

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

IN THE MATTER OF:)
)
T. O. C.) OAH No. 08-0576-CSS
) CSSD Case No. 001105191
_____)

DECISION AND ORDER

I. Introduction

This case concerns the obligation of T. O. C. for the support of O. C. (DOB 00/00/99) and N. C. (DOB 00/00/02). The custodian of record is S. (C.) H.

On July 14, 2006, the Child Support Services Division (Division) issued an administrative child support order setting support at \$489 per month for two children, effective August 1, 2006. On July 29, 2008, the Division issued a modified administrative child support order setting modified ongoing support at \$1,481 effective March 1, 2008.

Mr. C. filed an appeal and requested an administrative hearing. The Office of Administrative Hearings conducted a telephonic hearing on November 10, 2008. David Peltier represented the division. Mr. C. and Ms. H. participated.

Mr. C. argues that the modified order is based on prior earnings that he will not earn in the future. Based on the evidence and the testimony at the hearing, modified ongoing support is set at \$840 per month for two children, and the modified order is amended accordingly.

II. Discussion

T. C. was steadily employed (with seasonal breaks) from the first quarter of 2003 through mid-July, 2008. In 2003-2004 he worked at the Y.-K. H. C., and earned wages of \$32,689 in 2003 and, for about three-quarters' work, \$25,182 in 2004.¹ In the second quarter of 2005, Mr. C. earned wages of \$12,742 working as a driller at the D. C. M.² In the third quarter of 2005 he earned wages of \$12,730 working for A. W. & S..³ Mr. C. also worked part of the fourth quarter of 2005 for the No Name utility, but was laid off

¹ Post Hearing Brief, pp. 1-3. Mr. C. received unemployment compensation beginning October 9, 2004, indicating that he was laid off in September.

² Post Hearing Brief, p. 1; T. C. testimony.

beginning in November.⁴ His total wages in 2005 were \$26,901.⁵ Mr. C. worked for the No Name Traditional Council in the first quarter of 2006, earning wages of \$6,318, before returning to work at the D. C. M. beginning in the second quarter of 2006.⁶ From the second quarter of 2006 through the second quarter of 2007, Mr. C. worked regularly at the D. C. M., where his wage was \$15-\$16 per hour.⁷ His total wages in 2006 were \$54,604.⁸ From the third quarter of 2007 through the second quarter of 2008, he worked regularly at the P. M., where he earned \$32.50 per hour.⁹ His total wages in 2007 were \$86,895.¹⁰

Mr. C. suffers from asthma and he uses Albuterol for relief from symptoms of that condition.¹¹ On July 14, 2008, while on the job, Mr. C. had difficulty breathing. He did not have his inhaler with him, so he left the rig and visited the on-site EMT. The EMT administered Albuterol, which relieved Mr. C.'s symptoms.¹² When Mr. C.'s shift ended he returned to his home in No Name City, where he visited the health clinic on August 8, complaining of continued congestion.¹³ He did not return to the jobsite and he terminated his employment at P. M. Because he left the job without prior notice and because his supervisor considered him responsible for a rig shutdown that had occurred in June, 2008, Mr. C. is unlikely to be rehired to work at P. M.¹⁴

Since July, 2008, Mr. C. has been unemployed. He has not applied for any drilling jobs. Drilling jobs are relatively scarce in the winter due to seasonal shut-downs, but Mr. C. expects that he can find work in his field early in 2009. Department of Labor

³ Post Hearing Brief, p. 1.

⁴ Post Hearing Brief, pp. 1-3. Mr. C. received unemployment compensation from November 19-December 3, 2005, indicating that he was laid off in November.

⁵ Post Hearing Brief, p. 1.

⁶ Post Hearing Brief, p. 1.

⁷ Testimony of T. C.; Post Hearing Brief, p. 1.

⁸ Post Hearing Brief, p. 1.

⁹ Testimony of T. C.; Exhibit 5. At the rate of \$32.50 per hour, working an 84-hour work week would result in weekly wages of about \$3,445 ($\$32.50 \times 40 = \$1,300$; $44 \times \$48.75 = \$2,145$). The standard rotation at P. M. is six weeks on, two weeks off. *Id.*

¹⁰ Post Hearing Brief, p. 1; Exhibit 5. Mr. C.'s 2007 wages consisted of \$27,241 at D. C. and \$59,654 at P. M. *Id.*

¹¹ Ex. 9, pp. 6-9.

¹² Ex. 9, pp. 2-3.

¹³ Ex. 9, p. 5.

