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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CHRISTOPHER SANDRU,
Petitioner,

vs.

ROCHDALE INSURANCE CO.
Respondent/Insurer.

WCC NO. 2003-0908

PETITIONER'S REPLY BRIEF TO HIS MOTION FOR LEAVE TO AMEND PETITION AND TO DETERMINE THE CLASS OF CLAIMANTS

The Petitioner, Christopher Sandru, by and through his counsel, files this Reply Brief concerning Petitioner's Motion for Leave to Amend Petition and to Determine the Class of Claimants, as follows:

1. The Petition for Hearing and Emergency Trial should be amended as requested by Petitioner, upon the Court's grant of leave to amend.

A review of the insurer's responsive brief dated January 5, 2004, indicates that the insurer failed to document or show, in said brief, any prejudice that might result upon the Court's grant of the motion for leave to amend the petition. The insurer's brief: (1) cites the Court to the recent statute that expressly targets and prohibits "common fund" fees; (2) criticizes Petitioner for not making "any showing" that a class exists; (3) criticizes Petitioner for non-compliance with Rule 23, M.R.Civ.P.; and (4) indicates that the insurer cannot identify the class. Again, nowhere does the insurer mention or document in its Brief any prejudice to it if the Court were to allow an amended petition as requested by Petitioner. Further, it is too late for the insurer to come forth with any such claim of prejudice in its next Brief, which is sure to follow this Brief.

Pursuant to Rule 15(a), M.R.Civ.P., in pertinent part, a "...party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires..." emph. supp. In this case, Petitioner realized, as the case developed, that the Montana bar and restaurant industry, as a prime example, appears to treat all employees similar to the treatment of Mr. Sandru by his employer, with regard to tips

and the class-wide exclusion of tips from an injured employee's wage-loss benefits calculation. Petitioner's counsel came to realize this class-wide treatment when the insurer continued to proceed with formal discovery process (via Interrogatories, Requests to Produce, and its lenghty oral deposition of Christopher), to discover Mr. Sandru's prior employment and tip reporting history, for the last ten (10) years; in each case, Mr. Sandru's pay stubs showed less tips than he actually made or than which were actually known to the employer.

In the event of a workers compensation claim, therefore, the injured worker would then not be paid his or her full entitlement to benefits, because tip income would be excluded by the insurer in the computation of benefits. This scenario is a class-wide, common situation, and cries out to be dealt with in terms of justice and the law. It appears to the Petitioner that nearly all of Montana's employees in the bar/restaurant trade in Montana are not receiving proper wage loss benefits in the event of a work-related injury. Such an injustice should be corrected as soon as possible, because it is simply not right, as Montana law mandates that wage loss benefits are based upon "wages" which definition includes tips, "...to the extent that tips or gratuities are documented by the employee to the employer for tax purposes..." Sec. 39-71-123(1)(c), MCA.

In Mr. Sandru's case, as a "head bartender" for the subject employer, the Elks Club, he made $7.50/hour for 40 regular hours of work each week, or $300.00 in hourly wages, plus an average of another $300.00 per week in tips, all as written by and acknowledged by the employer's manager and by Mr. Sandru, in due course following the subject work injury. See First Report of Injury, Resp. Exh. 1, attached hereto, which document was prepared by the employer's agent and received by the insurer's agent, and signed by the "Worker" and on behalf of the "Employer," as of June 1, 2003. Also, see Pet. Exhibit 2, attached hereto, confirming Exhibit 1. Therefore, the gross income involved in this action amounts to $600.00 per week, not $300.00 per week, for Mr. Sandru. The insurer's computation for benefits, however, disregards the $300 tip income each week, which gives Christopher only $300 income per week, upon which to compute benefits. (Note: All exhibits referenced herein are Respondent's proposed pre-trial exhibits).

