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FILED
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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 STATEMENT OF GENUINE ISSUES, AND BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Pursuant to the requirement of MAR 24.5.329(3), the Petitioner (hereinafter called "Chris"), presents the following statement of genuine issues in this case:

1. Chris is required by statute to report or document his tips to his employer for tax purposes. Sec. 39-71-123(1,c), MCA. The statute is silent as to the timing of the report; at least, the statute is ambiguous to that timing. Chris in fact reported his tip income to his employer, the Elks Club, by various means, including:

   a. Conversation with the manager, Linda Stamos;

   b. Credit card charge slips, some for hundreds of dollars, charged by customers in favor of the Elks Club, to pay tips to Chris; such slips were turned over to the employer by Chris, including the 6/14/03 Kempthorne $200 tip paid to Chris, for one single event.

   c. The June 30, 2003, First Report of Injury signed by Chris, after which The Elks Club manager, Linda Stamos, further wrote on June 26, 2003, to the Insurer, to confirm the wages and $300 tips per week earned by Chris:

      :...He earns a definite $300 per week based on 40 hours; <u>and he averages $300 per week in tips."</u>

and

"he earns $7.50hr. plus all tips." (Emphasis supplied).

It is, in fact, a matter of common knowledge that Chris earned an average of $300 tips/week, at the Elks Club, serving as head bartender.

d. Chris' 2003 Income tax returns show tip income form the Elks Club employment, per Chris' Affidavit filed herewith. While the paychecks only show $98.06 in total tips earned by Chris in 2003, that amount is so low as to be patently false, and sharply contrasts with the $2,198 in tips reported by Chris on Form 4137; attached to his 2003 income tax returns, per Chris' Affidavit.

e. Letters to the Insurer by counsel, all referring to the $300 average tips/week income.

f. "Taped" statement taken by the Insurer's Sandy Scholl on June 26, 2003, which refers to questions by Sandy Scholl to Chris, concerning the amount of his tips. See Chris' Affidavit. (Note: this tape was admittedly improperly taken by Sandy Scholl, and Chris' answers were not recorded; however, the fact remains that the Insurer raised the issue of tips with Chris for him to quantify, but the Insurer's position now is that all the Insurer can look to are the actual paychecks, to determine tips).

2. The Insurer's wage loss benefits improperly exclude more than approximately 95% of Chris' tips (only $98 tips of $2,100 paid), and the wage loss benefits should include the last pay period's paycheck, for good cause, because that check includes one week of wages (plus tips) earned by Chris before the injury, but paid to him after the injury. The last week worked (5th pay period for Chris) is more reflective of the true earnings of Chris for this employer, as he had just received a wage raise to $7.50/hour effective for this period, and without paycheck #5 included in the benefits determination, that raise (plus the "back pay" noted on the check) is not credited at all to Chris, when there is "good cause" to do so, within the meaning of Sec. 39-71-123(3)(b), MCA. The last check (Check #5), is more indicative of Chris' earnings than Check #1, when Chris started at his lower start rate.

3. As head bartender, Chris was admittedly in a position to receive good tips, and in fact did earn good tips, allowing the employer to pay a lower hourly wage for this position. The employer wrongfully benefits by saving FICA contributions, if the tips remain "unreported" for paycheck purposes. This practice in which the injured employee is cheated out of his benefits and the non-reporting employer fails to pay correct FICA contributions, should not be approved by a Court of law.

4. The Insurer unreasonably refused to include the correct tip income in the determination of benefits, even after both the employer and the claimant repeatedly and fully advised the Insurer of the true facts concerning this tip income.

5. The Insurer's practice of excluding nearly all the tips, as wages for purposes of calculating benefits, constitutes a violation of: (1) the statutory scheme by excluding tips as earned income, and also (2) the Equal Protection Clause and the guarantee against discrimination contained in the state and federal Constitutions governing this case.

The Insurer's practice in this case creates two classifications of employees, and treats the classes differently, with no rational basis for doing so. The two (2) classes are those employees who have higher paying jobs and earn no tips, and those employees with lower paying jobs who earn tips as a substantial part of their income. The lower-waged employee (here, $6.50-$7.50/hr) receive substantially less wage benefits than the higher-waged employee. Here, 50% of the employee's income was discounted and ignored, for no rational purpose, thus effecting invidious discrimination against low wage earners, yet benefiting the non-reporting employer who pays less FICA contributions, likely unlawfully. See Senor T's Restaurant v. The Industrial Commission of Arizona (1982), 131 Ariz 360, 641 P.2d 848, 852, a copy of which case is attached hereto for convenience, and is duly referenced in the Brief below.

CHRIS' BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

The Petitioner, Chris Sandru, hereinafter "Chris," by and through counsel, files the following Brief in opposition to the Respondent Insurer's Motion for Summary Judgment:

ARGUMENT

1. Summary Judgment Motions Disfavored. The subject Insurer's Motion for Summary Judgment is arguably a classic example of why this Court disfavors such Motions, as set forth expressly in MAR 24.5329(b). The Insurer would like to slam the door now on this case, as a matter of law, but the facts and circumstances dictate otherwise, and now Chris is required to present several documents in opposition, and the Court is faced with reviewing the same, all of which will essentially likely be redone in a trial setting, and all judicial economy is lost as a result of the Insurer's pending Motion.

2. Genuine Issues of Material Fact Exist. Chris' Affidavit, submitted in Support of this Brief and in Support of his Statement of Controverted Facts, and also his List of Genuine Issues contained in this document, all show the existence of genuine issues of material fact. One of such issues is that Chris reported tips to his employer, and that his employer reported those tips (average $300/week tips) to the Insurer. The Insurer then unreasonably refused to include the reported tips for purposes of calculating wage loss benefits.

