

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

IN THE MATTER OF: )  
 )  
J D. H )  
 )  
\_\_\_\_\_ ) OAH No. 05-0114-CSS  
CSSD Case No. 001015430

**DECISION AND ORDER**

**I. Introduction**

This case concerns the obligation of J D. H for the support of D H (DOB 00/00/88). The custodian of record is D D. W.

A support order was issued on December 4, 1993, setting support in the amount of \$50 per month. On September 17, 2004, Ms. W filed a request for review and modification. On January 6, 2005, the Child Support Services Division issued a modified support order in the amount of \$592 per month. Mr. H appealed. Administrative Law Judge Andrew Hemenway was appointed as the hearing officer.

On March 16, 2005, the hearing officer conducted a hearing under AS 25.27.170 and 15 AAC 05.030. The hearing was recorded. Mr. H appeared in person; Ms. W participated telephonically. Andrew Rawls, Child Support Specialist, represented the division.

Based on the record, ongoing child support will be set at \$475 per month.

**II. Facts**

J H lives in Anchorage. In the past three full years (2002-2004) he has worked seasonally or in temporary jobs for several employers. During that period, his average annual income from wages (\$43,788.82) and unemployment compensation (\$633.87) was \$44,422.69.<sup>1</sup> His primary employment during that the period has been as a shipping and receiving expediter for an hourly wage of about \$12, as a hazardous materials abatement worker for an hourly wage of \$36, and as a construction laborer for an hourly wage of \$17.<sup>2</sup> He has had his current job as a construction laborer for about seven or eight

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<sup>1</sup> Posthearing Brief; Exhibits 7, 9.

<sup>2</sup> Exhibit 6.

months and anticipates continuing to work full time in that capacity with the same employer, from whom he earned \$41,704.58 in 2004.

Mr. H has one prior child. He contributes about \$125 per month in direct payments for the support of the prior child. Mr. H lives with his ten-month old son, J, and his companion (who is unemployed) in an apartment. Mr. H pays personal and household expenses of around \$3,315 per month.<sup>3</sup>

## II. Discussion

The division calculated Mr. H's support on the basis of his actual reported wages from October 1, 2003-September 30, 2004, which totaled \$44,097.24. At the hearing, Mr. H asserted that his actual annual income was closer to \$35,000.

Exhibit 7 indicates that Mr. H's average annual wage for the past three years was \$43,788.82. However, during 2002 and 2003, the majority of Mr. H's earnings were on out of town jobsites as a hazardous materials abatement worker, at an hourly wage more than twice his current wage. Furthermore, full time work as a construction laborer at Mr. H's current wage of \$17 per hour would provide an annual income of about \$34,000 (\$17 x 40 hrs. per wk. x 50 wks. per yr.). During 2004, Mr. H's earnings as a construction laborer were substantially increased by "DB Fringe Benefits" that are not part of his regular wages.<sup>4</sup> Lastly, looking at a five-year period rather than a three-year period, Mr. H's average annual wages were \$34,574.76.<sup>5</sup> I conclude that the best estimate of Mr. H's future earnings is his current wage of \$17 per hour, or \$34,000 per year. This level of earnings, plus an Alaska Permanent Fund dividend, results in a monthly child support obligation of \$475, as shown in the attached exhibit.<sup>6</sup>

Although he disputed the division's calculation of his income, Mr. H's primary argument as stated in his appeal and at the hearing was that he cannot afford a \$592

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<sup>3</sup> Mr. H testified that his regular monthly expenses include: (1) rent: \$825; (2) utilities (including telephone and cable TV): about \$200; (3) food: about \$400; (4) auto payment: \$365, gas and auto insurance: about \$350; (5) necessary medication: \$225; (6) entertainment, tobacco & alcohol: about \$325; (7) personal care (including infant): \$500 per month; (8) debt: about \$125 per month.

<sup>4</sup> Exhibit 5. This could be "D-B wages". Mr. H testified that he is not a union member, but that he worked on a number of public works projects. Typically, public works construction wages are paid at union scale wages, which may be higher than Mr. H's hourly wage.

