JOE C. MAYNARD
STEVEN W. JENNINGS
Crowley, Haughey, Hanson,
Toole & Dietrich P.L.L.P.
P. O. Box 2529
Billings, MT 59103-2529
(406) 252-3441
Attorneys for Respondent

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CHRISTOPHER SANDRU, Petitioner, vs. ROCHDALE INSURANCE COMPANY, Respondent/Insurer.	WCC No. 2003-0908 **BRIEF IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Respondent, Rochdale Insurance Company, and in support of its *Motion for Summary Judgment*, submits the following brief and attached documents:

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRITE WHEN NO GENUINE ISSUE OF MATERIAL FACT EXISTS AND THE MOVANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

> "[S]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for production, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

ARM 24.5.329(2). Furthermore,

> "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

> genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, may be entered against the adverse party."

ARM 24.5.329(7). Because no genuine issues of material fact exist in this case summary judgment is appropriate.

II. BECAUSE PETITIONER HAS NOT DOCUMENTED HIS ALLEGED TIP INCOME TO HIS EMPLOYER FOR TAX PURPOSES, HE IS NOT ENTITLED TO THE INCLUSION OF SUCH ALLEGED INCOME FOR THE PURPOSE OF CALCULATING HIS BENEFITS.

Under Montana's Workers' Compensation Act workers qualifying for temporary total disability benefits are entitled to "66 2/3% of the wages received at the time of the injury." § 39-71-701(3). The term "wages" means,

> "...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.*"

§ 39-71-123(1)(c), MCA (emphasis added). Thus, as required by statute, in order for tips or gratuities to be considered wages for the purpose of calculating temporary total disability benefits, the worker must furnish the employer, for tax purposes, documentation of such earnings.

This Court has, on several occasions, addressed tip income and has announced that it will not permit claimants to increase the value of their claim by asserting tip earnings not previously reported for tax purposes.

In *Sampson v. Broaddway Yellow Cab Co. & St. Comp. Ins. Fund.*, WCC No. 85123369 (1986), a claimant argued that his tips should be included in his time of injury wages even though the only evidence he presented regarding such tips was his own testimony that they amounted to $10.00 per day. This Court rejected the claimant's argument, held that the tips should not be included, and stated,

> "...[t]his Court will not establish a policy whereby claimants will be allowed to increase the defendant's evaluation of the settlement value by introducing previously unreported wages."

Sampson v. Broaddway Yellow Cab Co. & St. Comp. Ins. Fund., WCC No. 85123369 (June 18, 1986) [citing *Thomas v. Insurance Company of North America*, WCC Docket No. 1615 (August 8, 1983) and *Anderson v. Insurance Company of North America*, WCC Docket No. 1657 (May 16, 1983). See also *Simons v. St. Comp. Ins. Fund*, WCC No. 9207-6503 (October 13, 1992) ("The issue of cash earnings is not new to this Court and when tips are concerned the Court has elected to include only those amounts that are reported for tax purposes when computing wages").

As is made plain from the above cases, this Court has strictly adhered to the policy reflected in § 39-71-123(1)(c), MCA, and has refused to permit claimants to increase the value of their claim by adding tip earnings that were not documented for tax purposes prior to the claim. Indeed, to follow any other policy would be to permit claimants to increase their time of injury wages by whatever amount they desire by the simple expedients of asserting undocumented tip income or attempting to report such income after their injuries.

In the case at bar it is clear that Petitioner has not documented his tip income to his employer for tax purposes prior to his claim. During his deposition Petitioner repeatedly admitted that he kept no record or log of his tip income.

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

A. No, I did not.

Deposition Christopher Sandru, January 16, 2003, 18:10-12.

Q. What is that documentation that you could provide [of tip income reported to employer]?

A. Documentation - -

Q. That you reported the tip income to your employer.

A. Well, based on our conversations.

Q. Okay. But is there any evidence? Is there any paperwork - -

A. No.

Deposition Christopher Sandru, January 16, 2003, 20:11-19.

Q. ...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.

Deposition Christopher Sandru, December 10, 2003, 27:5-11.

