IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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| DOROTHY F. BARNEY,<br><br>Appellant,<br><br>vs.<br><br>STATE OF ALASKA, DEPARTMENT OF REVENUE CHILD SUPPORT ENFORCEMENT DIVISION,<br><br>Appellee. | Case No. 3AN-11-10497 CI |

# ORDER DENYING BARNEY'S ADMINISTRATIVE APPEAL

## Introduction

This case involves an appeal from a final determination of the Commissioner of Revenue calculating the child support Paul Prevost should pay to Dorothy Barney, custodian of D.K.B. The central question is whether the administrative law judge ("ALJ") improperly failed to consider Prevost's 2010 personal injury settlement in calculating child support. Barney also accuses the ALJ of (1) improperly shifting the burden to her to demonstrate that some portion of the settlement money should have been included in the child support calculations and (2) giving Prevost improper credits on his child support obligations. The Court hereby affirms the ALJ's decision for the reasons stated below.

## Factual History

With one exception,[1] the parties do not dispute the facts underlying this case as described in the ALJ's recitation of material facts. Barney's Br. at 5; compare R. at 196-97 with State's Br. at 2-11. The ALJ found as follows:

> Mr. Prevost was formerly a pile driver. His career ended in 2008 as the result of injuries he received in an automobile accident on March 6, 2008. With the exception of an attempt to return to light duty work in July 2008, he has not worked since his accident. Mr. Prevost subsequently applied for and was awarded Social Security disability benefits (SSI) in the amount of $1,591 per month, effective September 2008. Ms. Barney also applied for CIB (Children's Insurance Benefits) payments on [D.K.B.'s] behalf and the child was awarded $851 per month, effective September 2008. Because of the length of time between the onset of Mr. Prevost's disability in 2008 and the payment of disability benefits, both parties received lump sum payments from Social Security. Mr. Prevost testified that he received $10,000 in December 2010 and approximately $24,000 after that. Ms. Barney received $25,348 in March 2011.
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> While he was waiting for his application for Social Security benefits to be acted upon, Mr. Prevost supported himself by withdrawing his union pension and settling the personal injury action related to his automobile accident. In 2009, he withdrew all of his retirement assets consisting of $68,303.51 from the Northern Alaska Carpenters Union, Local 2520's defined contribution plan. Also in 2009, after attorney fees, costs, and various liens were paid, he received settlement proceeds of $22,285.60. In 2010, after fees, costs and a child support lien were paid, Mr. Prevost received a second settlement of $51,146.50 . . .

[1] Barney objects to the ALJ's finding that a settlement Prevost received in 2010 is not relevant to calculating child support. Barney's Br. at 5. As the settlement's relevance is a question of law, and not a finding of fact, the Court does not include that assertion here in reciting the ALJ's findings.

> Mr. Prevost currently owns a home with his sister, who handles his financial matters. They live in the home with her boyfriend and the three of them share the household expenses on an equal basis. Mr. Prevost testified during the first hearing that he had about $15,000 remaining from his retirement proceeds, personal injury settlements and the lump sum Social Security payout, but at the final hearing, he said he does not have any money in the bank. He said the reason is that he used most of his settlement to pay the people who had been loaning him money, mostly his sister.
>
> Little is known of Ms. Barney's and [D.K.B.'s] circumstances. The custodian testified that [D.K.B] is disabled because he was seriously hurt in a snow machine accident two years ago and has had several surgeries since then. She did not provide any other evidence of hers or [D.K.B.'s] current situation.

R. at 196-97 (citations omitted).

Prevost requested modification of his child support on March 17, 2010 based on his financial situation. R. at 19. Prior to that request, he had been paying child support based on the child support calculations in effect prior to his accident and disability. See R. at 195. By March 25, 2010, CSSD had begun evaluating Prevost's request and asked both Prevost and Barney to provide additional information. R. at 20-21. CSSD initially denied Prevost's request on the basis that he failed to provide CSSD with certain additional information regarding his medical condition and employment. R. at 64, 195. Prevost appealed the denial and the matter was referred to the ALJ. R. at 9, 67.

The ALJ held hearings on the matter on March 15, 2011, April 13, 2011, and May 25, 2011. See Trans. of Appeal Proceedings 1. In those hearings,

Prevost was represented by counsel. Barney represented herself in the first and second hearings, but obtained counsel for the third hearing. See Tr. 1 (Vol. 1A), 1 (Vol. 1B), 1 (Vol. 1C).