The documents relied upon by Chris to establish his reporting of tips to his employer are essentially contained in Chris' Affidavit filed herewith, and are also referred to in the documents filed in connection with Chris' Response and objection to the Insurer's Motion for Summary Judgment. Tips are to be included as wages if the tips "...are documented by the employee to the employer for wage purposes." Sec. 39-71-123(1)(c). MCA.

3. Prior Cases are Clearly Distinguishable from this Case. The Insurer cites the Court to several cases in its Brief in Support of Respondent's Motion for Summary Judgment,

and the Insurer uses these cases to attempt to preclude tip income in this case, for purposes of wage loss benefits determination.

The first case cited by the Insurer is Sampson v. Broaddway Yellow Cab Co. & St. Comp. Ins. Fund, WCC No. 85123369 (1986), at page 2 of the Insurer's Brief. However, the Sampson case is easily distinguished from the instant case by an examination of the facts. In Sampson, the Court's "Finding of Fact No. 10" stated as follows, on p.6:

> 10. Tips received by the claimant were not reported to the employer nor were tips reported for tax purposes. (Testimony of claimant and Jim Stiert).

The Court then concluded, at Sampson, p.7 that:

> The sole evidence presented with regard to tips i(s) the testimony of the claimant which he reported to average $10.00 per day.

Obviously, in Sampson the Court had no corroboration of the claimant's testimony as to tips. Sampson did not have a letter from the employer that verified his tip income, as does Chris in this case. In this case, Linda Stamos, manager of the employer, wrote to the Insurer by letter dated June 26, 2003, and confirmed in writing the statements made in the First Report of Injury signed June 30, 2003, as to wages, including tips, as follows (emphasis supplied):

> June 26, 2003
> GAB Robins
> ATTN: Sandy Scholl
>
> Re: Christopher Sandru
> GAB File No: 49238-04649
> Customer Code: 307096
> Date of Claim: 6/21/03
>
> Dear Sandy:
>
> Per my conversation with you earlier regarding Christopher Sandru: Chris is our Head Bartender here at the Hellgate Elk's Lodge #383. He gets paid twice a month on the 5th and on the 20th. He earns $7.50/Hr. plus all tips. He has been averaging approximately 42-45 hours each week – of which any hours over 40 are paid at overtime rate of $11.25. He earns a definite $300 per week – based on 40 hours; and he averaged $300 per week in tips.
>
> If you need any additional information, please do not hesitate to call me. Please process his claim as quickly as possible.
>
> Sincerely,

/s/ Linda Stamos
Linda Stamos, Manager
Hellgate Elk's Lodge #383

The Sampson facts further do not include any mention of how the claimant there could document his tips. Therefore, that case is not useful precedent for the instant case, and the Insurer has failed to point this truth out to the Court, for self-serving reasons. It is not helpful for the Insurer to twist and spin a prior case to try to make that case precedent for this case, when that argument is contrived and tends to misinform the Court.

Next, the Insurer cites Thomas v. Insurance Co. of N.A., WCC Docket No. 1615 (August 8, 1983) and Anderson v. Insurance Company of North America, WCC Docket No. 1657 (May 16, 1983). Chris will now review each one of these cases, and show how each is easily distinguishable from his case. In the Thomas case, the claimant again failed to show what tips were made, or how the tips were ever reported, at pp. 7-10:

> 28. (Finding of Fact #28). At the time of the accident claimant was earning $3.45 per hour, plus unreported tips.

The claimant in Thomas, at p.9, moved the Court to take judicial notice of the manner in which restaurants pay their employees, and the Court denied the motion. At Thomas, p.10, the Court held that:

> Claimant has failed to present any evidence demonstrating that (it is) capable of accurate determination by resort to sources whose accuracy cannot be reasonably questioned.

Again, the Thomas case is easily distinguished from the instant case. The claimant in Thomas had no "First Report of Injury" signed by the employer indicating the amount of tips paid to the employee, as is the case in the instant case, and he had no letter from the employer documenting tip income, such as the Stamos letter reference above.

Next, the Insurer cites Anderson v. Insurance co. of N.A., WCC Docket No. 1657 (May 16, 1983), in support of its position that this Court should exclude Chris' tips as wages. The Anderson case is easily distinguishable from the instant case. The date of injury in Anderson was 1/27/98. Anderson at p. 15. The claimant (a waitress) did not report 1978 tips until she wrote a letter to the Insurer in 1981, and the Insurer then included the tips to pay wage loss benefits. At trial, in 1982, the claimant then changed her position, and testified that she underreported tips in 1978 and that the tips reported in the 1981 letter were "too low," or testimony to that effect. Anderson, Supra at 13. The claimant then wanted the Court to add to her 1978 wages the unreported amount of tips and recompute the amount of benefits to which she is entitled. Anderson Supra. The Anderson case is easily distinguishable from the instant case, in that Chris did not wait 2 years to report tips, and the Insurer adamantly refused in this case to pay the tips that its own principal, the Employer, reported to the Insurer.

The Anderson Court did note the claimant's latest report in tip amount, as follows, at p.13:

> The claimant has cited this Court to 2 Larson at Sec. 60.12 for the proposition that an injured worker's tip must be included as part of his wages when calculating the amount of his disability rate. This is not the issue: the defendant has already done this regarding the amount of tips the claimant reported. The issue is whether the claimant is entitled to include the amount of those tips she did not previously report to the defendant.

