IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 49

WCC No. 2003-0908

CHRISTOPHER SANDRU

Petitioner

vs.

ROCHDALE INSURANCE COMPANY

Respondent/Insurer.

DECISION AND SUMMARY JUDGMENT

Summary: Claimant, who is a bartender, seeks inclusion of tip income in the computation of his wages for purposes of determining his workers' compensation benefits.

Held: Tips are included in computing wages only if the tips are documented by the employee and reported to the employer for tax purposes. Since the claimant did not document his tips and did not report them so that the employer could withhold taxes on the tips, they cannot be considered in determining his wages and benefits.

Topics:

Summary Judgment: Generally. While summary judgment is an extreme remedy which should not be granted if there is any dispute regarding material facts, it should be granted where undisputed material facts entitle the moving party to judgment as a matter of law.

Summary Judgment: Generally. On a motion for summary judgment the Court will not consider contentions or issues not pled in the petition.

Wages: Tips. Tips are considered wages only if they are documented and reported to the employer for tax purposes. § 39-71-123(1)(c), MCA (1999-2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-123(1)(c), MCA (1999-2003). Tips are considered wages only if they are documented and reported to the employer for tax purposes.

¶1 This case involves undocumented tip income which the petitioner (claimant) asserts should be included in computing his workers' compensation benefits. The respondent moves for summary judgment regarding the claim.

The Petition

¶2 The petition alleges that when computing the claimant's benefits the respondent insurer, Rochdale Insurance Company (Rochdale), failed to include $300 a week in tips he received and reported to his employer. Other than a claim for attorney fees and penalty, that is the sole claim laid out by the petition. While the claimant's brief in opposition to the motion raises other issues involving computation of his benefits, those claims are not pled and will not be considered.

Facts

¶3 The claimant worked as a bartender for Hellgate Elks Lodge 38 (Elks Lodge) in Missoula, Montana, from April 1, 2003 to June 21, 2003. (First Report of Injury attached to Brief in Support of Respondent's Motion for Summary Judgment.)

¶4 On June 21, 2003, the claimant injured his Achilles tendon at work when a catering cart hit him in the right leg and ankle. (Petition for Hearing and Request for Emergency Trial, ¶ 1.)

¶5 At the time of the claimant's injury, his employer was insured by Rochdale. (*Id*. at ¶ 2.)

¶6 Rochdale has accepted liability for the claimant's injury. (Sandy Scholl Letter of July 8, 2003, attached to Brief in Support of Respondent's Motion for Summary Judgment.)

¶7 At the time of the claimant's injury he was earning $6.50 to $7.50 per hour in wages plus tips. (Chris' Affidavit of Uncontroverted Facts.) Rochdale calculated the claimant's benefits based on his last four pay periods.

¶8 As of the date of the claimant's injury, Elks Lodge had recorded $98.06 in tips for claimant for the year. (Payroll Check dated 07/03/03 attached to Brief in Support of Respondent's Motion for Summary Judgment *and see* Chris' Affidavit of Uncontroverted Facts, ¶ 8.)

¶9 The claimant asserts that he earned $300 a week on average in tips during his employment with Elks Lodge. However, it is undisputed that he did not keep track of his actual tips or report his actual tips to Elks Lodge. His deposition testimony was as follows:

> **Q:** (By Mr. Jennings) . . . Did you ever keep a - did you ever keep a record of your tips?
>
> **A:** When?
>
> **Q:** When you received them at any point during your employment at Hellgate Elks Lodge did you -

A: No.

(Sandru 12/10/03 Dep. at 27 attached to Brief in Support of Respondent's Motion for Summary Judgment.)

Q: Okay. That's fine, Chris. So you did not keep a log or any type of record of your tips?

A: No, I didn't, because it wasn't required.

Q: Okay. And you understand this policy is not requiring you to keep a log or record?

A: It's stated on payroll policy. It says it is a good idea for each employee to keep a personal diary of tips actually brought home at the end of each shift. I guess if you want to go into the termination idea we can.

Q: Well, did you consider it not to be a good idea?

A: No.

