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

G. C. M.	)	
	)	
Appellant,	)	
v.	)	
	)	
CHILD SUPPORT SERVICES DIVISION,	)	
	)	OAH No. 04-0040-CSS
Respondent.	)	CSSD No. 001123524
	)	DOR No. 040452

DECISION AND ORDER

I. Introduction

This case involves the Obligor G. C. M.' appeal of an Amended Administrative Child Support and Medical Support Order that CSSD issued on May 19, 2004. The Obligee child is N., DOB 00/00/02.

The formal hearing was held on August 10, 2004. The Obligor appeared in person; the Custodian, K. L. W., did not participate. David Peltier, Child Support Specialist II, represented the Child Support Services Division (CSSD). The hearing was tape-recorded. The record closed on August 10, 2004.

Kay L. Howard, Administrative Law Judge for the Alaska Office of Administrative Hearings, was appointed to hear this appeal by the Chief Administrative Law Judge, Terry L. Thurbon. Having reviewed the record in this case and after due deliberation, I have concluded the Obligor's appeal should be granted and his child support should be corrected and calculated from his actual 2002 income. However, I have also concluded Mr. M. is not disabled for child support purposes, and finally, that he is voluntarily and unreasonably unemployed.

II. Facts

A. History

On March 7, 2004, CSSD served an Administrative Child and Medical Support Order on Mr. M.[1] He requested an administrative review and provided income information.[2] On May 19, 2004, CSSD issued an Amended Administrative Child and Medical Support Order that set

[1] Exhs. 2 & 4.

ongoing support at $401 per month, with arrears of $5213 for the period from January 2003 through January 2004.[3] Mr. M. filed an appeal on June 18, 2004.[4]

At the formal hearing, Mr. M. claimed his child support order is too high because it is based on his former wages as a chef. The Obligor claimed he no longer earns that income amount because he has been permanently disabled and is undergoing retraining with the State Department of Vocational Rehabilitation (DVR).

Mr. M. testified he was injured in the year 2000 at his workplace at the North Slope Restaurant in Eagle River, which was owned by his parents until 2004. The Obligor said he injured his knee because a coworker kept leaving a lower drawer open, and the Obligor ran into it several times with his knee. He said after hitting the open drawer numerous times with his knee, he felt and heard something pop in his knee, and it has been very painful since then. Mr. M. said his knee was originally injured years earlier and that he had surgery on it in 1998, but he claimed his knee was better after the surgery and it was the collisions with the drawer at the restaurant that caused his current disability.

Mr. M. said he quit the restaurant in the year 2002 because he could not stand on his feet and work as a chef any longer. He said he consulted doctors on more than one occasion about his knee, and they discussed possible surgery with him, but instead he preferred to be referred to a pain management center rather than risk another surgery. Mr. M. said after his knee was injured at the restaurant his work there was limited to filling in when someone was sick, or performing easy tasks such as running the cash register and seating customers because he could not stay on his feet to cook.

Mr. M. said that from January 2003 through April 2004, he was unemployed and homeless. He testified he went to Boise, Idaho for three weeks to visit his sister who was very sick with multiple sclerosis. Also during that time, Mr. M. said his father had cancer, which contributed to life being difficult. He said he spent his time reading books and cooking dinner at night for the friends he stayed with sometimes. He said his mother bought groceries for him occasionally but he did not look for work because he felt sorry for himself since his knee prevented him from working as a chef.

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[2] Exh. 9.
[3] Exh. 6.
[4] Exh. 8.

Mr. M. further testified currently he is looking for work at which he will be able to spend most of his time sitting, such as in an office setting. He claimed he does not have any job skills other than chef because he has worked in the restaurant since he was 12 years old. Mr. M. affirmed he is indeed looking for work, but conceded he does so only sporadically. At one point, he said he worked at the Kubiak Inn, where he earned $200 per week for a short time, then in April 2004 he started working at the Qupqugiaq Inn as an innkeeper, where he earned $7.15 per hour. Mr. M. said he left there in July 2004 after a dispute with his employer about his compensation.

