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FILED

FEB - 4 2004

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CHRISTOPHER SANDRU,

Petitioner,

vs.

ROCHDALE INSURANCE COMPANY,

Respondent/Insurer.

WCC No. 2003-0908

**STATEMENT OF
UNCONTROVERTED FACTS**

PURSUANT to ARM 24.5.329, and in support of its *Motion for Summary Judgment*, Respondent, Rochdale Insurance Company, submits the following *Statement of Uncontroverted Facts*.

STATEMENT OF UNCONTROVERTED FACTS

1. On April 1, 2003, Petitioner was hired as a bartender for Hellgate Elks lodge 383 (The Lodge) in Missoula, Montana. *First Report of Injury and Occupational Disease*, July 1, 2003.
2. On June 21, 2003, while working at The Lodge, Petitioner suffered an injury to his Achilles tendon when a catering cart impacted the posterior portion of his ankle. *Petition for Hearing and Request for Emergency Trial*, October 24, 2003, ¶ 1.
3. On the date of Petitioner's injury The Lodge was enrolled in Compensation Plan 2, of the Montana Workers' Compensation Act, with Respondent as its workers' compensation insurer. *Petition for Hearing and Request for Emergency Trial*, October 24, 2003, ¶ 2.
4. On July 1, 2003, Petitioner filed a claim for workers' compensation benefits based upon his injury of June 21, 2003. *First Report of Injury and Occupational Disease*, July 1, 2003.

5. On July 8, 2003, Respondent accepted Petitioner's claim and began paying medical benefits and temporary total disability benefits. *Letter from S. Scholl to C. Sandru*, July 8, 2003.
6. On June 26, 2003, pursuant to a request for information by Respondent, Linda Stamos, The Lodge's manager, sent a letter to Respondent stating that Petitioner averaged \$300.00 per week in tip income while employed by The Lodge. *Letter L. Stamos to S. Scholl*, July 26, 2003.
7. In calculating Petitioner's temporary total disability benefits, Respondent relied upon Petitioner's pay-stubs for the four weeks prior to his injury to determine Petitioner's time of injury wage. *Letter from S. Scholl to C. Sandru*, July 8, 2003; *Payroll Check Information Check # 5410*; *Payroll Check Information Check # 5384*; *Payroll Check Information Check # 5362*; *Payroll Check Information Check # 5334*.
8. Based on those pay stubs Respondent calculated Petitioner's time of injury wage as \$285.37 per week and multiplied that figure by 2/3 to determine Petitioner's temporary total disability benefit of \$190.25 per week. *Letter from S. Scholl to C. Sandru*, July 8, 2003.
9. Since Petitioner's injury Respondent has paid Petitioner his temporary total disability benefits at a rate of \$190.25 per week. *Petition for Hearing and Request for Emergency Trial*, October 24, 2003, p. 2.
10. Petitioner alleges that during his employment with The Lodge he earned \$300.00 per week in tips. *Petition for Hearing and Request for Emergency Trial*, October 24, 2003, ¶ 3.
11. The *First Report of Injury and Occupational Disease*, did not include Petitioner's earnings for the four pay periods preceding his injury but it did include the Petitioner's hourly wage as well as the Petitioner's hand written notation indicating that Petitioner's weekly tip income was \$300.00 per week. *First Report of Injury and Occupational Disease*, July 1, 2003; *Deposition Christopher Sandru*, January 16, 2003, 44:10-16.
12. When Petitioner was hired he received a copy of The Lodge's written policy regarding tip income. *Payroll Policy Elk's Club*, February 4, 2003; *Deposition Christopher Sandru*, January 16, 2003, 29:20-24, 30:1-12.
13. The written tip policy stated that "[i]t is a good idea for each employee to keep a personal diary of tips actually brought home at the end of each shift." *Payroll Policy Elk's Club*, February 4, 2003.
14. During his employment with The Lodge, Petitioner did not keep any keep any record or log documenting his tip income. *Deposition Christopher Sandru*, January 16, 2003, 18:10-12; *Deposition Christopher Sandru*, December 10, 2003, 27:5-11; 29:15-17; 30:3-5.
15. During his employment with The Lodge, and prior to his injury of June 21, 2003, Petitioner did not document or report his tip income to The Lodge by any means other than casual conversation. *Deposition Christopher Sandru*, January 16, 2003, 44:6-24.
16. During his employment with The Lodge, Petitioner periodically received pay stubs which detailed his hours worked, wage rate, current net and gross earnings, year to date net and gross earnings, and current and year to date tip earnings. *Payroll Check Information Check # 5410*; *Payroll Check Information Check # 5384*; *Payroll Check Information Check # 5362*; *Payroll Check Information Check # 5334*; *Payroll Check Information Check # 5439*.

17. The pay stubs also indicated that Social security, Medicare, and federal and state tax withholdings were subtracted from all earnings, including any tip earnings appearing on the stubs. *Id.*

18. From May 1, 2003, to June 30, 2003, Petitioner received five such pay stubs. *Id.*

19. Petitioner's final pay stub, for pay period ending June 30, 2003, indicated year to date tip earnings of \$98.06. *Payroll Check Information Check # 5439.*

20. All of Petitioner's earlier pay stubs indicated year to date tip earnings of \$9.40. *Payroll Check Information Check # 5410; Payroll Check Information Check # 5384; Payroll Check Information Check # 5362; Payroll Check Information Check # 5334.*

21. At no time did Petitioner notify The Lodge that his pay stubs did not accurately reflect the amount of tip income he earned. *Deposition Christopher Sandru, January 16, 2003, 25:25; 26:1-3; 27:10-22.*

22. On October 24, 2003, Petitioner initiated this action alleging that Respondent had improperly failed to include Petitioner's alleged \$300.00 per week tip income in calculating Petitioner's time of injury wage for the purpose of determining Petitioner's weekly temporary total disability benefits. *Petition for Hearing and Request for Emergency Trial, October 24, 2003, ¶ 3.*

Dated this 3rd day of February, 2004.

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By: 

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