In Anderson, the employer favorably acted on the employee/claimants two (2) year old report of tips. These facts contrast markedly with the instant case, in that the claimant did not wait 2 years to report tips, and also in that here the Insurer has refused both the claimant's and the employer's report of tips, for inclusion as wages.

Finally, the Insurer cites the Court to Simons v. St. Comp. Ins. Fund, WCC No. 9207-6503 (October 13, 1992) in support of its refusal to include all of claimant's tips as wages. However, the Simons case is also easily distinguishable from the instant case. At the outset, the claimant corrects the Insurer's date of the Simons decision. The correct date is January 26, 1993, and the correct date is most helpful when looking up the decision.

In Simons, supra at p.18, the employee and the employer disagreed with the amount of unreported income. That fact alone distinguishes the Simons case from the instant case. In Chris' case, both the employer and the employee agree with the amount of unreported income, in this case, 7 weeks x $300/week = $2,100.00, as Chris reported on his 2003 income tax returns, and as Linda Stamos agreed in her June 26, 2003 letter to the Insurer.

The Simons case involved missing book evidence on tips on the part of the employee, and an amended income tax return for 1990. Supra at 18. Further, the claimant filed a Form 4137 reporting $1,238.00 in unreported income, but then submitted a handwritten document to the Court showing $2,527.20 unreported cash payments for Saturday dog grooming. Those facts do not exist in this case, as the 2003 Form 4137 ("Social Security and Medicare Tax on Unreported Tip Income") in this case shows an amount, $2,100.00, that is fully consistent with the $300/week for 7 weeks of work (5/1/03 – 5/15/03; 5/16/03 – 5/21/03; 5/22/03 – 5/31/03; 6/1/03 – 6/15/03; 6/16/03 – 6/21/03 = 7 weeks of work). Both the Employee and the Employer in the instant case agree to this amount of $300.00 tips/week. The Simons case does not help the claimant in the instant case.

In Simons, the Court appeared to approve the Form 4137 amount of $1,238.00, if that amount would not have been later changed by the claimant's testimony to $2,527.20. Here, the amount of $2,100.00 unreported tip income (unreported as in not reported to the government by the employer's paychecks, as required) is not changed by Chris, as the claimant. It appears that the Simons Court, as the Court should do in this case, would approve the Form 4137 income of $1,238.00 tips as wages to determine wage loss benefits.

The Insurer points to the Simon's Court statement on p.18, to the effect that "...when tips are concerned the Court has elected to include only those amounts that are reported for tax purposes when computing wages." However, the Simons case is easily distinguishable from the instant case, and also Chris here notes that the above Court statement improperly adds to the statutory language, with the effect of making one more hoop for the employee to jump through to include reported tips as wages.

By adding the judicial language "...when computing wages," to the statutory language "for tax purpose," Sec. 39-71-123(1,c), to then read as follows and as stated in Simons at 18:

> "... to include only those amounts that are reported for tax purposes when computing wages,"

the Court has in effect made legislative law. The statute does not require or state the condition or limitation "when computing wages." That language was added by the Simons Court, and has the improper effect of chilling the claimant's claim for inclusion of tips into wages for benefits calculation. The statute stops short of requiring a report of tips to the employer "when computing wages." The "added" condition sets up a new standard that is unknown in the statute and in the bartending industry, and is certainly the most strict, and most unreasonably high standard imaginable.

The present law governing this case is set forth in Sec. 39-71-123(1)(c), MCA, and requires the employee to "document" to the employer tips "for tax purposes." This statute does not state, and thus cannot be construed to mean, that the employee must document tips to the employer for tax purposes when computing wages. Such an added condition is not the law in Montana. Chris reported and documented his tip income averaging $300/week to his employer, to such an extent that the employer reported that same amount to the Insurer. Such documentation is all that is required to fulfill Sec. 39-71-123(1)(c), MCA, in terms of tips treated as wages. However, Chris did more. Before the employer furnished his 2003 W-2 Form to Chris showing a mere $98.06 in tips, Chris had reported and documented to the employer his tips and tip income, via the Stamos letter dated 6/26/03 following the 6/30/03 First Report of Injury, and through the Sandru deposition in December, 2003, when Chris provided more detailed information as to tips, and up to the present date, when the employer is now reminded that the Kempthornes credit card charged through the Elks Club a $200.00 tip to Chris on June 14, 2003. The latest tip was not provided by the employer in its records (see Chris' Affidavit) which impeaches the employers (and the Insurer's) credibility and believability. The employer and the Insurer are now not coming clean with the most obvious of tips, and the Kempthorne $200.00 tip alone (one event), more than doubles the $98.06 tips acknowledged by the employer's checks and argued by the Insurer as the truth.

$98.06 is not the truth. Chris, by obtaining documentation from the customers themselves (see Chris' Affidavit), has documented now to the employer the $200.00 tip, and other tips, more than sufficiently for benefits calculation purposes. Yet the Insurer continues to insist on arguing untrue facts, to obtain savings and a windfall for the Insurer, to the detriment of an injured employee who trusted the employer to acknowledge the reporting of tips. Chris has further provided the Jarvis J. Ashley statement, to show the Elks Club was well aware of tips

earned by the head bartender. It is unreasonable to believe that Chris earned but $98.06 in tips for the seven weeks of work in question; he made approximately $10/hour for the 240 hours of work, which leaves him close to the $2,100.00 figure reported to the IRS, and also to the employer.

