IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 16

WCC No. 2004-1186

TYAD, INCORPORATED, A MONTANA CORPORATION, d/b/a THE PLAYGROUND LOUNGE AND CASINO

Petitioner

vs.

INDEPENDENT CONTRACTOR CENTRAL UNIT

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Five exotic dancers filed wage claims against the establishment where they danced. The claims were referred to the Independent Contractor Central Unit (ICCU) of the Department of Labor and Industry for a determination as to whether they were employees or independent contractors. After the ICCU determined they were employees, the establishment petitioned the Workers' Compensation Court for a *de novo* determination.

Held: (1) Under a 2001 amendment to the Workers' Compensation Act, the Workers' Compensation Court has jurisdiction over independent contractor disputes involving not only workers' compensation and unemployment insurance issues but also those involving wage claims. § 39-71-415(3), MCA (2001-2003). (2) Where a strip club controls the daily times dancers perform, provides significant equipment and services essential to the dancers performing, and can terminate dancers at any time without liability simply by giving written notice, the dancers are employees, not independent contractors.

Topics:

> **Jurisdiction: Independent Contractor Disputes.** Under a 2001 amendment to the Workers' Compensation Act, the Workers' Compensation Court has jurisdiction over independent contractor disputes involving not only workers' compensation and unemployment insurance issues but also those involving wage claims. § 39-71-415(3), MCA (2001-2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-415(3), MCA (2001-2003). Under a 2001 amendment to the Workers' Compensation Act, the Workers' Compensation Court has jurisdiction over independent contractor disputes involving not only workers' compensation and unemployment insurance issues but also those involving wage claims.

Independent Contractor: Right of Control. Where a strip club controls the daily times dancers perform, provides significant equipment and services essential to the dancers performing, and can terminate dancers at any time without liability simply by giving written notice, the dancers are employees, not independent contractors.

¶1 The trial in this matter was held in Great Falls, Montana, on March 29, 2005. The respondent was represented by Mr. Brian J. Hopkins. Its president, Mr. David Blackwell, was also present. Respondent was represented by Mr. Arthur M. Gorov.

¶2 Exhibits: Authentication objections made to some exhibits were withdrawn and all exhibits were admitted with the proviso that the Court will consider only relevant documents. The Court noted that many of the documents, such as the determinations of the Wage and Hour Unit, appear largely or wholly irrelevant to the present proceedings and also noted that the Court's jurisdiction in this case is *de novo,* thus the prior findings and conclusions of the Independent Contractor Central Unit are not entitled to weight or deference in the Court's deliberations and decision.

¶3 Witnesses and Depositions: David Blackwell, Sharon Peterson, Chad Taylor, Renne Smith, and Billy Young testified. No depositions were submitted.

¶4 Issues Presented: The issue, as stated in the Final Pretrial Order, is as follows:

> Whether the exotic (topless and nude) dancers performing at the Playground Lounge in Great Falls were independent contractors or employees.

(Final Pretrial Order at 5.) While the parties have further parsed that issue, that parsing simply invokes the independent contractor analysis required under section 39-71-120, MCA (2001-2003).

¶5 Having considered the Final Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

I. Background

¶6 The issue in this case is whether five "exotic dancers" who filed wage claims against the Playground Lounge and Casino (Playground) in Great Falls, Montana, were employees of that establishment. The Playground contends that the claimants, and other similarly situated dancers, were independent contractors.

¶7 The Playground is a bar and casino that offers adult entertainment, viz., strip shows where the dancers remove their clothes during their dances, concluding their dance routines either wholly nude or topless.

¶8 The Playground revenues are derived from cover charges for entrance into the establishment, from selling drinks to its customers, and from poker and other licensed gambling machines on the premises.

¶9 Since 2001, the Playground has been owned and operated by the petitioner herein, TYAD, Incorporated (TYAD). TYAD also owns and operates an adjacent establishment known as the Loading Zone Bar and Casino. Only the Playground is involved in the present case.

¶10 Since 2001, the Playground's overall operations have been managed by David Blackwell (Blackwell), a shareholder and the President of TYAD. However, Blackwell has had little contact with the dancers, delegating primary responsibility for dealing with dancers to the Playground's disk jockeys (DJs). The DJs play recorded music for the dancers' dance routines and have daily contact with the dancers. They are responsible for obtaining the signed rental agreements discussed hereinafter, enforcing the Playground's rules, and settling disputes among the dancers.

