

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 38

WCC No. 2000-0238

GLEN A. MORTENSEN d/b/a TOWN TAVERN

Petitioner

vs.

INDEPENDENT CONTRACTOR CENTRAL UNIT

Respondent.

DECISION AND JUDGMENT

Appeal Dismissed w/Prejudice 1/8/02

Summary: Town Tavern in Great Falls hires exotic dancers to provide adult entertainment. It enters into a written agreement with dancers. While the dancers are free to determine their clothing, dance routines and music, and are paid by customers, the agreement requires dancers to perform on days and times fixed by Town Tavern, fixes rates the dancers may charge for table dances, requires a portion of the table dance fees to be remitted to the bartender and bouncer, and requires that all private parties at which the dancers perform be arranged by Town Tavern. The agreement also prohibits prostitution, use of illegal drugs, consumption of more than one alcoholic drink per hour, and disclosure of dancer's real names and other personal information. The Unemployment Insurance Division of the Department of Labor and Industry alleges that the dancers are employees and that Town Tavern is therefore subject to unemployment taxes.

Held: (1) The Workers' Compensation Court has jurisdiction to determine employment status for purposes of unemployment insurance taxes. (2) The dancers are employees not independent contractors.

Topics:

Jurisdiction: Independent Contractor Disputes. Under 1999 legislation the Workers' Compensation Court has jurisdiction over employment status disputes arising under unemployment insurance laws. Jurisdiction is *de novo*. §§ 39-51-1109, 39-71-415.

Independent Contractor: Jurisdiction. Under 1999 legislation the Workers' Compensation Court has jurisdiction over employment status disputes arising under unemployment insurance laws. Jurisdiction is *de novo*. §§ 39-51-1109, 39-71-415.

Montana Code Annotated: § 39-51-1109. Under 1999 legislation the Workers' Compensation Court has jurisdiction over employment status disputes arising under unemployment insurance laws. Jurisdiction is *de novo*. §§ 39-51-1109, 39-71-415.

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Independent Contractor: Independent Contractor Unit. Under 1999 legislation the Workers' Compensation Court has jurisdiction over employment status disputes arising under unemployment insurance laws. While the Independent Contractor Unit of the Department of Labor and Industry makes an initial determination regarding employment status, an appeal to the Court is a *de novo* proceeding. §§ 39-51-1109, 39-71-415.

Independent Contractor: Generally. Under unemployment insurance laws, employment status is determined pursuant to the AB test. Part A of the test considers the right of control of the employing party over the hired party. Part B considers whether the hired party is engaged in an independently established business. § 39-51-201(15).

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Independent Contractor: Elements. Under unemployment insurance laws, employment status is determined pursuant to the AB test. Part A of the test considers the right of control of the employing party over the hired party. Part B considers whether the hired party is engaged in an independently established business. § 39-51-201(15).

Independent Contractor: Right of Control. Where a tavern hires exotic dancers to provide adult entertainment under a written agreement which entitles the tavern to schedule the times of dancers' performance, to discipline them for failure to show up for work in a timely fashion, to fix rates for table dances, and to exclusively schedule any private parties at which the dancers may perform, the dancers are subject to significant control such that they are employees under statutes governing unemployment insurance.

¶11 This matter is before the Court for a second time. The issue presented is whether exotic (topless and nude) dancers performing at the Town Tavern in Great Falls are independent contractors or employees. The dancers claimed they are employees and submitted a claim under the Wage and Wage Protection Act, Title 39, Ch. 3, MCA. Town Tavern responded that

the dancers are independent contractors. The matter was referred to the Independent Contractor Central Unit (ICCU) of the Department of Labor and Industry (Department). The ICCU found that the dancers were employees and Town Tavern appealed the determination to this Court. I found that this Court lacked jurisdiction over independent contractor issues arising under the Wage Act and remanded the matter to the Department for a contested case hearing. [*Glen A. Mortensen, d/b/a TOWN TAVERN v. Dawn M. Hugl et al.*](#), 2000 MTWCC 43.

¶12 Following remand, the matter before the ICCU was expanded to include a claim by the Unemployment Insurance Division. On October 5, 2000, the ICCU issued a Determination finding that the dancers were employees for purposes of unemployment insurance. This appeal by Town Tavern followed.