4. Chris' Wage Benefits should include Week #7 (the 5th pay period), from 6/17/03 – 6/21/03, for good cause, and within the provision of Sec. 39-71-123(3)(b), which states in pertinent part (Emph. supp.):

> "For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer, the wage may be calculated by dividing the total earning for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period ..."

In this case, as set forth in Chris' Statement of Facts, the Insurer should include the last week of Chris' earnings, so that his wage loss benefits will yield a higher but accurate figure. The Insurer has never shown its computations of wage benefits to establish the present rate, despite several requests by Chris for that information, and now Chris' computation of benefits appears more accurate than the Insurer's computation.

In this regard, Chris relies upon the State of Montana "Declaration of public policy" set forth in Sec. 39-71-105(1):

> "... the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease."

Chris submits to the Court that, for good cause shown, his "actual" wages would include his last week of work, which includes his "Back-pay" for prior work within the regular 4 pay periods, and his recent wage raise to $7.50/hour effective 6/16/03. Also, the Insurer's computation of wages which excludes $300.week acknowledged tip income is very unreasonable, and does not bear the statutorily required "reasonable relationship to actual wages lost..."

5. The Insurer's Exclusion of Chris' Tip Income Reportedly in the Sum of $300 average/week violates the Equal Protection provisions of the federal and state constitutions. Chris referred to the Insurer's actions in this case as being in violation of the Equal Protection constitutional provisions. See Chris' List of Genuine Issues, Supra. Also, refer to Senor T's Restaurant v. Industrial Comm. of Az. (1982), 131 Ariz 360, 641 P.2d 848, 852 quoted supra in the referenced List of Issues, just prior to the commencement of this Brief, in this document (a copy is attached hereto.)

Clearly, wage-earners with lower hourly rates, such as Chris, rely upon substantial tip income, and their employers can lower the hourly wage, and reduce or lower the employer's duty to make FICA contributions. In Chris' case, as a "Head Bartender," his hourly wage was $6.50/hour, but he made as much in tips ($300/week) as he made in hourly wages. The employer

also benefits from the tips, because the employer can then escape FICA contributions associated with the hourly wages paid in each paycheck. The employer's incentive to not report tips to the government, of which it is aware as in this case, is to maintain that lower hourly rate for a key employee.

However, such conduct creates two separate but unequal classes of workers: those who depend upon tip income, and those who depend on salary or hourly wages. Another way to look at the unequal classification created is that some employees are able to report tips, and some are not able to do so as set forth in the Senor T's decision, supra at 851.

As applied in this case, the Insurer's conduct to exclude tips from wage benefit calculations, discriminates against the lower paid workers, with no rational basis or reason for doing so. Such conduct is unconstitutional and violates equal protection of the law constitutionally guaranteed, as follows:

> Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas. (Emph. supp.). Article II, Sec. 4, Montana Constitution.

In addition, each person is protected by the Equal Protection Clause of Section 1, Article XIV of the U.S. Constitution, as follows, in pertinent part:

> Section 1. "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emph. supp.)

This instant case is very similar to the Senor T's Restaurant case, supra, in which the Supreme Court of Arizona reviewed Arizona's workers compensation law, as applied, and found that "tips" income was not excluded by the Arizona statute, similar to Montana's statute, from "wages," with the following rationale and holding. (See the highlighted portions of the case, taken from pages 851 – 852, attached to this Brief).

CONCLUSION

The Court should deny the Insurer's Motion for Summary Judgment, as that Motion has no basis in law or in fact, and there exists genuine issues of material fact.

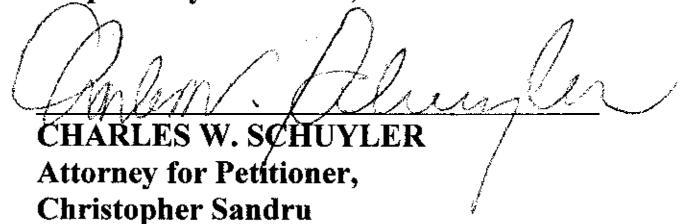
In this case, Chris Sandru was required to document his tips to The Elks Club, his employer, for tax purposes. Chris has documented his tips to his employer. However, it is the Insurer who hopes to reap windfall by ignoring real and actual income in the form of tips, and to show wages about 50% of what the true wages should be. The Employer reported the tips to the

Insurer, and the Insurer wants to ignore that report. Chris has further properly reported his tips to the government, per Form 4173's $2,100.00 tips, and has reported his tips to the Employer (see "First Report of Injury" signed 6/30/03). However, the Employer ignored that report and the actual evidence of tips set forth in Chris' Affidavit, and sent him a W-2 Form in 2004, for the 2003 employment, which showed a mere $98.06 in tips.

The Insurer's position is unfounded and unreasonable, in this case. The Insurer should immediately pay the correct amount of benefits, including computation of wages with the last week worked by Chris (the "fifth" pay period, for good cause shown), and also all of Chris' tips as duly reported to his Employer, the Insurer, and the government.

DATED this 19th day of March, 2004.

Respectfully submitted,



CHARLES W. SCHUYLER
Attorney for Petitioner,
Christopher Sandru

CERTIFICATE OF SERVICE

I, the undersigned hereby certify that on the 19th day of March 2004, I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

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131 Ariz. 360

SENOR T'S RESTAURANT, Petitioner Employer,

American Motorists Insurance Company, Petitioner Carrier,

v.

The INDUSTRIAL COMMISSION OF ARIZONA, Respondent,

Ellen Osgood, Respondent Employee.

No. 15695–PR.

Supreme Court of Arizona, En Banc.