Q: Okay. But you didn't keep a log or any type of record?

A: Correct.

Q: And to your knowledge did the Elks Lodge keep any type of record of your tips?

A: Not to my knowledge.

Q: Okay. Can you provide any type of documentation that you reported your tips, any letter written, anything at all?

A: There should be a letter in this packet.

Q: Okay. Well, I'm talking about efforts that you made to document your tips.

A: No, I can't.

(*Id*. at 29-30.)

Q. To your knowledge did the Elk's Lodge keep a record of your tips?

A. Not to my knowledge.

Q. Did you keep any record or logs of your tips?

A. No, I did not.

Q. Why not?

A. I wasn't required to.

Q. Okay. Do you intend on reporting your tips to the government -

A. Yes, I do.

(Sandru 1/16/04 Dep. at 18 attached to Brief in Support of Respondent's Motion for Summary Judgment.)

¶10 By his own admission, the claimant's reporting of tips to his employer was to "casually" mention the magnitude of his tips to his employer. In his first deposition he testified:

Q: Did you report that income to your employer at the Hellgate Elks Lodge?

A: Yes.

Q: Who specially did you report that to?

A: Linda Stamos.

Q: And how would you report that? What were the details? Would you write it out on a piece of paper? Would you advise her? How would you do that?

A: In casual conversation.

Q: And how often would that happen?

A: I don't recall.

Q: Okay. What amounts did you report to her?

A: I don't recall.

Q: You don't recall the amounts that you reported to her?

A: No.

Q: Did you ever recall a specific instance of reporting it to her?

A: Yes.

Q: What was that instance?

A: Like I said, in casual conversation.

Q: And what was the casual conversation, what was the context of that conversation?

A: Regarding maybe an event that transpired.

Q: And what was the event?

A: They had lots of events.

Q: What was the specific one that was being discussed in this conversation?

A: I don't remember.

Q: You don't remember. Do you remember when the conversation occurred?

A: Sometime during my employment.

Q: Okay. But you don't remember a specific week, specific day, date?

A: No.

Q: Okay. So you don't remember the subject matter of the conversation?

A: I remember that, you know, I stated I had a really good night in tips.

Q: Okay. But you said it was casual conversation?

A: Correct.

Q: Okay. And you don't recall anything else about the conversation other than you reported a good night in tips?

A: Correct.

Q: How often did you report your tip income to Ms. Stomas?

A: I don't know exactly.

Q: Can you approximate the number of times?

A: During my employment?

Q: Yeah.

A: More than once, less than 50.

Q: Okay. Did you develop any standard practice in doing that?

A: No.

. . . .

Q: There was no typical manner in which you reported the tip income?

A: No.

Q: Okay. Do you remember any specific amounts that you ever reported?

A: Not to the exact dollar, no.

Q: Do you remember approximate figures that you ever reported?

A: Approximately, yes.

Q: And what were those approximate figures?

A: Between - estimated between 50 and $200.

Q: Uh-huh. And was that - did that answer that you just gave, did that apply to more than one reporting of between 50 and $200?

A: I believe so.

. . . .

Q: Okay. And would you do this, when you did report it would you generally report what you earned on a single evening or what you earned during an entire week or an entire month? In what increments would you report?

A: A single evening.

Q: A single evening. So is it fair to say that after every single evening you would have reported your tips to Ms. Stamos?

A: There was no requirement for reporting, I'm going to say no.

(Sandru 12/10/03 Dep. at 20-25 attached to Brief in Support of Respondent's Motion for Summary Judgment.) In his second deposition the claimant again testified that his only reports of tips were in casual conversation:

Q. Okay. Well - did you in fact report your tips to your employer, the Hellgate Elk's Lodge?

A. Yes.

Q. When did you do that?

A. In casual conversation. . . . It was in casual conversation.

Q. Okay. It was in casual conversation. And it is accurate to say that the subject just casually came up?

A. Yes.

(Sandru 1/16/04 Dep. at 10-12 attached to Brief in Support of Respondent's Motion for Summary Judgment.)