At the end of the hearings and after receiving all of the evidence, the ALJ found that Prevost had met his burden to show that CSSD improperly denied his motion for modification. R. at 199. Moreover, the ALJ found that CSSD, after receiving further information from Prevost, had correctly calculated Prevost's child support at $510 per month, effective April 1, 2010. The ALJ further concluded that the amounts Prevost received through the personal injury settlements were not income for the purposes of child support calculation. R. at 199. The ALJ finally found that Prevost was entitled to a credit against his child support obligation because Barney was receiving $851 from the CIB program, which was $341 more than Prevost owed under the new child support calculations. R. at 200. The Commissioner of Revenue adopted the ALJ's findings on August 11, 2011. R. at 201.

## Procedural History

Barney filed her Notice of Appeal on September 2, 2011 seeking review of the final child support order. The agency record and transcripts of the proceedings were filed with the Court on October 19, 2011. Barney filed her appeal brief on November 22, 2011. The State filed its brief on January 20, 2012. Barney replied on March 19, 2012. The Court held oral argument on July 30, 2012.

## Standard of Review

AS 25.27.220 generally sets the standard for reviewing an administrative determination of child support. AS 25.27.220(b) states that the Court may only examine three questions: "(1) whether the agency has proceeded without or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion." AS 25.27.220(b). Abuse of discretion means that "the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." Id.

However, "whether an item qualifies as income for the purposes of Rule 90.3 is a question of law . . ." Robinson v. Robinson, 961 P.2d 1000, 1002 (Alaska 1998). Alaska courts adopt "the rule that 'is most persuasive in light of precedent, reason and policy" when deciding questions of law. Id. (quoting Nass v. Seaton, 904 P.2d 412, 414 (Alaska 1995)).

## Discussion

Barney argues four points on appeal. First, she asserts that the ALJ should have included Prevost's 2010 personal injury settlement in the new child support calculations. Barney's Br. at 3. Second, she argues that the ALJ improperly required Barney, and not Prevost, to demonstrate which part of the personal injury settlement should be part of Prevost's income. Id. Third, Barney argues that the ALJ also failed to require Prevost to supplement the information in the record regarding which part of the settlement reflected lost 2010 income.

Id. Finally, Barney argues that the ALJ gave Barney credits to his child support obligation that he did not deserve. Id. at 3-4. Barney argues that each of these failures represents the ALJ's failure to give her a fair hearing or an abuse of the ALJ's discretion. Id.

The State, however, argues that there is essentially one issue in this appeal: whether the Commissioner of Revenue erred in excluding Prevost's 2010 settlement from the child support calculation. State's Br. at 1. Barney disagrees with the State's characterization that this case has only one issue. Barney's Reply at 1-2.

I. The ALJ did not need to include the 2010 personal injury settlement because the settlement was insufficient to satisfy Prevost's lost past wages.

Based on the parties' arguments and the presentations during oral argument, whether Prevost's 2010 personal injury settlement should be considered income for Rule 90.3 purposes requires a two-step inquiry. First the Court must decide if it is appropriate to include a personal injury settlement in child support calculations as income under Rule 90.3, and if so, whether the entire settlement or only specific pieces of the settlement are income. Second, assuming a personal injury settlement, or part thereof, can be considered income, the Court must determine whether the ALJ should have included any of Prevost's 2010 personal injury settlement in determining his income.

A. Only the portions of a lump-sum personal injury settlement intended to replace lost wages and lost future wages for the period of time following the effective date of the modification order are income under Rule 90.3.

Under Rule 90.3(a), "[a]djusted annual income as used in [Rule 90.3] means the parent's total income from all sources . . ." Rule 90.3(a)(1). This language, although broad, does not define the term "income." Without a specific statutory definition, the Court turns to the commentary to Rule 90.3 because our supreme court has specifically noted that although "[t]he commentary to Civil Rule 90.3 has not been officially adopted . . . it can provide useful guidance in applying the rule." Miller v. Clough, 165 P.3d 594, 600, n.10 (Alaska 2007).