Q. ...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.

Deposition Christopher Sandru, December 10, 2003, 29:15-17.

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

A. Correct.

Deposition Christopher Sandru, December 10, 2003, 30:3-5. Furthermore, when Petitioner was hired by The Lodge he received a copy of its written payroll policy. *Payroll Policy Elk's Club*, February 4, 2003; *Deposition Christopher Sandru*, January 16, 2003, 29:20-24, 30:1-12. With references to taxes that policy stated that,

"[i]t is a good idea for each employee to keep a personal diary of tips actually brought home at the end of each shift. Tip taxes may be refundable at the end of the year depending on your tax bracket."

Payroll Policy Elk's Club, February 4, 2003. Thus, in spite of being advised by his employer to keep a diary of his tips, Petitioner kept no such record of his tip income and therefore, had no means of documenting such income to his employer for tax purposes.

During his deposition, Petitioner repeatedly asserted that he has reported his tip income to his employer in casual conversation. However, even assuming that these "reports" occurred, it is clear from his deposition testimony that such reports fall far short of the documentation required by § 39-71-123(1)(c), MCA.

Q. … - - 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.

Deposition Christopher Sandru, January 16, 2003, 10:4-9.

Q. Would [the manager] ever approach you and ask what did you make in tips tonight or this week?

A. Yes, in a manner.

Q. Okay. And in your earlier testimony you said not specifically, no. Can you explain why the discrepancy with your answers?

A. It was in causal conversation.

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

A. Yes.

Q. Do you remember the context in which it casually came up?

A. Well, at the end of the evening she would be curious and I would let her know.

Deposition Christopher Sandru, January 16, 2003, 12:4-18. Equally clear from Petitioner's deposition testimony is that these "casual conversations" were the only means by which he ever reported his tip income prior to filing his claim for workers' compensation benefits.

Q. …About how often did these conversations in which you reported your tip income occur per week?

A. Approximately once per week.

Q. Is it your testimony that those casual conversations were the only time 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.

Q. Okay. But not until that time?

A. During this - - during these casual conversations.

Q. Other than during the casual conversations and prior to your injury - -

A. Right.

Q. - - did you ever report the tip income?

A. No.

Deposition Christopher Sandru, January 16, 2003, 44:6-24. Thus, other than in "casual conversation" Petitioner never even discussed his tip income with his employer until such time as his injury, and resulting claim for benefits, provided an incentive to assert such income.

Again, § 39-71-123(1)(c), MCA, requires tips to be *documented* to an employer *by the employee* if they are to be considered wages. To document means "[t]o record; to create a written record of..." *Black's Law Dictionary* 394 (Bryan A. Garner ed., 7th abridged ed., West 2000). A casual conversation is not a written record or a means of recording. Thus, assuming such hit and miss casual conversations occurred, they were insufficient to *document* Petitioner's alleged tip income to his employer for tax purposes. Indeed, Petitioner was aware, or should have been aware, that his casual conversations were not documentation.

Q. Did [your manager] ever ask you to fill out any paperwork documenting your tip income?

A. No.

Deposition Christopher Sandru, January 16, 2003, 24:7-9.

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

A. Not to my knowledge.

Deposition Christopher Sandru, January 16, 2003, 18:7-9. Thus, even assuming that Petitioner "reported" his tip income in "casual conversations", it is clear that he was aware that such reports or conversations did not result in the documentation or recording of his tip income. Furthermore, even if Petitioner believed that his "casual conversations" were serving to document his tip income to his employer, he was repeatedly notified that these conversations were not effectively

