

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

IN THE MATTER OF:)

K. M. M.)

OAH No. 08-0484-CSS

CSSD No. 001046508

DECISION AND ORDER

I. Introduction

The Obligor, K. M. M., appealed a Notice of Denial of Modification Review that the Child Support Services Division (“CSSD”) issued in his case on August 14, 2008. The Obligee child is K., DOB 00/00/93.

The hearing was held on October 2, 2008. Both Mr. M. and the custodian, T. L. G., appeared by telephone. David Peltier, Child Support Specialist, represented CSSD. The hearing was recorded and the record closed on October 16, 2008.

Kay L. Howard, Administrative Law Judge, conducted the hearing. Based on the record and after due deliberation, CSSD’s Notice of Denial of Modification Review is affirmed and Mr. M.’s child support shall remain at \$997 per month for one child.

II. Facts

A. Background

Mr. M.’s child support obligation for K. was set at \$997 per month in a Decision and Order issued on June 27, 2008.¹ Mr. M. requested a modification on April 22, 2008.² On April 30, 2008, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ Mr. M. provided current financial information.⁴ On August 14, 2008, CSSD issued a Notice of Denial of Modification Review that left his child support at \$997 per month, as set in June 2008, for the reason that a new calculation based on his current income did not result in a 15% change from the existing order.⁵ Mr. M. appealed on September 11, 2008, asserting

¹ Exh. 1.

² Exh. 2. For reasons discussed in that decision, Mr. M. had already requested another modification before the hearing in that earlier appeal and the parties understood that the second modification review would go forward.

³ Exh. 3.

⁴ Exh. 4.

⁵ Exhs. 5 & 6.

primarily that CSSD used an incorrect gross income figure and did not include his 401(k) deduction in the calculation.⁶

B. Material Facts

Mr. M. pays support for another child, G., DOB 00/00/95, and his support obligation for his younger child will be addressed in the decision in that case. It should be noted, however, that it was determined in his June 2008 decision in this case, that Mr. M. is not entitled here to a deduction for supporting G. because that child is younger than K. This support obligation will have a net effect of reducing his child support amount for G. and it will be discussed in that decision.

Mr. M. began working for Peak Oilfield Services on March 15, 2008 and earns \$32.50 per hour.⁷ If he had no overtime, he would thus earn approximately \$67,600 in one year.⁸ But in the approximate six months he has worked for Peak Oilfield Services,⁹ Mr. M. has indeed worked overtime, as shown in his year-to-date paystub.¹⁰ The paystub shows that as of September 21, 2008, Mr. M. had received \$5,971.89 in overtime pay in addition to his straight time earnings of \$33,702.50.¹¹ CSSD estimated his annual income from these figures by dividing his year-to-date wages of \$39,674.39 by 27 weeks, then multiplying the resulting average weekly salary of \$1,469.42 times 52 weeks, which yields the total annual income figure of \$76,409.84.¹²

In contrast, CSSD's estimate of Mr. M.'s monthly 401(k) deduction appears to be incorrect, as it also was based on his 27 weeks of employment. But Mr. M. testified he did not qualify for the deduction until July 1, 2008, which means he had been receiving it for only about 11 weeks instead of 27 weeks. Dividing the total 401(k) deduction of \$1,587.70 by 11 weeks equals an average of \$144.34 per week, which is estimated at \$7,505.68 per year. This amount is 9.8% of Mr. M.'s total income as estimated by CSSD.

⁶ Exh. 7.

⁷ His previous employer went into bankruptcy, thus the change in employers.

⁸ \$32.50 per hour x 2080, the number of hours a full-time employee typically works in one year, which is derived by multiplying 40 hours per week x 52 weeks.

⁹ CSSD correctly ascertained Mr. M. had worked 27 weeks from March 15, 2008 through September 21, 2008. *See* Exh. 9 at pg. 2.

¹⁰ Exh. 9 at pg. 2.