Section III of the commentary to Rule 90.3 specifically discusses how to determine income. The commentary indicates that the language of Rule 90.3 "should be interpreted broadly to include benefits which would have been available for support if the family had remained intact." Rule 90.3, cmt. III.A. The commentary then provides a non-exhaustive list of twenty-eight different items that should be considered income. Id. This list includes, among other things, salaries and wages, workers' compensation, unemployment compensation, and disability benefits. Id. at III.A.1, III.A.11, III.A.12, III.A.25. However, the commentary also notes that "[c]hild support is calculated as a certain percentage of the income which will be earned *when the support is to be paid.*" Rule 90.3, cmt. III.E.

In addition to the commentary, the supreme court's prior cases provide guidance regarding what should be considered "income" for Rule 90.3 purposes.

For example, in Brotherton v. State, 201 P.3d 1206 (Alaska 2009), the supreme court held that the Rule 90.3 definition of income and the IRS definition of income are not the same. Brotherton, 201 P.3d at 1212. Therefore, whether the IRS would treat Prevost's settlement as income is irrelevant for Rule 90.3 purposes.

Our supreme court has also examined whether one-time payments, such as gifts and inheritances, should be included in income for Rule 90.3. In Nass v. Seaton, 904 P.2d 412 (Alaska 1995), the court held that gifts should not be considered income after reviewing Rule 90.3, the commentary to Rule 90.3, out-of-state case law, and determining that including gifts could "blur[ ] the easily administered and well-established historical distinctions between gifts and earned income." Nass, 904 P.2d at 416. The supreme court has also recognized that including one-time gifts or inheritances "would unfairly inflate [child support] beyond the obligor's reliable future resources." Crayton v. Crayton, 944 P.2d 487, 490 (Alaska 1997) (citing Nass, 904 P.2d at 415-16 and n.5). Similarly, the supreme court has held that "[i]n defining income, Rule 90.3 generally contemplates an income stream, rather than non-recurring payments. For instance, it excludes one-time gifts and inheritances, but includes recurring payments such as salary, royalties, and dividends." Brotherton, 201 P.3d at 1213, n.25.

Although Rule 90.3's commentary supports the broad definition of income Barney favors, our supreme court has clearly chosen to place some limitations on how expansive the definition of "income" should be. Brotherton recognizes

that Rule 90.3 appears focused on income streams and not one-time payments. Nass demonstrates a desire to keep child support calculations easy to apply. Crayton indicates that one-time payments may be problematic because they are difficult to extrapolate into the future.

Based on the case law cited above, the Court finds that including the entire amount of a lump sum personal injury settlement as income under Rule 90.3 may be inappropriate where only part of the settlement is intended to compensate the injured party for lost wages that would have been earned after the date of modification. In so finding, the Court follows the supreme court's interpretation of Rule 90.3 from Brotherton that income generally refers to an income-stream and not lump sum payments. A personal injury settlement that is paid as a lump sum is not, in and of itself, an income stream. It may produce an income stream through prudent investment, but the issue of interest income is not present in this case.

Moreover, excluding at least some of a lump-sum personal injury settlement respects the supreme court's concern in Crayton that including a one-time payment is not a reliable predictor of the obligor parent's future resources. This concern echoes Rule 90.3's commentary where it states that Rule 90.3 income should be calculated based on the income that will be earned when the support is to be paid. See Rule 90.3, cmt. III.E. Thus, excluding part of a previously paid lump-sum personal injury settlement conforms with both Crayton and the commentary.

The Court's distinction between those parts of a settlement meant to replace earnings, however, also recognizes Brotherton's language favoring the inclusion of income streams in child support calculations. It would be inconsistent to say that income generally refers to recurring payments, such as wages, and then hold that the parts of a lump sum settlement intended to replace lost wages cannot be included in the child support calculations simply because they were paid as a lump sum.

This approach is similar to that of the California Court of Appeals in In re Marriage of Heiner, 136 Cal. App. 4th 1514 (Cal. Ct. App. 2006) where the court held that although the entirety of a lump-sum personal injury settlement may not be income for the purposes of calculating child support, the portion of the settlement intended as "compensation for loss of income and loss of earning capacity may be considered by the court . . ." In re Marriage of Heiner, 136 Cal. App. 4th 1514, 1523-24 (Cal. Ct. App. 2006). The applicable statute in Heiner defined "income" as "'income from whatever source derived . . . and includes . . . commissions, salaries, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, social security benefits . . ." Cal. Fam. Code § 4058. The Heiner Court looked to prior California case law providing that "the generally accepted definition of income . . . is 'the gain or recurrent benefit that is derived from labor, business, or property or from any

other investment of capital.'" Id. at 1521 (citing In re Marriage of Scheppers, 86 Cal. App. 4th 646, 650 (Cal. Ct. App. 2001)).