The effect of twice the income is to substantially increase benefits, by $200.00 per week (2/3 of the $300 for tips each week), for Temporary Total Disability rates, up to the maximum Average Weekly wage rate allowed by law. Therefore, the impact of including tip income on the claimant's benefits is substantial. Further, it appears that this scenario is, at the least, an industry-wide problem. Workers are being paid lower hourly wages because they can earn substantial tips; upon event of work injuries, however, only hourly wages and nominal tips (in this case, only $9.40 tips for 2 weeks of work, rather than $600 tips) as reported on Mr. Sandru's actual pay stub, (see Respondent's Exh. 2, attached, for example), are used by the subject insurer and likely the state's other insurers, to compute wage loss benefits.

The Court is only being requested at this time to allow amendment of the Petition to include allegations of the proposed class, so that a class might be determined later as the Court deems proper and as allowed by the rules of the Court, pursuant to law, as guided or as required by Rule 23, M.R.Civ.P., with this Court's just determination. Ruhd v. Liberty Northwest Insurance Corp. 2003 MTWCC 38 para 19, p.5-6 of 11.

To clarify at this point, the "class" as proposed would include the following persons: all workers compensation claimants eligible for wage loss benefits as of July 1, 2003, or thereafter, and who reported tip income to the employer prior to his or her injury, but which tips were partially or totally improperly excluded by the insurer for purposes of computation of wage loss benefits for the claimant, plus any other injured employees found who reported tip income and who are similarly situated to Christopher in any other trade or industry in Montana; such employer is most likely found in the bar/restaurant industry in Montana.

2. Sec. 39-71-611(3), MCA (2003), violates Article II, Section 16, Montana Constitution, and the statute is unconstitutional, and attorneys fees and costs should be paid out of the common fund as generated in this action.

Sec. 39-71-611(3) provides in pertinent part:

> 39-71-611. Costs and attorney fees...- barring of attorney fees under common fund and other doctrines.
>
> ...(3) Attorney fees may be awarded only under the provision of subsection (1) and may not be awarded under the common fund doctrine in law or equity.

Sec. 39-71-611(3), MCA (2003), is new legislation in Montana, known as Chapter 464, and effective on April 21, 2003, the date signed by the Governor. This legislation was sponsored by Vicki Cocchiarella as Senate Bill 450, and Ms. Cocchiarella was and is an employee of Putnam & Associates, an insurers' agent handling workers compensation cases in Montana.

Article II, Section 16, Montana Constitution (1972), states as follows:

> Section 16. The administration of justice. Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay.

The Court has previously indicated in its rulings that Rule 23, M.R.Civ.P., is a guide and that the Court's primary duty, in regard to class action matters, is to make sure that the benefits due claimants are actually paid to claimants; in fact, "...class action certification...," as such, is not provided for or contemplated in the Workers Compensation court rules. Murer v. Montana State Compensation Mutual Insurance Fund, 257 Mont. 434, 849 P.2d 1036 (1993) (Murer 1), quoting Moen v. Peter Kiewitt & Sons, Co. (1982), 201 Mont. 425, 434, 655 P.2d 482, 486. The "responsibility" to "assure that non-participating beneficiaries are identified and paid the benefits

they are owed … can be carried out without resort to formal class action procedures," supra, and quoting Ruhd v. Liberty Northwest Insur. Comp., 2003 MTWCC38, at para. 19.

Therefore, the Court should allow amendment of the subject Petition to allow a class of similar claimants to be included in this case, to allow justice to be sought and a clear wrong to be righted for everyone involved, in the State of Montana. In the event claimant prevails in this action, the benefits of the ruling can then automatically accrue to all similarly situated claimants, upon identification of, and notice to, these people.

Previous to the recent statutory enactment referred to above, and now constitutionally challenged herein, the Montana Supreme Court has held that reasonable attorney fees should be awarded, "pursuant to the common fund doctrine." Murer v. State Comp. Mut. Ins. Fund, 947 P.2d 69,77 (1997) (Murer III). The judicial rationale behind this 1997 ruling is as sound today as it was in 1997, as stated supra at 76:

> [10] The common fund doctrine is deeply rooted in American jurisprudence and provides a well-recognized exception to the traditional American rule regarding attorney fees. The United States Supreme Court created the common fund doctrine in Trustees v. Greenough (1881), 105 U.S. 527, 15 Otto 527, 26 L.Ed. 1157, and has subsequently applied that doctrine in numerous other cases. See e.g. Boeing Co. v. VanGemert (1980), 444 U.S., 472, 100 S.Ct. 745, 62 L.Ed2d 676; Alyeska Pipeline Serv. Co. v. Wilderness Society (1975), 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141; Fleischmann Distilling Corp. v. Maier Brewing Co. (1967), 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475; Hobbs v. McLean (1886), 117 U.S. 567, 6 S.Ct. 870, 29 L.Ed. 940; Central Railroad & Banking Co. v. Pettus (1885), 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915. These common fund doctrine cases provide that when a party has an interest in a fund in common with others and incurs legal fees in order to establish, preserve, increase, or collect that fund, then that party is entitled to reimbursement of his or her reasonable attorney fees from the proceeds of the fund itself.
>
> In Means v. Montana Power Co. (1981), 191 Mont. 395, 625 P.2d 32, we recognized that the common fund doctrine is "rooted in the equitable concepts of quasi-contract, restitution and recapture of unjust enrichment." Means, 191 Mont. At 403, 625 P.2d at 37. Furthermore, we expressly adopted the common fund doctrine and concluded that:
>
> The "common fund" concept provides that when a party through active litigation creates, reserves or increases a fund, others sharing in the fund must bear a portion of the litigation costs including reasonable attorney fees. The doctrine is employed to spread the cost of litigation among all beneficiaries so that the

active beneficiary is not forced to bear the burden alone and the "stranger" (i.e., passive) beneficiaries do not receive their benefits at no cost to themselves.

Means, 191 Mont. at 403, 625 P.2d at 37.

[11] Application of the common fund doctrine is especially appropriate in a case like this where the individual damage from an institutional wrong may not be sufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong. The alternative to the doctrine's application is simply for the wrong to go uncorrected.

[12] Based on these legal principles and authorities, we conclude that when a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bear a portion of the litigation costs, including reasonable attorney fees. Accordingly, the party who creates the common fund is entitled, pursuant to the common fund doctrine, to reimbursement of his or her reasonable attorney fees from that fund.

As correctly stated by James Goertz, counsel for claimant in Murer III, at pp. 46-47 of his Appellant's Brief:

> The institutional defendant which, by virtue of its size, may perpetrate a multi-million dollar wrong in individual increments of only a few hundred dollars presents an important challenge to the integrity of the judicial system. The courts must assure access to the court and to a beneficial remedy for such wrongs or it has utterly failed its constitutional role. The Montana Constitution guarantees not only theoretical access to the courts, but also a remedy which constitutes actual and full legal redress:
>
> > Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress . . . right and justice shall be administered without sale, denial, or delay.
>
> Article II, Sec.16 Montana Constitution.
>
> The common fund/substantial benefit doctrines is a tool which enables courts to administer this constitutionally required justice. The use of this tool is essential where the cost of remedying an institutional wrong through individual litigation cannot be economically justified because there is insufficient

> financial incentive to make legal counsel realistically available, or because the disproportionate ratio of expense to potential recovery creates a substantial barrier or precludes the initiation of the litigation altogether. See also Eisen v. Carlisle & Jacquelin, supra 417 U.S. 156 at 161 ("No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount.")

In conclusion, without benefit of attorney fees paid from a common fund that may be generated in this case, then it is impossible to proceed with a class action, because Mr. Sandru cannot personally bear the entire costs in such litigation, and access to the courts for Mr. Sandru and the other similarly situated class members, is effectively and unconstitutionally denied. That denial further violates the rule of Due Process and Equal Protection of law guaranteed by both the state and federal constitutions, in Article II, Section 4 (Equal Protection) and Section 17 (Due Process), Montana Constitution, and Amendments V and XIV, U.S. Constitution, to the detriment of Mr. Sandru and other potential class members.

Singling out Christopher and others similarly situated by physical disability into a class denied proper and fundamentally basic benefits after injury at work, and denying Christopher the right to determine others similarly situated, by due process of law, is a denial of both equal protection under the law, and of the right of due process.

