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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

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

COMES NOW the Respondent, Rochdale Insurance Company (Rochdale), and pursuant to ARM 24.5.316, submits this Reply to *Petitioner's Statement of Genuine Issues, and Brief in Opposition to Motion for Summary Judgment*.

ARGUMENT

I. *PETITIONER'S STATEMENT OF SPECIFIC CONTROVERTED FACTS THAT ESTABLISH A GENUINE ISSUE OF MATERIAL FACTS PRECLUDING SUMMARY JUDGMENT* FAILS TO ESTABLISH DISPUTED MATERIAL FACTS AND THUS DOES NOT PRECLUDE SUMMARY JUDGMENT.

Along with his brief in opposition to Respondent's motion for summary judgment Petitioner included his *Statement of Specific Controverted Facts that Establish a Genuine Issue of Material Facts Precluding Summary Judgment*. In this document Petitioner argues that certain facts contained in Respondent's *Statement of Uncontroverted Facts*, are in dispute and thus preclude summary judgment by virtue of their existence.

Summary judgment is appropriate if there are no genuine issues of *material* fact and the movement is entitled to judgment as a matter of law. ARM 24.5.329(2). Thus, a party basing its opposition to summary judgment upon disputed facts must prove that

a fact is both disputed and material. As will be shown, Petitioner fails to establish the existence of any fact that is both disputed and material.

Petitioner's specifications of factual disputes as stated in ¶¶ 1, 2, 4, 9, 10, and 18 of *Petitioner's Statement of Specific Controverted Facts that Establish a Genuine Issue of Material Facts Precluding Summary Judgment* are completely irrelevant to the issues of this case and are thus conceded by Respondent. Accordingly, the facts addressed in those paragraphs are neither disputed nor material and thus do not preclude summary judgment.

Petitioner's specification of a factual dispute as detailed in ¶ 3 is quite confusing as Petitioner indicates his agreement with Respondent's Statement of Uncontroverted Fact ¶ 3 (that Respondent was Petitioner's Plan 2 insurer at the time of injury) but asserts that Respondent ignored wage information provided by the Elks Club in the *First Report* and the Letter from Linda Stamos to Sandy Scholl of June 26, 2003. While it is unclear how wage information is relevant to the simple statement that Respondent was the at risk insurer at the time of injury, it is quite clear that Petitioner does not dispute Respondent's Statement of Uncontroverted Fact ¶ 3. Accordingly, Respondent's Statement of Uncontroverted Fact ¶ 3 is not in dispute and thus does not preclude summary judgment.

Similarly, Petitioner's specification of a factual dispute as contained in ¶ 5 is merely his statement that he does not dispute Respondent's Statement of Uncontroverted Fact ¶ 5. Thus, Respondent's Statement of Uncontroverted Fact ¶ 5 is not disputed and does not preclude summary judgment.

Petitioner's sixth specification of a disputed fact regards Respondent's Statement of Uncontroverted Fact ¶ 6 in which Respondent points out that on June 26, 2003, pursuant to a request by Claims Adjuster Sandy Scholl, Linda Stamos, the manager of the Elks Club, sent a letter to Ms. Scholl detailing Petitioner's wage information. Petitioner asserts that the fact of Ms. Scholl's "request" is disputed because there is "no record of a 'request' by the insurer to Linda Stamos, the Elks Club Manager, in the referenced letter..." *Petitioner's Statement of Specific Controverted Facts that Establish a Genuine Issue of Material Facts Precluding Summary Judgment*, ¶ 6, March 18, 2004. Ms. Stamos's letter begins as follows:

> "Per my conversation with you earlier regarding Christopher Sandru:"

Letter L. Stamos to S. Scholl, June 26, 2003. Clearly, Ms Stamos provided the information pursuant to an earlier conversation between herself and Respondent's agent, Sandy Scholl.

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

A.R.M. § 24.5.329(7). In attempting to create a factual dispute over Respondent's Statement of Uncontroverted Fact ¶ 6, Petitioner merely denies the statement and asserts that there is no record of a request for information which resulted in Ms.

Stamos's letter of June 26, 2003. Petitioner offers no evidence which indicates the request did not occur. However, Ms. Stamos's letter itself indicates that Ms. Scholl requested the wage information provided by Ms.Stamos. Accordingly, as Petitioner has provided no evidence to refute Respondent's Statement of Uncontroverted Fact ¶ 6 the statement is not disputed and does not preclude summary judgment. Furthermore, even if disputed, the fact is not material to the questions at issue. Whether the wage and tip information in the letter of June 26, 2003, was specifically requested of Ms. Stamos or volunteered by her has no relevancy to whether Petitioner documented his tips to his employer for tax purposes, or whether respondent should use such tips in the calculation of time of injury wages. Accordingly, Respondent's Statement of Uncontroverted Fact ¶ 6 is neither disputed nor material and thus does not preclude summary judgment.

Respondent also points out that the correct date of Ms. Stamos's letter is June 26, 2003, and not July 26, 2003, as indicated in Respondent's citation to that letter. Respondent's Counsel regrets this error and apologizes to this Court for any confusion.

