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**FILED**

**MAR 22 2004**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**CHRISTOPHER SANDRU,**  
**Petitioner,**

**WCC NO. 2003-0908**

vs.

**ROCHDALE INSURANCE CO.**  
**Respondent/Insurer.**

**PETITIONER'S STATEMENT OF  
SPECIFIC CONTROVERTED FACTS  
THAT ESTABLISH A GENUINE  
ISSUE OF MATERIAL FACTS  
PRECLUDING SUMMARY JUDGMENT**

In response to the Respondent's "Statement of Uncontroverted Facts," the Petitioner states as follows:

**Statement of Specific Controverted Facts that Establish a Genuine  
Issue of Material Facts Precluding Summary Judgement**

1. Although the First Report of Injury that Petitioner (hereinafter, "Chris") signed on June 30, 2003, may indicate a date of hire on "4/1/03," Chris never agreed in the record of this case that he provided that information on that form. The First Report of Injury does not provide any authority in this case for a hire date of "April 1, 2003;" which date is now alleged by the Insurer to have been furnished by Chris.
2. As to Insurer's Statement #2 listed by the insurer, Chris' Petition for Hearing in this case does not contain the words "impacted" or "posterior," and thus, similar to #1, the Statement is not an "Uncontroverted Fact" as asserted by the Insurer.
3. Chris agrees to Insurer's Statement #3, as to the Insurer's role in this case as insurer of The Elks Lodge, Chris' employer at time of injury, although the Insurer ignores the wage information consistently provided by the employer to the Insurer. See Chris' First Report of Injury signed by himself and the Employer's Manager. See Elks letter dated 6/26/03.

4. As to Insurer's Statement #4, the First Report of Injury was signed by Chris on June 30, 2003, and not "July 1, 2003," as asserted by the insurer as the date Chris "filed a claim for workers' compensation benefits," therefore, Insurer's Statement #4 is controverted.

5. Chris agrees to Insurer's Statement #5, to the effect that the insurer began payment of TTD benefits on or about 7/8/03.

6. As to Insurer's Statement #6, there is no record of a "request" by the insurer to Linda Stamos, The Elks Lodge manager, in the referenced letter, which correct date is June 26, 2003, and not "July 26, 2003" as asserted by the Insurer; this statement is controverted.

7. As to Insurer's Statement #7, Chris' paychecks were both biweekly and weekly, and the Insurer is incorrect in its statement that the four pay stubs covered four "weeks." However, as of July 8, 2003, when the Insurer's claims person Sandy Scholl wrote to Chris, Ms. Scholl was then fully aware of the June 26, 2003, letter (not July 26, 2003 as asserted by the Insurer) from Linda Stamos, that Chris earned certain wages "...and he averaged \$300 per week in tips." Thus, it is unknown why Ms. Scholl would then elect to ignore the tips for wage determination purposes. This Insurer's Statement is controverted.

8. As to Insurer's Statement #8, Chris' payroll checks show the following information.

|    |             |                   |          |
|----|-------------|-------------------|----------|
| a. | Check #5334 | 5/01/03 – 5/15/03 | \$665.09 |
| b. | Check #5362 | 5/16/03 – 5/21/03 | \$187.98 |
| c. | Check #5384 | 5/22/03 – 5/31/03 | \$399.01 |
| d. | Check #5410 | 6/01/03 – 6/15/03 | \$544.57 |
| e. | Check #5435 | 6/16/03 – 6/30/03 | \$485.08 |

The first four pay periods, covering 6 weeks, total \$1,796.65, less overtime pay (29.12 hours x \$3.25 = \$94.64), divided by 6, for an Average Weekly Wage of \$283.67 (2/3) = \$189.25.

However, the last check #5435, for one week (6/16/-6/21) includes "Back pay," and should be included, as more representative of the claimant's true earnings for this employer, as the last best earnings record. If the last check is included, then the total over 7 weeks is \$1,796.65, plus \$485.08 less OT pay of 9.03 hrs x \$3.75 (\$33.86) or an adjusted total of \$2,247.87 divided by 7, or an AWW of  $\$321.12 \div 2/3 = \underline{\$214.08/\text{week}}$ .

Therefore, without including the \$300 per week average tip income earned by Chris, the insurer's computation of TTD benefits at \$190.25 per week is below the true benefits payable at \$214.08/week. The Scholl letter to Chris on July 8, 2003, provides inadequate wage compensation to Chris, and Insurer's Statement #8 is controverted.

