BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of	)	
	)	
Z O	)	OAH No. 13-0425-CCA
	)	Agency No.

DECISION

I. Introduction

Z O received Child Care Assistance from 2009-2012 to help pay the cost of child care for her young son while she and her domestic partner, S C, were working. The Division of Public Assistance later determined that Z was not eligible for Child Care Assistance because, in the division's view, Z had given the division false information and S was not engaged in either of the eligible activities of work or self-employment. The division determined that S was not employed because S's employer, his mother, never reported the payments to S as employment expenses. He was not self-employed because he did not have a business license. Because the regulations governing Child Care Assistance require that both Z and S be engaged in an eligible activity, the division sought recoupment of $8,668.50 in Child Care Assistance from Z.

Based on the evidence received at the hearing, the outcome turns on whether H's payments to S were a gift or a wage or salary. The evidence on that question was equivocal. Because the division did not meet its burden of proving that the payments to S were *not* a wage or salary, the division's decision that Z must repay $8,668.50 in back child care assistance is reversed.

II Facts

Z O has two children, W, who turned 16 in December 2010, and Y, who turned five in December 2010.[1] Z lives with S C, who is W's father.[2] They live in No Name.

Z works at a business owned by S's mother, H C. The business includes an RV Park, a gift shop, and an ice-cream shop.[3] Z works there all year, but is full-time only during the busy season.[4] She is paid nine dollars per hour.[5]

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1 Division Exhibit 3a.
2 O testimony; Division Exhibit 3a.
3 O testimony.
4 *Id.*
5 Division Exhibit 8a. In 2009, she made eight dollars per hour. Division Exhibit 3b.

S also regularly does work for his mother.[6] He does maintenance on her business's facilities.[7] He also does maintenance on her private home. He keeps a careful record of his work activity and time on a time ledger that shows each day of the week and the time "in" and time "out."[8] Both H and her sister, N E, who is H's accountant, testified about the nature of S's work. They explained that S has a back injury, and that he cannot always work a full day.[9] As a consequence, in their view, the employment status of S is unclear. H gives S money. He does work for her. Yet, the sum of money is not necessarily related to the quantity of work—the payments are never reconciled to the time sheets.[10] And H testified that she would give S money even if he did not do work for her business.[11]

For tax purposes, both H and S treat H's payment to S as a gift.[12] H's business does not include the money paid to S as a business expense on its tax returns, and it does not report S as an employee to the Department of Labor.[13] S does not pay federal taxes on his income from H.[14]

During the years at issues in this appeal, 2009-12, Z needed to put Y in child care while she and S were working. To help pay for child care, on May 13, 2009, Z applied to the Division of Public Assistance Child Care Program Office for Child Care Assistance. Child Care Assistance provides funding for qualifying low-income families to help with the cost of child care.

In filling out the application, Z listed four family members: Z, W, Y, and S.[15] Z attached the birth certificates for both children to the application.[16] The birth certificates clearly showed that S was W's father and that he was not Y's father.[17] In the box labeled "Earned Income in Your Family," Z included wages and hours for both herself and S.[18] She also attached "Employment Statement" forms for both herself and S, signed by S's mother, which showed that

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6 S. C testimony; O testimony; H. C testimony; N. E testimony.
7 H. C testimony; N. E testimony.
8 O Exhibit 1.
9 H. C testimony; M. E testimony.
10 E testimony.
11 H. C testimony.
12 E testimony.
13 E testimony.
14 *Id.*
15 Division Exhibit 3a.
16 Division Exhibit 3i-3j.
17 *Id.*
18 Division Exhibit 3b.

they both worked for S's mother at the RV park.[19] The application reported that S worked full time, and that he made $10 per hour.[20]

The application was processed by No Name, a nonprofit organization designated by the Department of Health and Social Services under 7 AAC 41.015 to administer child care assistance in the No Name area.[21] The agent who processed the application was S M, who interviewed Z in person.[22] Ms. M approved the application for three months of full time day care assistance at $420 per month, with Z providing a co-pay of $185 per month.[23] As part of the application, both Z and S signed a form authorizing any entity contacted by No Name to release information to No Name, including the Departments of Law, Labor, and Revenue, and banks or other financial institutions.[24] No Name obtained a printout of Z's bank account history.[25] It did not, however, request that the Department of Labor verify Z's or S's employment.