In analyzing the specific facts of the case, the Heiner Court held that the settlement at issue could not be considered income for child support purposes *in its entirety* because the obligor father had five components of damages in his personal injury case and not all of these would qualify as "a gain or recurrent benefit that is derived from labor, business, property or investment of capital." Id. at 1522. However, the Heiner Court also held that personal injury payments made to compensate the victim for lost income and lost earning capacity could be considered because these types of damages are a substitute for traditional types of income. Id. at 1524.

Also similar is the Court of Appeals of Virginia's holding in Whitaker v. Colbert, 442 S.E.2d 429 (Va. Ct. App. 1994), which indicated that the portions of a personal injury settlement that are income-related, as opposed to capital recoupment, may be considered in determining child support. Whitaker, 442 S.E.2d at 430-31 (Va. Ct, App. 1994). The Virginia statute defined "gross income" as "income from all sources [including] income from salaries, wages, commissions, royalties, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits . . . workers' compensation benefits, spousal support, rental income, gifts, prizes or awards." Va. Code Ann. § 20-108.2. The court noted that the trial court had found that the settlement was structured such that it was not possible to apportion the award

between different types of recovery, some of which could be income-based and some of which were capital recoupment, and that the inclusion of any portion of the settlement in the child support calculation would be purely speculative. Whitaker, 442 S.E.2d at 431. Looking to that ambiguity, the Whitaker Court held that the petitioner had failed to demonstrate that the settlement was income attributable to the non-custodial parent. Id.

B. The out-of-state cases Barney cites are inapplicable because they adopt standards that are inconsistent with the Supreme Court of Alaska's decision.

Barney attempts to rely on a number of out-of-state cases which are not persuasive in light of our supreme court's prior decisions. For example, Barney cites to Stuart v. Stuart, 260 S.W.3d 740 (Ark. Ct. App. 2007), where the Court of Appeals of Arkansas held that money received from a class action settlement should be included in child support calculations. Stuart, 260 S.W.3d at 743. The court noted that Arkansas defined income for child support as "any form of payment . . . due to an individual, regardless of source . . ." Id. (citing In re: Administrative Order No. 10: Ark. Child Support Guidelines, 347 Ark. Appx. 1064, 1067 (2002)). Using this broad language, the court found that a settlement was income because it was "a payment from any source."[2] Slaughter v. Slaughter, 867 A.2d 976 (D.C. 2005) uses a similar approach. Slaughter, 867 A.2d at 977.

[2] Despite its holding, the court in Stuart found that the specific class action settlement in that case should not be part of the child support calculation because the amount the plaintiff would receive and when they would receive it had not yet been determined. Thus, it was too speculative to include in the child support calculation because "the trial court cannot set a sum-certain dollar amount . . ." Stuart, 260 S.W.3d at 742-43.

Our supreme court, however, has never adopted such a broad understanding of income under Rule 90.3.

Barney also relies upon the Court of Appeals of Wisconsin's decision in Sommer v. Sommer, 323 N.W.2d 144 (Wis. Ct. App. 1982). There, the court held that proceeds from a personal injury suit could be considered in determining child support. Sommer, 323 N.W.2d at 146-47. The court noted that the purpose of child support payments was "to maintain children, insofar as possible, at the economic level they would have enjoyed had there been no divorce." Id. at 146. The court concluded that "[h]ad Mr. Sommer not been divorced, it is expected that any improvement in his economic status achieved through a personal injury recovery would have accrued, at least in part, to his family." Id. The court also noted that Wisconsin law required the court to "'take into consideration each parent's earning capacity and *total economic circumstances* . . ." when modifying child support." Id. at 147 (citing Wis. Stat. Ann. § 767.32(1) (emphasis as in Sommer). Given these policy concerns and the broad language of the statute, the court determined that it was appropriate to include the personal injury settlement amount in determine whether to modify child support. Id.