Petitioner's seventh specification of a disputed fact addresses Respondent's Statement of Uncontroverted Fact ¶ 7 which states that, "[i]n calculating Petitioner's temporary total disability benefits, Respondent relied upon Petitioner's pay-stubs for the four weeks prior to his injury to determine Petitioner's time of injury wage." Petitioner argues that his paychecks "were both biweekly and weekly, and [Respondent] is incorrect in its statement that the four pay stubs covered four 'weeks'." *Petitioner's Statement of Specific Controverted Facts that Establish a Genuine Issue of Material Facts Precluding Summary Judgment*, ¶ 7, March 18, 2004. While Respondent's Statement of Uncontroverted Fact ¶ 7 does not state that each paycheck represented a one week period Respondent does concede that Petitioner's pay checks were both biweekly and weekly and that Respondent could have more accurately stated that that it relied upon Petitioner's pay stubs for the *four pay periods* prior to his injury. However, while Respondent's Statement of Uncontroverted Fact ¶ 7 could have been more artfully worded, it does not create a factual dispute. In her letter dated July 8, 2003, Claims Adjuster Sandy Scholl informed Petitioner that his "temporary total disability benefits are calculated by taking the four gross pay periods prior to your date of accident to compute your average weekly wage of $285.37." Letter from S. Scholl to C. Sandru, July 8, 2003. Accordingly, the facts that Petitioner's paychecks were biweekly as well as weekly and that Respondent computed Petitioners benefits based upon the four pay periods prior to his injury are not in dispute. Petitioner's seventh specification of factual dispute goes on to state that "it is unknown why Ms. Scholl would...elect to ignore the tips for wage determination purposes." *Petitioner's Statement of Specific Controverted Facts that Establish a Genuine Issue of Material Facts Precluding Summary Judgment*, ¶ 7, March 18, 2004. Quite simply, Ms. Scholl's reason for excluding Petitioner's alleged tip income was that Petitioner had failed to produce any evidence that he documented his tip income to employer for tax purposes. However, Ms. Scholl's reasons for excluding Petitioner's tip income are completely irrelevant to whether Petitioner's paycheck was issued weekly, biweekly or both. Likewise, Ms. Scholl's reason for excluding alleged tip income has nothing to do with the number of pay periods Ms. Scholl used in calculating Petitioner's benefits. Accordingly, Petitioner's confusion as to the reasons Ms. Scholl excluded Petitioner's income does not create a disputed fact from Respondent's Statement of Uncontroverted Fact ¶ 7.

Petitioner's eighth specification of disputed fact addresses Respondent's Statement of Uncontroverted Fact ¶ 8 which merely states that "[b]ased on those pay stubs Respondent calculated Petitioner's time of injury wage as $285.37 per week and multiplied that figure by 2/3 to determine Petitioner's temporary total disability benefit of $190.25 per week." While Petitioner goes to great length to argue that Respondent relied on the wrong pay periods in calculating time of injury wage, and thus improperly calculated TTD benefits, he does not dispute the fact that Respondent indeed calculated both the time of injury wage and corresponding TTD benefits as stated. Accordingly, Respondent's Statement of Uncontroverted Fact ¶ 8 is not disputed. Furthermore, Petitioner's contention that Respondent used the wrong pay periods to calculate time of injury wages is an allegation not previously made by him. Petitioner's Petition for Hearing states,

> "A dispute exists between the parties. The petitioner reported tips to the employer as required by the employer, and now claims his tips ($300 average/week) as income earned during his employment as head bartender with the respondent, for the purpose of wage loss benefits computation."

Petition for Hearing and Request for Emergency Trial, ¶ 3, October 24, 2003. Clearly, Petitioner has not heretofore made the allegation that Respondent improperly omitted pay periods in calculating time of injury wages. As a result, Respondent has not had an opportunity to address this issue in its *Response to Petition*, discovery, depositions, or its motion for summary judgment and should not now be subject to this surprise allegation. If Petitioner wishes to amend his petition to include such an allegation he is free to move this Court to do so. However, even assuming this Court would likely grant such a motion, the pay periods used by Respondent in calculating Petitioner's time of injury wage is completely immaterial to the issues involved in Respondent's motion for summary judgment - - namely, whether Respondent must include alleged tip income in time of injury wages. Accordingly, Respondent's Statement of Uncontroverted Fact ¶ 8 is neither disputed nor material and thus does not preclude summary judgment. (Note: If the Court permits Petitioner to amend his petition to include this allegation Respondent moves this Court to consider its motion for summary judgment as a partial motion for summary judgment on the issue of the tip income.)

Petitioner's eleventh specification of disputed fact takes issue with Respondent's Statement of Uncontroverted Fact ¶ 11 which states that petitioner made a hand written notation on the *First Report* indicating that his tip income was $300 per week. As authority for this statement Respondent cited *Deposition Christopher Sandru*, January 16, 2004, 44:10-16. Petitioner asserts that he did not make any hand written notations on the *First Report* indicating his tip income. Petitioner reproduces the cited portion of the deposition and points out that, while he did state that he reported his tip income on the *First Report,* he did not state that he did so by hand written notation. This factual dispute is completely immaterial to the issue of whether petitioner documented his tips to his employer for tax purposes. Whether the handwritten notation indicating tip income was written by Petitioner himself or was written by another as a result of Petitioner's reporting of tip income on the *First Report*, the fact remains that Petitioner reported his tip income on the *First Report*. *Deposition Christopher Sandru*, January 16, 2004, 44:13-14. In addition, other than in casual conversations, this reporting of tips on the *First Report* was the first time Petitioner ever reported such tips to his employer.

Deposition Christopher Sandru, January 16, 2004, 44:10-16. Accordingly, the fact that Petitioner reported his tip income on the *First Report* is neither disputed nor material.

Petitioner's twelfth specification of factual dispute addresses Respondent's Statement of Uncontroverted Fact ¶ 12 which states that when Petitioner was hired he received a copy of the Elks Club payroll policy regarding tip income. Petitioner cites his deposition and states that he did not receive a copy of the payroll policy but merely saw it when he was hired. Whether Petitioner received a copy of the policy or merely saw it is irrelevant to whether he documented his tip income to his employer for tax purpose. Accordingly, Respondent concedes that Petitioner merely saw the payroll policy and did not receive a copy. Thus, the fact that Petitioner saw the payroll policy but did not receive a copy is neither disputed nor material.