Before the initial authorization expired, No Name sent Z a renewal notice.[26] The notice advised that to renew her child care assistance, Z must submit a completed application and pay stubs for the past two months.[27] Z filled out a new application, including a new release for information, and provided check stubs for herself and S.[28] Although both Z and S worked for S's mother at the RV park, their pay stubs were very different. Z's pay stubs were in a standard format on a pre-printed employee form, showing gross wages, and deductions for social security, Medicare, and Unemployment insurance.[29] S's pay stubs, however, were not in a standard employee format. Instead, they were written on the RV park's check register—the checks that would be used, for example, to pay bills rather than to pay employee wages.[30] The memo line for each check said "Advance on June (or July) 2009 Wages."[31]

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19 Division Exhibits 3k-3l.
20 Division Exhibit 3l.
21 M testimony.
22 Division Exhibit 4.
23 Division Exhibits 4f, 5.
24 Division Exhibit 3e.
25 Division Exhibits 3n-o.
26 Division Exhibit 6a
27 *Id.*
28 Division Exhibit 7.
29 Division Exhibit 7i.
30 Division Exhibits 7j-n.
31 *Id.*

Ms. M again interviewed Z, and made extensive case note entries.[32] First, she noted that even though S was now reported as working part-time, Z requested full-time day care because S did not have a driver's license, and Z needed to drive Y to day care.[33] Ms. M tried to verify that S did not have a driver's license through an online search, but was unable to do so, and noted that "in order to obtain a copy of an individual's driving record I would need permission from the individual in question."[34]

Second, Ms. M noted certain peculiarities with S's employment. His checks were labeled as advances and "do not show hours worked nor do they have rate of pay."[35] After comparing S's actual income from the checks with the employment verification statement, she concluded that the "actual is not congruent with the employment verification."[36] With regard to S's payments, Ms. M noted that "[h]e is also to be paid monthly but in reality he is paid whenever he asks his mom for income."[37] To address these issues, Ms. M attempted to call H for clarification, but was apparently unable to reach her.[38] Ms. M did not report the matter to the division.[39] The application was approved, with the co-pay reduced to $45 per month.[40]

Over the next year-and-a-half, Z and No Name had extensive interactions, including regular renewals, and reports of changes including increased or decreased working hours, change of daycare providers, and income from additional sources.[41] The case notes continued to reflect concern about the peculiar nature of S's employment—for example, the March 4, 2010, case note stated that "[S's] pay information is difficult to understand as he does not receive a complete paycheck each month."[42] Yet, no further inquiry to clarify S's employment status was made, and No Name approved child care assistance for each renewal during this time period.[43]

Z's May 3, 2010, application for the months of June-August 2010, on the other hand, did cause No Name to take action. This application notified No Name that "[S's] not getting paid because the R V Park's not open and his mom can't pay him."[44] On May 3, 2010, No Name

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32 Division Exhibit 8.
33 *Id.* at 8a.
34 *Id.*
35 Division Exhibit 8m.
36 Division Exhibit 8b.
37 *Id.*
38 *Id.*
39 *Id.*
40 Division Exhibit 9a.
41 Division Exhibits 12-23; M testimony.
42 Division Exhibit 21a.
43 Division Exhibits 12-23.
44 Division Exhibit 24b.

denied the application because "S C is not doing one of the listed activities." No Name concluded that he was not in work status because he was not getting paid.[45] On May 7, Ms. M asked the division's Child Care Program Office for its analysis, and it confirmed that if S was merely doing volunteer work for his mother's business, Z would not be eligible for child care assistance.[46]

Upon further review, however, Ms. M believed that Z could still be eligible for child care assistance.[47] Ms. M testified that in May 2010, she did not understand the rules, and at that time she thought that if S was not the father of the child in care (Y), then S did not have to be engaged in an eligible activity.[48] The May 12, 2010, case note, made by Ms. M, states, "After speaking with CCPO I have removed S C from the family. This is a family unit however they do not have children in common. His income will not count in the family portion of this applicant."[49] Z was asked to submit a new application that did not include S's income, which she did.[50] Ms. M interviewed Z by telephone on May 18, 2013, and in this interview Z affirmed that S was not Y's father.[51] No Name approved this application, with a co-pay of $11.00 per month.[52] The case notes entered by Ms. M reflect that birth certificates were received for all children and that Z and S were "[d]omestic partners no children in common."[53] On September 9, 2010, Z's next renewal application was approved for six months, on the same understanding that Z and S had no children in common.[54]

On January 4, 2011, Z came into No Name to report further changes in her situation.[55] She was asking for additional part time child care, and reporting a reduction in her work hours and her receipt of unemployment.[56] An interview was scheduled for January 6, 2011.

