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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CHRISTOPHER SANDRU, Petitioner, vs. ROCHDALE INSURANCE COMPANY, Respondent/Insurer.	)	WCC No. 2003-0908 **RESPONDENT'S ANSWER IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO AMEND AND TO DETERMINE THE CLASS OF CLAIMANTS**

COMES NOW the Respondent, and in opposition to Petitioner's *Motion for Leave to Amend Petition and to Determine the Class of Claimants*, states as follows:

BACKGROUND

On October 28, 2003, this Court issued its *Scheduling Order* establishing December 5, 2003, as the deadline for motions to amend the pleadings. *Scheduling Order*, October 28, 2003, ¶ 6.

On December 23, 2003, Petitioner moved this court for leave to amend the pleadings "to change the case caption to state 'Petitioner, for himself and all persons similarly situated… ." *Motion for Leave to Amend Petition and to Determine the Class of Claimants*, December 23, 2003, p. 1-2. Petitioner further seeks to add two allegations. First, that he represents a class of claimants who have reported tip income but have not had such income included in the computation of workers' compensation benefits by workers compensation insurers, including the Respondent. Second, that such class members be awarded attorney fees, recovery of interest and applicable penalty awards from a common fund created on behalf of Petitioner and class members. *Id.*

ARGUMENT

I. THAT PORTION OF PETITIONER'S *MOTION TO AMEND*, WHICH REQUESTS ATTORNEYS FEES UNDER THE COMMON FUND DOCTRINE, SHOULD BE DENIED BECAUSE SUCH AWARDS ARE PROHIBITED BY MONTANA LAW.

§ 39-71-611(3), MCA (2003) states that attorneys fees "may not be awarded under the common fund doctrine or any other action or doctrine in law or equity." § 39-71-611(3), MCA (2003) superceded § 39-71-611(3), MCA (2001) (which did not bar such awards) on April 21, 2003. § 39-71-611(3), MCA (2003), *Compiler's Comments*.

Petitioner's work place injury occurred on June 21, 2003. *Petition for Hearing and Request for Emergency Trial*, October 24, 2003, ¶ 1. Thus, § 39-71-611(3), MCA (2003) applies and prohibits any award of attorneys fees under the common fund doctrine.

As mentioned above, Petitioner requests leave to amend the pleadings to include an allegation which states as follows:

> "Petitioner further alleges recovery of *attorney fees* from all members of the class, and also recovery of interest, and penalty awards as applicable, from the subject insurers, out of the common fund created by recovery of the subject benefits on behalf of the Petitioner and the class members."

Motion for Leave to Amend Petition and to Determine the Class of Claimants, December 23, 2003, p. 1-2 (emphasis added).

Clearly, Petitioner's request to recover attorneys fees under the common fund doctrine is prohibited by Montana law. Accordingly, that portion of his motion requesting such an award should be denied.

II. PETITIONER'S MOTION SHOULD BE DENIED BECAUSE HE HAS FAILED TO MAKE ANY SHOWING THAT A CLASS OF PERSONS SIMILARLY SITUATED EXISTS.

This Court has stated that it does "not intend to strictly adhere to class actions rules, however, it will look to the rules for guidance." *Miller v. Liberty Mutual Fire Ins. Co.*, 2003 MTWCC 6, WCC No. 2000-0174, ¶ 36. This Court has further stated that where the potential for a class action exists it prefers cooperation between the parties, rather than the formal rules for class-actions, as the best means of identifying class members. *Rhud v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 38, WCC No. 2002-0500.

Thus, integrating these two statements the rule is that, when a potential for a class-action exists, this court will seek guidance from Rule 23, Mont. R. Civ. P., in determining whether to proceed informally as a class-action or quasi class-action and to require the parties to cooperate in identifying potential class members

The elements required for a class-action are,

> "1) the class is so numerous that joinder of all members is impracticable, 2) there are questions of law or fact common to the class, 3) the claims or defenses of the

representative parties are typical of the claims or defenses of the class, and 4) the representative parties will fairly and adequately protect the interests of the class."

Rule 23(a), Mont. R. Civ. P. Thus, a party requesting the Workers' Compensation Court to proceed informally as a class-action or quasi class-action must show that the above elements can be met.

In his *Motion for Leave to Amend Petition and to Determine the Class of Claimants*, Petitioner simply requests leave to re-caption the case to state "Petitioner, for himself and all persons similarly situated" without the slightest showing that such persons exist. *Motion for Leave to Amend Petition and to Determine the Class of Claimants*, December 23, 2003, p.1. Indeed, Petitioner does not even address the elements required by Rule 23(a) or attempt to explain how they are satisfied in this case. Thus, Petitioner fails to make any showing that he can establish the existence of a class as contemplated by Rule 23(a).

For this Court to grant Petitioner's motion, unsupported by any showing that the proposed class exists, or even the attempt at such a showing, would be to establish a rule that any party to any suit before this Court could proceed as a class based upon nothing more than the merest unsupported whim. Accordingly, Petitioner's motion should be denied.

III. PETITIONER'S MOTION SHOULD BE DENIED BECAUSE THE ELEMENTS REQUIRED BY RULE 23(a) ARE NOT PRESENT IN THIS CASE.

As stated above, for this Court to proceed informally as a class-action or quasi class-action, a party must demonstrate that the class proposed actually exists by establishing that the four elements required by Rule 23(a) are present. Petitioner has not even addressed those elements. However, even in the event that he attempts to address such elements at some future date, he cannot establish their existence.

Recall that the elements contained with Rule 23(a) are in the conjunctive. Thus, all elements must be met. Petitioner cannot meet elements 2 and 3.