¶11 Since TYAD's takeover in 2001, the Playground has used the services of 100 to 125 dancers. Since it may have only a dozen or so dancers at any one time, it is apparent that the rate of turnover is high.

¶12 Upon taking over the Playground, TYAD employed dancers, paying them wages and withholding taxes from their pay. However, it encountered difficulty in hiring and retaining dancers. Some dancers wanted to work only for a couple of days and others did not wish to furnish sufficient identification to allow the Playground to file the necessary forms to effect employment. After approximately eight months of ownership, Blackwell and TYAD decided to move to a new arrangement with its dancers.

¶13 Under the new arrangement, as reflected in the written agreements found at exhibits 5, 6, 11, 12, 17, 22, 23, 28, and 42-44, the Playground rented its stage to dancers for a fixed fee per day paid by the dancers to the Playground. The fee structure changed over time, as discussed below in paragraph 34.

¶14 Between November 13, 2003, and January 20, 2004, five dancers who had worked at the Playground filed complaints with the Department of Labor and Industry (DLI) seeking payment of wages for all hours they worked. (See Exs. 34-38.) Based on the hours each individual worked, the wages sought ranged from $2,782.00 to $16,860.80. (*Id.*) The dates the dancers worked encompassed January of 2003 to November 2003. The Wage and Hour Unit referred the matter the Independent Contractor Central Unit (ICCU) for a determination as to whether the dancers were independent contractors.

¶15 On March 2, 2004, the ICCU determined that the five dancers were employees, not independent contractors. (Ex. 29.) TYAD requested a redetermination and then appealed the decision to mediation. (Exs. 30-31.) Following mediation, it filed a petition with this Court asking the Court to determine the status of the five complainants. Additional facts germane to the controversy are set out below.

II. Rental Agreements Made Compulsory for Dancers

¶16 Upon deciding to utilize the stage rental agreement, the Playground required all of the dancers theretofore employed by it to sign the rental agreements and agree to work as independent contractors. Any dancer not agreeing to the arrangement was not allowed to work at the Playground. The terms of the agreements were dictated by TYAD and the Playground and were non-negotiable.

¶17 While utilizing the rental agreements with its dancers, other persons working at the Playground, including security personnel (bouncers), bartenders, and DJs, were treated and paid as employees. At present the Playground has thirty-two employees, a number that does not include any dancers.

III. Facts Pertaining to Independent Trade, Occupation, Profession, or Business

¶18 The stage rental agreements in all of its iterations expressly provides that each dancer is an independent contractor, not an employee. (Exs. 5, 6, 11, 12, 17, 22, 23, 28, and 42-44, ¶¶ 6 and 9.) In the recitals, the agreements further state:

> Renter is an exotic dancer, who offers her services as such to a variety of business establishments in Montana or elsewhere, and who desires to use

a portion of TYAD's place of business for that purpose from time to time as hereafter provided.

(*Id.*, ¶ 2 of RECITALS.)

¶19 The Playground, however, never attempted to verify that the dancers in fact offered their services to other business establishments or individuals. Further, while it suggested that dancers obtain independent contractor exemptions from the DLI, such exemptions were not a prerequisite and the Playground never followed up to determine whether they had been obtained. In fact, the Playground is unaware of any exemption for any of the 100-plus dancers who have worked at the Playground since 2001.

¶20 At least some of the dancers, including Renne Smith (Smith) and Lori Niendorf (Niendorf), worked full time and exclusively at the Playground during the period of their rental agreements. (Smith Tr. Test and Ex. 36 at 18.) Smith's records of her time show that on average she worked fifty hours a week. Niendorf worked exclusively for the Playground for two years. (Ex. 36 at 18.)

¶21 There is no evidence that any of the dancers working at the Playground had any sort of business insurance or business cards, or that any of them publically advertised her services for hire by other establishments. At least four of the dancers, mentioned in these findings of fact, did not in fact have business cards or business insurance and did no advertising of independent services. (Exs. 34 at 13; 36 at 18; 37 at 11; 38 at 8.) The only advertising they received was on the Playground WEB site as dancers at the Playground.