Jurisdiction

¶13 In [*Art v. Independent Contractor Central Unit*](#), 2000 MTWCC 37, I determined that the Workers' Compensation Court has jurisdiction over appeals to ICCU determinations regarding independent contractor status under the Montana Workers' Compensation Act and the Unemployment Insurance Act. That jurisdiction is based on section 39-51-1109, MCA (1997-99), which provides in relevant part:

39-51-1109. Tax appeals -- procedure. (1) A decision, determination, or redetermination of the department involving an employer-employee relationship or the charging of benefit payments to employers is final unless an interested party entitled to notification submits a written appeal of the decision, determination, or redetermination. The appeal must be made in the same manner as provided in 39-71-415.

Section 39-71-415, MCA, which is referenced by section 39-51-1109, MCA, in turn provides in relevant part:

39-71-415. Procedure for resolving disputes regarding independent contractor status. (1) If an individual, employer, or insurer has a dispute as to whether an individual is an independent contractor or an employee as defined in this chapter, any party may, after mediation pursuant to department rules, petition the workers' compensation court for resolution of the dispute.

The ICCU, which is the unit designated by the Department to make initial determinations regarding independent contractor status, ARM 24.35.201 through 24.35.203, made its determination under unemployment insurance provisions, thus the matter on appeal is within the Court's jurisdiction. As provided in section 39-71-415, MCA, review of the Department's determination is by way of petition to this Court, thus it is a de novo matter to be heard and finally determined by the Court.

Submission of Case for Decision

¶14 Town Tavern moved for summary judgment. The ICCU followed with its own summary judgment motion. The parties then filed a stipulation submitting the case for decision based upon the "exhibits and briefs filed in support of and in opposition to their respective motions for summary judgment." Stipulation (February 28, 2001.) The stipulation further provided, "The parties do not object to the other's statement of uncontroverted facts." (*Id.*) Following the stipulation, the parties filed a Combined Statement of Uncontroverted Facts.

Facts

¶15 I do not set forth all facts tendered by the parties as some of those facts are not essential to the decision in this matter. I also summarize many of the facts.

¶16 Glen Mortensen owns and operates Town Tavern in Great Falls, Montana. Town Tavern provides adult entertainment for its customers. The entertainment is provided by exotic dancers who may, but are not required, to remove their clothing while dancing.

¶17 Dancers are required to sign a contract with Town Tavern. (UEF Ex. 107.) The contract was prepared by Mortensen. It is short and provides *inter alia*:

¶17A Dancers are independent contractors and are required to report their own income for income tax purposes.

¶17B Dancers are scheduled by a Dance Manager employed by Town Tavern and are required to perform at times fixed by Town Tavern.

¶17C Dancers must pay a \$10 nightly stage fee to perform at the Tavern.

¶17D Dancers' are compensated by tips and payments from customers.

(UEF Ex. 107.) The contract also incorporates written rules which are set out in a separate document entitled "TOWN TAVERN GENERAL RULES." (Ex. 108.) The contract provides:

TOWN TAVERN RULES - The general rules that are on the following pages are an integral part of this agreement.

(Ex. 107, emphasis added.) Each dancer is required to sign the agreement. Above the signature line is the following statement:

You have read the conditions of this agreement and the **attached general rules** and thoroughly understand them.

(*Id.*, emphasis added.)

¶18 The GENERAL RULES begin with the following statement:

DANCERS - - THIS IS MY ESTABLISHMENT AND THESE ARE MY RULES. THEY ARE VERY SIMPLE BUT STRAIGHTFORWARD. IF YOU CANNOT OR WILL NOT FOLLOW THEM, THEN PLEASE FIND SOMEWHERE ELSE TO DANCE. I WILL ENFORCE THEM.

(Ex. 108, emphasis added.) The rules go on to provide:

¶18A Dancers are required to show up at the time they are scheduled. Failure to show up on time or missing a scheduled day may result in removal from the schedule for up to a week, and persistent missed shifts may result in termination altogether.

¶18B Dancers are prohibited from

- using drugs;
- drinking of alcohol in the dressing room;
- prostitution;
- masturbation;
- disclosing their real names, addresses and telephone numbers to customers.

¶18C Dancers' use of alcohol is expressly limited to one drink per hour on the tavern floor. They are prohibited from drinking in the dressing room. (Other employees of the Tavern are prohibited from drinking alcohol altogether.)

¶18D Dancers are free to choose their costumes, music, and dance routine.

¶18E Dancers' rates for performing "table dances" are fixed at \$10.00 for topless dances, \$20.00 for nude dances. Dancers are required to remit \$1.00 of that amount to the Bar and \$2.00 to the Bouncer.

