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

IN THE MATTER OF:	)	
	)	OAH No. 07-0274-CSS
J. M. C.	)	CSSD No. 001035106
	)	

DECISION AND ORDER

I. Introduction

This matter involves the Obligor J. M. C.'s appeal of a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on April 24, 2007. The Obligee child is B., DOB 00/00/92.

The formal hearing was held on June 7, 2007. Both Mr. C. and the Custodian, A. R. U., appeared by telephone. Andrew Rawls, Child Support Specialist, represented CSSD. The record closed on July 9, 2007.

Kay L. Howard, Administrative Law Judge, Alaska Office of Administrative Hearings, conducted the hearing and prepared this decision. Based on the record as a whole and after due deliberation, Mr. C.'s appeal is denied and his modified ongoing child support should be set at $344 per month, based on a finding of unusual circumstances and good cause.

II. Facts

A. History

Mr. C.'s child support was set at $234 per month for one child, B., in 2000.[1] He requested a modification on February 22, 2007.[2] On February 23, 2007, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.[3] Mr. C. provided recent income information.[4] On April 24, 2007, CSSD issued a Modified Administrative Child Support and Medical Support Order that set Mr. C.'s modified ongoing child support at $270 per month, effective March 1, 2007.[5] Mr. C. filed an appeal and requested a formal hearing on May 9,

[1] Pre-hearing brief at pg. 1.
[2] Exh. 1.
[3] Exh. 2.
[4] Exh. 3.
[5] Exh. 4.

2007.[6] CSSD thereafter revised the calculation to $314 per month to reflect the correct tax treatment of Mr. C.'s workers' compensation benefits in Washington.[7]

B. Material Facts

Mr. C. lives in the state of Washington.[8] He requested a modification because he has been receiving workers' compensation benefits for 15 months following an April 18, 2005, injury on the job. He was working for Industrial Resources at the time, and a six-inch pipe fell on him causing multiple contusions to his right shoulder, back and hip. He was off work for a "couple of weeks" after the injury, then returned to light duty work. Soon thereafter, however, his doctor said he could not work any more, so Mr. C. informed his employer and was apparently terminated on October 24, 2005, at which time his "time loss" benefits commenced.

Mr. C.'s treatment has been nonsurgical in nature.[9] Primarily, it has involved chiropractic care, physical therapy and massage,[10] and in late 2005, he had injections in his trochanteric bursa, located on the side of the hip,[11] and his sacroiliac joint.[12] As of May 23, 2007, his chiropractor's chart notes indicated Mr. C. was still having severe pain and was unable to work.[13]

On April 17, 2007, at the request of Washington's Department of Labor and Industries, Mr. C. received an independent medical exam (IME) performed by Dr. Lewis Almaraz, a neurologist, Dr. Peter Taylor, an orthopedic surgeon, and Dr. Warren Harrison, a psychiatrist. Drs. Almaraz and Taylor concluded, assuming for the analysis that Mr. C. had right shoulder contusions and sprain, and lumbar, thoracic and bilateral hip sprains, that he is capable of returning to work and that there are no restrictions preventing Mr. C. from returning to work.[14]

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[6] Exh. 5.
[7] Exh. 6.
[8] Unless otherwise indicated, the facts are taken from Mr. C.'s hearing testimony.
[9] The only actual medical records Mr. C. provided were from a chiropractor. *See* Obligor's documents received at the OAH on June 14, 2007, hereinafter Exh. A, at pgs. 2-3. The information regarding other treatment he has received comes from an Independent Medical Examination (IME) of Mr. C. that was conducted by three physicians on April 17, 2007. Exh. A. at pgs. 6-22.
[10] Exh. A at pgs. 9-11.
[11] Exh. A at pg. 10.
[12] *Id.*
[13] Exh. A at pg. 3.
[14] Exh. A at pg. 14.

On May 7, 2007, Washington's Division of Industrial Insurance (DII) informed Mr. C., apparently as a result of the IME conducted by Drs. Almaraz, Taylor and Harrison that it appeared his "industrially related condition" had reached maximum medical improvement, so the DII would no longer authorize medical or chiropractic treatment after June 1, 2007.[15]

The Custodian, Ms. U., does not work, nor is she able to be employed.[16] She is a single parent providing full-time care of the obligee B., who has been diagnosed with "Sanfilippo syndrome," a severe enzyme disorder with clinical symptoms appearing between the ages of 2 and 6 years and which results in stiffening of the joints, slowing of growth, and intellectual deterioration.[17] Ms. U. stated at the hearing that B. requires 24-hour care and that she receives Social Security disability benefits. The benefits do not fully support B., so Ms. U. must rely on charitable organizations such as church groups for necessities such as groceries.