¶22 There is no evidence that any of the dancers worked at other establishments at the same time they worked at the Playground. Some of them had worked at other establishments prior to working at the Playground.

¶23 Dancers could and some did dance for private parties outside of their work at the Playground. There is a dispute as to whether they were required to arrange off-site performances through Billy Young (Young), a Playground bartender. Young had a sideline business of arranging private parties, although he was told by Playground management that he could not do so while at work at the Playground. However, if asked by a customer at the Playground, he gave out cards advertising "Billys Angels" [sic] with his phone number, or he simply supplied the customer with his phone number. Customers then called him and arranged for dancers. Young testified that he never told the dancers that they had to arrange private parties through him and Blackwell testified that the dancers were not required to do so. Smith, however, testified that although she never did an outside private party, she was told by one of the DJs that outside private parties had to be arranged through Young. While I am unpersuaded that the dancers were "required" to go

through Young, based on Smith's testimony, I find it likely that they were at least encouraged by the DJs to do so and may have felt that they were required to do so.

IV. Control

¶24 The Playground had several ex-contractual rules that dancers were required to follow. The rules were strict. Even though there was no provision in the stage rental agreement allowing for suspension of stage rental privileges, and indeed the only provision governing termination required that notice of termination be given in writing (see, e.g., Ex. 5, ¶ 20), the Playground enforced its rules by suspending offending dancers' stage rental privileges, thus barring them from performing until the suspensions were lifted. No suspension or termination was ever provided in writing.

¶25 The first rule prohibited dancers from bringing beverages of any sort into their dressing room. (There was a single dressing room provided for all dancers.) The rule was imposed because some dancers were younger than twenty-one years old and older dancers had slipped alcoholic beverages to the under-aged dancers prior to the time the Playground adopted the rule.

¶26 Second, dancers were prohibited from touching the dance poles with their "private parts." Smith, who testified at trial, agreed that this prohibition was a reasonable hygienic measure designed to protect other dancers.

¶27 Third, dancers were prohibited from using rap music for their dance routines until 10:00 p.m. The Playground imposed the restriction because its older customers disliked rap music. The older customers typically went home by 10:00 p.m.

¶28 Fourth, not only were the customers prohibited from touching the dancers, the dancers were prohibited from touching of any sort with the customers.

¶29 Fifth, unruly or disruptive conduct by a dancer was grounds for a disciplinary suspension of the dancer's stage rental privileges. One of the DJs' jobs was to mediate disputes among dancers, thus suspension was a tool he had available to him in those disputes if they became heated.

¶30 Sixth, as Smith testified, the Playground required dancers to be accompanied by bouncers whenever going from the Playground to their cars.

¶31 The Playground also exercised a degree of control over the scheduling of stage rentals. Until approximately October 2003, dancers simply designated the times they wished to dance on a roster containing their names. However, at times more dancers than needed for an evening signed up. On those occasions, the DJ called some of the dancers

and directed them not to work that evening. On other occasions, too few dancers signed up for an evening. On those occasions, the DJ called dancers who had not signed up and requested them to come in.

¶32 Control over scheduling became more structured after Chad Taylor took over as one of the DJs in the fall of 2003. He posted a weekly sign-up schedule with time slots. The number of dancers who could sign up for any time slot was limited by the number of lines for names next to the time slot. Three dancers were allowed to sign up for the 4:00 p.m. to 12:00 a.m. time slot; one for 6:00 p.m. to 12:00 a.m.; two for 7:00 p.m. to 2:00 a.m.; one for 8:00 p.m. to 2:00 a.m.; and one additional dancer for the 8:00 p.m. to 2:00 a.m. slot on Saturdays and Sundays. The schedule worked on a "first come - first served basis." Once eight dancers signed on for any given day, other dancers with rental agreements were closed out entirely for that day.

¶33 Dancing was further restricted by a limitation on the number of dancers who could appear on stage at any given time. Only one typically danced at a time, at most two.