Petitioner's thirteenth specification of disputed fact refers to Respondent's Statement of Uncontroverted Fact ¶ 13 which merely quoted a single sentence from the Elks Club Payroll Policy of February 4, 2003. That sentence reads as follows: "It is a good idea for each employee to keep a personal diary of tips actually brought home at the end of each shift." While Petitioner correctly points out that Respondent did not quote the entire policy, he does not assert that the quoted portion is inaccurate or that the Payroll Policy did not include that sentence or make that statement. Accordingly, Respondent's Statement of Uncontroverted Fact ¶ 13 is not disputed simply because the payroll policy also says things not quoted by Respondent.

Petitioner's fourteenth specification refers to Respondent's Statement of Uncontroverted Fact ¶ 14 which simply states that "[d]uring his employment with the Elks Club, Petitioner did not keep any keep any record or log documenting his tip income." Petitioner explains that such records or logs were never required by his employer. However, Respondent has never alleged or stated as a fact that they were required. As with his thirteenth specification, Petitioner attempts to create a disputed fact by reference to additional, non-contradictory facts not cited by Respondent. Respondent's Statement of Uncontroverted Fact ¶ 14 is not disputed simply because additional, non-contradictory, facts exist. Furthermore, Petitioner does not maintain that he did keep a record or log of his tip earnings. Thus, the simple fact that he did not is undisputed and does not preclude summary judgment.

Petitioner's fifteenth specification of disputed fact attempts to dispute Respondent's Statement of Uncontroverted Fact ¶ 15 which states that "[d]uring his employment with the Elks Club, and prior to his injury of June 21, 2003, Petitioner did not document or report his tip income to the Elks Club by any means other than casual conversation." The record is quite clear on this fact. During Petitioner's deposition the following exchange took place.

Q. Is it your testimony that those casual conversations were the only times you reported your tip income?

A. No, because I reported it on my first report of injury.

Q. Your first report of injury?

A. Correct.

Q. Okay. But not until that time?

A. During this casual -- during these casual conversations.

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

A. Right.

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

A. No.

Deposition Christopher Sandru, January 16, 2004, 44:6-24. Petitioner now attempts to dispute this fact but does so with only an unsupported denial. Petitioner attempts to create the appearance of support for this denial by referencing his "awareness" of credit card charges indicating tips received by him. Pursuant to Petitioner's discovery requests, Respondent provided Petitioner with copies of each credit card receipt indicating a tip payment and processed by the Elks Club during his employment. Interestingly, while Petitioner attaches copies of those receipts (*Chris' Affidavit of Uncontroverted Facts*, Petitioner's Exhibit O, March 19, 2003) in an effort to support his contention that he documented his tip income, he fails to provide the cover letter that accompanied Respondent's discovery response. That letter stated as follows:

> "Please find enclosed our supplemental response to Request for Production No. 2 of your second discovery request. You will note that the response consists of credit card receipts in which tips were given. The Elks Lodge has explained that these represent all credit card tip transactions during shifts in which Mr. Sandru worked. The Elks Club has further explained that because it has many employees it cannot state that any or all of the tips indicated by these receipts were tips given to Mr. Sandru as the employee providing the service to the tipping customer."

Cover letter to Respondent's Supplementary Response to Petitioner's Second Discovery Requests to Respondent, January 30, 2004. As is indicated in the cover letter the credit card receipts do not document tip income to Petitioner because no one knows to whom the indicated tips were paid.

Petitioner goes on to state that the "employer knew of all credit card charge slips for bartender tips, because the employer processed each slip." *Petitioner's Statement of Specific Controverted Facts that Establish a Genuine Issue of Material Facts Precluding Summary Judgment*, ¶ 15, March 18, 2004. Yes...as indicated by the cover letter the employer was arguably aware of bartender tips but was not aware of which bartender received such tips. In addition, Petitioner also states that "[t]he Elks Club only provided what it described as every credit card slip charged for tips in favor of [Petitioner] Chris Sandru." Id. This statement is patently untrue. As is plain from the cover letter, the Elks Club specifically and pointedly disclaimed any knowledge of the identity of the tip recipients.

Furthermore, Petitioner accuses the Elks Club of refusing to produce all credit card receipts which could establish tips paid to Petitioner. Oddly, in spite of his belief

that the Elks Club has failed to comply with the rules of discovery, Petitioner has not chosen to compel such discovery as is his right under the rules. Rather, he merely asserts that the Elks Club has refused to comply with discovery and relies upon that assertion to create an inference that documentation of his tip income surely exists but that the Elks Club has sinisterly refused to produce it. As evidence that other un-produced credit card receipts exist, Petitioner relies on a statement, attached to his accompanying affidavit as Petitioner's Exhibit M. The statement is signed by Mr. and Mrs. Kempthorne and states as follows:

> "To whom it may concern,
>
> On June 14th, 2003 Krista and I were married at the Elks Lodge in Missoula and held our reception there. We had an open bar bill for approximately $900 and left the bartender a $200 tip which was all added together with the reception bill. There were 250 people at our wedding and reception that also tipped the bartender in cash when they were served drinks.
>
> Sincerely,
>
> Guy and Krista Kempthorne."