¹⁴ Testimony of T. C.

and Workforce Development statistics state that the average monthly wage of a hard rock driller in Alaska \$4,271.¹⁵

III. Discussion

A. Applicable Legal Principles

The division will modify a child support obligation when “the child support award calculated under 15 AAC 125.070 and the child support guidelines of Alaska Rule of Civil Procedure 90.3 is more than 15 percent greater or less than the amount of the support obligation that is set out in the outstanding support order.”¹⁶ 15 AAC 125.070(a) provides that where a parent has primary custody, “the agency will calculate the child support award by multiplying the adjusted annual income determined under 15 AAC 125.065 by the appropriate percentage under Alaska Rule of Civil Procedure 90.3(a).” Adjusted annual income is determined based either on “income from all sources determined under 15 AAC 125.030” or, in the case of a person who is voluntarily and unreasonably unemployed or underemployed, based upon “the parent’s potential income under 15 AAC 1250.060.”¹⁷ Thus, the first inquiry in a modification proceeding is to determine whether the individual is voluntarily and unreasonably unemployed or underemployed. If so, the income determination is based upon potential income. If not, the income determination is based on income from all sources, which is “the expected annual income that the parent will earn or receive when the child support award is to be paid.”¹⁸

B. Mr. C. Was Not Voluntarily and Unreasonably Unemployed

Mr. C. argues that he left his job for medical reasons. Ms. C. argues that Mr. C. left his job in response to the request for modification, and not for health reasons. The Division argues that Mr. C.’s health concerns did not preclude working at P. M.

¹⁵ www.labor.alaska.gov/research/occtbl/pdfs/const.pdf (accessed December 28, 2008). Mr. C. testified that his hourly rate at D. C. was (after a raise) \$16 per hour, and that a hard rock driller in Alaska can earn an average of \$60,000 per year. Assuming an 84 hour work week, this is equivalent to approximately \$1,696 per week. For three weeks of work per month, this would result in a monthly wage of approximately \$5,088 per month, or \$60,000 per year if there are no seasonal shutdowns.

¹⁶ 15 AAC 125.321(b)(1).

¹⁷ 15 AAC 125.065(a), (b).

¹⁸ 15 AAC 125.030(a). The regulation specifically states that this definition applies “[f]or purposes of 15 AAC 125.020. However, 15 AAC 125.020(a) applies “[i]n every matter in which the agency must establish or review a child support order....” Thus, the definition applies in modification proceedings.

The child support obligation may be based on potential earnings when the parent is voluntarily and unreasonably unemployed.¹⁹ A determination of voluntary and unreasonable unemployment must be based on consideration of all of the relevant circumstances, “including the parent’s education, training, occupation, health, [and] employment opportunities.”²⁰ Whether unemployment, if it exists, is unreasonable likewise depends on all of the circumstances, including whether the obligor’s lack of work is temporary, whether it is the result of economic factors or personal choice, and the children’s needs and the parents’ needs and financial abilities.²¹

Mr. C. testified that he was reluctant to return to work at P. M. because it is a remote, fly-in job site and he was not assured of ready access to medical care in the event of an emergency. He has a documented prior history of breathing problems, and it is uncontested that access to a health care facility from the P. M. jobsite was problematic. Mr. C. continued to work at P. M. for several months after the request for modification was sent to him, and the specific incident that preceded his termination occurred before the Division had modified the child support order. While it is true that Mr. C. could have returned to P. M. and that he therefore became voluntarily unemployed, his health concerns were real and not pretextual and his decision to leave that particular job was not unreasonable.

After leaving that job, which had for some time been paying him substantially more than he could earn in other positions in his field, Mr. C. did not engage in a diligent job search, either in his chosen field or in the local job market. However, there is no evidence that jobs suitable to his training, skills and experience were available to him in No Name City, a bush village with a population of around 500 and with relatively few jobs in Mr. C.’s prior work areas of construction, drilling, and air cargo handling,²² and given the late summer date of unemployment there is no assurance that even a diligent search would have resulted in re-employment as a driller prior to the winter shut-down of most mines. Furthermore, Mr. C. has a good work history over the past five years except

¹⁹ See Civil Rule 90.3(a)(4); Maloney v. Maloney, 969 P.2d 1148 (Alaska 1998).

²⁰ 15 AAC 125.060(a).

²¹ Sawicki, 186 P.3d at 550, *citing* Nunley v. State, Department of Revenue, 99 P.3d 7, 11 (Alaska 2004); Patch v. Patch, 760 P.2d 526, 530 (Alaska 1988), Curley v. Curley, 588 P.2d 289, 292 (Alaska 1979).

²² See www.commerce.state.ak.us/dca/commdb/CF_BLOCK.cfm (accessed December 28, 2008).

for a relatively short time beginning in the late summer of 2008, and he testified that he expected he could find work in his field early in 2009. Thus, Mr. C. should not be considered voluntarily and unreasonably unemployed as of the date the modified order is effective, and his modified order should be based on his expected future earnings from that point forward, rather than on his potential wages in 2008 had he stayed on the job at P. Mine.