¶18F Private parties are required to be scheduled through Town Tavern and dancers are prohibited from discussing compensation for the parties with customers. (Paragraph 9.)

¶18G Dancers are prohibited from leaving the Town Tavern "with any bar patron or customer, or stranger" and are required to be escorted to their cars or taxis by the Town Tavern doorman - "no exceptions." (Paragraph 6.)

(UEF Ex. 109.) Towards the end of the rules is the following, additional admonition: "THESE ARE MY RULES, IF YOU CANNOT FOLLOW THEM AND PERFORM UNDER THEM, YOU ARE IN THE WRONG PLACE, GO FIND A STAGE SOMEWHERE ELSE."

¶19 Some of the uncontroverted facts set forth by the parties appear to be in derogation of the contract and the attached rules. Specifically, the parties agree:

¶19A If a dancer decided not to dance on a particular evening, Mr. Mortensen had no authority under the terms of the contract to reprimand her, and he never did so. (Fact 8.)

¶19B The Town Tavern never fined a dancer or disciplined a dancer for not showing up on a particular night. (Fact 22.)

¶9C Dancers are never required to schedule private parties through Town Tavern even though the contract requires them to do so. The contractual provision was included in an attempt to have dancers notify him [Mortensen] in advance if they did not intend to dance on a certain evening. (Fact 9.)

¶9D Dancers had the discretion to charge whatever fee they wished for private or semi-private table dances. (Fact 15.)

The parties also agree that dancers can and do dance at other establishments in Montana while under contract with Town Tavern. (Fact 16.)

Decision

¶10 The Unemployment Insurance Act defines an independent contractors as follows:

(15) "Independent contractor" means an individual who renders service in the course of an occupation and:

(a) has been and will continue to be free from control or direction over the performance of the services, both under a contract and in fact; and

(b) is engaged in an independently established trade, occupation, profession, or business.

§ 39-51-201(15), MCA. The test set out in the section is know as the AB test.

¶11 As an initial matter, the designation of the dancers as "independent contractors" is not conclusive as to their status. "It is well established that the fact that a contract designates a party as an independent contractor is not dispositive of a worker's status: A party must have been an independent contractor in fact." *Lundberg v. Liberty Northwest Ins. Co., Inc.*, 268 Mont. 499, 503, 887 P.2d 156, 159 (1999). Moreover, there is a presumption, so to speak, in favor of employment status: "Independent contractor status requires a convincing accumulation of evidence from the statutory test, whereas employee status may be found based on one part of the statutory test. (*Id.* at 503, 877 P.2d at 159-160.)

¶12 In *Lundberg*, which is cited above, the Part B of the AB test was conclusive as to employment status since the facts failed to establish that the claimant was engaged in an independent occupation. To meet the Part B test, the dancers in this case must in fact be engaged in their own business "independently" from their relationship with Town Tavern, *Lundberg* at 504, 887 P.2d at 159. Arguably they are. The stipulated facts indicate that while working at Town Tavern the dancers were free to dance for other establishments and in fact did so. Analysis is therefore required under Part A.

¶13 Under Part A, the ultimate question is whether the hiring party has control over the individual hired. Four factors are considered in determining control:

The first, or "A," part of the test requires that in order for an individual to be an independent contractor, that individual must be free from control or direction over the performance of such services. This Court has previously recognized four factors to consider in determining if the right to control exists: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire.

Phoenix Physical Therapy v. Unemployment Ins. Div., 284 Mont. 523, 527-28, 943 P.2d 523, 527-28 (1997).

I. Direct Evidence of the Right of Control

¶14 The **right** of control, not the amount of control actually exercised, is the critical element in applying the control test of Part A. *Sharp*, 178 Mont. at 424, 584 P.2d at 1301. In this case the dancers and Town Tavern entered into a standard contract. That contract provides the most direct evidence of the right of control.

¶15 In many respects, the dancers in this case are free from control by Town Tavern. Town Tavern exercises no control over their performances. Dancers are free to choose dance routines, their costumes, and their music. On the other hand, Town Tavern has retained the right of control in a great many respects.

¶16 Initially, dancers are also subject to a strict code governing their interaction with customers. They are prohibited from giving their real names, addresses, and phone numbers to customers, and from leaving the Tavern with customers. They are also prohibited from using drugs. Their use of alcoholic beverages while working is also limited to one drink per hour.