3. The class elements required in Rule 23(a) and (b)(3) can be satisfied in this case, with development of the case and by statistical information provided by the Department of Labor, State of Montana, upon request by claimant petitioner, and/or the Court.

The elements required to determine whether a case should proceed as a "class action" are found in Rule 23 M.R.Civ.P., and are construed as set forth in McDonald v. Washington, et al., 261 Mont. 392, 400, 862 P.2d 1150, 1155 (1993), as follows:

1. The class must be so numerous that joinder of all members is impractical.

2. There must be questions of fact or law common to the class.

3. The claims or defenses of the representative parties must be typical of the claims or defenses of the proposed class.

4. The representative parties will fairly and adequately protect the interest of the proposed class.

5. The questions of law or fact common to the members of the class predominate over questions of the individual members.

6. The class action is superior to other methods of adjudicating the controversy.

In this case, element 1 (numerosity) is satisfied, because those injured employees not receiving proper wage benefits are likely substantial in number. First, it has been established by this Court in 2003 in Ruhd, supra, that there are a total of some "600 other non-party insurers or

self-insured," which figure was determined in that case by the Court's Order to the Department for such information. Here, the number of insurers is less than in Murer III because the claimant is initially narrowing the class to only those injured employees in the bar/restaurant industry, which is the industry class containing Mr. Sandru as an injured employee. The actual number of the class can be determined only as the case progresses, and the Petitioner is actively working to inquire about the size of the class from the Department of Labor, State of Montana. By common experience, the practice of tipping income is wide-spread throughout the State of Montana, and many injured employees in the subject industry are similarly situated to Mr. Sandru, as many bar/restaurant employees are likely injured in Montana each year.

Element 2 (commonality) is satisfied, because insurers generally don't include tip income for purposes of computing injured workers' wage benefits. The injured restaurant or bar worker is likely to be credited with only 50% of his true income (half of which is tips) for purposes of wage loss benefits, as in the case of Mr. Sandru. Again, this practice of excluding tip income for benefits calculation appears to be an industry wide practice, as can be seen in the nominal tips shown on W-2 forms by the subject employer in this case, which amounts are set forth in discovery in this case, from the years 2000-2003. For example, Mr. Sandru's 2003 W-2 shows that he made less than $100.00 in tip income in 2003; actually, the employer has reported to the insurer $300/week (See Pet. Exh. 1) in tips, or over $2,000 tips for approximately 7 weeks (this is the minimum) of work. The less than $100.00 amount contrasts markedly to the $2,000 correct figure; Christopher will report the higher figure for income tax purposes, of course, although the employer continues to document the lower figure in the 2003 W-2 form, despite Pet. Exh. 1 and evidence of the higher tip income in this case. The other W-2 forms for other employees of the Elks Club since 2000, show a similar nominal amount of tip income (about $1/day), when it is common knowledge that such employees of bars and restaurants earn between $25 - $150 tips per workshift, which is well over $1/day.

It is reasonable to believe that this practice (denial of dtip income) by employers and insurers is pervasive throughout the subject industry, and may occur in other industries as well (cosmetologists, fishing guides, etc.) In Mr. Sandru's case, the policies of his previous bar and restaurant employers also resulted in deflating the amount of tip income, for tax purposes, if the insurer looked only to the pay stubs to compute benefits, which appears to be the prevailing practice, based upon both Mr. Sandru's experience with the Elks Club and his prior two restaurant/bar employers, as evidenced in the discovery produced in this case. In other words, the practice of the insurer in this case appears to be common to the insurers in Montana, in terms of wage benefits computation to exclude tip income, resulting in substantially lower wage benefits paid to the injured worker, and particularly in the bar/restaurant industry.

Element 3 (typicality) is satisfied in this case, because the insurer's practice of excluding most of the employee's tip income, is likely a common practice throughout the industry, and the insurers are likely to defend similarly as in this case, i.e., object on grounds that the injured employee "failed" to tell the employer the exact dollars and cents of tippage, and thus the tippage amount was "not reported," thus not meeting strictly the "wages" definition set forth above. In short, the problem pointed out in this instant case appears to be widespread in the example industry and in the State of Montana, and that problem needs to be corrected, by this Court.