Chris' Affidavit of Uncontroverted Fact, Petitioner's Exhibit M, March 19, 2003. Clearly, while this statement does document a fairly large bar tab and corresponding tip to a "bartender," its does not establish that the tab and tip was paid by credit card nor does it establish a tip paid specifically to Petitioner. Accordingly, this statement offers no proof that a credit card receipt of this transaction exists or that Petitioner received a tip. Indeed, also attached to Petitioner's affidavit, as Petitioner's Exhibit N, is a statement by Elks Club employee Jarvis J. Ashley which states that on at least one occasion Petitioner shared his tips with Mr. Ashley. *Chris' Affidavit of Uncontroverted Fact,* Petitioner's Exhibit N, March 19, 2003. Mr. Ashley also states that it was a frequent practice for bartenders to share their tips with him. Id. Thus, Petitioner himself provides evidence that bartender tips were routinely distributed amongst other employees. Accordingly, even if the Kempthorne's did tip Petitioner $200 there is no way of knowing how much of that amount Petitioner kept and how much he distributed to other employees. Finally, as indicated by Linda Stamos's attached affidavit, The Kempthornes paid their bar bill with a check and not a credit card. *Affidavit of Linda Stamos*, March 24, 2004. Furthermore, while several of the groomsmen ran their own tab and paid by credit card, those credit card receipts do not indicate that a tip was included in the charge. Id. Thus, Petitioner's assertion of a $200 tip from the Kempthorn's credit card payment is not supported by the documentation he provides. However, it must be noted that even assuming that Petitioner indeed did receive the Kempthorne tip ($200) as well as all tips indicated on the credit card receipts contained in Petitioner's Exhibit O ($63.25) the total amount of such tips is $263.25. As indicated by the dates on the credit card receipts and the date of the Kempthorne wedding, the $263.25 in tips was paid out over a six week period - - from May 9, 2003, to June 20, 2003. Obviously, $263.25 over six weeks does not average $300 per week in tip income. Rather it averages $43.87 per week. Accordingly, $256.13 of alleged weekly tip income ($300 - $43.87 = $256.13) remains undocumented. Significantly, Petitioner makes no attempt to provide any evidence of documentation of such weekly tip income. In short, even if Respondent were to concede that all credit card tips were given to

Petitioner, that the credit card receipts themselves were sufficient to document tip income to the employer for tax purposes, and that the Kempthorne's indeed tipped Petitioner $200 the Petitioner would only be able to document a weekly tip average of $43.87. Far short of the $300 alleged.

Respondent's Statement of Uncontroverted Fact ¶ 15 is quite significant in that it is the single most important fact of this case. Either Petitioner documented his tips to his employer for tax purposes or he did not. If he did he would be entitled to have such tips included in his time of injury wages for the purpose of computing his benefits. If he did not he would not be so entitled. It is that simple. Respondent's Statement of Uncontroverted Fact ¶ 15 is the crux of this whole case. That Petitioner did not document his tips to his employer is made abundantly clear not only from his own deposition testimony but from his failure to produce such documentation in this action. Petitioner could easily prevail in this case if he would merely produce the documentation of tip income that he provided to his employer. This he fails to do. Rather, he attempts to recreate such documentation in the form of credit card receipts and statements from Elks Club customers. However, as has been shown above, such documents do not demonstrate that he documented his tip income to his employer for tax purposes. Consequently, Respondent's Statement of Uncontroverted Fact ¶ 15 is not disputed and thus does not preclude summary judgment.

Petitioner's sixteenth specification of disputed fact takes issue with Respondent's Statement of Uncontroverted Fact ¶ 16 in which Respondent described the information contained within Petitioner's pay stubs. Petitioner states that this fact is disputed because he disputes the amounts of tip earnings indicated in the pay stubs. However, Respondent's Statement of Uncontroverted Fact ¶ 16 does not assert as fact any specific amount of tip earnings. The statement merely lists the categories of wage information contained on the pay stubs. As petitioner does not dispute that these categories appear on the pay stubs Respondent's Statement of Uncontroverted Fact ¶ 16 is not disputed. Interestingly, in his sixteenth specification Petitioner admits that he did not report his tip earnings. Specifically, Petitioner states that he "reasonably believed that the employer itself was accounting for the unreported tips earned by Chris, by the confusing language in the tip policy ('...$1.00 per hour (withheld) from your paycheck')." *Petitioner's Statement of Specific Controverted Facts that Establish a Genuine Issue of Material Facts Precluding Summary Judgment*, ¶ 16, March 18, 2004. While Petitioner attempts to credit his failure to report tips to his "confusion" over the payroll policy, it is clear, by his own admission, that he did not report his tips to his employer.

Petitioner's seventeenth specification of disputed fact addresses Respondent's Statement of Uncontroverted Fact ¶ 17 which states, "[t]he pay stubs also indicated that Social security, Medicare, and federal and state tax withholdings were subtracted from all earnings, including any tip earnings appearing on the stubs." Petitioner asserts that this simple statement, describing deductions listed on virtually all pay stubs, is disputed because the employer pays less in FICA contributions when lower wages are listed on the pay stub. While that may be true it does not contradict or dispute the fact that the pay stubs indicated the deductions described in Respondent's Statement of Uncontroverted Fact ¶ 17. Accordingly, that statement is not disputed.

Petitioner's nineteenth specification of disputed fact corresponds to Respondent's Statement of Uncontroverted Fact ¶ 19 which merely states that

"Petitioner's final pay stub, for pay period ending June 30, 2003, indicated year to date tip earnings of $98.06." Petitioner attempts to create a dispute by arguing that the $98.06 figure is not an accurate reflection of his tip earnings. The most cursory glance at the referenced pay stub reveals that it, in fact, indicates a year to date tip earnings of $98.06. Petitioner's disagreement with the amount of tip earnings indicated does not alter the fact that the pay stub actually says what Respondent says its says. Thus, Respondent's Statement of Uncontroverted Fact ¶ 19 is not disputed and thus does not preclude summary judgment.

Petitioner's twentieth specification of disputed fact concerns Respondent's Statement of Uncontroverted Fact ¶ 20 which merely asserts that "[a]ll of Petitioner's earlier pay stubs indicated year to date tip earnings of $9.40." Again, Petitioner disputes that the $9.40 figure is an accurate reflection of his tip income but does not dispute that the pay stubs indicate that figure. Accordingly, Respondent's Statement of Uncontroverted Fact ¶ 20 is not disputed.