Jan. 18, 1982.

Rehearing Denied March 2, 1982.

Proceeding was instituted on a petition to review a decision of the Court of Appeals, Division One, 131 Ariz.App. 389, 641 P.2d 877, affirming an award of the Industrial Commission that an injured waitress' compensation claim be based on the monthly amount she was paid by her employer as well as on the tips she received from customers. The Supreme Court, Hays, J., held that: (1) statute defining term "monthly wage" to mean average wage paid during and over a month in which employee is killed or injured is ambiguous and, hence, is susceptible to judicial construction to provide that tips be included in term "monthly wage" for purpose of determining amount of workmen's compensation due injured employee, and (2) interpreting the Workmen's Compensation Act as including tips in the computation of the average "monthly wage" for an employee does not deprive a compensation carrier of property without due process of law on ground that the regulations of the Department of Insurance prohibit carriers from including tips within the premium calculation process since, aside from fact that carriers are not compelled to insure business in which employees are earning tips, regulations cannot be interpreted as prohibiting carriers from including tips in an employee's wage for premium calculation purposes.

Opinion of the Court of Appeals vacated, and the award of the Industrial Commission affirmed.

Holohan, Chief Justice dissented and filed opinion.

1. Statutes ⟹190

Statutes which are ambiguous must be construed in view of purposes they are intended to accomplish and the evils they are designed to remedy.

2. Workers' Compensation ⟹831

Statute defining term "monthly wage" to mean average wage paid during and over a month in which employee is killed or injured is ambiguous and, hence, is susceptible to judicial construction to provide that tips be included in term "monthly wage" for purpose of determining amount of workmen's compensation due injured employee. A.R.S. § 23–1041, subd. D.

See publication Words and Phrases for other judicial constructions and definitions.

3. Workers' Compensation ⟹810

The goal of the Workmen's Compensation Act is to determine a realistic preinjury wage base which can serve as a standard of comparison with postinjury earning capacity of the injured worker. A.R.S. § 23–1041, subd. D.

4. Workers' Compensation ⟹811

The emphasis in setting a worker's average monthly wage is on what the employee has actually earned from his labors. A.R.S. § 23–1041, subd. D.

5. Workers' Compensation ⟹831

Computation of the average "monthly wage" of injured waiters, waitresses, bartenders and the like should reflect the employee's actual earnings and, hence, should reflect the base rate of pay as well as tips received from document since those employees in most instances receive a substantial portion of their earnings in form of tips. A.R.S. § 23–1041, subd. D.

6. Workers' Compensation ⚡810

The word "paid," within statute that the term "monthly wage" be defined as meaning the average wage paid during and over the month in which the employee is killed or injured, does not express a legislative intent that the "monthly wage" refer only to the actual amount of wages paid the employee by the employer. A.R.S. § 23–1041, subd. D.

See publication Words and Phrases for other judicial constructions and definitions.

7. Constitutional Law ⚡48(1)

In interpreting a statute, a court should avoid making the statute unconstitutional.

8. Workers' Compensation ⚡831

An interpretation of the controlling statute as including tips within the definition of average "monthly wage" for an employee is in harmony with the purposes of the Workmen's Compensation Act and avoids the possible constitutional infirmities inherent in an interpretation which would exclude tips from wages. A.R.S. § 23–1041, subd. D.

9. Constitutional Law ⚡301(4)

Interpreting the Workmen's Compensation Act as including tips in the computation of the average "monthly wage" for an employee does not deprive a compensation carrier of property without due process of law on ground that the regulations of the Department of Insurance prohibit carriers from including tips within the premium calculation process since, aside from fact that carriers are not compelled to insure businesses in which employees are earning tips, regulations cannot be interpreted as prohibiting carriers from including tips in an employee's wage for premium calculation purposes. A.R.S. § 23–1041, subd. D; U.S.C.A. Const.Amend. 14.

10. Workers' Compensation ⚡831

Regulations of the Department of Insurance must be construed in accordance with judicial interpretation of controlling statute and, hence, cannot be interpreted as absolutely prohibiting compensation carriers from including tips in an employee's wage for premium calculation purposes. A.R.S. § 23–1041, subd. D.

11. Workers' Compensation ⚡831

Employees desiring to have their tip income included in the calculation of their average "monthly wage" cannot be required to report the tip income to their employer. A.R.S. § 23–1041, subd. D.

12. Courts ⚡100(1)

Decision in *Scott* that tips should be included in the computation of the average "monthly wage" for purposes of determining the injured claimant's compensation was not meant to apply retroactively to claims closed prior to the date of the decision. A.R.S. § 23–1041, subd. D.

Jennings, Strouss & Salmon by Steven C. Lester, Phoenix, for petitioners.

Calvin Harris, Chief Counsel, Industrial Commission of Arizona, Phoenix, for respondent.

Law Offices of Chris T. Johnson, P.C. by Dennis R. Kurth, Phoenix, for respondent Emp.

HAYS, Justice.

This case is before us on a petition for review of a decision of the Court of Appeals, Division One, in *Senor T's Restaurant v. Industrial Commission,* 131 Ariz.App. 389, 641 P.2d 877 (App.1981). We granted review to consider whether tips received by an employee should be included in the calculation of an injured claimant's average monthly wage in a workmen's compensation award. We have jurisdiction pursuant to 17A A.R.S. Rules of Civil Appellate Procedure, rule 23, and A.R.S. § 12–120.24.