Element 4 (adequacy, i.e., the representative parties will adequately protect the interests of the proposed class) is satisfied, namely because Mr. Sandru and his counsel have actually raised these issues, and both counsel and Mr. Sandru want to have this glaring problem corrected, as it is simply not right that injured workers are paid based on 50% of their income, to start with, after which a 2/3 multiplier and cap is attached to the determination of net benefits. Counsel was admitted to practice in this state and federal courts in 1975, and has practiced privately since 1978, continuously to date. His practice is primarily civil, including litigation and workers compensation cases. Counsel last tried a case before this Court (Judge Hunt) in the early 1980's, which case successfully settled after trial. Since that time, counsel has successfully handled numerous workers compensation matters for claimants, annually, and has successfully avoided any need to file or litigate a matter before this Court, due to settlement and resolution prior to litigation (except for filing two claims in 1996 due to the legislative caps on permanent awards, to preserve the favorable effect of the previous statute).

Counsel has been involved in one prior class action in the late 1980's in federal court, concerning treatment of minors incarcerated at the Warm Springs State Hospital. That case settled before a class was certified by the Honorable Russell Smith, U.S. District Court for Montana. Counsel is proceeding to research applicable class action law for this case, and believes that he can adequately represent a class in this case, and will be in contact with other practitioners who actively practice before this Court, in class action and other matters pending before the Court.

Element 5 (commonality of the class members) is satisfied, because while no two employees are exactly alike, the common facts and issues linking the potential class members is obvious. Although opposing counsel points out in his responsive Brief that each employee is different and there are no true common grounds, the rule of law is that the Petitioner does not need to show complete likeness within the class members, and the class members can be different, as long as common facts or common issues exist, as is true in this case. The class members are in the same industry, are injured at work in Montana, and are all receiving tip excluded benefits (or are eligible for same) as of July 1, 2003 and thereafter. The fact that the benefits amount varies, or that the employee reported the tips in various ways to the employer, are not significant differences to defeat a class action. Here, it is only vital that the employer and/or insurer as employer's agent, knew about the tips, and that less tips than were actually earned by the employee were used to calculate benefits, by the insurer. Both common facts and common issues exist with the proposed class members.

The class members are not required to be identical, and there will of necessity be differences in kind of the class, as stated by the Supreme Court of Montana in <u>Sieglock, et al, individually and all others similarly situated v. BNSF Railway Co.</u>, 319 Mont. 8, 13, 81 P.3d 495 (2003), as follows:

> Total commonality is not required, meaning all questions of law or all questions of fact need not be common. (Citing case). The requirements of Rule 23(a)(2) are disjunctive, therefore, the party seeking classification must have either common questions of law or fact. (Citing case). Commonality is satisfied when the question of law linking class members is substantially related to resolving

the litigation, even though individuals may not be similarly situated.

Element 6 (the class action is superior to other methods of adjudication) is satisfied, because otherwise the class members would likely never be made known or determined, and the lost benefits would never be paid, and the insurer would continue to be unjustly enriched by keeping benefits rightfully owed to the injured workers. Individual actions would never be viable or possible, as the claimants could not be determined, with at least a quasi-class action as a litigation vehcile.

CONCLUSION

In conclusion, justice requires that this action proceed in the manner of a class action, and that the Department of Labor proceed to assist counsel in the determination of claimants for purposes of the class, which process can proceed up to trial, and then thereafter, in the event of a favorable ruling in Petitioner's favor on the underlying claim. Leave should be granted by the Court to amend the Petition as requested by the Petitioner, to allow for the class action proceedings and other appropriate relief.

DATED this 26th day of January, 2004.

CHARLES W. SCHUYLER
Attorney for Petitioner Christopher Sandru

CERTIFICATE OF SERVICE

I, the undersigned hereby certify that on the 26th day of January, 2004, I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

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