Petitioner's twenty first specification of disputed fact attempts to dispute Respondent's Statement of Uncontroverted Fact ¶ 21 which merely asserts that Petitioner never notified the Elks Club of his belief that the tip earnings indicated in the pay stubs did not reflect his actual tips. Petitioner explains that he did not notify the Elks Club of his disagreement with the tip figures because he "erroneously trusted his employer to report tips in a proper manner, per its 'tip policy'." Here again, while Petitioner offers and explanation for why he did not advise the Elks Club of a discrepancy in the tip information he does not dispute the fact that he indeed did not so advise the Elks Club. Thus, Respondent's Statement of Uncontroverted Fact ¶ 21 is undisputed.

Petitioner's final specification of disputed fact regards Respondent's Statement of Uncontroverted Fact ¶ 22 in which Respondent uses the word "alleged" to describe Petitioner's tips. Respondent's Statement of Uncontroverted Fact ¶ 22 also states that Petitioner initiated this action on October 24, 2003. Petitioner argues that his $300.00 per week tip income is a fact and objects to Respondent's use of the word "alleged." As Respondent disputes that Petitioner made (or averaged) $300 per week in tips and because Petitioner has yet to prove these tip earnings, Respondent's use of the word "alleged" is appropriate to describe a yet-to-be-proven fact.

Petitioner also argues that Respondent's "chronology of this case, intended to show the claimant did nothing and took no action from July 10, 2003, to October 24, 2003, is false and incorrect." *Petitioner's Statement of Specific Controverted Facts that Establish a Genuine Issue of Material Facts Precluding Summary Judgment*, ¶ 22, March 18, 2004. In drafting Respondent's Statement of Uncontroverted Fact ¶ 22 Respondent had no such intentions. The statement exists merely to provide the background information that this action was commenced on October 24, 2003. No inferences were intended. Neither can one be read into the statement. However, regardless of Respondent's intentions Petitioner does not dispute that he indeed commenced this action on October 24, 2003. Accordingly, Respondent's Statement of Uncontroverted Fact ¶ 22 is not disputed.

As has been shown, Petitioner's specifications of disputed facts do not reveal a single fact that is both disputed and material to this case. Accordingly, summary judgment is not precluded by the existence of disputed, material facts.

II. RESPONDENT IS NOT ESTOPPED FROM DENYING THAT PETITIONER DOCUMENTED HIS TIP INCOME TO HIS EMPLOYER FOR TAX PURPOSES BY THE ELKS CLUB'S ALLEGED "KNOWLEDGE" OF PETITIONER'S TIP INCOME.

In his twenty first specification of disputed fact Petitioner argues that Respondent is estopped from denying its knowledge of Petitioner's tip income. In all three documents provided by Petitioner in opposition to Respondent's motion for summary judgment, Petitioner asserts as, a fact, the Elks Club's knowledge of his alleged $300 average weekly tip income. In an effort to support this assertion, Petitioner relies upon a variety of documents as evidence that the Elks Club and Respondent were aware of his alleged $300 per week average tip income. However, as will be shown all such documents were based upon Petitioner's undocumented claim of $300 per week tip income which he made after his work place injury.

Petitioner has never provided the Elks Club or Respondent with documentation of his tip income for tax purposes.

> Q. What is that documentation that you could provide [of tip income reported to employer]?
>
> A. Documentation - -
>
> Q. That you reported the tip income to your employer.
>
> A. Well, based on our conversations.
>
> Q. Okay. But is there any evidence? Is there any paperwork - -
>
> A. No.

Deposition Christopher Sandru, January 16, 2004, 20:11-19.

In an effort to overcome the simple fact that he never documented his tip income to his employer Petitioner attempts to alter the requirements of § 39-71-123, MCA. Petitioner misstates that statute by substituting the word "report" in place of the statute's use of the word "document."

> "All that is <u>required</u> of Chris is that he report his tips to his employer..."

Petitioner's Statement of Specific Controverted Facts That Establish a Genuine Issue of Material Facts Precluding Summary Judgment, ¶ 21, March 18, 2004 (emphasis in original).

> "Chris is required by Statute to report or document his tips to his employer for tax purposes. Sec. 39-71-123(1,c), MCA."

Petitioner's Statement of Genuine Issues, and Brief in Opposition to Motion For Summary Judgment, ¶ 1, March 19, 2004.

The statute cited by petitioner states as follows:

" 'Wages' means all remuneration paid for services performed by an employee for an employer... . The term includes but is not limited to:

(c) tips or other gratuities received by the employee, to the extent that tips or gratuities are documented by the employee to the employer for tax purposes."

§ 39-71-123(1)(c), MCA. Clearly, the statute requires more than mere "reporting" of tip income. The statute requires that such income be "documented." In substituting the word "report" for "document", petitioner attempts to lower the requirements of the statute and then proceeds to point to evidence that he has met this lower "reporting" requirement. In arguing that he has "reported" his tips Petitioner states that he "reported" them to his employer during casual conversations.

Q. ... - - did you in fact report your tips to your employer, the Hellgate Elk's Lodge?

A. Yes.

Q. When did you do that?

A. In casual conversation.

Deposition Christopher Sandru, January 16, 2004, 10:4-9.