At the January 6 interview, in addition to describing the changes that prompted the January 4 notification, Z and S also explained that S was the father of W, Z's older child who was not in child care.[57] Ms. M wrote in the case notes that "[t]his was different information than

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45 M testimony.
46 Division Exhibit 26; M testimony.
47 M testimony.
48 *Id.*
49 Division Exhibit 27.
50 Division Exhibit 28.
51 M testimony; Division Exhibit 29a.
52 Division Exhibit 30.
53 Division Exhibit 29a-b.
54 Division Exhibit 34a.
55 Division Exhibit 68c.
56 *Id.*
57 Division Exhibit 40; M testimony.

what was originally reported."[58] Ms. M also sent a notice of incorrect payment to Child Care Program Office, noting that the error was "client caused" not "agency caused."[59]

No Name then cancelled the existing authorization for February 2011, but processed Z's application with the change back to a family of four and with the inclusion of S's income.[60] On this basis, No Name approved Z's application through July 31, 2011, with a $79.00 monthly copay requirement.[61] For at least up through July 2012, Z continued to apply for and receive child care assistance, and continued to notify No Name of changes in her employment and household.[62]

Meanwhile, the Child Care Program Office was processing the notice of client-caused error that it had received from Ms. M in January 2011. The file was assigned to investigator Ambra Mavis-Bracone.[63] Child Care Assistance Investigators conduct their investigations on the record, and do not typically interview the designees, and do not notify or interview the recipient who is accused of wrongdoing.[64] Therefore, Ms. Mavis-Bracone accepted the report from No Name that the cause for the incorrect exclusion of S and his income from the household in May 2010 was that Z had falsely reported that she and S had no children in common.[65] She concluded that Z was not eligible for child care assistance during the time January 2010 through July 2012 because Z had submitted false information.

During the investigation, however, Ms. Mavis-Bracone also determined that an additional problem existed with Z's file. As part of her investigation, Ms. Mavis-Bracone had requested employment verification for S from the Alaska Department of Labor.[66] The report from the Department of Labor reported no employment for S in Alaska since 2003.[67] Ms. Mavis-Bracone then checked with the Alaska Department of Commerce, to see if S had a business license during the period that he was reported to have been working for his mother's RV park.[68] The reports from the Department of Commerce revealed that S has not held an Alaska business license since

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58 Division Exhibit 40.
59 Division Exhibit 41a.
60 Division Exhibit 43. Although Z reported that S's son, A, was living with the family, No Name did not include A in the household because it believed that he was overage. Division Exhibit 44. The Division indicated at hearing that this may have been in error, but it does not appear that this error is at issue here.
61 Division Exhibit 45a.
62 Division Exhibits 46-58.
63 Mavis-Bracone testimony.
64 *Id.*
65 *Id.*
66 *Id.*
67 Division Exhibit 61c.
68 Mavis-Bracone testimony.

2006.[69] Ms. Mavis-Bracone determined that S's lack of employment or a business license was a second reason that Z was not eligible for child care assistance from January 2010 to July 2012.[70]

On February 11, 2013, the Benefits Issuance and Recovery Unit of the Division wrote to Z and informed her that she had been overpaid child care assistance benefits in the amount of $10,722.50 from January 2010 through July 2012.[71] The letter informed her that "[t]he reason you were overpaid is because the agency incorrectly calculated the self-employment income from January 2010 through May 2010, and you reported false information to our office from June 2010 through July 2012."[72]

Z disputed the charge, and requested an administrative review.[73] The administrative review affirmed "the decision made to collect the overpayment of $10,722.50 from you."[74] The review affirmed that Z was not eligible because she had supplied false information, and that, in addition, S was either not in an eligible activity or was self-employed without a business license. Z appealed and requested a fair hearing.[75]

Telephonic hearings were held in this matter on June 21, June 26, and August 2, 2013. Cheryl Windham represented the division, and Z represented herself. At the hearing, the division admitted that it had erred in its calculation of the potential damages by failing to recognize that W had moved out of the family home on February 1, 2012.[76] At that time, Z and S no longer had a child-in-common living in the home, so S's income no longer mattered. The division accordingly reduced its claim for recoupment to $8668.50.