¶34 The stage rental fee structure also acted as a control over scheduling. Initially, the amount of the rental charged to the dancers was $15 per evening except on Friday and Saturday, when it was $20. (Ex. 17, ¶ 1.) The amount was then increased to $35 per evening but the dancer received a credit of "$15.00 per evening if on time for Rental." (See Ex. 11, ¶ 1.) The change was made because some of the dancers were showing up late for their scheduled stage time. While styled as incentive, the change in fee structure in fact imposed a $15 penalty on any dancer showing up late and is thus evidence of control concerning the dancers' stage time. The penalty structure was preserved in the most recent rental agreement available to the Court. That agreement provides for a $35 rental with an on-time credit of $10 for Thursday through Saturday rentals and a $20 rental with a $10 on-time credit for Sunday through Wednesday rentals for the 4:00 p.m. shift. (See Ex. 6, ¶ 1.)

¶35 Blackwell further testified, and I find, that the Playground expected dancers to complete their shifts and would consider their leaving early grounds for termination.

¶36 There was also testimony by Smith that dancers were expected to tip the DJs. The expectation on her part appears to arise out of the way the DJs treated Smith and her CDs and I am unpersuaded that there was any policy requiring such tipping.

V. Method of Payment

¶37 The dancers received no pay or other remuneration directly from the Playground. Their sole income was from customer tips given in appreciation for their performances.

VI. Furnishing of Equipment

¶38 While the dancers furnished their own costumes, selected their own music (with the exception of rap music as noted herein), and choreographed their own dance routines, they were dependent on the Playground to furnish other essentials for their routines. In addition to the stage and dressing room, which were the subject of the stage rental agreement, the Playground furnished: (1) the stereo equipment for playing music; (2) a DJ to play the music; (3) a stock of music CDs if the dancers did not wish to use their own; (4) the customers or audience; (5) a place for the customers; (6) free non-alcoholic beverages; and (7) bouncers to protect the dancers.

¶39 The role of and need for bouncers warrants further explication. The bouncers walked dancers to and from their cars; they dealt with unruly customers; and they policed lap dancing. Lap dancing at the Playground consisted of a dancer dancing for a specific customer or customers in a more private area of the lounge for a fee agreed upon between the dancer and the customer. No physical contact between the dancer and the customer was allowed by the Playground and the Playground's bouncers enforced that prohibition. Indeed, the bouncers enforced the prohibition against any physical contact between dancers and customers in all areas of the Playground. Bouncers were essential to the entertainment (exotic dancing) provided by the Playground for its customers.

VII. Right to Fire

¶40 The rental agreement provides that either party may terminate the agreement upon written notice to the other. (Exs. 5, 6, 11, 12, 17, 22, 23, 28, and 42-44, ¶ 20.) The agreement could be terminated immediately with such notice, without further liability of either party to the other. Moreover, as a matter of fact, the Playground also temporarily suspended the rental privileges of dancers as discipline for infractions of its rules.

CONCLUSIONS OF LAW

I. Evidentiary Difficulties

¶41 Both parties in this case were encumbered in the presentation of their cases by evidentiary difficulties. In the case of the ICCU, four of the five wage claimants have moved out of state and now reside as far away as Guam. The ICCU was unable to bring them back to Montana to testify in person and its attorney indicated that it would have been prohibitively expensive to secure their testimony via a video conference. On its part, two of the DJs who interacted with the dancers are deceased and the petitioner was therefore unable to procure their testimony, which it believed would have benefitted its case. Despite these difficulties, the Court finds it unlikely that the additional witnesses would affect the result in this case as the facts critical to the Court's determination are either uncontroverted

or unlikely to have been undermined by other testimony. Moreover, given the findings of fact and discussion that follows, it is difficult for the Court to envision how dancers at any establishment such as the Playground can ever be found to be independent contractors no matter how ingenious the agreement employed by the establishment is.

II. Jurisdiction

¶42 This case arose solely on account of wage claims made by dancers at the Playground. Workers' compensation coverage and unemployment insurance are not involved. Under this same set of facts, in *Mortensen d/b/a Town Tavern v. Hugi,* 2000 MTWCC 43, I dismissed an appeal from an ICCU determination, holding that the Workers' Compensation Court lacks jurisdiction to determine whether a worker is an employee or independent contractor where the sole reason for the determination is a wage claim.