¶17 Town Tavern points out that the restrictions it imposes on dancers are for their safety and to prevent illegal acts by dancers, e.g., prostitution;

In the present case, a certain amount of control over the dancers was necessary to ensure that the Town Tavern got the end result it bargained for: namely the rental of its stage for exotic dancing in a **safe environment while complying with applicable laws and ordinances**. Neither under the contract, nor in fact, did the Town Tavern exercise more control than was necessary to achieve this end. . . .

(Brief in Opposition to the Respondent's Motion for Summary Judgment at 4; emphasis added.) It cites *Potter v. Dept. of Labor and Indust.*, 258 Mont. 476, 481-82, 853 P.2d 1207, 1211 (1993), as supporting its position that the employer of an independent contractor "is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result that he bargained for."

¶18 Given the nature of its enterprise, Town Tavern's argument regarding the foregoing restrictions is not easily dismissed. The nature of its business exposes dancers to uninvited approaches and Town Tavern to potential liability in the event of an assault, hence the

requirement that dancers be accompanied to their cars by the doorman. This requirement and the prohibitions regarding dancers giving out their real names, addresses, and phone numbers are also reasonably calculated to prevent Town Tavern from possible accusations of involvement in prostitution. The rule against use of illegal drugs and prostitution simply prohibit what the law already prohibits. The rule limiting alcohol may be reasonably justified as preventing the entertainers from becoming intoxicated while working. These rules are reasonably related to the end product bargained for and are not sufficient in themselves to establish an employment relationship.

¶19 However, some of the contractual provisions go far beyond considerations of illegal conduct and protection of the dancers. Under the contract, Town Tavern had the right to fix days and hours of work and to penalize dancers for not showing up as scheduled or for showing up late. It could regulate prices charged by dancers for table dances (\$10 for topless, \$20 for nude). It also had the right to require dancers to arrange their performances at private parties through Town Tavern, and by implication control rates charged for private parties. Paragraph 9 of the agreement provided:

PRIVATE PARTIES - All parties are to be scheduled through the TOWN TAVERN. **Absolutely no quotes of any kind should be given by a dancer for a private party.** Any inquiries should be directed to DRAKE or if she is not available direct them to Glen. [Emphasis added.]

Finally, it required its dancers to share their earnings from table dances with the bartender (\$1 per dance) and bouncer (\$2 per dance). Whether or not Town Tavern ever exercised these rights, the fact that it retained the rights is determinative. *Sharp*, 178 Mont. at 424, 584 P.2d at 1301.

¶20 Town Tavern urges that the degree of control it exercised was only that necessary "to ensure the employer gets the result he bargained for." Brief in Opposition to the Respondent's Motion for Summary Judgment at 4. It cites *Walling v. Hardy Construction*, 247 Mont. 441, 807 P.2d 1335 (1991), a case in which the general contractor instructed its concrete subcontractor as to many details, including the days of work, how much concrete to pour, when to pour, and the method and nature of concrete surfacing. However, that case involved a \$6.5 million construction contract with lengthy specifications and 15 subcontractors. The Supreme Court found that the degree of control exercised by the contractor was not sufficient to establish an employment relationship. It noted that it was necessary for the contractor to schedule the sequence of work by its subcontractors, and that its control over the sequence was necessary to the end product. Ordering the subcontractor to pour cement during bad weather was merely part of its control over the sequence. An order that the subcontractor change its screening method was necessitated by a change made in the method of setting forms, a task for which the contractor was responsible. Designation of the type of surface pertained to the end result.

The subcontractor was paid on a per square foot basis, hired and paid its own employees, provided its own valuable equipment, and could not be fired unless the contractor terminated the contract and incurred liability for the work performed. Not surprisingly, the Supreme Court held that the subcontractor was an independent contractor.

¶21 This case differs from *Walling*. Some, but not all, of the rights reserved by Town Tavern are reasonably necessary for obtaining the end result. Certainly, the safety requirements and the prohibition of illegal conduct are not inconsistent with independent contractor status. Scheduling of dancers may also be essential to assure that adequate numbers of dancers are working and to prevent too many from being there at the same time. But disciplinary provisions, exercised at the discretion of Town Tavern, for failing to show up for work as scheduled or for showing up late goes beyond a mere right to terminate the agreement for breach of contract. Moreover, control over dancers' pricing for table top dances and control over the scheduling and prices of their private parties goes beyond what was necessary to provide customers with entertainment. Requiring dancers to remit part of their table dance commissions to the bartender and bouncer is also unrelated to the end product. The degree of control reflected in these matters is incompatible with independent contractor status.