Our supreme court, however, has not adopted a rule that any payment that would have been available for the family had divorce not occurred should be available for child support. In fact, the decisions in Brotherton and Nass clearly demonstrate that Alaska law does not attribute income to a parent for child support simply because that income would have been available to support the

family had divorce not occurred. The case law Barney cites is not persuasive in light of our supreme court's prior decisions.[3]

In opposing Barney, the State argues that none of Prevost's personal injury settlement should be included in his income because the modification was effective on April 1, 2010 and Prevost received the settlement proceeds in March 2010. State's Br. at 16. The State cites to the commentary, which states that "[c]hild support is calculated as a certain percentage of the income which will be earned when the support is to be paid." Rule 90.3, cmt. III.E. This argument is unpersuasive when looking at compensation for wages that would have been earned after the date of the modification. That money is intended to compensate the plaintiff for income *he would have earned during the time period the modification covered*. Thus, settlement payments for money that would have been earned after the date of the modification is money that Prevost would have earned in the future that has been discounted to present value. The fact that the money is paid prior to when it would have been earned does not change its fundamental character.

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[3] Barney cites several other cases that either do not support her position or are inapplicable here. In Christian v. Christian, 5 A.D.3d 765 (N.Y. App. Div. 2004), part of the basis for upholding the inclusion of the personal injury settlement was that "the husband acknowledged that a portion of such award was to compensate him for future wages . . ." Thus, Christian would appear to support the Court's conclusions in this Opinion. Mehne v. Hess, 533 N.W.2d 482 (Neb. Ct. App. 1996) is similarly supportive. Mehne, 533 N.W.2d at 487-88. In Darby v. Darby, 686 A.2d 1346 (Pa. Super. Ct. 1996), the Superior Court of Pennsylvania restated earlier case law providing that "[i]t would, indeed, call into question the sanity of the law if this court were to rule that the tort award in [sic] available to pay debts to 'the butcher, the baker and the candlestick maker' but not to appellants child for support." Darby, 686 A.2d at 1349 (citing Butler v. Butler, 488 A.2d 1141, 1143 (Pa. Super. Ct. 1985)). However, our supreme court has clearly chosen not to adopt similar rationale because our supreme court has already excluded one-time gifts and inheritances from income under Rule 90.3.

Therefore, the Court holds that a lump sum personal injury settlement may be considered in calculating income under Rule 90.3, but only to the extent that the settlement is intended to replace lost earnings that the obligor would have received after the new support award would become effective.

II. The Court finds that none of Prevost's settlement was for lost wages after April 1, 2010 because the income-replacement payments Prevost received failed to compensate him for his lost wages from the date of injury to April 1, 2010.

Based on the prior analysis, the relevant question becomes whether part of Prevost's 2010 settlement was intended to compensate him for lost wages or earnings that he would have received after April 1, 2010. This is because Prevost filed for a modification to his child support in March 2010 and, under Rule 90.3(h)(2), modifications of child support cannot be made retroactively. Moreover, "income" must be calculated based on the money that will be earned during the time period covered by the child support award. Therefore, the ALJ only has authority to modify child support on a going-forward basis beginning on April 1, 2010 because Prevost filed for a modification on March 17, 2010.

The State asserts that the fact that Prevost's entire settlement amount would be insufficient to compensate him for his lost wages prior to April 1, 2010 is dispositive of the issue here. State's Br. at 25. Essentially, the State argues for a first-in, first-out approach where unallocated settlement proceeds are allocated first to losses already incurred before being applied to future losses. Barney, however, argues that it is necessary to determine exactly how much of the settlement was allocated to each particular type of damages. See Barney's Br. at

12-14. Further, Barney asks this Court to adopt a rule regarding the burden of proof in the underlying CSSD proceeding that would require Prevost to demonstrate which portion of his recovery was not for lost future wages.

The State's argument is more persuasive given the facts of this case. The money paid in an unallocated lump-sum personal injury settlement should be applied to any known past lost wages on which the obligor parent has already paid child support before being allocated to other types of damages.

This rule is one of fundamental fairness. An injured plaintiff has a variety of costs and losses for which he may not be compensated until some time in the future. During the interim period, that individual must expend other resources to support himself and then hope to recover the amounts spent through a future proceeding. In requiring unallocated settlement proceeds to be considered on a first-in, first-out basis, the Court recognizes the economic realities facing a person in the appellant's position. See Adrian v. Adrian, 838 P.2d 808, 811 (Alaska 1992) (citing Ogard v. Ogard, 808 P.2d 815, 818-19 (Alaska 1991)). A first-in, first-out approach is also a more easily applied rule than one which would require significant testimony regarding the purpose of the award and discussions of how future earning capacity was evaluated. See Nass, 904 P.2d at 416 (determining that including gifts in child support could "blur[ ] the *easily administered* and well-established historical distinctions between gifts and earned income." (emphasis added)).