¹¹ *Id.*

¹² *Id.*

Mr. M.'s health insurance coverage at Peak Oilfield Services became effective on July 1, 2008, after he had worked 90 days. He is an insulin-dependent Type I diabetic and before he had insurance he had to pay for insulin and diabetic supplies on his own. Now that he has insurance Mr. M. incurs only the copay costs for his insulin and syringes, as well as the lancets and test strips for his blood glucose monitor. In addition, Mr. M. has hypertension – high blood pressure – and now must take up to three different medications. He estimated his total out of pocket expenses for his diabetic supplies and medications is now about \$225 per month.¹³

Mr. M. has a mortgage payment of \$884 per month; plus he pays \$800 for food in addition to other unremarkable household expenses. His vehicle is paid for and he has a \$325 per month payment on a 2004 Harley Davidson motorcycle. He spends approximately \$320 per month on gasoline and \$225 per month for medications and diabetic supplies.¹⁴ Finally, Mr. M.'s girlfriend lives in his home and works three days per week, earning \$7.15 per hour.

Ms. G.'s financial situation remains mostly unchanged from the June 2008 decision, with the exception that her total mortgage and lot rent expense will go up to \$1,200 per month in December.

III. Discussion

A. Income

Modification of child support orders may be made upon a showing of “good cause and material change in circumstances.”¹⁵ If the newly calculated child support amount is more than 15% different than the previous order, the Rule assumes a material change in circumstances has occurred and the support amount may be modified.¹⁶

Mr. M.'s child support was set at \$997 per month in June 2008. CSSD denied his modification request because it estimated his child support would not go down the requisite 15% from that order.¹⁷ After the hearing, CSSD postulated that Mr. M.'s estimated annual income, including the incorrectly calculated 401(k) deduction, would result in a child support amount of

¹³ Mr. M. testimony.

¹⁴ Mr. M. testimony.

¹⁵ AS 25.27.190(e).

¹⁶ Civil Rule 90.3(h).

¹⁷ $\$997 \times 15\% = \149.55 . $\$997 - \$149.55 = \$847.45$.

\$929 per month and would still not equal a 15% change. To reach the 15% change, Mr. M.'s child support would have to get down to \$847.45 or lower from his current support order.¹⁸

Mr. M. argues that CSSD significantly overestimated his annual income. He claimed that he is guaranteed only 40 hours per week, so his hourly wage of \$32.50 per hour should result in annual income of \$62,400, not the much higher figure CSSD used. Mr. M. argues overtime should not be included in his total income figure because even though he occasionally gets overtime work it is not guaranteed and cannot be counted upon.

Civil Rule 90.3(a)(1) provides that an obligor's child support is to be calculated from his or her "total income from all sources." The commentary to the Rule specifically defines income to include overtime pay.¹⁹ Naturally, because Mr. M. has not yet been working for his current employer for one year, his "total income from all sources" must be estimated from the information he provided. After Mr. M. provided a copy of his most recent paystub, CSSD divided his total year-to-date income by the number of weeks he had been working for Peak Oilfield Services – 27 weeks – then multiplied that amount times 52 weeks to reach the resulting figure of \$76,409.84.²⁰

In the absence of yearly figures derived from his employer or a tax return or the Alaska Department of Labor and Workforce Development, CSSD's method accurately estimated Mr. M.'s annual income working for Peak Oilfield Services. The figure CSSD reached includes the total overtime Mr. M. worked, averaged out over the roughly one half year of his employment. Mr. M. correctly points out that overtime work is not necessarily consistent or guaranteed, but in the absence of evidence to the contrary, since Mr. M. has occasionally worked overtime for this employer in the past, the evidence indicates overtime work will continue to be available to him in an amount consistent with the average number of hours he has already worked overtime. CSSD thus correctly estimated Mr. M.'s total annual income, including the earnings he derived from occasional overtime work.

