IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 47

WCC No. 2004-1186

TYAD, INCORPORATED, A MONTANA CORPORATION, d/b/a THE PLAYGROUND LOUNGE AND CASINO

Petitioner

vs.

INDEPENDENT CONTRACTOR CENTRAL UNIT

Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

Summary: Following a decision determining that exotic dancers at The Playground Lounge and Casino in Great Falls were employees, TYAD, Incorporated, which owns and operates the Playground, moved for reconsideration and to amend the Court's Findings of Fact, Conclusions of Law and Judgment. It urges that the Court misapprehended both the evidence and the law and should have found that the dancers were independent contractors.

Held: The motion was timely; however, none of the grounds advanced by the petitioner are meritorious.

¶1 The petitioner, TYAD, Incorporated (TYAD), moves the Court to reconsider and amend its Findings of Fact, Conclusions of Law and Judgment entered April 8, 2005. The motion was mailed on May 2, 2005, and deemed filed on that date. ARM 24.5.303(5).

¶2 The Independent Contract Central Unit (ICCU) initially urges that the motion is untimely since it was not filed within twenty days after issuance of the decision. Rule 24.5.344 requires that a request for a new trial or for amendment of the Court's findings of fact and conclusions of law be filed "within 20 days after the order or judgment is served." However, under Rule 24.5.303(3), three days are added:

> 24.5.303 SERVICE AND COMPUTATION OF TIME
> . . .
> (3) Whenever a party has the right or is required to do some act within a prescribed period of time after the service of a notice or other paper upon the party and the notice or paper is served by mail, three days shall be added to the prescribed period.

ARM 24.5.303. The Court's Findings of Fact, Conclusions of Law and Judgment were entered and served on April 8, 2005. Since three days must be added to the twenty days permitted for a request to amend, the petitioner had until May 1, 2005, to file its motion. However, since May 1 was a Sunday, the time for filing the motion was extended to Monday, May 2, 2005. ARM 24.5.303(4). It is therefore timely.

¶3 However, the motion is without merit. I address each of the petitioner's arguments in order.

> ARGUMENT 1:
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> Finding of Fact ¶ 15 fails to address the ICCU's determination as to dancers Ms. Campbell and Ms. Hamilton contained in Combined Exhibits 39-49.

RESPONSE: The Court's decision makes it clear that its determination applies to all similarly situated dancers, which includes both Ms. Campbell and Ms. Hamilton.

> ARGUMENT 2:
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> Finding of Fact ¶ 20 states Lori Niendorf worked exclusively for the Playground for two years. Niendorf's wage claim documents establish that Niendorf performed at the Playground for 8 months, from March, 2003, to October, 2003. Exhibit 36 at 32.

RESPONSE: The finding is inaccurate in that it states that Ms. Niendorf "worked exclusively for the Playground for two years." Rather, as shown in Ex. 36 at 18, The Playground Lounge and Casino (Playground) was the only employment she had during the previous two years. The error is immaterial. The point is that the Playground was her sole employment during the time in question and that she did not work for others.

> ARGUMENT 3:
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> Finding of Fact ¶ 21 states that four of the dancers claimed the only advertising they received was on the Playground website. This Finding fails to account for the proven "collusion" in the dancers' statements, as admitted

by Renne Smith in her testimony. Further, the Finding fails to take into account the cards and word of mouth advertising that was used by Billys Angels [sic] and is in conflict with Finding of Fact ¶ 23.

RESPONSE: The Court resolved credibility issues in accordance with its decision and took into account the sideline business of Billy Young. There is no conflict between findings 21 and 23: some dancers may have used his services, others, such as Smith, never did.

ARGUMENT 4:

Findings of Fact ¶¶ 25, 26, 28, 30, 38, 39, and Conclusion of Law ¶¶ 53, 58, 59, are in error to the extent the Court holds that such facts were indicia of control. Under Montana law a party contracting with an independent contractor is required to provide a safe place to work regardless of "the status of the worker." Cain v. Stevenson, 218 Mont. 101, 103-105, 706 P.2d 128, 130-131 (1985); *see also* Peyatt v. Moore, 324 Mont. 249, 256-257, 102 P.3d 535, 539-540 (2004); Trankel v. State, 282 Mont. 348, 364, 938 P.2d 614, 624 (1997). Montana public policy dictates that safety precautions are owed to independent contractors and to employees and thus is not indicia of an "employment relationship."

RESPONSE: The Court stands by its findings of fact and the conclusions of law based on those findings.

ARGUMENT 5:

Finding of Fact ¶ 30 states that the Playground required dancers to be accompanied by bouncers whenever going from the Playground to their cars. The finding should more accurately state that the Playground required its bouncers to accompany the dancers whenever going from the [P]layground to their cars. It was the bouncers who were under the control of the Playground and not the dancers.

RESPONSE: Ms. Smith's testimony supports the Court's phrasing of this finding and the Court found her testimony credible. (Tr. 128, 154.) Moreover, even if, as the petitioner contends, the Playground required its bouncers to accompany dancers rather than requiring the dancers to be accompanied by bouncers, the distinction is a semantic not a substantive one. In either event, the dancers were compelled to have bouncers accompany them.