¶43 However, following my decision in *Mortensen*, the legislature amended section 39-71-415, MCA, to expand this Court's jurisdiction to encompass all independent contractor disputes which are subject to the DLI's jurisdiction. The expansion of jurisdiction was effected by the 2001 legislature, which added a new subsection (3). The subsection provides:

> (3) A dispute between an employer and the department involving the issue of whether a worker is an independent contractor or an employee, but not involving workers' compensation benefits, must be brought before the independent contractor central unit of the department for resolution. A decision of the independent contractor central unit is final unless a party dissatisfied with the decision appeals by filing a petition for mediation within 10 days of service of the decision. A party may petition the workers' compensation court for resolution of the dispute within 45 days of the mailing of the mediator's report. An appeal from the independent contractor central unit to the workers' compensation court brought pursuant to this part is a new proceeding.

Under the new subsection, the Workers' Compensation Court now has jurisdiction over independent contractor disputes in wage claims.

III. Statutes Governing Independent Contractor Status

¶44 The work at issue in this case occurred between January 2003 and November 2003, inclusive. Therefore, the statutes in effect during that time govern. *See Buckman v. Montana Deaconess Hosp.,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Thus, 2001 law applies prior to July 1, 2003, while 2003 law applies thereafter. However, the 2001 and

2003 versions of statutes governing employee and independent contractor status are identical.

¶45 Since the employment status at issue in this case is for purposes of the Wages and Wage Protection Act, Title 39, chapter 3, employment and independent contractor status is governed by that Act. Unlike the Worker's Compensation Act, which contains specific criteria for determining whether a worker is an independent contractor, § 39-71-120, MCA (2001-2003), and the Unemployment Insurance Act, which incorporates the criteria of the Workers' Compensation Act, § 39-51-204(2), MCA (2001-2003),[1] the Wages and Wage Protection Act contains no specific provision for determining who is an employee and who is an independent contractor. It states only that an employee is "any person who works for another for hire." § 39-3-201(4), MCA (2001-2003). However, the Act authorizes the DLI to "issue, amend, and enforce rules for the purpose of carrying out the provisions of this part," § 39-3-202, MCA (2001-2003) – "this part" being part 2 of Title 39, chapter 51, which governs payment of wages. Pursuant to that authority, the DLI has adopted a blanket rule governing independent contractor determinations.

¶46 The DLI rule is found in ARM 24.35.301, which provides that "'[i]ndependent contractor' has the same meaning as provided by 39-71-120(1), MCA." Section 39-71-120 is part of the Workers' Compensation Act. Hence, criteria for establishing independent contractor status for the purposes of employee wages are the same as under the Workers' Compensation Act.

Section 39-71-120(1), MCA (2001-2003), provides:

> (1) An "independent contractor" is one who renders service in the course of an occupation and:
>
> (a) has been and will continue to be free from control or direction over the performance of the services, both under the contract and in fact; and
>
> (b) is engaged in an independently established trade, occupation, profession, or business.

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[1]Section 39-51-204(2), MCA (2001-2003), provides that an independent contractor "under the terms of 39-71-401(3) is considered an independent contractor for the purposes of this chapter." Section 39-71-401(3), MCA (2001-2003), is part of the Workers' Compensation Act and provides that independent contractors are exempt from workers' compensation insurance coverage requirements. Criteria for determining who is an independent contractor for purposes of the Workers' Compensation Act are set out separately in the section 39-71-120, MCA (2001-2003). Hence, those criteria are indirectly incorporated by the Unemployment Insurance Act.

A worker is presumed to be an employee, however, that presumption is a disputable one. *State ex rel. State Compensation Mut. Ins. Fund v. Berg*, 279 Mont. 161, 182-84, 927 P.2d 975, 988 (1996)

¶47 Designating a worker, by contract or otherwise, as an independent contractor is not dispositive of the worker's status, *Lundberg v. Liberty Northwest Ins. Co, Inc.,* 268 Mont. 499, 503, 887 P.2d 156, 158 (1994), if relevant at all. As set forth in section 39-71-120(1), MCA (2001-2003), an independent contractor relationship can be established only if both subparts (a) and (b) are satisfied. "Unless both parts of the test are satisfied by a convincing accumulation of undisputed evidence, the worker is an employee and not an IC." *Wild v. Fregein Constr.,* 2003 MT 115, ¶ 34, 315 Mont. 425, 68 P.3d 855.

¶48 To determine whether part (a) – freedom from control – is met, four factors are considered. Those factors are: "(1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire." *Wild,* ¶ 33. In this case, evidence concerning the four factors fails to establish an independent contractor relationship.