III. Discussion

The child care assistance program is authorized under AS 47.25 for the purpose of "providing day care for the children of low and moderate income families."[77] In general, the program is designed to help parents who need child care while they are working, seeking work, or attending school.[78]

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[69] Division Exhibit 61d-f.

[70] Mavis-Bracone testimony; Division Exhibit 61b. Ms. Mavis-Bracone explained that under regulation the division could recoup retrospective payments only for one year after it had notice of the violation. Mavis-Bracone testimony

[71] Division Exhibit 63b.

[72] *Id.*

[73] Division Exhibit 63a.

[74] Division Exhibit 64d.

[75] Division Exhibit 65b.

[76] Mavis-Bracone testimony

[77] AS 47.25.001(a)(1).

[78] 7 AAC 41.310.

This case raises two questions. First, did Z tell No Name that S was not W's father? This issue is important because the division alleges that if Z misled No Name in order to stay eligible for assistance she would not be eligible for assistance.[79] Second, was S working during the time that Z received child care assistance, as the term "work" is defined under 7 AAC 41.310? This issue is important because if S was not working, self-employed under a valid business license, seeking work, or in an eligible education program, then the household was not eligible child care assistance.[80]

A. Did Z mislead No Name?

Z and S are not married, but they live together as domestic partners. The rules for child care assistance eligibility take domestic partnerships into account. If the domestic partners have any children in common who are part of the household, then both partners must be engaged in an eligible activity (work, self-employment, school, or seeking work) to be eligible for assistance.[81] If the domestic partners have no children in common, however, then only the parent of the child for whom assistance is claimed needs to be in an eligible activity.[82]

When the partners have both a child-in-common, and a child-not-in-common, it does not matter which child is in day care. Here, for example, S is W's father, but not Y's. Only Y was in child care. That did not matter—because Z and S have one child in common who lived in the household, both S and Z had to be in an eligible activity for Z to be eligible for child care assistance.

As described above, when Z first applied for assistance in 2009, she provided W's and Y's birth certificates, and acknowledged that S was W's father. Then, when H had cash-flow problems and was unable to pay S—in the spring of 2010, before the RV park opened—Z reported S's lack of income to No Name. Ms. M at first determined that Z was ineligible because S was not working. Ms. M then determined that she did not need to include S in the family unit because he was not Y's father, and informed Z that she did not need to include S on the application.[83] Ms. M approved the new application that did not include S. The following January, during an in-person interview, Z explained again to Ms. M that S was, in fact, W's father. That fact was already documented on earlier applications and on W's birth certificate,

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[79] 7 AAC 41.425. The Division stated at hearing that it was not seeking sanctions for the alleged intentional program violation because it acknowledged that it had Y's birth certificate on file at all times.
[80] 7 AAC 41.310.
[81] 7 AAC 41.013(3).
[82] 7 AAC 41.013(1).
[83] M testimony.

which No Name had on file. Ms. M, however, then reported to the Division that the parent had provided false information in May 2010. This report triggered the investigation.[84]

At the hearing, however, Ms. M testified that she had instructed Z to take S off the application in May 2010 because she (Ms. M) had misunderstood the rules regarding the child in common: "I was under the impression that the child needing care had to have parents in common. That was my interpretation of policy."[85] She explained that she had disregarded the relationship of W to S because she did not think it was important. Ms. M acknowledged that the client statement that she had received from Z in May 2010 was that Y was not a child in common. This was a true statement. Thus, no evidence supports the accusation that Z reported false information.

B. Was S working for H?

When domestic partners have a child in common, the regulations require that both partners be engaged in an eligible activity in order for the family to be eligible for Child Care Assistance.[86] Six different activities qualify as eligible activities, but only one—working—is applicable here. Thus, in Z's and S's situation, to be eligible for child care assistance, both Z and S had to be working.[87] The regulations define "work" for the purposes of child care assistance as follows:

> For purposes of this chapter, work is
> (1) an activity for which a wage or salary is paid; or
> (2) being engaged in a business
> (A) operated with the intention of making a profit;
> (B) for which a business license under AS 43.70 has been obtained; and
> (C) that generates revenue during any consecutive three-month period.[88]

The division argues that under this definition, if a person does not have a business license (and S did not), then "work" necessarily means regular employment by an employer who follows all of the legal requirements that apply to employers. In the division's view, for purposes of child care assistance, "work" does not include work that is "under the table"—that is, work that

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84 Division Exhibit 40.
85 M testimony.
86 7 AAC 41.013.
87 7 AAC 41.310(a)(1); 7 AAC 41.013.
88 7 AAC 41.312. *See also* 7 AAC 41.312(54).

is done without the formality of a contract for employment and observance of legal reporting and withholding requirements by the employer.