1. The Questions of Law and Fact to be Adjudicated in this Case are not Common to The Class Proposed By Petitioner.

As stated above, the second element of Rule 23(a) requires that there be questions of fact and law common to all members of the proposed class. Petitioner cannot prove the existence of that element because one of the primary questions of fact to be determined in this case could not be applied to the class he proposes.

Petitioner claims to have reported his tips as required by his employer. *Petition*, October 24, 2003, ¶ 3; *Petitioner's Responses to Respondent's First Discovery Requests*, November 24, 2003, Response to Request for Production No. 3. Thus, a question of fact to be determined in this case is what the Petitioner's individual employer, Hellgate Elks Lodge 383, required under its tip reporting policy. Clearly, such policies will vary from employer to employer with no two policies requiring precisely the same procedures. Therefore, due to the unique nature of employer tip reporting policies this question of fact cannot apply to any class that includes persons that did not work for Hellgate Elks Lodge 383. Indeed, discovery in this case has revealed that no two of Petitioner's previous employers required the same tip reporting procedure. See *Overland Express Pay Stub # 3269* (indicating that tips were withheld at 8% of sales but that employees did not report their actual tips) and *Payroll Policy, Elks Club, Updated*

2-4-03 (recommending that employees keep a record of their tips for reporting purposes). Clearly, as demonstrated by Petitioner's own employers, no two employers will have the same tip reporting policies. Accordingly, questions of fact regarding the requirements of employer tip policies cannot apply to the class proposed by Petitioner.

2. Petitioner is not Representative of the Class He Proposes Nor is His Claim Typical of that Class.

As stated above, the third element required by Rule 23(a) is that the claims or defenses of the representative parties are typical of the claims or defenses of the class. Thus, a party requesting this Court to proceed as a class-action must represent the class he proposes. However, as will be shown Petitioner does not represent the class he proposes.

Petitioner proposes a class of Claimants whose members have reported their tip income to their employers or whose employers were otherwise aware of such income. *Motion for Leave to Amend Petition and to Determine the Class of Claimants*, December 23, 2003, p.1. However, as stated in the *Response to Petition*, Respondent contends that Petitioner did not report his tip income. *Response to Petition*, November 21, 2003, ¶ 4. Thus, the ultimate question of fact in this action is whether Petitioner reported his tip income.

Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979). The inclusion of tip income in the computation of benefits is only required if a claimant reported such income to his employer for tax purposes. § 39-71-123(c), MCA. Thus, in this case, Petitioner must prove that he reported his tip income to his employer for tax purposes. Until Petitioner meets that burden the presumption is that he has not reported such income. Accordingly, Petition is not a member of a class of persons who have reported such income.

Furthermore, as stated above, Petitioner claims to have followed his employer's policy with regard to tip reporting. Thus, Petitioner's claim cannot be typical of the class he proposes because, as shown above, he claims to have followed a reporting procedure unique to his employer and which would not, and could not, be asserted by the class he proposes because that class did not work for Petitioner's employer.

IV. THIS ACTION CANNOT PROCEED INFORMALLY AS A CLASS-ACTION OR QUASI CLASS-ACTION BECAUSE NO AMOUNT OF COOPERATION BETWEEN THE PARTIES COULD REVEAL MEMBERS OF THE CLASS PROPSOED BY PETITIONER.

Even in the event that this Court would completely eschew the requirements of Rule 23(a), the Court has stated that it prefers cooperation between the parties as the most appropriate means of identifying class members. *Rhud v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 38, WCC No. 2002-0500. Thus, for this action to proceed as an informal or quasi class-action, cooperation between the parties would have to have some chance of revealing members of the class proposed by the Petitioner. However, in this case no amount of cooperation between the parties could reveal members of the class proposed by the Petitioner because neither party possesses the necessary information.

Petitioner proposes a class of persons who, 1) made tip income, 2) reported said income to their employer or whose employer was otherwise aware of such income, 3) suffered a

compensable work place injury, 4) received wage loss benefits or awards for such injury, and 5) such benefits were improperly calculated by excluding the tip income.

Respondent has no records indicating who such persons might be. Further, Respondent cannot fathom, and Petitioner has not suggested, how such persons might be identified. Indeed, Respondent believes that such persons do not even exist because, if their properly reported tip income had been excluded by Respondent, such persons would, presumably, have taken action against Respondent or otherwise advised Respondent of the error. Thus, Respondent is unaware of, and cannot determine, the identities of members of the class proposed by Petitioner. Accordingly, no amount of cooperation between the parties in this case could reveal such persons. Therefore, this action cannot proceed as the informal or quasi class-action contemplated in *Rhud* because, if the class proposed by Petitioner actually exists, it members are unknowable and cannot be discovered through cooperation between the parties.

CONCLUSION

Petitioner's motion to re-title this action as a class-action should be denied because he has not even attempted to explain how the elements of a class-action are met in this case. Furthermore, as shown above, his motion should be denied because the questions of fact to be determined in this case are not, and cannot be, common to the class he proposes. In addition, Petitioner's motion should be denied because he does not represent the class he has defined and his claim is not typical of that class. Finally, Petitioner's request for attorneys fees under the common fund doctrine is prohibited by law and should thus be denied.

WHEREFORE, Respondent requests that Petitioner's *Motion for Leave to Amend Petition and to Determine the Class of Claimants* be denied

Dated this 5th day of January, 2004.

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Attorneys for Respondent

By: _____
STEVEN W. JENNINGS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of January, 2004, a true and correct copy of the foregoing was duly served on counsel for Petitioner by fax and by depositing a copy thereof in the U. S. mail, postage prepaid, addressed as follows:

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