IV. Resolution – Part (a)

¶49 Questions concerning employment and independent contractor status presuppose a contract or agreement to hire the services of another. Given the Playground's attempt to characterize its agreement with the dancers as a stage rental agreement, the first matter the Court must address is whether there is an agreement to hire the services of the dancers; if not, then there can be no employment relationship.

¶50 It is clear, however, that the stage rental agreements were simply a device to secure the services (exotic dancing) of the dancers and to do so for the financial benefit of the Playground. Unless the dancers performed, there was no benefit to either party and the agreements would be otiose, i.e., pointless and futile. Thus, the agreements must be construed as securing services and the Court properly reaches the question of whether the dancers are employees.

¶51 Applying part (a) – the control test – I conclude that the Playground retained a degree of control over the dancers' services inconsistent with independent contractor status.

(i) Right of Control

¶52 Of the four part (a) factors, the "right of control" factor is the "most crucial factor." *American Agrijusters Co. v. Montana Dept. of Labor and Industry,* 1999 MT 241, ¶ 22, 296 Mont. 176, 988 P. 2d 782. Under this factor "an individual is an employee of another when

that other has the right to control the details, methods, or means of accomplishing the individual's work, and not just the end result of the work." *Id.* Specifications of details of the work is not inconsistent with independent contractor status so long as the details specified are "necessary to ensure that . . . [the hiring party] gets the end result from the contractor that he bargained for." *Walling v. Hardy Constr.,* 247 Mont. 441, 448, 807 P.2d 1335, 1339 (1991).

¶53 Some of the details controlled by the Playground are details which are required to ensure that it secured exotic dancing. They include the restriction on beverages in the dressing room and the prohibition against dancers touching the dance poll with their genitals. The first was calculated to prevent underage drinking and protect the Playground's liquor license. Of course, a supervising matron could have been put in charge of the dressing room to oversee the dancers but that sort of solution may itself be viewed as inconsistent with treating the dancers as independent contractors and is in any event an extraordinary and expensive alternative not required by independent contractor analysis. The second was a hygiene rule intended to protect other dancers.

¶54 In accessing other restrictions and rules, the "end result" to be gained by hiring the dancers must be identified. It could be argued that the end result to be achieved is the *profitability* of the Playground and that the Playground could therefore adopt all rules thought necessary to assure its profitability. Such a broad interpretation of the "end result" rule, however, would be unprecedented and render the right of control test meaningless.

¶55 Rather, the end result to be achieved through the stage rental agreements was the dancing. The degree of control exercised by the Playground over the dancers went beyond that necessary to merely secure either performers or performances. Initially, the Playground, through its DJs, controlled the dancers' scheduling by limiting the performers who could perform each night. Dancing was further limited by the fact that only one or, at most, two dancers could dance at a time. Thus, the Playground regulated when the dancers performed and, importantly, did so on a day-by-day basis.

¶56 A right of control is further reflected in the Playground's use of suspensions to discipline dancers for infractions of its basic rules and for disruptive conduct. While it could be argued that the use of suspensions was extra-contractual, that use was nonetheless an actual exercise of control. If any question arose as to its use of suspensions, the stage rental agreement allowed the Playground to terminate the contract at will so long as the termination was effected in writing.

¶57 The Playground also limited the music the dancers could use in their performances, thus controlling a detail closely connected with the dancers' actual performances. However, it can be reasonably argued that the restriction on rap music during performances was akin to a contract with a cabinet maker specifying the wood to use in

the cabinets, thus the music restriction is not in itself sufficient to make the relationship at issue here one of employment.

¶58 The prohibition against touching customers also went beyond what was minimally necessary to secure the dancers' performances. The rigidity of the rule is illustrated by the testimony of Smith, who testified that the rule prevented any sort of touching whatsoever of a dancer by a customer or vice-versa. While the prohibition was undoubtedly a good business practice given the nature of the establishment, a less restrictive rule preventing only untoward touching could have been adopted. As with some of the other rules, however, given its rational relationship to the core operations of the Playground, the rule in itself is not sufficient to find an employment relationship.