The division has raised several policy arguments in support of its interpretation of the regulation. When a person is employed, the employer must perform all duties of an employer. An employer must report payments made to employees and must make the withholdings, payments, and reports required by law, which may include taxes, unemployment insurance, Medicaid, worker's compensation, and child support.[89] For the division, the reporting of earnings to the Department of Labor is a tool that it uses to ensure that recipients are actually working and accurately reporting earnings. If this were a case that turned only on policy considerations, the division's policy argument could be given considerable weight in interpreting and applying the regulation. Here, however, the applicant has already received assistance and spent it on child care. In this case, the language of the regulation, the interpretation applied in awarding the assistance to Z, and the unique facts of S's work for H must be given greater weight than the division's policy argument.

1. Does the language of the regulation support the division's interpretation?

The analysis starts with the language of the regulation defining work. Does this language give the applicant notice that the employer must follow legal requirements for employers? Here, the language of the regulation does not, on its face, provide direct support the division's policy interpretation. The regulation provides that a person is working if the person receives a wage or salary.[90] The regulation does not say that work done for a salary or wage is work only if the employer deducts taxes from the employee's earnings and otherwise follows all legal requirements for employers. Because the division's interpretation is not adopted into regulation, it cannot be considered as an adopted policy—it can only be considered on a case-by-case basis.[91]

The division argued that support for its interpretation may be found in the distinction between self-employment and working for a wage or salary. The division believes that if S's employment is not reported by H to the Alaska Department of Labor, then his employment is self-employment. In the division's view, any other result would allow an end-run around the

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89 *See, e.g.,* AS 23.20.105 ("An employing unit shall keep work records containing information which the department prescribes.").

90 7 AAC 41.312.

91 *See, e.g.,* AS 44.62.640(3); *Kenai Peninsula Fisherman's Co-op Ass'n v. State,* 628 P.2d 897, 905-06 (Alaska 1981).

requirement that self-employed individuals must have a business license—the self-employed contractor who did not have a business license would just claim employment status.

Although the division's argument is well-taken, the regulation does not support an interpretation that all work not reported by the employer to the Alaska Department of Labor is automatically self-employment. Indeed, in the context of trying to determine whether a person providing services is an independent contractor or an employee, the Alaska Supreme Court has specifically held that holding a business license does not mean a person is not an employee.[92] Given that an employer cannot avoid its legal requirements as an employer just because the employee has a business license, it follows that a person cannot be considered to be self-employed (and therefore needing a business license) just because the employer has not followed those requirements.

The Alaska Supreme Court has advised that whether a person is an employee or an independent contractor "depend[s] upon the context of the dispute."[93] The court has adopted different tests for whether a person is an employee, based on the context of the dispute. For example, in a worker's compensation dispute, the court has adopted the "relative nature of the work test"[94] The court explained that

> This is a multi-factor test which looks at "first, the character of the claimant's work or business; and second, the relationship of the claimant's work or business to the purported employer's business." The inquiry into the character of the claimant's business can further be broken into three factors: (1) the degree of skill involved, (2) whether the claimant holds himself out to the public as a separate business, and (3) whether the claimant bears the accident burden. The inquiry into the relationship between the claimant's work and the work of the purported employer can also be broken into three factors: (1) extent to which claimant's work is a regular part of the employer's regular work, (2) whether claimant's work is continuous or intermittent, and (3) whether the duration of the work is such that it amounts to hiring of continuing services rather than a contract for a specific job.[95]

In the fair labor standards context, the court has adopted a slightly different test:

> Two factors are critically significant: (1) how specialized is the nature of the work; and (2) whether the worker is in business for herself. *Id.* To aid analysis the courts have broken these factors into a six-part inquiry:

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92 *Tachick Freight Lines, Inc. v. State, Dep't of Labor, Emp. Sec. Div.*, 773 P.2d 451, 453 (1989).
93 *Jeffcoat v. State, Dep't of Labor,* 732 P.2d 1073, 1075 (Alaska 1987).
94 *Odsather v. Richardson,* 96 P.3d 521, 523 (Alaska 2004).
95 *Id.* (citations omitted).

> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business.[96]

Although the different tests for an employment relationship do not directly apply to this case, these cases show that whether a person is an independent contractor or an employee is a question that is frequently addressed by the courts. The issue is not determined by whether the alleged employer complies with the formal requirements for employers—the issue is determined by the ***facts*** that govern the relationship between the person providing the service and the alleged employer. Therefore, the division's argument that its regulation presumes a requirement that the employer must comply with all formal requirements for an employer is not persuasive.

In sum, under the terms of the regulation, a person would be working if the person receives a wage or a salary for the performance of an activity. Here, whether S was receiving a wage or salary for his activity at the RV Park is a question of fact. As shown below, this question is not easily answered because the evidence in the record goes both ways.

2. Does No Name's course of conduct support the division's interpretation?

One fact that supports a finding that S was working for a wage or salary is that No Name was on notice that S's employment was not a straightforward employment relationship, but No Name approved it as work for purposes of child care assistance. The case notes show that No Name knew that "in reality [S] is paid whenever he asks his mom for income," and that "he does not receive a complete paycheck each month."[97] Ms. M testified that S's pay did strike her as

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[96] *Jeffcoat,* 732 P.2d at 1075-76. For the test of whether a service provider is an employee in a tort context, see *Powell v. Tanner*, 59 P.3d 246, 249 (Alaska 2002). For the test in an unemployment context, see AS 23.20.525(a)(10), and *Alaska Contracting & Consulting, v. Alaska Dep't of Labor*, 8 P.3d 340, 348 (Alaska 2000). Although it appears that under these tests S would likely be considered an employee because of the long-standing and exclusive nature of his work for H, none of these tests for employment have been adopted by the department or applied by a court to a child care assistance case. Therefore, this decision will turn on the language of the child care assistance regulation and the facts, not on an application of one of the legal tests for an employment relationship. Moreover, as explained below, the actual fact question here is not whether S was self-employed, it is whether the payments to S were a gift from H. If the payments were a gift, S would not be considered an employee under any test.

[97] Division Exhibit 8b; Division Exhibit 21a.

odd, and although she would not accept this arrangement today without further inquiry, at the time she believed that having a verification statement from the employer was sufficient.[98]

Neither No Name nor the division ever notified Z that the division was interpreting the regulation to mean that a person was not working if the employer was not complying with an employer's legal duties. [99] Nor did the division ever tell Z that if the employer was not reporting the wages to the Department of Labor then the worker was required to have a business license. Further, in May 2010, when H was unable to pay S, No Name concluded that S was not an employee. At all other times, as long as S was paid, No Name considered him to be employed by H, even though the payments were clearly nonstandard. This evidence supports the argument that S's payments were wages or a salary, and that S was in an eligible activity.

3. Does the evidence show that S was receiving a wage or salary, or was he receiving a gift?

Turning to the facts of the relationship between H and S, the issue is not whether S was self-employed—under the regulation, the issue is whether S was receiving a wage or salary. If H's payments to S were a gift, then S was not receiving a wage or salary. The record contains evidence that supports a finding that S was receiving a wage or salary. It also contains evidence that supports a finding that the income was merely a gift from H.

Evidence that supports a finding that the income was a gift includes the testimony by H's accountant, N E, that the payments to S were never reconciled with the hours that he worked, and that H and S did not report the payments as income for tax purposes.[100] Both H and Ms. E testified that H would have given S money even if he did no work.[101] They also testified that S experiences chronic pain and that there were times when he was unable to work.[102] This evidence tends to support the characterization of the payments to S as a gift.