On September 8, 1978, respondent employee Ellen Osgood (claimant) sustained an industrial injury which was accepted for benefits by a Notice of Claim Status dated October 9, 1978. On December 7, 1978, the Industrial Commission determined that claimant's monthly wage was $425.80. A request for hearing on this finding was

filed and granted. Claimant testified that she worked 35 hours a week as a cocktail waitress and part-time bartender. Her rate of pay was $2.75 an hour. In addition to this hourly wage, claimant stated that she earned approximately $100.00 per week in tips. The petitioner employer, Senor T's, had a tip-reporting system whereby a tip slip was attached to each timecard given to the employee, and the employee was expected to fill out the tip slip along with the timecard. Claimant testified that she was unaware of the tip-reporting system and did not declare any tips. On January 22, 1980, the administrative law judge issued his findings and award which concluded that claimant should have $400.00 per month in tip income included in her average monthly wage determination. In reaching this conclusion, the judge relied on *Scott v. Industrial Commission*, 122 Ariz. 169, 593 P.2d 919 (App.1978), which held that tips are to be included in the computation of the average monthly wage. After a request for review, the administrative law judge affirmed the decision. Petitioners then brought a special action to the Court of Appeals, Division One, seeking to set aside the award and asking the Court of Appeals to overrule *Scott*. The Court of Appeals affirmed the award, and declined to overrule *Scott*.

Prior to the *Scott* decision, the Court of Appeals had construed A.R.S. § 23-1041 as excluding tips from the definition of "monthly wage." [1] *See Springer v. Industrial Commission*, 23 Ariz.App. 429, 533 P.2d 1166 (1975); *Industrial Commission v. Jordan*, 9 Ariz.App. 23, 448 P.2d 895 (1968). In both *Springer* and *Jordan*, the court expressed the opinion that assessment of premiums and payment of compensation on the basis of wages inclusive of tips was a matter requiring legislative action. In *Scott*, however, the court abandoned its earlier position and overruled itself, concluding:

> "In our view, the results in *Jordan* and *Springer* fly in the face of statutory policy to fix compensation in relation to the economic loss sustained as a result of industrial injury."

122 Ariz. at 173, 593 P.2d at 923.

Finally, the Court of Appeals in the present case, in affirming the award of the administrative law judge, stated:

> "We decline to [overrule *Scott*], not because we agree that tips ought to be included in computing a worker's average monthly wage, but because the principle of stare decisis should now be followed on this question. We agree with the court in *Jordan* that the issue is legislative in nature and that it should be addressed in the legislative process."

131 Ariz. at 390, 641 P.2d at 878.

Despite repeated invitations to the legislature to act in this area, § 23-1041(D) was reenacted without change following *Jordan*, *Springer* and *Scott*.

Initially, petitioners argue that the *Scott* decision amounted to judicial legislation and usurped powers reserved to the legislature. In support of this contention, they rely on dicta in *Jordan* and *Springer* and Judge Wren's dissent in *Scott* which all opined that the inclusion of tips within the definition of wages is a matter requiring legislative action.

[1, 2] We cannot accept petitioners' argument. One of the most elemental and basic functions of the judiciary is to interpret statutes passed by the legislature. A statute is open to interpretation where, in some respect, it is ambiguous. It is clear from a reading of § 23-1041(D) that the legislature did not expressly provide whether tips are to be included or excluded from the definition of "monthly wage"; there-

1. A.R.S. § 23-1041 provides, in pertinent part, as follows:

A. Every employee of an employer within the provisions of this chapter who is injured by accident arising out of and in the course of employment, or his dependents in event of his death, shall receive the compensation fixed in this chapter on the basis of such employee's average monthly wage at the time of injury.

D. The term "monthly wage" means the average wage paid during and over the month in which the employee is killed or injured.

fore, the statute may be reasonably considered ambiguous and is susceptible to judicial construction. Statutes which are ambiguous must be construed in view of the purposes they are intended to accomplish and the evils they are designed to remedy. *State v. Berry*, 101 Ariz. 310, 312, 419 P.2d 337, 339 (1966).

[3, 4] The underlying purpose of the Workmen's Compensation Act is to compensate an employee for lost earning capacity and to prevent the injured employee and his dependents from becoming public charges during the period of disability. *Stephens v. Textron, Inc.*, 127 Ariz. 227, 619 P.2d 736 (1980); *Prigosin v. Industrial Commission*, 113 Ariz. 87, 546 P.2d 823 (1976). The goal of the Act is to determine a realistic pre-injury wage base which can serve as a standard of comparison with the post-injury earning capacity of the injured worker; the emphasis in setting a worker's average monthly wage is on what the employee has actually earned for his labors. *Faith Evangelical Lutheran Church v. Industrial Commission*, 119 Ariz. 506, 507, 581 P.2d 1156, 1157 (App.1978).

[5] We believe it to be a matter of common knowledge that waiters, waitresses, bartenders and the like, in most instances receive a substantial portion of their earnings in the form of tips. The hourly wage paid by the employer is quite low and is often less than the federal minimum wage. The reason for the low rate of pay is that both the employer and employee contemplate that tips will constitute part of the compensation under the contract of employment. We conclude that the purposes and policy of the Workmen's Compensation Act indicate that the computation of an injured employee's average monthly wage in this situation should reflect the claimant's actual earnings: the base rate of pay plus tips. The remedial purposes of the Act would be undermined by an interpretation of § 23-1041(D) which excludes tips from the definition of monthly wage. As Judge Nelson observed in his dissent in *Springer, supra*:

> "To fix wage-loss calculations upon their base wages would result in so low an award as to not only wholly fail in the Act's purpose of taking care of the major portion of the loss during the period of injury, but to certainly fail to provide the minimum compensation necessary to protect the injured employee and any dependents from becoming public charges."