documenting such income. During his employment with The Lodge, Petitioner regularly received his pay stubs. *Payroll Check Information Check # 5410*; *Payroll Check Information Check # 5384*; *Payroll Check Information Check # 5362*; *Payroll Check Information Check # 5334*; *Payroll Check Information Check # 5439*. With the exception of his very last pay stub, all of these pay stubs indicated a year to date tip earnings of $9.40. *Payroll Check Information Check # 5410*; *Payroll Check Information Check # 5384*; *Payroll Check Information Check # 5362*; *Payroll Check Information Check # 5334*. His very last pay stub indicated a year to date tip earnings of $98.06. *Payroll Check Information Check # 5439*. Petitioner worked at the Lodge from April 1, 2003, until his injury on June 21, 2003. *First Report of Injury and Occupational Disease*, July 1, 2003; *Petition for Hearing and Request for Emergency Trial*, October 24, 2003, ¶ 1. Thus, assuming arguendo that Petitioner averaged $300.00 per week in tips, as he asserts, he would have made a total tip income of approximately $3,600.00 during his employment with The Lodge ($300.00 X 12 weeks = $3,600.00). Accordingly, if his "casual conversations" were effective for documenting tip income for tax purposes his pay stubs would have reflected such income. Indeed, his final pay stub would have indicated a very impressive year to date tip earnings of $3,600.00. However, even when routinely provided with pay stubs that indicated tip earnings far short of the amount he claims, Petitioner failed to take action to correct this discrepancy.

Q. During your employment with the Lodge did you ever object to the tip income reported on these pay stubs?

A. No, I did not.

Deposition Christopher Sandru, January 16, 2003, 25:25; 26:1-3.

Q. So is it correct to say that you never advised the Lodge that these were not accurate indications of your tips?

A. Would it be correct to say that I never advised the Lodge?

Q. Yes. Would it be correct to say that you never advised the Lodge that these figures in Exhibit D through H [the pay stubs], is it, are not an accurate indication of your tips?

A. Yeah, I didn't write the paychecks, so - -

Q. Okay. So it would be fair to say that you never advised the Lodge that - -

A. Yes.

Deposition Christopher Sandru, January 16, 2003, 27:10-22. Quite obviously, even if Petitioner intended his "casual conversation" to document his tip earnings to his employer for tax purposes, he was clearly and repeatedly notified, via his pay stubs, that his employer was not getting the message. Yet, given this state of affairs, Petitioner took no action to advise The Lodge of the discrepancy between his "reports" and his pay stubs. Thus, Petitioner failed to document his tip earnings to his employer even after he knew, or should have known, that such earnings were not documented on his pay stubs for tax purposes. The effect of such failure was, of course, that petitioner was not taxed on the very income he now claims should be the basis for his benefits.

After Petitioner's injury and Pursuant to a request for wage information from Respondent, Linda Stamos, Petitioner's supervisor, asserted in a letter that Petitioner made $300.00 per week in tips. *Letter L. Stamos to S. Scholl*, July 26, 2003. However, Ms. Stamos's letter does not provide evidence that Petitioner documented his tips to his employer for tax purposes for two reasons. First, nowhere in Ms. Stamos's letter does she state that petitioner documented his tips to The Lodge nor does she refer to any such documentation which might substantiate her claim of Petitioner's weekly $300.00 average tip income. Second, she could not have based her figures on any documentation provided by Petitioner to his employer because, as is clear from Petitioner's testimony, Petitioner provided no such documentation. Indeed, because Petitioner failed to keep any kind of record, log or diary of his tips there was no documentation that Ms. Stamos could have relied upon in asserting that Petitioner made $300 per week in tips. Thus, drawing all inferences in favor of Petitioner, Ms. Stamos's letter cannot provide evidence of Petitioner documenting his tips to his employer for tax purposes.

The requirement that tip income must be documented by the employee to the employer for tax purposes exists to prevent workers from knowingly under-reporting income while using that very same tax-free income as the basis for benefits. Clearly, such a possibility would create an incentive for tax fraud. In addition, without the requirement for documentation, claimants could assert whatever time of injury wages they desired regardless of their actual time of injury wages. Given a claimant's incentive to inflate his time of injury wages, such wages could never be determined without extensive litigation. This case is a perfect illustration of such indeterminate wages. Nobody, including Petitioner, knows what amounts of tip income he "reported" to his employer. Petitioner repeatedly indicated such lack of knowledge in his deposition.

Q. Okay. What amounts [of tips] did you report to [your manager]?

A. I don't recall.

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

A. No.

Deposition Christopher Sandru, December 10, 21:10-15.