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

A. Yes, in a manner.

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

A. It was in causal conversation.

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

A. Yes.

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

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

Deposition Christopher Sandru, January 16, 2004, 12:4-18. Clearly such hit and miss casual conversations are hardly the documentation required by § 39-71-123, MCA. Furthermore, they do not even establish any type of systematic or conscientious "reporting" that would provide the Elks Club with anything more than the most cursory knowledge that Petitioner occasionally had a good night in tips. These "reports," during casual conversation, would certainly not provide any detailed understanding of

Petitioner's weekly tip average. Indeed, Petitioner acknowledges that he cannot recall the amounts of tips reported during these conversations but then imputes a detailed knowledge of his tips to the Elks Club based upon those very same conversations. In other words, he expects the Elks Club to recall what he cannot.

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

A. I don't recall.

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

A. No.

Deposition Christopher Sandru, December 10, 2003, 21:10-15. Furthermore, Petitioner states that he was not aware of any record of his tips maintained by the Elks Club but then assures this Court that the Elks Club had a detailed knowledge of his tip income.

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

A. No.

Deposition Christopher Sandru, January 16, 2004, 24:7-9.

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

A. Not to my knowledge.

Deposition Christopher Sandru, January 16, 2003, 18:7-9. As is readily apparent from Petitioner's own testimony, his "reports" were insufficient to cause the Elks Club to have any knowledge of his weekly tip average. Thus, even if Petitioner's preferred lower "reporting" requirement was indeed the law, his casual conversation did not even meet that requirement sufficient to cause the Elks Club to have knowledge of his average weekly tip income.

Petitioner also relies upon the *First Report* as evidence that he "reported" his tip income. As noted above the *First Report* contains a hand written notation indicating a $300 per week tip income. Petitioner points to this as evidence that he "reported" his tip income to his employer. Petitioner further argues that by Ms. Stamos signing this *First Report* the Elks Club indicated its knowledge of his $300 per week tip income and so advised Respondent. Nothing could be further from the truth. The *First Report* is divided into two portions. *First Report*, June 30, 2003. The top half of the page is entitled "Worker" and contains a signature block for the worker to sign indicating that the information contained in the "Employee" section is his claim for workers' compensation benefits. Id. The hand written notation indicating $300 per week in tips appears in this section. Id. The bottom half is entitled "Employer" and contains a signature block for the employer's authorized agent to sign. Id. The most cursory glance at the two portions of this document reveals that the employer's signature at the bottom merely attests to the information contained in the section entitled "Employer." Accordingly, by signing the *First Report*, the Elks Club in no way endorsed, confirmed or admitted knowledge of the information contained in the "Employee" section. Indeed, as is clear

from Ms. Stamos's attached affidavit, the hand written notation had already been placed upon the *First Report* by the time she received it. *Affidavit of Linda Stamos*, March 25, 2004. Thus, the hand written notation is insufficient to impute knowledge of Petitioner's tip income to either the Elks Club or Respondent.

In relying on the *First Report* as evidence of his "reporting" of tip income, Petitioner once again seeks to ignore the documentation requirement of § 39-71-123, MCA. The hand written statement of tip income is not accompanied by any documentation substantiating his tip income and thus does not comply with the requirements of the statute. However, even if this Court were to accept Petitioner's lower "reporting" requirement it is clear that the *First Report* does not demonstrate that he ever "reported" his tip income to his employer for tax purposes.

Petitioner also relies on Ms. Stamos's letter of June 26, 2003, in which Ms. Stamos advised Claims Adjuster Sandy Scholl that Petitioner "averages $300 per week in tips." Letter from L. Stamos to S. Scholl, June 26, 2003. As is clear from Ms. Stamos's affidavit she has no knowledge of Petitioner's average weekly tip income. Affidavit of Linda Stamos, March 25, 2004. Rather, she relied upon Petitioner's post injury statements when advising Ms. Scholl of the average weekly tip income. Id. Accordingly, Ms. Stamos's letter of June 26, 2003, only proves that, after his injury, Petitioner asserted to Ms. Stamos that he averaged $300 per week in tips. The letter does not establish that he documented his tips to his employer for tax purposes or that the employer had knowledge of his alleged $300 per week tip income.

As has been shown, the Elks Club had no knowledge of Petitioner's average weekly tip income. Petitioner's various "reports" were never sufficient to supply the Elks Club with such knowledge. At most, the Elks Club was generally aware that bartenders received tips - - nothing more. In his attempt to impute such knowledge and thereby invoke the rule of estopple, Petitioner points to nothing more than his own assertions, made after his injury, that he averaged $300 per week in tips. Accordingly, because Petitioner has failed to prove that the Elks Club had knowledge of his alleged weekly $300 average tip income, Respondent is not estopped from denying such income.

Furthermore, in attempting to show that Respondent had knowledge of his tip income Petitioner misses the point of this case. The question at issue is not whether Petitioner made a specific amount of tip income but whether he documented such income to his employer for tax purposes. Thus, not only is Respondent not estopped from denying the $300 weekly tip average but it is also not estopped from denying the more relevant fact that Petitioner never documented his tip income to his employer for tax purposes. Indeed, while Petitioner argues that Respondent is estopped from denying its knowledge of Petitioner's alleged $300 average weekly tip income, he makes no argument that Respondent should be estopped from denying Petitioner's failure to document his tip income for tax purposes. Accordingly, Respondent is not estopped from denying either fact.

III. RESPONDENT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE PETITIONER HAS NOT DOCUMENTED HIS TIP INCOME TO HIS EMPLOYER FOR TAX PURPOSES AS REQUIRED BY § 39-71-123.

The policy objectives behind § 39-71-123, MCA are quite clear and perfectly illustrated by Petitioner's claim. Were claimants to be permitted to claim tips, previously

undocumented to their employer for tax purposes, they would be permitted to avoid taxes on tip income while using that very same untaxed income to claim higher wages in the event of a work place injury. Clearly, such a policy would create incentive for tax fraud by encouraging workers to hide tip income unless they were injured, in which case they could run to the employer to document tips earned during that tax year (but not in previous years). Such is the policy that Petitioner urges this Court to accept.

