 (rejecting claim that medical problems prevented obligor from pursuing additional work because "Richard produced no evidence of his current medical condition beyond the fact that he had a pending disability claim with the Veteran's Administration.").

[31] Although Mr. Q's representations regarding availability of work were likely not completely accurate, *see, e.g.* Q Exhibit 3, I still found Mr. Q overall to be a credible witness. That he was reluctant to discuss his disability is understandable.

Mr. Q argued that the Division erred when it cited evidence that he could work as a journeyman electrician when, in fact, he is an apprentice. The Division, however, did not actually conclude that Mr. Q could work as a journeyman, and it did not assign or impute journeyman wages to him. Therefore, the Division did not err with regard to Mr. Q's status as an electrician or wage rate.

C. Did the Division incorrectly compute Mr. Q's income from No Name Electric when it concluded that he was paid bi-weekly?

Relying on information provided by No Name Electric, the Division calculated Mr. Q's income as if Mr. Q was paid biweekly. In fact, however, No Name Electric had made an error in its initial reporting to the Division. Mr. Q is paid twice per month. This means that the Division overstated his income from No Name Electric.

The Division based its calculation on Mr. Q working an average of 38.5 hours per pay period, which is an acceptable basis for estimating his future income from No Name Electric.[32] On a yearly basis, pay every two weeks would result in 26 pay periods. Pay twice per month results in 24 annual pay periods. Because the Division calculated Mr. Q's yearly wage earnings based on an every-two-weeks pay period, it overestimated his wage earnings. The correct estimate of wage earnings based on 24 pay periods is $18,480. The additional hours needed on a yearly basis to reach full time is 1077 hours, as shown by the following chart:

Month	Working Days per Month (2016)[33]	Monthly Working Hrs	Less Hours Worked at No Name Electric (77)
January	21	168	89
February	21	168	89
March	23	184	91
April	21	168	89
May	22	176	90
June	22	176	90
July	21	168	89
August	23	184	91
September	22	176	90
October	21	168	89
November	22	176	90
December	22	176	90

At $9.45 per hour for a minimum wage job, multiplied by 1077 hours, Mr. Q's imputed income is $10,177.65. Adding this amount to his actual income, and including $1022.00 for a PFD, his total gross income is $30,039.65. Using the child support calculator on the CSSD website, his adjusted

[32] Division Exhibit 6 at 3.

[33] Working days can be calculated by subtracting holidays and weekends for each month. That leaves the hours available for Mr. Q to work part-time at an entry-level job.

annual income is $25,972.93.[34] Mr. Q's annual child support obligation for one child is $5,194.59, which is $433 per month.

IV. Conclusion

The Division's imputation of income to Mr. Q is affirmed. The Division's calculation of his child support obligation, however, was erroneously based on a biweekly pay period rather than a twice monthly pay period. This resulted in a slight overestimation of Mr. Q's actual income. Mr. Q's support obligation beginning January 1, 2016, should be set at $433 per month. This obligation was calculated under Civil Rule 90.3.

V. Order

1. Mr. Q's child support obligation from January 1, 2016, through December 31, 2016, is $433.00 per month.
2. Mr. Q's ongoing support obligation is $433.00 per month.
3. All other provisions in the Division's Modified Administrative Child Support and Medical Support Order dated September 30, 2016, remain in effect.

DATED this 6th of January, 2017.

By: *Signed*
Stephen C. Slotnick
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Revenue, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 26th day of January, 2017.

By: *Signed*
Signature
Stephen C. Slotnick
Name
Administrative Law Judge
Title

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

[34] https://webapp.state.ak.us/cssd/guidelinecalc/form. The calculation is attached to this decision.