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. How many times was the amount between 50 and $200?

A. I don't recall.

Q. More than once?

A. Yes.

Q. More than twice?

A. Probably.

Q. More than three times?

A. Yes.

Deposition Christopher Sandru, December 10, 2003, 24:12-25; 25:1-7.

Q. Okay. Well, that was my question. How often and in what increments would you report the tip income?

A. I don't recall

Q. You don't recall. But you know that you did report it?

A. Yes.

Deposition Christopher Sandru, December 10, 2003, 25:19-25; 26:1-3. Furthermore, in addition to revealing a lack of knowledge as to the amounts of tip income reported, Petitioner made contradictory statements regarding the amount of tip income earned.

Q. Okay. Well my question is do you recall when Mr. Schuyler was just now questioning you that you estimated that your tips, your hourly tip income was approximately $10 an hour?

A. Correct.

Q. And you've stated that you work in the neighborhood of 40 plus hours a week?

A. Correct.

Q. Why have you estimated your tip income to be $300 rather than $400 a week?

A. It was $300 on average, sometimes a little more, sometimes a little less.

Q. Well, do you agree with me that $10 an hour times 40 hours a week is $400?

A. Yes.

Q. So your estimate to Mr. Schuyler of $10 per hour average, that was a little high?

A. No, it would vary on each week.

Q. Okay. But I believe you stated that was an average in response to his question to what was your average tip income per hour. Do you recall that?

A. An average, yes.

Q. Okay. And if you worked 40 hours a week, then it would appear that your tip income would be $400 a week, average. Why haven't you claimed $400 a week?

A. Because it was $300 on average.

Q. So was your estimate of $10 an hour a little bit high?

A. That amount ranged.

Q. As an average was that a little bit high?

A. No.

Deposition Christopher Sandru, January 16, 85:23-25; 86:1-25; 87:1-5. As is plain from Petitioner's deposition testimony, he cannot accurately recall the amount the amount of tip income he either reported or earned. Thus, the reason behind the requirement for documentation becomes painfully obvious. Were this Court to order Petitioner's alleged tip income to be included in his time of injury wages what amount would that be? The $98.06 revealed in the pay stubs and already included in his time of injury wage calculation of $285.37? The $300.00 per week average claimed by Petitioner but undocumented prior to his injury? The $400.00 per week result obtained by multiplying his $10.00 per hour estimated average by a 40 hour work week? Manifestly, the requirement for documentation exists precisely to avoid such never ending permutations of possible time of injury wages. Thus, because Petitioner did not document his tip income to his employer for tax purposes, such income may not be included in his time of injury wages.

CONCLUSION

Montana law requires a worker to document tip income to the employer for tax purposes if such income is to be included in the workers time of injury wages. Petitioner has clearly failed to document his alleged $300.00 weekly tip income to his employer for tax purposes. He kept no record or log of his tip income and thus had no means of providing his employer with documentation as to such income. His "reports" of such income were limited to "casual conversations" with his manager which fall far short of the documentation required by § 39-71-123(1)(c), MCA. Furthermore, as is evident from his pay stubs, Petitioner failed to document his tip income even after he was aware, or should have been aware, that his "reports" during "casual conversations" had been ineffective in documenting his tip income to his employer for tax purposes. Accordingly, because the Petitioner has failed to document his tip income to his

employer for tax purposes, such income may not be included in his time of injury wages for the purpose of calculating his temporary total disability benefits.

WHEREFORE, Respondent respectfully request this Court to grant its *Motion for Summary Judgment* and dismiss the above captioned case with prejudice, each party bearing its own costs.

Dated this 3rd day of February, 2004.

CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH P.L.L.P.
Attorneys for Respondent

By: Steven W. Jennings
STEVEN W. JENNINGS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of February, 2004, a true and correct copy of the foregoing was duly served on counsel for Petitioner by depositing a copy thereof in the U. S. mail, postage prepaid, addressed as follows:

Charles Schuyler
Marsillo & Schuyler, PLLC
103 South 5th East
Missoula, MT 59801

Steven W. Jennings