B. Findings

Based on the evidence in the record and after due consideration, I hereby find:

1. Mr. M. met his burden of proving by a preponderance of the evidence that CSSD's calculation of his child support obligation was incorrect[5]; his child support should not be calculated from imputed chef's wages of $13.50 per hour;

2. Mr. M. is not disabled for child support purposes;

3. Mr. M. is voluntarily and unreasonably unemployed or underemployed;

4. Mr. M.' last full year of work was 2002, so his income for 2002 is the correct measure of his ability to pay support;

5. Mr. M.' 2002 income, minus UIB benefits, consisted of wages of $20,506.60; and the PFD of $1,540.76; for a total of $22,047.36;[6]

6. Mr. M.' 2002 income results in a child support calculation of $309 per month for one child.

III. Analysis

A. Obligor's Disability

A parent is obligated both by statute and at common law to support his or her children.[7] 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."

The Obligor has the burden of proving his or her earning capacity.[8] An Obligor who claims he or she cannot work, or pay child support, because of a disability, or similar

[5] *See* 15 AAC 05.030(h).
[6] Exh. 3.
[7] *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

impairment, must provide sufficient proof of the medical condition such as testimony or other evidence from a physician.[9]

Mr. M. provided copies of medical records that indicate he consulted doctors at Alaska Orthopedic Specialists, Inc., on four occasions in the last few years. On June 24, 2002, the Obligor consulted Dr. David A. McGuire, whose report states Mr. M. said at the time that his knee function was the same after his knee surgery, but he wanted a referral to the pain clinic because his knee was still painful.[10] According to Dr. McGuire, Mr. M. also said he was wearing a neoprene brace while at work and had increased his work activity, but he could not put a lot of weight on his knee after a long day.[11]

The second record states that on May 20, 2003, Mr. M. saw Dr. Carl Unsicker, who stated in his report that the Obligor:

> . . . has been doing well feeling good stability, but having increasing discomfort in the knee not well localized, and is usually worse at the end of the week after he has been working and standing on his feet all week.[12]

The plan Dr. Unsicker discussed with Mr. M. included a regular exercise program, or, if he did not improve, a recheck in three months with possible x-rays and/or arthroscopic procedures.[13] On July 25, 2003, Mr. M. again visited Alaska Orthopaedic Specialists, but he did not see a doctor that time. He spoke with a member of the office staff, and requested a referral to the Eagle River pain clinic. The nurse wrote that she referred Mr. M. to the pain clinic in Eagle River after she phoned the Anchorage pain clinic to verify Mr. M. was no longer a patient there.[14]

Mr. M.' last documented visit to his doctor's office occurred on February 12, 2004. Dr. McGuire wrote that Mr. M. reported the problem with his knee was that he kept running into a drawer left open by a fellow employee, and up until that time his knee function was "OK." The

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[8] *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).
[9] *Id.* at 1371.
[10] The report indicates Mr. M. saw Dr. McGuire on June 6, 2001, but there are no records from that visit in the documents produced for the hearing.
[11] Exh. A at pg. 4.
[12] *Id.*
[13] *Id.*

doctor reported Mr. M. said he was still in pain, the front of his leg was numb, and he was not better even after trying the pain clinic.[15] The doctor discussed further therapy options with Mr. M., who said he would let the doctor know whether he wanted to pursue any of the procedures Dr. McGuire discussed.[16] On that same day, the doctor released Mr. M. to work with two restrictions: that he not cook on the line for more than 2 hours at a time, and that he not lift more than 30 pounds. It is especially noteworthy that Dr. McGuire did not indicate on the form he filled out that Mr. M. was unable to return to work. [17]

Finally, Mr. M. provided a letter from the Division of Vocational Rehabilitation (DVR), which states Mr. M. had completed an orientation on August 5, 2004 and was scheduled for an intake interview the next week, with his eligibility for services to be determined at a later date.[18]