ARGUMENT 6:

> Finding of Fact ¶ 32 addresses certain changes implemented to the stage reservation schedule after October, 2003. Such changes are irrelevant to this matter as none of the five claimant dancers in this matter were affected by such changes because all five had ended their contractual relationship with the Playground by October 2003.

RESPONSE: Contrary to the petitioner's contention, the finding is relevant as showing the Playground's exercise of control over the dancers. Even if the five named dancers had already terminated employment, the finding is further evidence of a pattern of control over dancers which is inconsistent with an independent contractor relationship.

ARGUMENT 7:

> Finding of Fact ¶ 37 is in error inasmuch as the Finding fails to account for the fees which were individually negotiated by the dancers at their own discretion and under their complete control, and at whatever charges they found acceptable for lap dances, with such negotiated fees being in addition to tips dancers received for stage performances. The evidence established that such fees were not tips as defined in ARM 24.16.1508 as the amount for payment was negotiated by the dancers in advance and not at the sole discretion of the patron.

RESPONSE: The finding is correct. When dancing on stage, the dancers received tips. Negotiated fees were with respect to lap dances. Even in that regard, the Court notes Ex. 38 at page 20, taken from the Playground's website, which states that on Sunday lap dances are $10 – an advertisement which is patently inconsistent with the Playground's position that the dancers always negotiated the fees for lap dancing.

ARGUMENT 8:

> Conclusion of Law ¶¶ 50 and 51 are in error to the extent they suggest that the rental contract was of no benefit to TYAD if the dancers did not dance. No evidence submitted showed that TYAD could not sue to collect fees for stage rental once the dancer had signed up and did not use the same. The contract is prima facie evidence of such payments and this is corroborated by the testimony of David Blackwell. As such it is in error to reach the conclusion that the agreement was without benefit to TYAD "unless the dancers performed." Hence ¶ 51 is likewise in error.

RESPONSE: The Court stands by its conclusion.

ARGUMENT 9:

Conclusion of Law ¶ 55 is in error to the extent it concludes that TYAD regulated when the dancers could perform. The testimony established that ultimately it was the dancers who decided if and when they would rent the stage to dance.

RESPONSE: The conclusion is accurate and supported by the evidence.

ARGUMENT 10:

Conclusion of Law ¶ 56 and Finding of Fact ¶ 40 are in error as such erroneously conclude there would be no potential liability for either party for breach of the stage rental contracts. The stage rental contracts and David Blackwell's testimony established that either party could seek damages for failure of performance i.e. a dancer who had signed up for rental slots could have sued for damages in the event TYAD breached its duties under the agreement; TYAD could have sued for damages had the performer not paid their fees.

RESPONSE: The Court stands by its conclusions, which are supported by the evidence.

ARGUMENT 11:

Conclusion of Law ¶ 61 is in error to the extent it fails to find that the payment by patrons directly to the dancers was indicative of independent contractor status. This is especially true given that here the dancers were paid nothing by TYAD, and TYAD made no claim for any portion of the "lap dance" proceeds collected by the dancers. Had the dancers been employees, TYAD would have been entitled to collect the full amount of "fees" negotiated and paid by the patrons for such performances (Mont. Code Ann. § 39-2-102) as such fees did not constitute tips as that term is defined by ARM 24.16.1508.

RESPONSE: The Court stands by its conclusion.

ARGUMENT 12:

Conclusion of Law ¶ 62 is in error to the extent the Court concludes that the dancers could not perform without the equipment provided by TYAD. The evidence showed that dancers conducted their own "performances" outside of the facility for Billys Angels (sic) [see Finding of Fact ¶ 23] and there was

no evidence that the more private "lap dances" utilized any of the music, stage, or other purported equipment.

RESPONSE: The conclusion is supported by the evidence that the music provided by the Playground and its DJs was integral to the dancer's performances.

ARGUMENT 13:

Conclusion of Law ¶ 66 erroneously states that there was no liability for termination of the stage rental agreement. This Conclusion should be amended to take into consideration that TYAD had potential liability for a dancer's lost economic opportunity for nights she had signed up and was not allowed to dance, i.e. a breach of contract remedy.

RESPONSE: If there was potential liability, it was illusory.

ARGUMENT 14:

Conclusions of Law ¶¶ 41, 68 and 69, should be amended to conform with the above changes in the Findings of Fact and Conclusions of Law and determine that the relevant dancers were independent contractors.

RESPONSE: The Court stands by its determination that the dancers were employees.

("Arguments" from Motion for Reconsideration and Request to Amend Findings of Fact and Conclusions of Law, May 2, 2005.)

ORDER

¶4 The petitioner's motion for reconsideration and request to amend the Court's Findings of Fact, Conclusions of Law and Judgment is **denied**.

DATED in Helena, Montana, this 10th day of August, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. K. Dale Schwanke
Mr. Arthur M. Gorov
Submitted: May 5, 2005