9. As to Insurer Statement #9, the same is controverted, because the insurer did not pay the first five (5) days of TTD after injury, and it is simply incorrect for the insurer to state that it has paid \$190.25 TTD benefits to Chris "(S)ince Petitioner's injury."

10. As to Insurer Statement #10, the same is controverted, because Chris never alleged in his Petition that "... he earned \$300.00 per week in tips," although the employer did make this statement in the First Report of Injury. Chris stated in his Petition for Hearing that he "averaged" \$300.00 per week in tips. Petition for Hearing, 10/24/03, Para. 3.

11. As to Insurer's Statement #11, Chris never indicated in the record that he made "hand written notation" in the First Report of Injury he signed 6/30/03. Contrary to the insurer's statement, in his Deposition of 1/16/04, at p.44, ll. 10-16, Chris stated in fact (Note: the Insurer's reference to the deposition date as "January 16, 2003" is in error):

Q: Is it your testimony that those casual conversations were the only times you reported your tip income:

A: No, because I reported it on my first report of injury.

Q: Your first report of injury?

A: Correct.

Here, there is no proof, or basis to find, that Chris made any "hand written notation," in the First Report of Injury. The words "hand written notation" are in the minds of the insurer's team, and not in this record. Chris' quoted testimony only indicates that he "reported" his tip income "on (his) first report of injury." It is a stretch of the truth by the Insurer to use this testimony to prove that Chris "hand wrote" the "Tips \$300/week" language on the First Report of Injury, by the simple statement by Chris that the tips were "on" the First Report of Injury.

This Insurer's Statement is indicative of how the Insurer attempts to stretch the truth to mean what the Insurer says it means, when such attempt is false and untrue.

12. As to Insurer's Statement #12, Chris agrees that he "saw" the Payroll Policy Elk's Club "when I started," Depo. C. Sandru, January 16, 2004 (not 2003), 30:8-9. Nowhere does Chris state for the record that when he was hired "he received a copy" of the policy, and Insurer's Statement #12 to that effect, is controverted by the facts:

Q: When did you see that?

A: I saw it when I started and Mr. Schuyler showed it to me before.

Again, nowhere in the record does Chris testify that he "received a copy" on hiring, in the Insurer's Statement #12, which is clearly erroneous, as follows:

12. When the Petitioner was hired he received a copy of The Lodge's written policy regarding tip income. (Citing Depo. C. Sandru, January 16, 200(3) Sic, 29:20-24, 30:1-12).

13. As to Insurer's Statement #13, referring to a portion of the employer's tip policy, said Statement is controverted because the entire policy speaks for itself. In addition to the quoted language in the Statement, the policy also stated that:

"For employees who make at least \$20.00 per month in tips ... we will be withholding taxes on \$1.00 per hour from your paycheck..."

The above language from the employer is confusing, to say the least. Suffice it to say, that the employer failed to withhold \$1.00 per hour from Chris' paycheck. Therefore, by omission of much of the "tip policy" in Insurer's Statement #13, the Statement stands controverted by the entire policy. For example, while the employer suggests the employee "Keep a personal diary of tips ...," the employer requires itself to withhold "taxes on \$1.00 per hour from your paycheck," which language is confusing, but indicates the employer's intent to take care of the tax consequences from tip income.

Note that this tip policy is self-serving to the employer, because the less tip income reported by the parties on paychecks, the less FICA is matched and paid by the employer to the government.

14. As to Insurer's Statement #14, Chris did not keep a daily record of tip income, but such a record was never required by the employer. However, clearly the Elks Lodge knew about the amount of tips paid weekly to Chris, and the employer reported those tips (average \$300/week) to the Insurer. Chris further reported tip income to the manager by casual conversation, and by filing this Petition and prior thereto, in response to questions after July 1, 2003, by Sandy Scholl, and by filing of Chris' tax return for 2003, copied to the Insurer's counsel.

15. As to Insurer's Statement #15, the Petitioner documented and reported his tip income to the employer, as indicated in #14 above. Further, Chris is aware of credit card charges for tips he received primarily at the conclusion of events such as weddings and banquets. As indicated in Chris' Affidavit filed with this document, the employer knew of all credit card charge slips for bartender tips, because the employer processed each slip. Yet the employer here, The Elk's Club, has failed to provide many of these very slips in discovery requests.

For example, the Elks has provided no documentation for the \$200.00 tip, paid to Chris Sandru by Krista & Guy Kempthorne at their reception on June 14, 2003, per Chris' Affidavit. The Elks only provided what it described as every credit card slip charged for tips in favor of Chris Sandru, but these documents fail to include this event tip, and other such tips. Upon its denial of knowledge of its employees' reporting tips, the Elks' credibility is seriously impeached. Insurer's Statement #15 is controverted.