23 Ariz.App. at 482, 533 P.2d at 1169. We also observe that the overwhelming majority of courts which have considered the question have determined that tips should be included as wages. *See* Larson, 2 *The Law of Workmen's Compensation*, § 60.12(a) at 10-564 (1981).

[6] Petitioners argue, however, that the language of § 23-1041(D) indicates that the legislature did not intend to incorporate tips and gratuities within the average monthly wage calculation. § 23-1041(D) defines "monthly wage" as the "average wage *paid* during and over the month in which the employee is killed or injured." (Emphasis added). Petitioners maintain that the use of the word "paid" expresses a legislative intent that the "monthly wage" refers only to the actual amount of wages paid the employee by the employer. Petitioners fail to suggest, however, why the legislature would make such a distinction.

Application of petitioners' analysis to the restaurant business reveals the illusory nature of the argument. In the more typical situation, a waiter or waitress receives tips directly from the restaurant patron. Under petitioners' interpretation of § 23-1041, these employees would not be compensated for the loss of the tip earnings in the event of injury since the tips were not wages paid the employee by the employer. However, another method used by restaurants is to automatically add a stated percentage of the price of the meal as a gratuity to the final bill. The employee receives a wage directly from the employer which includes the gratuity paid to the restaurant. In this situation, the employee would be compensated for a loss of earnings which would include tip income, merely because it was received through the employer rather than directly from the customer.

[7, 8] We cannot discern any plausible reason why the legislature would have intended to treat the employees in these examples any differently. We must agree with the respondent employee that an interpretation of § 23–1041(D) which results in such an absurd distinction would be subject to attack on equal protection grounds under the United States and Arizona Constitutions. In *Petrafeck v. Industrial Commission*, 191 Colo. 566, 554 P.2d 1097 (1976), the Colorado Supreme Court reached a similar conclusion, stating:

> ". . . An injured employee who received a straight hourly wage has the total amount of that wage considered in his award. An injured employee who received some part of her earnings, under the 'contract for hire' as tips does not receive equal treatment . . . To exclude tips from an employee's average weekly wage requires that a penalty be imposed on all employees that depend, to some extent, on tips for their income.
>
> "We do not perceive, and respondent does not propose, any rational basis for this differential treatment. The fact that the wages of an employee who receives tips as part of her contract of hire is more speculative and incapable of precise prospective determination than that of a straight hourly wage earner is an insufficient basis for distinction. . . . Moreover, mere considerations of administrative expediency are not alone generally perceived as forming a sufficient rational basis for an otherwise irrational distinction. [citations omitted]"

Id. at 569, 554 P.2d at 1099. *See also Hopkins v. Fred Harvey, Inc.*, 92 N.M. 132, 584 P.2d 179 (App.), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978). In interpreting a statute, a court should avoid making the statute unconstitutional and give the statute a constitutional construction where possible. *Mardian Construction Co. v. Superior Court*, 113 Ariz. 489, 557 P.2d 526 (1976). We believe that an interpretation of § 23–1041 which includes tips within the definition of monthly wage is in harmony with the purposes of the Workmen's Compensation Act and avoids the possible constitutional infirmities inherent in an interpretation which would exclude tips from wages. We therefore hold that tips should be included in the computation of the average monthly wage for purposes of determining the injured claimant's compensation.

[9] The petitioner insurance carrier contends, however, that such a holding deprives it of property without due process of law because Department of Insurance regulations prohibit insurance carriers from including tips within the premium calculation process. *See Manual of Rules, Classifications, and Rates for Workmen's Compensation and Employer's Liability Insurance, rule VI, section 3.* Rule VI, as it exists in the national basic *Manual* issued by the National Council on Compensation Insurance, includes tips within the actual wages received by an employee for premium calculation purposes. The Arizona version of the rule, however, limits the wages to those "actual wages paid by the employer."

[10] We are not impressed by petitioner's constitutional argument for the simple reason that insurance carriers are not compelled to insure businesses in which employees are earning tips. Nevertheless, a rule or regulation of an administrative agency should not be inconsistent with, or contrary to, the provisions of a statute, particularly the statute it seeks to effectuate. *Ferguson v. Arizona Department of Economic Security*, 122 Ariz. 290, 594 P.2d 544 (1979). Similarly, the rule or regulation should not be inconsistent with the interpretation given the statute by an appellate court. We are not convinced that the rule in question absolutely prohibits the insurance carriers from including tips in an employees' wage for premium calculation purposes. However, rule VI, section 3, of the *Manual* must be construed in accordance with the interpretation we give to § 23–1041(D); otherwise, the rule is invalid.

[11] Anticipating a holding which approves *Scott*, petitioners in their reply brief seek an interpretation of § 23–1041 which would require that tips be reported to the employer in order to be included as part of

the "monthly wage." We note that in the present case, the claimant did not report her tip income to her employer even though a tip-reporting system was in effect. We agree with petitioners that it is inequitable to allow individuals to have unreported tip income included in the calculation of their average monthly wage when, in many instances, they do not report this tip income for social security or income tax purposes. Nevertheless, we decline to impose a tip-reporting requirement.