The medical documents Mr. M. filed do not establish he is disabled for child support purposes. Granted, they indicate the Obligor had knee surgery in approximately 1998, and that he has experienced post-surgery problems with the knee since then. However, there is no indication in the medical records from Dr. McGuire's office that Mr. M. is disabled or that he cannot work. Mr. M. did not pursue any of the follow-up procedures Dr. McGuire discussed with him for the purpose of determining the nature of his continuing problems with the knee. Rather, on at least three occasions, Mr. M. requested that Dr. McGuire or his staff simply refer the Obligor to a pain clinic. Also, it appears that each time he saw the doctor, Mr. M. complained about ongoing pain in the knee in relation to his work.

The medical records also differ significantly from Mr. M.' testimony. He stated at the hearing that his knee function was satisfactory after his 1998 surgery and that his disability arose in 2000 primarily from the collisions he had with a drawer that a fellow employee left open on numerous occasions.[19] Yet none of Mr. M.' earlier visits with Dr. McGuire or his staff referred to any incident with an open drawer. He did not mention the drawer until he saw Dr. McGuire on February 12, 2004.[20] Similarly, Mr. M. testified he was unemployed and homeless from

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[14] *Id.*
[15] Exh. A at pg. 3.
[16] *Id.*
[17] Exh. A at pg. 1.
[18] Exh. B.
[19] Tape of hearing.
[20] Exh. A. at pg. 3.

January 2003 through April 2004, which he later clarified was from March 2003 through April 2004. However, Mr. M.' medical records show he consulted Dr. McGuire on May 20, 2003 complaining his knee was "usually worse at the end of the week after he has been working and standing on his feet all week."[21] And lastly, it was on February 12, 2004 that Mr. M. saw Dr. McGuire and complained about running into the open drawer at work. Both of these appointments occurred during the time Mr. M. testified he was unemployed and homeless.

The final piece of evidence Mr. M. produced was a statement from DVR that he had initiated services there on August 6, 2004, merely four days before his child support hearing, and that he would be evaluated in the future. Given the number of years Mr. M. claims he has been suffering from knee problems, the fact that he began pursuing vocational rehabilitation just four days before the hearing has little probative value in this appeal. Instead, it raises nothing but suspicion that Mr. M. made the appointment in order to influence the decision in his case.

B. Voluntarily Unemployed

If Mr. M. is not disabled for child support purposes, then the secondary issue is whether he is voluntarily and unreasonably unemployed or underemployed, as CSSD claims. Alaska law allows CSSD to use a parent's "potential income" if a finding is made that the parent is voluntarily and unreasonably unemployed or underemployed.[22]

It is not necessary to prove the parent was purposefully avoiding a support obligation, or acting in bad faith, in order to find voluntary unemployment or underemployment.[23] The Alaska Supreme Court has upheld lower court decisions finding noncustodial parents were not making their best efforts to obtain employment or remain employed. For example, the Obligor in Kowalski claimed the construction industry, his health, and the season had contributed to his erratic work history. On appeal, the court affirmed the trial court's finding that the Obligor was voluntarily unemployed because he had not made "any major effort to remain employed" after the parties' marriage.[24] In another case, the Alaska Supreme Court upheld a lower court's finding that the Obligor parent was voluntarily underemployed because the Obligor deliberately kept a low profile in his business. He did not market his services or even have a listed telephone

[21] Exh. A at pg. 1.
[22] Civil Rule 90.3(a)(4).
[23] *Kowalski* at 1371.

number, did not operate a large piece of equipment that could have earned more money, and did not hire additional employees to keep his shop busy, so the court considered him not to be earning his "optimal" income, and stated he could be considered voluntarily underemployed.[25]