Moreover, the rule that the Court applies today in this case also prevents an injured parent from gaining a windfall at the expense of his child because the amount of the reduction of the settlement amount is limited to the amount of income on which the obligor parent has already paid child support. Thus, the child is left in the same position he would have been in regardless of the non-custodial parent's injury.

Based on the record, the Court finds that the ALJ did not need to include any of Prevost's 2010 settlement in calculating child support. At the time of his accident and through the date of CSSD's modification, Prevost paid child support on an annual income of $67,447.56. R. at 15. Multiplying this annual income from the date Prevost became completely disabled until the date of the modification, Prevost paid child support on approximately $135,000 of income. State's Br. at 6, n.5. This is income that Prevost did not actually receive because of his injury and resulting disability.

To replace these earnings, Prevost received SSI payments and two personal injury settlements. R. at 196.[4] Prevost's two personal injury settlements equaled $82,938.48. Id. The ALJ also found that the Social Security Administration awarded Prevost disability payments of $1591 per month and CIB

[4] Barney asserted in oral argument that looking only to these payments did not take into account the fact that Prevost liquidated his retirement account. However, in measuring whether the obligor parent's settlements exceed the amount of lost wages, the Court believes that the better practice is to look only to those payments from third-parties intended to compensate the injured parent for his injuries. Thus, Prevost's liquidation of his retirement account would not be included in this analysis. Whether Barney could have separately applied for a modification of child support based on Prevost's liquidation of his retirement account is not an issue in this case.

of $851 per month with both awards beginning in September 2008.[5] Id. Based on these numbers, Prevost would have received $30,229 in disability payments directly and Barney would have received $16,169 in CIB payments attributable to Prevost for the period between September 2008 and April 1, 2010.[6] Thus, Prevost had another $46,398 in money attributable to lost past income. Combined then, Prevost received $129,336.48, which is less than his total lost wages for the period of March 2008 through April 1, 2010. Therefore, none of the 2010 settlement amount would be considered lost future wages accruing after April 1, 2010 using a first-in, first-out methodology because the settlement monies and other replacement income were insufficient to cover the amount Prevost lost between the date of his disability and April 1, 2010 and Prevost had already paid child support on those lost past wages.

III. The ALJ did not improperly award Prevost credits because none of the settlement amounts should have been included as income under Rule 90.3.

Barney argues that "[t]he agency's decision did not take into account whether Paul's payments that he made with the settlement proceeds were made with money that should have been determined replacement income and hence available for child support." Barney's Br. at 14. However, none of the settlement

[5] As Pacana v. State, 941 P.2d 1263 (Alaska 1997), reaffirmed, CIB payments are considered "income" to the non-custodial parent. Pacana, 941 P.2d at 1265 (citing Miller v. Miller, 890 P.2d 574 (Alaska 1995)). The Court counts the CIB payments here as part of the amounts to be included as making up for Prevost's lost wages because Barney would not have received CIB but for Prevost's disability and inability to work.

[6] September 2008 through March 2010 is 19 months. 19 * 1591 = 30,229. 19 * 851 = 16,169.

proceeds should have been included as income for Rule 90.3, which means that the ALJ did not give Prevost any improper credits.

## Conclusion

A lump sum personal injury settlement should be included in determining income under Rule 90.3 to the extent that the settlement is intended to replace income that would have been earned after the effective date of the modification. Where the settlement proceeds have not been allocated among various claims for damages, the trier of fact should use a first-in, first-out methodology to determine if any of the proceeds should be included in calculating child support. Here, Prevost's lost wages prior to April 1, 2010, the effective date of the modification, were greater than the amount of replacement income he received. Therefore, the ALJ's rejection of the settlement proceeds as income was appropriate and the Court affirms the ALJ's decision.

DATED at Anchorage, Alaska, this 7th day of August 2012.

Mark Rindner

MARK RINDNER
Superior Court Judge

***I certify that on August*** 8-7-12 ***2012 a copy was mailed to:***
G. Eschbacher
AGO - Gustafson

*Administrative Assistant*