In *Dearing v. Arizona Department of Economic Security*, 121 Ariz. 203, 589 P.2d 446 (App.1978), the Court of Appeals held that tips were wages for purposes of the Employment Security Act provision defining wages. At the time of the decision, there was no provision in A.R.S. § 23–622 which excluded tips from the definition of wages. In response to *Dearing*, however, the legislature added § 23–622(B)(10), which excluded from wages any "tip, gratuity or service charge received by an employee which is not specified and collected by the employing unit." By this amendment, the legislature made clear that an employee could not receive unemployment insurance benefits based upon tip income if the tip income was not reported to the employer.

Petitioners point to § 23–622(B)(10) as evincing a legislative intent that employees desiring to have their tip income included in the calculation of their average monthly wage should be required to report the tip income to their employer. Although this is undoubtedly true for purposes of the Employment Security Act, we cannot judicially add a similar requirement for purposes of the Workmen's Compensation Act. Such a requirement must be enacted by the legislature as it did after the *Dearing* decision.

Finally, petitioners argue that *Scott* should not be retroactively applied to injuries occurring before the date of that decision. In *Scott*, the court stated that the ruling was "not to apply retroactively to claims closed prior to this day [December 1]." 122 Ariz. at 171, 593 P.2d at 921.

Generally, a decision which overrules earlier decisions is retrospective in its operation. *O'Malley v. Sims*, 51 Ariz. 155, 75 P.2d 50 (1938). An exception to this rule is made where contracts have been entered into in reliance upon a legislative enactment as construed by the earlier decisions. *Id.* at 161, 75 P.2d at 53. However, an important factor to be considered in deciding whether a civil case should be given retroactive application is whether or not substantial inequity may result. *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977).

[12] Petitioners maintain that the insurance carrier entered into a contract of insurance with the employer based upon rates actuarially computed by application of § 23–1041 as it was construed by *Jordan* and *Springer*. The *Scott* case, however, did not purport to affect contractual rights between the insurance carrier and its insured, but rather the rights of an injured worker to obtain compensation. As was aptly stated by the Court of Appeals in *Hollywood Continental Films v. Industrial Commission*, 19 Ariz.App. 234, 236, 506 P.2d 274, 276 (1973), "While this right to obtain compensation may affect a contract of insurance covering that compensation, the effect is too tenuous, in our opinion, to fall within the exception noted in *O'Malley v. Sims, supra*." Further, in balancing the inequities which may result from applying *Scott* retroactively or prospectively, we believe that greater hardship would fall upon the injured workers should we, *at this date*, rule that *Scott* be applied prospectively. We believe that the court in *Scott* properly limited the effects of its ruling by expressly stating that it was not to apply retroactively to claims closed prior to the date of the decision.

The Court of Appeals opinion is vacated and the award is affirmed.[2]

GORDON, V. C. J., and STRUCKMEYER and CAMERON, JJ., concur.

2. An issue raised by the concurring judges in the Court of Appeals opinion was whether one department of the Court of Appeals may overrule another. We decline to expressly rule on

HOLOHAN, Chief Justice (Dissenting):

The ambiguity found by the majority in A.R.S. § 23–1041 eludes me. The statute uses plain ordinary language which, in my judgment, needs no special construction.

A.R.S. § 23–1041(D) defines the term "monthly wage" as the average wage paid. The term "tip or tips" is not mentioned. In ordinary English usage "wages" are not the same as "tips," and there is no suggestion that "tips" are synonymous with "wages."

The members of the public including employees and employers understand that wages are paid by the employer and tips are gratuities from customers.

The majority brushes aside the problem that insurance carriers have in attempting to determine the risk involved. It is a poor answer to tell them not to write the insurance if they are having problems determining the average wage. Their problem is with inconsistent judicial decisions.

I dissent.

131 Ariz. 369

Vera Warren LOVE, a married woman, Plaintiff-Appellant,

v.

HOME TRANSPORTATION COMPANY, INC., a Georgia corporation, Defendant-Appellee.

No. 15678–PR.

Supreme Court of Arizona, In Banc.

Feb. 3, 1982.

Passenger in truck brought action against insurer of truck to recover for injuries sustained in motor vehicle collision. The Superior Court, Maricopa County, Cause Nos. C–350566 and C–357070, Paul W. LaPrade, J., granted insurer's motion for summary judgment, and plaintiff appealed. The Court of Appeals, Jacobson, J., 641 P.2d 882, affirmed, and petition for review was granted. The Supreme Court, Cameron, J., held that substantial fact issue existed as to whether statement of insurer's representative that insurer was not liable to plaintiff was a statement of law or a mere opinion, precluding summary judgment on issue of whether her release was invalid as a result of fraud and misrepresentation.

Reversed and remanded.

Holohan, C. J., dissented and filed opinion in which Hays, J., joined.

1. Fraud ⚷**10**

A misrepresentation does not have to be in specific legal terms or language to be a statement of law in order to satisfy one of the nine elements of actionable fraud.

2. Judgment ⚷**181(6)**

In action brought by passenger of truck against insurer of truck to recover for injuries sustained in motor vehicle collision, substantial fact issue existed as to whether statement of insurer's representative that insurer was not liable to plaintiff was a statement of law or a mere opinion, precluding summary judgment on issue of whether her release was invalid as a result of fraud and misrepresentation.

Steven M. Friedman, Phoenix, for plaintiff-appellant.

Burch, Cracchiolo, Levie, Guyer & Weyl, P. A. by Brian Kaven, Thomas G. Bakker, Phoenix, for defendant-appellee.

this question as it was not raised by the parties and is not essential to our determination. We are in general agreement, however, with the opinions expressed in Judge Froeb's special concurrence. *See Senor T's Restaurant v. Industrial Commission*, 131 Ariz.App. at 392, 641 P.2d at 880.