If a parent is found to be voluntarily unemployed or underemployed, the child support is calculated using his or her "potential income," which is based on the parent's "work history, qualifications and job opportunities."[26] The use of "potential income" in a child support obligation is not to punish the Obligor parent; rather, it is to insure that the children and the other parent are not "forced to finance" the Obligor parent's lifestyle.[27] The commentary states the court should consider "the totality of the circumstances" when deciding whether to impute income to the obligor parent.[28]

CSSD found Mr. M. is voluntarily and unreasonably unemployed, then calculated his child support based on his reported wage of $13.50 per hour. This equals annual income of $29,187.56, including the PFD, which results in a child support amount of $401 per month for one child.[29]

After having considered the "totality of the circumstances" in this case, I must agree with CSSD. This is a classic case of voluntary unemployment, just the type of situation the drafters were contemplating when they wrote this part of Civil Rule 90.3, and the Alaska Supreme Court was addressing in this case:

> 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.[30]

It is easy to understand why Mr. M. believes CSSD's child support calculation, at $401 per month, is too high, since it is not based on his actual income. However, Mr. M.'

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[24] *Id.* at 1370.
[25] *Nass v. Seaton*, 904 P.2d 412, 418 (Alaska 1995).
[26] Civil Rule 90.3, Commentary III.C.
[27] *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).
[28] Civil Rule 90.3, Commentary III.C.
[29] Exhs. 6 & 7.

unemployment was a voluntary decision not to pursue work. Instead of putting consistent effort into finding employment that would provide a reliable and sufficient wage with which to support his child, Mr. M. has chosen to stay largely unemployed for at least the last two years. He did find employment in 2004, but it did not last very long because Mr. M. quit both the pizza delivery and the night innkeeper jobs. His regular periods of underemployment have forced his child N. to forego the support Mr. M. could have provided had he simply stayed on the job and done the work.

C. Mr. M.' Income

When CSSD found Mr. M. voluntarily unemployed or underemployed, the agency imputed income to him in the amount of $13.50 per hour, which resulted in a child support amount of $401 per month. I have determined this amount is too high, and it should be replaced with Mr. M.' 2002 income of $20,506.60.[31] That was the last year Mr. M. was employed fully, and the income he earned that year is a better measure of his ability to pay support. I used CSSD's online child support calculator, at http://www.childsupport.alaska.gov/, to determine Mr. M.' support amount based on his 2002 income. The calculation yields a child support amount of $309 per month for one child. I have attached the printed worksheet to the end of this decision and labeled it as Attachment A.

IV. Conclusion

Mr. M.' knee problems do not rise to the level of disability for child support purposes. Mr. M. may not be able to work in his former profession as a chef, but this does not mean he cannot work. Mr. M. held two other jobs in 2004, but quit both of them. Thus, he is voluntarily and unreasonably unemployed or underemployed, so as a result, Mr. M.' child support should be calculated at $309 per month, which is derived from the income he received in 2002, the last year he appeared to work steadily. Accordingly, I issue the following child support order:

V. Child Support Order

1. Mr. M. is liable for child support in the amount of $309 per month, effective from January 2003 to the present, and ongoing.

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[30] *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).
[31] Exh. 3 at pg. 2.

2. Under AS 25.27.062 and AS 25.27.250 Mr. M.' income and property are subject to an order to withhold. Without further notice, a withholding order may be served on any person, political subdivision, department of the State or other entity.

DATED this 2nd day of February, 2005.

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. I, Terry L. Thurbon, Chief Administrative Law Judge, on behalf of the Commissioner of Revenue, order that this decision and order concerning the child support obligation of G. M. be adopted as of this date and entered in his file as the final administrative determination in this appeal.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the adoption of this decision, pursuant to 15 AAC 05.035(a). The motion must state specific grounds for relief, and, if mailed, be addressed: Commissioner's Office Appeals (Reconsideration), Alaska Department of Revenue, P.O. Box 110400, Juneau, Alaska 99811-0400.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 within 30 days of the date of this decision.

DATED this 2nd day of February, 2005.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

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