CSSD did not accurately estimate Mr. M.'s 401(k) deduction because the agency averaged the deduction out over 27 weeks, as it did with his total income. But Mr. M. has been making contributions to his 401(k) plan only since July 1, 2008, a period of 11 weeks from the

¹⁸ \$997 - \$149.55 = \$847.45.

¹⁹ Civil Rule 90.3, Commentary A.III.1.

²⁰ Post-hearing brief at pg. 1.

date of his most recent year-to-date paystub. Mr. M. testified that he is having 10% taken out of his check for the deduction, which appears to be consistent with the amount estimated from his year-to-date paystub, as discussed above. However, Civil Rule 90.3(a)(1)(B) caps the maximum retirement deduction at 7.5%, so although Mr. M. may be contributing 10% of his total income to the 401(k), he is allowed to deduct only 7.5% of his income in the child support calculation. Determining the 7.5% figure is done by multiplying Mr. M.'s estimated annual income of \$76,409.84 times 7.5%, which equals \$5,730.74, or \$477.56 per month. This amount should be inserted into CSSD's final draft calculation at Exhibit 10 in place of the figure CSSD used. The result is a child support amount of \$884 per month.²¹ This figure is not sufficient to reach the 15% threshold for child support modifications, so in the absence of a variation based on a financial hardship, which is discussed below, CSSD correctly denied Mr. M.'s request for a modification of his child support obligation.²²

B. Financial hardship

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. The parent may obtain a reduction in the amount calculated, but only if he or she shows that "good cause" exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."²³ The presence of "unusual circumstances" in a particular case 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 children²⁴

²¹ See Attachment A.

²² Mr. M. also argued that his PFD and federal tax refund should not be garnished in their entirety, but those issues cannot be resolved here. The administrative law judge does not have the authority to direct CSSD's enforcement actions. See AS 25.27.180(a).

²³ Civil Rule 90.3(c).

²⁴ Civil Rule 90.3(c)(1).

It is appropriate to consider all relevant evidence, including the circumstances of the Custodian and obligee child to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).²⁵

Based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. M. did not prove by clear and convincing evidence that manifest injustice will result if the child support amount calculated under Civil Rule 90.3 is not varied. Mr. M.'s financial situation is strained at the time, but his bills and expenses are not out of the ordinary or unusual. He is now eligible for health insurance from his employer, and will have assistance in obtaining insulin and diabetic supplies. He has to take additional hypertension medications, but these are also covered by his health insurance and as a result, his total copay expenses should roughly equal the \$225 per month he was already spending on medical supplies. Since his overall financial obligations are not excessive or unusual, his situation does not constitute "unusual circumstances."

Nor is Mr. M.'s requirement to pay child support in two cases unusual. In such a situation, Civil Rule 90.3 has been designed to factor into a younger child's support obligation the amount he pays for an older child.²⁶ Mr. M.'s support obligation for his younger child will address the issue of a deduction in that case based on the amount of his support obligation for K. in this case.

IV. Conclusion

Mr. M. did not meet his burden of proving by a preponderance of the evidence that CSSD's Notice of Denial of Modification Review was issued in error. CSSD correctly estimated his annual income to include occasional overtime work. CSSD did not correctly estimate his retirement deduction, but correcting that adjustment did not result in a 15% change in the child support amount sufficient to warrant a modification. Mr. M.'s child support amount should remain at \$997 per month. CSSD may make whatever adjustments are necessary in the child support amount for Mr. M.'s medical insurance credit.

V. Child Support Order

- Mr. M. remains liable for child support in the amount of \$997 per month;

²⁵ See Civil Rule 90.3, Commentary VI.E.1.

²⁶ See Civil Rule 90.3(a)(1)(C).

- CSSD's August 14, 2008, Notice of Denial of Modification Review is affirmed.

DATED this 5th day of November, 2008.

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 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 24th day of November, 2008.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

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