It is quite clear that Petitioner failed to document his tips to his employer for tax purposes. The evidence supporting that conclusion is overwhelming.

1. Petitioner has failed to produce copies of the documentation of his tip income he provided to his employer in spite of the fact that were he to do so this case would almost certainly be immediately resolved in his favor.

2. He has admitted in deposition that other than casual conversation he never even reported (let alone documented) his tip income to his employer prior to filing his *First Report*. *Deposition Christopher Sandru*, January 16, 2004, 20:11-19; 44:6-24.

3. He has admitted in his sixteenth specification of disputed fact that he did not report tip income to his employer. *Petitioner's Statement of Specific Controverted Facts That Establish a Genuine Issue of Material Facts Precluding Summary Judgment*, ¶ 16, March 18, 2004.

4. He has admitted that he kept no log or record of his tip income. *Deposition Christopher Sandru*, January 16, 2004, 18:10-12; 20:11-19; *Deposition Christopher Sandru*, December 10, 2003, 27:5-11; 29:15-17; 30:3-5.

5. Even with Respondent conceding all credit card tips and the Kempthorne tip, Petitioner's best attempt to document such income, in his fifteenth specification of disputed fact discussed above, reveals only $43.87 per week - - $256.13 short of the $300 per week tip income he alleges. *Petitioner's Statement of Specific Controverted Facts That Establish a Genuine Issue of Material Facts Precluding Summary Judgment*, ¶ 15, March 18, 2004

In an effort to overcome this overwhelming evidence and retroactively create the documentation necessary for his argument, Petitioner provides a host of exhibits attached to his affidavit accompanying his brief in opposition. For example, Petitioner's Exhibit G is his bank statement from April 1 to June 30, 2003 which indicates various deposits and contains hand written notations indicating that four such deposits were in cash. Petitioner cites these cash deposit as evidence of tip income. Unfortunately, of the four cash deposits cited by Petitioner as evidence of tip income, two such deposits occurred before he began working at the Elks Club on May 1. Specifically, the cash deposit of $400.27 occurred on April 25, 2003, while the $130 cash deposit occurred on April 30, 2003. *Chris' Affidavit of Uncontroverted Facts*, Exhibit G, March 19, 2004. However, even were Respondent to concede that all indicated cash deposits after May 1 were tip income, those deposits total only $900. $900 plus $263.25 (the Kempthorne and credit card tips assuming these are not accounted for in the cash deposits) equals $1,163.25. That figure divided by the six weeks Petitioner worked at the Elks Club

equals $193.88 per week in tip income - - $106.12 short of the $300 per week figure alleged by Petitioner. Accordingly, even if Respondent is quite generous with its concessions, there is no way to add the figures provided by Petitioner to come up with a $300 per week tip average.

Petitioner also provides Petitioner's Exhibit H as evidence of his documentation of tip income. Exhibit H is a loan application, executed on May 7, 2003, in which Petitioner states his employment income as $2,200 per month. *Chris' Affidavit of Uncontroverted Facts*, Exhibit H, March 19, 2004. Petitioner argues that this is proof of his tip earnings because his wages ($6.50/hr) times his hours worked could equal only about 50% of the $2,200 monthly earnings claimed on the application. Thus, argues Petitioner, the portion of the $2,200 not accounted for by hourly wages can only be tip income. However, Petitioner misses the point. Even if the Court were to accept Exhibit H as proof of Petitioner's tip income (a leap of faith given that Petitioner had only been working at the Elks Club for a week when he executed his loan application and thus could not have accurately stated a monthly average wage which was 50% based upon tips), § 39-71-123, MCA requires that he document his tip income to his employer for tax purposes. Whether Petitioner actually made the tip income is not the issue. The issue is whether Petitioner documented such income to his employer for tax purposes. Exhibit H does not prove such documentation to his employer and is thus irrelevant.

Likewise Petitioner also provides Petitioner's Exhibit I which is a copy of rent receipts indicating cash payments by Petitioner for his monthly rent. *Chris' Affidavit of Uncontroverted Facts*, Exhibit I, March 18, 2004. Once again, Petitioner contends that payment for rent in cash is evidence that he made tip income. As with Exhibit H Petitioner has missed the point. Exhibit I does nothing to demonstrate that he documented his tip income to his employer (or that the source of the cash was tips). Thus, Exhibit I is irrelevant.

Petitioner also provides Form 4137, entitled *Social Security and Medicare Tax on Unreported Tip Income* and filed along with his 2003 tax returns. *Chris' Affidavit of Uncontroverted Facts*, Petitioner's Exhibit K, March 19, 2004. Petitioner points to Exhibit K as evidence of not only his tip income but as evidence that he reported such income for tax purposes. However, Exhibit K is entirely unconvincing. Exhibit K was only filed after petitioner had commenced this action and thus had an incentive to report his alleged tips to the government for tax purposes. How much of an incentive did Petitioner have? As is indicated on line 12 of Exhibit K, Petitioner's total tax bill for his alleged tips amounted to $153. Id. Thus, by paying the government $153 Petitioner attempts to increase his time of injury wage by $300 per week. The corresponding increase in TTD benefits would be $200 per week or approximately $866 per month. However, Petitioner's belated attempt to document his previously unreported tip income fails because, as this Court has stated,

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

Sampson v. Broaddway Yellow Cab Co. & St. Comp. Ins. Fund., WCC No. 85123369 (June 18, 1986) (emphasis added) [citing *Thomas v. Insurance Company of North America*, WCC Docket No. 1615 (August 8, 1983) and *Anderson v. Insurance*

Company of North America, WCC Docket No. 1657 (May 16, 1983). Thus, belated, post-injury attempts to document previously unreported wages is not permitted.