II. Method of Payment

¶22 Payment of the dancers was made by customers on a per dance basis. Payment on a piece-work or commission basis is consistent with either employment or independent contractor status. *Walling v. Hardy Const.*, 247 Mont. 441, 448, 807 P.2d 1335, 1339 (1991). However, Town Tavern retained the right to regulate the charges for table top dances and private parties, and also required dancers to remit part of their earnings for table top dances to the bartender and bouncer. This retention of control is incompatible with its argument that the dancers merely rented space from Town Tavern and is inconsistent with a claim that they were independent contractors free to bargain with customers for compensation.

III. Furnishing of Equipment

¶23 While dancers furnished their own costumes, Town Tavern furnished the stage and tables for their performances, a disc jockey to play music, drinks for their customers, and a bouncer to protect them. These items were far more substantial than the costumes furnished by the dancers. This factor tends to support a finding of employment.

IV. Right to Fire

¶24 Town Tavern retained the right to terminate dancers who did not show up for scheduled shifts. This factor is compatible with both independent contractor and employment status.

Non-Montana Cases Cited by the Parties

¶25 Town Tavern has cited several non-Montana cases as supporting its position that the dancers are independent contractors. Those cases are distinguishable.

¶26 *Marlar, Inc. v. USA*, 151 F.3d 962 (9th Cir. 1998), dealt with a dancing arrangement similar to but not identical to the one in the present case. However, the Court of Appeals did **not** hold that the dancers were in fact independent contractors. Rather, it found that the strip club was entitled to protection under a "safe harbor" provision in the tax code of the United States. The safe harbor provision provides that a taxpayer is not liable for employment taxes where "(a) the taxpayers' treatment of the workers as non-employees was reasonable reliance on industry practice, and (b) the taxpayer filed all requisite federal tax returns consistent with the treatment of the workers as non-employees." 151 F.3d at 965. The only issue addressed was whether the club's reliance on industry practice was "reasonable" within the meaning of the safe harbor provision. While there is language in the decision pointing out that there were substantial arguments supporting characterization of the employees as independent contractors, the Court did not in fact decide that they were.

¶27 *Deja Vu Entertainment Enterprises of Minnesota, Inc. v. USA*, 1 F. Supp. 2d 964 (D.C. Minn. 1998), and *JJR Inc. v. United USA*, 950 F. Supp. 1037 (W.D. Wash. 1997), are safe harbor cases similar to *Marlar*. They do not apply the AB test nor do they finally determine the dancers' employment status.

¶28 *Redmond v. Chains, Inc.*, 996 P.2d 759 (Colo. 2000), similarly does not resolve the employment-independent contractor issue. It turns on a statute of limitations, on whether the employer willfully violated wage laws and on the employer's good faith. Moreover, the claimant in that case was a "private booth dancer;" there are significant factual differences between the contract for hire in that case and the contract for hire in this case.

¶29 *State ex rel. Roberts v. Acropolis McLoughlin, Inc.*, 945 P.2d 647 (Or. App. Ct. 1997), is closer on point than the foregoing cases. That case arose under a state minimum wage statute and the Oregon Court of Appeals reached and decided the nature of the employment relationship. That case, however, is factually inapposite to this case. There, the dancers were supplied by an independent agency, which scheduled dancers and was responsible for notifying the club of cancellations. The agency auditioned and hired dancers and set terms and conditions of their employment. Not only were the facts of that case different from those of the present case, but the test employed by the Court was an "economic realities" test different from the Montana AB test.

¶30 *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324 (5th Cir. 1993), held that an arrangement similar to that in the present case constituted employment. Town Tavern attempts to distinguish the case. I find it unnecessary to discuss the case since it also applies an "economic realities" test.

¶131 Ultimately, as the cases discussed about show, each case must be decided based upon its unique facts and the particular laws invoked.

Resolution

¶132 The right of control is the most important factor in determining employment status. *Loos for Loos v. Waldo*, 257 Mont. 266, 271, 849 P.2d 166, 169 (1993). The degree of control retained by Town Tavern, even though it may not have been exercised, is inconsistent with independent contractor status. I find and conclude that the dancers are employees.

JUDGMENT

¶133 The exotic dancers in this case are employees for purposes of unemployment statutes.

¶134 This Decision and Judgment is certified as final for purposes of appeal. ARM 24.5.348.

¶135 Any party to this dispute may have twenty (20) days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 12th day of July, 2001.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Karl K. Rudbach

Mr. Charles K. Hail

Date Submitted: March 14, 2001