III. Discussion

Modification of child support orders may be made upon a showing of "good cause and material change in circumstances."[18] If the newly calculated child support amount is at least 15% higher or lower than the previous order, Civil Rule 90.3(h) assumes "material change in circumstances" has been established, and CSSD will proceed with the modification.[19] If the newly calculated child support is not at least 15% different than the previous order, CSSD is not obligated to modify the obligor's child support.

A. Disability

The obligor parent has the burden of proving his or her earning capacity.[20] An obligor who claims he or she cannot work or pay child support because of a disability or similar impairment, must provide sufficient proof of the medical condition such as testimony or other evidence from a physician.[21]

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[15] Mr. C. claims this letter means that his entire claim was terminated or closed as of June 1st, but the record is silent as to whether his "time loss" benefits have been affected. The letter simply states the DII would no longer authorize treatment. Exh. A at pg. 4.

[16] Hearing testimony of A. R. U.

[17] *See* http://www.medterms.com/script/main/art.asp?articlekey=11152

[18] AS 25.27.190(e).

[19] 15 AAC 125.321(b).

[20] *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

[21] *Id.* at 1371.

Mr. C. has not proven by a preponderance of the evidence that he is disabled for child support purposes. First, although Mr. C.'s chiropractor's notes indicate the obligor is unable to work at this time, his condition appears to be a temporary one.[22] The printout of the payments made to him by the Washington State insurance carrier indicate he is receiving "time loss" benefits[23] based on shoulder, back and hip contusions and sprains.[24] There is no evidence in the record that Mr. C. has received, or will receive, any type of compensation for a permanent injury or loss, which would support his claim of disability.

The second reason Mr. C. is not disabled for child support reasons is that the three doctors who performed the IME on April 17, 2007, concluded that Mr. C. is able to return to work doing industrial maintenance repair, and there are "no restriction[s] preventing [him] from returning to work."[25] These three doctors, a neurologist, an orthopedic surgeon and a psychiatrist, made their conclusions about Mr. C.'s condition based on their own examinations of the obligor and their review of his medical records. The doctors' conclusions carry more weight than Mr. C.'s chiropractor's chart notes.

Even were a finding made that Mr. C. is disabled, his child support would still be calculated based on the worker's compensation benefits he has been receiving,[26] so there is no benefit to be derived from a finding that he is disabled. Had Mr. C. been determined to be permanently disabled in some way, the analysis may be substantially different, but at this juncture, such a finding is not supported by the evidence.

B. Voluntary Unemployment

If an obligor who is not working does not provide sufficient proof of a medical condition, the parent may be found to be voluntarily and unreasonably unemployed or underemployed.[27] It is not necessary to prove the parent was purposefully avoiding a support obligation, or acting in

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[22] Indeed, the chart notes entered by Mr. C.'s chiropractor do not clearly indicate whether the assessment that he cannot work was made by the doctor or by Mr. C. himself.
[23] Exh. 3.
[24] Exh. A at pg. 13.
[25] Exh. A at pg. 14.
[26] Although Mr. C. claimed his worker's compensation claim was terminated as of June 1, 2007, the "time loss" benefits he was receiving must still be attributed to him because he did not provide evidence that those payments had been terminated, only that Washington's DII would no longer authorize medical or chiropractic treatment. *See* Exh. A at pg. 4.
[27] Civil Rule 90.3(a)(4).

bad faith, in order to find voluntary unemployment or underemployment.[28] The Alaska Supreme Court has upheld lower court decisions finding noncustodial parents were not making their best efforts to obtain employment or remain employed.

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."[29] 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.[30] The commentary to Civil Rule 90.3 states the court should consider "the totality of the circumstances" when deciding whether to impute income to the obligor parent.[31]

CSSD initially used Mr. C.'s annual income from his worker's compensation benefits[32] to modify his child support from $234 per month to $270 per month.[33] CSSD incorrectly deducted federal taxes from Mr. C.'s benefits, so before the hearing, the agency corrected the calculation by eliminating the federal tax deduction from the obligor's income. The newly revised child support amount is $314 per month.[34]

After the hearing, CSSD asserted in closing that Mr. C. is voluntarily and unreasonably unemployed and on that basis, proposed that income should be imputed to him in an amount equal to $24,532.48, which is the average of his wages for the years 2003 – 2005, as reported by Social Security.[35] CSSD argued this approach should be taken because there are "unusual circumstances" in this case, specifically, that the obligee B. is disabled and Ms. U. cannot work but must provide for B.'s care on a full-time basis.