¶11 The petition in this case was filed on October 27, 2003. Since then the claimant has attempted to create or find documentation which would support his claim that he earned $300 a week in tips.

¶12 As set out in his affidavit, the claimant reported $2,100 in tips on his 2003 federal income tax return. (Chris' Affidavit of Uncontroverted Facts, ¶ 8 *and* Ex. K.) That return, however, was filed after the commencement of this litigation

¶13 The claimant has also provided a letter from a customer stating they tipped him $200 (Chris' Affidavit of Uncontroverted Facts, ¶ 9 *and* Ex. M), and cites credit card receipts

produced by the Elks Club showing substantial tips. This evidence, as does claimant's affidavit, indicates that he received substantial tips but falls far short of an accounting or recording of his tips. The credit card tips do not reflect whether the tip was specifically for the claimant or what amount of any tips the claimant passed on to other employees. (January 30, 2004 letter of Steven W. Jennings to Charles W. Schuyler, attached to Respondent's Reply to Petitioner's Brief in Opposition to Motion for Summary Judgment at 1.) Similarly, a letter of claimant's supervisor stating he earned $300 a week in tips was based on the claimant's later statements, not on any documentation furnished his employer.

Discussion

¶14 "Summary judgment is an extreme remedy and should never be substituted for trial if a material factual controversy exists." *Spinler v. Allen,* 1999 MT 160, ¶ 16, 295 Mont. 139, 983 P.2d 348 (1999). On the other hand, if the facts material to the motion are undisputed and entitle a party to summary judgment, then summary judgment is proper. *Mogan v. Cargill, Inc.,* 259 Mont. 400, 403, 856 P.2d 973, 975 (1993).

¶15 What facts are material are determined by the substantive law applicable to the case. *DeVoe v. State,* 281 Mont. 356, 366, 935 P.2d 256, 263 (1997). In this case that determination is governed by section 39-71-123(1)(c), MCA (2001).[(1)]

¶16 Section 39-71-123(1)(c), MCA (2001), provides in relevant part:

> **39-71-123. Wages defined**. (1) "Wages" means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). Wages include the cash value of all remuneration paid in any medium other than cash. The term includes but is not limited to:
>
> . . . .
>
> (c) tips or other gratuities received by the employee, **to the extent that tips or gratuities are documented by the employee to the employer for tax purposes**; [Emphasis added.]

The statute is very specific concerning the requirements for inclusion of tips in computing wages: If tips are not documented to the employer for tax purposes, then they cannot be included in wages.

¶17 The obvious purpose of the section is to avoid the very type of dispute that has arisen in the present case and assure that taxes are withheld and paid on tip income. The "for tax purposes" language indicates that the tip income reported by the employee is for the purpose of enabling the employer to report the income and withhold federal and state taxes on the tip income.

¶18 Documentation of tip income for tax purposes requires reporting of actual tips received by the employee, not some general, *casual* mention by the employee regarding the magnitude of tip income, or a retrospective estimate of tip income. Moreover, as noted in the previous paragraph, the tip income must be reported for tax purposes, i.e., so that taxes can be withheld on the income. The undisputed facts in this case show that the claimant did not document his tip income or report it so that the employer could include it as part of his wages for purposes of withholding taxes. Under the plain terms of section 39-71-123(1)(c), MCA, (1999-2003) his tip income cannot be included in determining his wages for purposes of benefits. Accordingly, Rochdale is entitled to summary judgment dismissing his petition.

JUDGMENT

¶19 The claimant's tip income does not satisfy the requirements of section 39-71-123(1)(c), MCA (1999-2003). Therefore, it cannot be used in calculating his wages for purposes of determining his workers' compensation benefits. His petition is therefore **dismissed with prejudice**.

¶20 This JUDGMENT is certified as final for purposes of appeal.

¶21 Any party to this dispute may have twenty days in which to request a rehearing from this Decision and Summary Judgment.

DATED in Helena, Montana, this 7th day of June, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Charles W. Schuyler
Mr. Steven W. Jennings
Submitted: March 26, 2004

1. The 2001 version of the section applies since that was the version in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).