16. As to Insurer's Statement #16, Chris received the five (5) payroll checks noted, but the Elks Lodge also knew that Chris made more tips than was reported by the employer on the checks (such as the \$200 Kempthorne tip). Chris reasonably believed that the employer itself was accounting for the unreported tips earned by Chris, by the confusing language in the tip policy ("...\$1.00 per hour (withheld) from your paycheck").

Chris reasonably fulfilled the statutory requirement of Sec. 39-71-701(3), MCA, i.e., to essentially document tips received by the employee to the employer for tax purposes, by the signing of the First Report of Injury, and the other conversation and means of reporting to the employer, including his 2003 Income tax returns sent to the Insurer, all as detailed more fully in Chris' Affidavit filed herewith.

17. As to Insurer's Statement #17, Chris' paychecks indicated certain "Soc. Sec." etc., deductions, but the employer benefited by lowering the tip amount, because the employer had to pay more FICA contributions if the tip amount was correctly stated with a higher figure.

18. As to Insurer's Statement #18, Chris objects to this statement (that there were 5 pay stubs) as being redundant. Yes, there were 5 pay "stubs," all as previously noted.

19. As to Insurer's Statement #19, that Chris' last check showed total tip earnings for 2003 of \$98.06, such information is ludicrous, incorrect, false, and flies in the face of truth and reality. Chris received \$200.00 alone, in one event on one night, from the newly married Kempthornes on 6/14/03; Chris received an average of \$300/week tips, all as reported by the employer, to the insurer. See Chris' Affidavit filed herewith.

It is unknown how the \$98.06 was computed by the employer, but it is false information. This Insurer's Statement #19 is controverted.

20. The Insurer's Statement #20 is likewise controverted, for the same reasons supplied in #19 above.

21. As to Insurer's Statement #21, Chris erroneously trusted his employer to report tips in a proper manner, per its "tip policy." The Elks always knew that Chris received more tips than shown by the employer on his pay stubs. The Elks and its insurer are estopped from claiming lack of knowledge about the tips paid to Chris, which admittedly averaged \$300/week.

Further, #21 is controverted because there is no statutory requirement or duty upon Chris to tell his employer how to make out his paycheck. All that is required of Chris is that he report his tips to his employer, which he did, and which the employer then reported to the insurer, by Linda Stamos' letter dated June 26, 2003.

22. As to Insurer's Statement #22, the same is controverted, as the "\$300.00 per week tip income" is not merely "alleged" by Chris, but is admitted by the employer. Further, as set forth in Chris' Affidavit, he made many requests of the Insurer to try to have the tip income averaging \$300/week included in wages for the purpose of determination of wage loss benefits.

In fact, counsel for Chris wrote to the Insurer on August 12, 2003, requesting information concerning wage benefits computation, and how Chris' benefits were "figured." When the requested information was not received or referenced in 8/20/03 correspondence from the Insurer, Chris' attorney again wrote to the Insurer, as follows:

I requested information on the wage benefits calculation by the insurer, by letter dated 8/12/03, and you have not responded. Please explain;...

To date, the Insurer has never detailed exactly how Chris' wage loss benefits were computed, although the correct benefits were due prior to July 1, 2003, and now nearly a year has elapsed. The Insurer has unreasonably denied basic information to Chris. Also, the Insurer's calculation of benefits is low, and improper, and constitutes taking money rightfully due the injured, and is subject to penalty.

Also, prior to filing his Petition for Hearing on October 24, 2003, Chris was required to proceed through ERD mediation which commenced on 9/4/03, and concluded by ERD's "Mediation Report & Recommendation" dated 10/9/03. Upon the express rejection of the ERD's Recommendation, Chris timely proceeded to file his Petition for Hearing in this case. The Insurer's chronology of this case, intended to show the claimant did nothing and took no action from July 10, 2003, to October 24, 2003, is false and incorrect. Chris consistently tried to get correct information to and from the Insurer about his wage loss benefits, but the Insurer failed and continues to fail to properly compute those benefits, by law.

DATED this 18<sup>th</sup> day of March, 2004.



**CHARLES W. SCHUYLER**

**Attorney for Petitioner Christopher Sandru**

**CERTIFICATE OF SERVICE**

I, the undersigned hereby certify that on the 19<sup>th</sup> day of March, 2004, I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

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