Other evidence, however, supports the characterization of the payments as earned income. Ms. E explained that there was an expectation that S would do work for the money, and that he did, in fact, do work.[103] H testified that she did check S's timesheets and did take the work done into consideration.[104] Ms. E explained that H is very meticulous, and wanted to keep

[98] *Id.*
[99] M testimony; Mavis-Bracone testimony.
[100] E testimony.
[101] E testimony; H. C testimony. S also characterized the payments as a gift, which he must do if he does not report the money as earned income for purposes of federal income tax.
[102] E testimony; H. C testimony.
[103] E testimony.
[104] H. C testimony. H also stated however, that she "may or may not look at time cards."

track of the work.[105] Z testified that she had never considered the payments a gift, and always viewed the payments from H to S as payment for the work he was doing for H.[106]

The most significant evidence is S's timekeeping.[107] The records themselves provide substantial evidence of an employment relationship. The timesheets record a total of hours worked for each day. Days where no work was done are marked "off." The off days do not support the division's argument that S only worked when he felt like it—although on some time cards the off days are irregular, on most the off days are separated by several work days. Often, two off days will be together, as a weekend, although they may not be on a Saturday and Sunday. The notation of "days off" is an indication of an employment relationship—it implies that the other days are "work" days.[108]

The first several timesheets in the exhibit just report hours worked and days off. The later timesheets, however, include detail of where the work was done and type of work performed, which is further evidence of an employment relationship rather than a gift.[109] And the fact that H did not reconcile hours with with pay does not prove that S was not an employee being compensated for services. A salaried employee's pay may or may not be related to hours worked. Although the employer statements that H signed stated that S's pay was $10.00 per hour, her testimony was more consistent with S being salaried. She mentioned several times that it was her intent to pay S approximately $13,000 per year.[110]

Z testified that she was not aware that H or S considered the payments to be either a gift or a "gray area." She testified that she understood at all times that S was being paid for services. Based on her first-hand observation, she believed that S was H's employee.[111] Her testimony is credible.

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[105] E testimony.
[106] O testimony.
[107] O Exhibit 1.
[108] The timesheets for June-August of 2010 appear to show no days off. O Exhibit 1. If all the timesheets were like that, S's work might look more a hobby than a job because few employees work seven days a week for weeks on end. Working every day during busy season, however, would be consistent with being a management-level salaried employee. And as soon as the busy season ended, S went back to taking days off. *Id.* Thus, the time cards are consistent with an employment relationship.
[109] Ms. E testified that with this level of detail, it would be possible to file amended tax returns and formalize the employer/employee relationship. She noted that this would be a tax advantage for H, and stated that there might or might not be tax consequences for S. At closing argument, Z stated that she intended to take steps to ask H to retrospectively formalize the employer/employee relationship, and was given time to supplement the record with documents showing that she had done so. No documentation was received, however.
[110] H. C testimony.
[111] O testimony.

In sum, at best, the evidence of whether S was being paid a wage or salary, or was receiving a gift, is a wash. Although H and S seemed to treat the payments in some senses as a gift, they also claimed that S's work status was a "gray area."[112] And as S's time sheets show, S was doing work for H's business, and he did receive payment from H. No Name had knowledge that H made payments to S whenever he asked for money, but still considered S to be working as that term was used in the regulation. Z observed the work that S was doing for H and concluded that he was an employee. Under the Department's regulations, the division has the burden of proof because the division is attempting to recoup assistance already paid to a family.[113] On this set of facts, the division has not proved that it is more likely than not that S was not working for H, as the term "work" is defined in 7 AAC 41.312.[114] Because the division has not proved its claim, its decision is overturned.

IV. Conclusion

The division did not prove that Z O provided false information to No Name. The division's own witness, Ms. M testified that the mix-up regarding whether Z and S had children-in-common was due to Ms. M's mistaken belief that the child-in-common had to be the child in child care.

The division also did not prove that S was not working during the time that Z received child care assistance. Neither the terms of the regulation defining work, 7 AAC 41.312, nor the cases on employment, support a finding that the employer's failure to file reports and comply with withholding requirements means that an employee is an independent contractor. And although the division has produced evidence that would support a finding that H's payments to S might have been a gift, substantial evidence in the record supports a finding that the payments were a wage or salary. This includes the actions of No Name, the records kept by S, and the first-hand testimony of Z. On this record, the division has not met its burden of proving that S

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[112] H.C testimony, E testimony. Both H and Ms. E testified that the family was in turmoil due to a death of a family member and two family members suffering from serious illnesses, which may have contributed to H's mistaken belief that S's employment status could be considered a gray area.

[113] 7 AAC 49.135.

[114] This decision is based on the facts in this record, and a different case might have a different outcome.

was not in an eligible activity. Accordingly, the division's finding that Z O owes $8,668.50 in back child care assistance is reversed.

DATED this 18th day of September, 2013.

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

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, 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 7th day of October, 2013.

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

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