<sup>5</sup> Exhibit 7 shows the following wages: \$16,788.90 (2000); \$24,788.45 (2001); \$38,403.32 (2002); \$40,076.31 (2003); \$52,886.82 (2004).

<sup>6</sup> Mr. H is not entitled to a credit for his monthly \$125 payment for his prior child's support because there is no child support order in effect. Civil Rule 90.3(a)(1)(B); *id.*, Commentary at III(D).

monthly child support obligation. Mr. H's testimony indicates that his net monthly income in 2004 was less than his actual expenses. To the extent that Mr. H's ability to pay child support is limited by his current expenses, he would be unable to pay any child support at all. But under Alaska law, an obligor's ability to pay is measured by income, not by expenses.<sup>7</sup>

Nonetheless, expenses can be taken into account and the support obligation may be reduced if the child support obligation as measured by income would result in a manifest injustice.<sup>8</sup> The obligor must provide clear and convincing evidence of manifest injustice.<sup>9</sup> In determining whether there is manifest injustice, all of the relevant circumstances should be considered.<sup>10</sup> Manifest injustice may be found where the support obligation determined by the obligor's income would cause substantial hardship to subsequent children.<sup>11</sup> The obligor's debts may constitute grounds for a reduction in support if there are exceptional circumstances.<sup>12</sup>

In this case, Mr. H has unusually high medical expenses for necessary medication and he has an infant son, J.<sup>13</sup> But Mr. H could increase the amount of his income available for D's support by obtaining a contribution from his companion for joint household expenses such as rent, food and utilities. Mr. H could reduce his expenses by obtaining child support from J's mother<sup>14</sup> as well as by reducing his other obligations.<sup>15</sup> In light of the potential contributions for J's support and household expenses, as well as Mr. H's ability to reduce his current expenses, I conclude that Mr. H has not provided clear and convincing evidence of manifest injustice.

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<sup>7</sup> Civil Rule 90.3, Commentary at II.

<sup>8</sup> 15 AAC 125.075(a)(2).

<sup>9</sup> 15 AAC 125.075(a).

<sup>10</sup> *See*, 15 AAC 125.080.

<sup>11</sup> 15 AAC 125.075(a)(2)(F). *See*, Civil Rule 90.3, Commentary at VI(B)(2).

<sup>12</sup> 15 AAC 125.075(b)(2). *See*, Civil Rule 90.3, Commentary at VI(B)(4).

<sup>13</sup> Infants typically require greater financial support than older children. *See*, Civil Rule 90.3, Commentary at VI(B)(6).

<sup>14</sup> "In considering whether substantial hardship to 'subsequent' children exists, ...the court should consider the income, including the potential income, of both parents of the 'subsequent' children." Civil Rule 90.3, Commentary at VI(B)(2). When, as in this case, there is no evidence of the other parent's actual income, the division estimates income at the average wage level. 15 AAC 125.050(c)(1).

<sup>15</sup> In particular, Mr. H's current monthly expense of \$685 for a vehicle and gas could be reduced by purchasing a lower cost, higher mileage vehicle.

#### **IV. Conclusion**

In accordance with Civil Rule 90.3(a)(2), Mr. H's child support obligation is 20% of his adjusted income.

#### **CHILD SUPPORT ORDER**

1. Mr. H's ongoing child support is set at the rate of \$475 per month effective May 1, 2005.
2. Mr. H is liable for arrears in the amount of \$475 per month for the period from October 1, 2004 through April 30, 2005.

DATED: April 8, 2005

Signed  
Andrew M. Hemenway, Administrative Law Judge

#### **ADOPTION**

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. I, Terry Thurbon, Chief Administrative Law Judge, on behalf of the Commissioner of Revenue, order that this decision and order concerning the child support obligation of J D. H be adopted as of this date and entered in his file as the final administrative determination in this appeal.

Under AS 25.27.062 and AS 25.27.250 the Obligor's 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.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within ten (10) days after adoption of the written decision of the hearing officer, pursuant to 15 AAC 05.035(a). The motion must state specific grounds for relief and, if mailed, must be addressed to: 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 thirty (30) days of the date of this decision.

DATED this 11<sup>th</sup> day of April, 2005.

By: Signed  
Terry Thurbon  
Chief Administrative Law Judge

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