C. Mr. C.'s Expected Annual Income is \$43,989 + PFD

15 AAC 125.050(c)(1)-(9) provide that to determine expected annual income, the Division looks “the best available information” including the parent’s (1) current income, (2) actual income in the immediately preceding calendar year, (3) partial year income, (4) wage rates in previous jobs, (5) job skills, training, work history and education; (6) average salaries in the parent’s field, (7) available employment in the area; (8) applicable minimum wage, and (9) restrictions on ability to work.²³

(1) Current Income

The Division did not have income information for 2008, but his income as of the effective date of the modified order was likely similar to what he had been earning at P. M. in the prior year: in excess of \$25,000 per quarter.

(2) Actual Income In Preceding Calendar Year

Mr. C.’s actual total income in 2007 was approximately \$88,997.²⁴

(3) Partial Income

The Division has complete income information from 2003-2007, rendering this consideration inapplicable.

(4) Wage Rates

Mr. C. earned \$15-16 per hour at the D. C. job and \$32.50 per hour at the P. M. job.

(5) Job Skills, Training, Work History and Education

²³ Potential earnings are determined “based on available information, the parent’s past income, skills, work history, and education, and the job opportunities in the area where the parent physically resides.” 15 AAC 125.020(b). These are substantially the same indicia used to determine expected annual income. Potential income, in effect, is the amount that an individual would earn if engaged in a reasonable job search. Thus, for a person who is not unreasonably unemployed, potential income may be effectively the same as expected income.

²⁴ Ex. 7.

Mr. C. is a high school graduate. He has a commercial driver's license and experience in retail trade, construction and air cargo handling. He is trained and skilled as a hard rock mine driller. He does not have experience in oilfield drilling. He has worked steadily at substantially full time positions since 2003 except for seasonal periods of unemployment.

(6) Average Wage

Mr. C.'s average annual wage in 2003-2007 was \$45,254.²⁵ Mr. C. earned substantially more at P. M. due to the difficulty of the work;²⁶ his average annual wage in 2003-2007 exclusive of his time at P. M. was \$36,814.²⁷ Mr. C. testified that the average annual wage for drillers in Alaska is \$60,000 per year. Department of Labor and Workforce Development statistics show an average monthly wage for a hard rock driller of \$4,271, or an annual wage of \$51,252.

(7) Availability of Employment²⁸

Mr. C.'s home town is No Name City, a bush village with a population of about 500. He grew up there and he presently lives there with his parents. His children are in No Name City. Jobs of any kind in No Name City are relatively scarce; unemployment is twice the statewide average. Most of the jobs in No Name City are in professional or government employment categories which are unsuited to a person of Mr. C.'s training, education, work history, and experience. Jobs in Mr. C.'s chosen field are non-existent in No Name City and he must work at remote sites if he is to be employed in his field. Work in his field is seasonal and typically not available several months of the year.

(8) Minimum Wage

The minimum wage in Alaska is \$7.15 per hour, equivalent to a monthly wage of about \$1,230.

(9) Restrictions

²⁵ $\$32,689 (2003) + \$25,182 (2004) + \$26,901 (2005) + \$54,604 (2006) + \$86,895 (2007) = \$226,271 \div 5 = \$45,254.$

²⁶ Testimony of T. C.

²⁷ $\$226,271 - \$ (59,654 + \$1,955) = \$165,662 \div 4.5 = \$36,814.$

²⁸ The available information related to this criterion comes from State of Alaska databases. *See* note 18, *supra*.

Mr. C.'s health condition does not prevent him from working in his chosen field (although he testified that he has been advised that it is not a healthy choice for him) but is a legitimate concern when he is working at remote sites.

Mr. C. testified that he is able and willing to return to work, but that job opportunities in his field are limited in the winter. He believed that he could find work in his field early in 2009 at wages typical in the field. His unemployment should therefore be considered a temporary condition. Nonetheless, because his work is job-oriented and seasonal, he can expect recurring periods of unemployment similar to those he has experienced in the past. He is unlikely to obtain work at the wages he earned at the P. M. job. Thus, his expected annual income is somewhat less than full time work for a hard rock driller. A reasonable estimate of Mr. C.'s expected annual income from wages is \$38,439, which is 75% (9 months) of the average wage of a hard rock driller in Alaska according to official statistics, and which is very close to his actual annual wage of \$36,814 over the four and a half year period before his employment at P. M. His expected annual income from unemployment compensation \$5,550.²⁹ Mr. C.'s expected annual income is thus \$43,989 plus his Alaska Permanent Fund dividend and his support obligation is \$840 per month, as shown on Appendix A.

IV. Conclusion

Mr. C. was not voluntarily and unreasonably unemployed in March, 2008. His child support obligation should be based on his expected annual income. The modified support order should be amended accordingly.

CHILD SUPPORT ORDER

The Modified Administrative Child Support and Medical Support Order dated July 29, 2008, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated July 29, 2008, is **AFFIRMED**:

Modified ongoing child support is set at \$840 per month for two children, effective March 1, 2008.

DATED: December 29, 2008.

Signed

Andrew M. Hemenway
Administrative Law Judge

²⁹ Unemployment is based on 15 weeks at the maximum benefit of \$370 per week.

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 15th day of January, 2009.

By: Signed
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

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