¶59 Finally, the requirement that a bouncer accompany a dancer whenever going from the Playground to the parking lot arguably goes beyond what was required to secure the performances since it was mandated and not subject to the dancers' desires. On the other hand, it could be viewed as a reasonable and necessary precautionary measure to protect not only the dancers but also protect the Playground from the fallout, including lawsuits, of parking lot assaults. Thus, this fact is not in itself sufficient to indicate employment status.

¶60 While some of the facts are neutral, others are not and overall they are more consistent with employment than independent contractor status, although not overwhelmingly so.

(ii) Method of Payment

¶61 The method of payment in this case is outside the typical parameters of payment for either independent contractors or employees in that there was no payment whatsoever made by or due from the Playground to the dancers. The only relevance this factor has in characterizing the relationship between the Playground and the dancers is therefore in determining whether the agreement between those parties was one for services. I have already found that it was.

(iii) Equipment

¶62 The Playground argues that the dancers furnished all of their own equipment, to wit: their costumes and music. Its argument, however, overlooks essential equipment and services furnished by the Playground. First and foremost were the bouncers. While bouncers are not "equipment" in a strict sense, the purpose of the equipment analysis in independent contractor cases is to ascertain whether the alleged contractor independently has the means necessary to carry out the job or whether much of the means for completing the job is supplied by the hiring party. In the present case, given the nature of their

performances, bouncers were essential to the dancers' safety. The essential nature of their services is illustrated by Young's testimony that even for private dances outside the club, dancers were accompanied by a bouncer, although the dancers selected their own bouncer and were presumably responsible for paying him. At the Playground, the bouncers were furnished by the Playground and were Playground employees.

¶63 The Playground also provided the stereo system and a DJ to play music for the dancers' performances, as well as an assortment of house CDs the dancers could choose from if they did not wish to use their own CDs. Music was integral to the performances and the tools essential to playing it were provided by the Playground.

¶64 The Playground also furnished seating and refreshments for an audience. Without the audience, dancing would be pointless and non-remunerative.

¶65 Lacking bouncers, the stereo system, the DJs, the audience seating, and the audience, the dancers could not have performed on a remunerative basis. Thus, the equipment factor is strongly indicative of an employment relationship.

(iv) Right to Fire

¶66 Under paragraph 20 of the stage rental agreements, the Playground could terminate a dancer at any time and for any reason simply by providing her with a written notice of termination. Such termination could be effected without any liability to the Playground; indeed, the Playground was never obligated to pay anything to the dancers. The right to terminate without liability is strongly indicative of an employment relationship.

(v) Sum of All Factors

¶67 In order to find that the dancers were independent contractors, there must be a "convincing accumulation of undisputed evidence" that the worker is in fact free from the control of the hiring party. *See Wild*, 2003 MT 115, ¶ 34. Control is determined by analyzing the four factors previously identified. In this case, the method-of-payment factor does not play a part, thus, control must be determined from the other three. All those other factors are more consistent with employment than with independent contractor status. Especially strong are the equipment and right-to-fire factors. Essential and expensive equipment and services were furnished by the Playground and it retained the right to terminate the dancers' services at will without liability. Since both part (a) and part (b) must be met in order to find an independent contractor relationship, and part (a) is not satisfied, I hold and conclude that the complaining dancers and all other similarly situated dancers at the Playground were employees.

¶68 Indeed, given the nature of the Playground's business, the equipment and services that must be furnished for the dancers in connection with their performances, and the integral role the dancers play in the business, it is hard to imagine what sort of arrangement between the Playground or a similar establishment and dancers could satisfy the part (a) analysis.

V. Part (b)

¶69 Under part (b) of the independent contractor analysis, it must be shown that the worker "is engaged in an independently established trade, occupation, profession, or business." § 39-71-120(1)(b), MCA (2001-2003). However, since part (a) is not satisfied, it is unnecessary to determine whether the dancers at the Playground had independently established businesses. Moreover, it is possible that some of the dancers might meet the independent business test, while others who worked exclusively for the Playground and did not solicit other work might not.

JUDGMENT

¶70 The five dancers who filed wage complaints with the DLI, and all similarly situated dancers, were employees of the Playground and not independent contractors.

¶71 This JUDGMENT is certified as final for purposes of appeal.

¶72 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 8th day of April, 2005.

(SEAL)

MIKE McCARTER
JUDGE

c: Mr. Brian J. Hopkins
Mr. Arthur M. Gorov
Submitted: March 29, 2005