The evidence that has been presented in this case does not support a finding that Mr. C. is voluntarily and unreasonably unemployed. Even though the April 2007 IME concludes that he is able to return to his work doing industrial maintenance repair, Mr. C. believes that he has not

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[28] *Kowalski* at 1371.
[29] Civil Rule 90.3, Commentary III.C.
[30] *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).
[31] Civil Rule 90.3, Commentary III.C.
[32] Under Alaska law, worker's compensation benefits are considered income for child support purposes. Civil Rule 90.3, Commentary III.A.11.
[33] Exh. 4 at pgs. 1 & 7.
[34] Exh. 6.
[35] *See* Exh. 9 at pg. 2; Exh. 10.

been released to return to work and that he is unable to work. This belief may have resulted in unemployment that is voluntary at some level, when compared to the April 2007 IME, but it does not rise to the level of voluntary and unreasonable unemployment, as defined by Civil Rule 90.3.

As a result of the finding that Mr. C. is not voluntarily and unreasonably unemployed, his modified child support is correctly calculated at $314 per month from his actual income, as discussed above. Whether his child support should be varied from this figure based on unusual circumstances is discussed below.

C. Unusual Circumstances/Good Cause

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. A party may obtain an increase or reduction from the support amount calculated, but only if the party shows that "good cause" exists for the variation. In order to establish good cause, the party must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied." Civil Rule 90.3(c). If there are "unusual circumstances" in a particular case, this may be sufficient to establish "good cause" for a variation in the support award:

> Good cause may include a finding . . . that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children . . . .[36]

The Alaska Supreme Court holds that factors that relate to the well being of the child of the order are especially important in determining whether there is good cause to vary the child support amount. The court has stated:

> The meaning of the term "good cause," however, is to "be determined by the context in which it is used." Coats v. Finn, 779 P.2d 775, 777 (Alaska 1989). That context, for Civil Rule 90.3 purposes, must focus first and foremost on the needs of the children. See Civil Rule 90.3, Commentary I(B).[37]

It is necessary to consider all the relevant evidence, including both party's and the child's circumstances, in order to determine if the support amount should be set at a different level than provided under the schedule in Civil Rule 90.3(a).[38]

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[36] Civil Rule 90.3(c)(1)(A).
[37] *Doyle v. Doyle*, 815 P.2d 366 (Alaska 1991).
[38] *See* Civil Rule 90.3, Commentary VI.E.1.

Based on the totality of circumstances, and on the evidence as a whole, this case presents unusual circumstances of the type contemplated by Civil Rule 90.3. CSSD proved by clear and convincing evidence that manifest injustice will result if Mr. C.'s modified child support is not varied to $344 per month, the amount calculated pursuant to Civil Rule 90.3 from his average wages earned from 2003-2005.

This finding of unusual circumstances and good cause to vary the amount from $314 per month to $344 per month centers on the obligee B.'s circumstances. She has been diagnosed with a severe enzyme disease that has resulted, or will result, in a total incapacitation and full-time reliance on Ms. U.'s care of her. Since B. requires 24-hour care, Ms. U. is unable to join the workforce and earn their support or supplement B.'s disability payments from Social Security. As a result, the funds they do receive do not fully support them and Ms. U. is forced to rely on charity organizations for even their most basic necessities, such as food.

As compared to B.'s situation, Mr. C.'s is difficult, but on balance, the severity of his circumstances is much diminished from hers. Mr. C. is currently unemployed and receiving worker's compensation benefits, but his condition is temporary and he will eventually return to work. Based on her diagnosis, B.'s situation will never improve. Thus, an increase from $314 per month to $344 per month will most likely have a negligible impact on Mr. C., but more likely than not it will represent a significant gain for B.

IV. Conclusion

CSSD met its burden of proving by clear and convincing evidence that manifest injustice will result in the absence of a variation in the child support amount calculated in this case under Civil Rule 90.3. Therefore, in the presence of unusual circumstances, and good cause to vary the amount from $314 per month, Mr. C.'s child support should be set at $344 per month, as calculated by CSSD. This amount should be adopted.

V. Child Support Order

- Mr. C. is liable for modified ongoing child support in the amount of $344 per month, effective March 1, 2007, and ongoing.

DATED this 18th day of September, 2007.

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. 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 within 30 days after the date of this decision.

DATED this 15th day of October, 2007.

By: *Signed*
Signature
Jerry Burnett
Name
Director,Admin Services
Title

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