Furthermore, Exhibit K reveals that the total amount of tip income Petitioner reported to the government, as having been reported to his employer in 2003, is $98 -- a far cry from the $300 per week alleged by Petitioner. On line 1 the taxpayer is instructed to enter the "[t]otal cash and charge tips you **received** in 2003..." *Chris' Affidavit of Uncontroverted Facts*, Petitioner's Exhibit K, March 19, 2004. The figure entered is $2,100. Id. On line 2 the taxpayer is instructed to enter the "[t]otal cash and tips you **reported** to your employer in 2003." Id. The figure entered on line 2 is $98.00. Id. Immediately to the left of line 2 is a hand written notation which states that the amount entered is "in addition to [the amount entered on line] 1 above." Id. Immediately above line 1 is another hand written notation, written in a different hand, which states, "wanted line one on line #2 could not input it that way." Id. Beneath that notation appears an illegible signature. Id. Thus, there is considerable confusion as to what amount Petitioner entered on line 2. If the reader ignores the hand written notation to the left of line 2 the total tips documented to the employer in 2003 would be $98. However, if the reader were to accept the hand written notation that line 2 is in addition to line 1 then the total tip income reported to the employer in 2003 is $2,198 in spite of the fact that only $98 has been entered on line 2. Indeed, $2,198 is the figure contended by Petitioner in his affidavit. *Chris' Affidavit of Uncontroverted Facts*, ¶ 8, March 19, 2004. This confusion is resolved on the very next line. Line 3 instructs the taxpayer to subtract line 2 from line 1. Id. The figure entered here is $2,002. Id. $98 (line 2) subtracted from $2,100 (line 1) is $2,002. This unadjusted figure of $2,002 also appears on line 5, entitled "Unreported tips subject to Medicare tax." Id. Thus the confusion is solved. The figure used in line 2 for the purpose of further tax computations was $98 and not $2,198 (which would have resulted in -$98 or 0 being entered on line 3 and 5). Accordingly, Petitioner's Exhibit K reveals that the "[t]otal cash and tips [Petitoner] reported to [his] employer in 2003" was $98.

Petitioner provides a host of other equally unconvincing documents. The simple truth is that Petitioner did not document his tip income to his employer for tax purposes. It is because of this simple fact that Petitioner finds himself in the position of having to prove such documentation by attempting to create oblique inferences from documents generally related to his finances. However, in reaching so far afield to prove non-existent documentation Petitioner only emphasizes the absence of such documentation.

As stated above, one of the policies behind § 39-71-123, MCA is to create a disincentive for tax fraud. Were Petitioner to be permitted to have his undocumented alleged tip income included in his benefits calculation the message would go out loud and clear. Workers would be perfectly free, and even encouraged, to avoid taxes on tip income until such time as they had a work place injury when they could then bump up their time of injury wage by asserting untaxed and undocumented income for that year only. In previous cases this Court has clearly condemned such tactics.

> "The issue of cash earnings is not new to this Court and when tips are concerned the Court has elected to include only those amounts that are reported for tax purposes when computing wages"

Simons v. St. Comp. Ins. Fund, WCC No. 9207-6503 (October 13, 1992). This statement speaks for itself.

The second policy behind § 39-71-123, MCA, is perfectly illustrated by Petitioner's case. Absent documentation of tip income provided to the employer, it is impossible to know or substantiate and employee's tip earnings. Thus, documentation is required to allow an insurer to know what amount of tip income to add to an injured worker's time of injury wage. Without this requirement, injured workers would be free to assert any amount of tips they desired with no proof required. Clearly, § 39-71-123's requirement for documentation was designed to avoid such a free-for-all.

Petitioner's case perfectly illustrates the reason for the documentation requirement because nobody knows what Petitioner made in tip income. Petitioner has no log or record of such income. *Deposition Christopher Sandru*, January 16, 2004, 18:10-12; *Deposition Christopher Sandru*, December 10, 2003, 27:5-11; 29:15-17. He has failed to provide his employer with any documentation of such income. *Deposition Christopher Sandru*, January 16, 2004, 20:11-19. Furthermore, he has provided conflicting estimates of his tip income. He has stated that he averaged $10.00 per hour in tips and worked 40 hours a week but then stated that his tips were $300 per week rather than $400 per week. *Deposition Christopher Sandru*, January 16, 2004, 85:23-25; 86:1-25; 87:1-5. He has provided evidence that he shared his tips with other employees (*Chris' Affidavit of Uncontroverted Facts*, Exhibit N, March 19, 2004) but then does not account for such reductions in his tips. He states that cash bank deposits were tip income but then refers to deposits made prior to his employment with the Elks Club. *Chris' Affidavit of Uncontroverted Facts*, Exhibit G, March 19, 2004. He disputes the tip information provided in the pay stubs but then admits that he did not notify his employer of the alleged discrepancy nor did he provide any other figures. *Deposition Christopher Sandru*, January 16, 2004, 25:25; 26:1-3; 27:10-22. He does not recall the amounts of tips reported to his employer during casual conversations but insists that he accurately reported all his tips. *Deposition Christopher Sandru*, December 10, 2003, 21:10-15; 24:12-25; 25:1-7; 25:19-25; 26:1-3. In short, he asks the insurer to merely take his word regarding his tip income but cannot point to any documentation substantiating any particular amount if such income. While Respondent concedes that Petitioner likely received some tip income as a result of his employment as a bartender it has no way of knowing the amount of such income because no documentation of it exists. Because Petitioner has not documented his tip income to his employer, as required by § 39-71-123, MCA, neither Respondent, Petitioner, the Elks Club, nor this Court can possibly know the amount of tip income he earned. Accordingly, the reason behind the requirement for documentation becomes painfully obvious.

IV. CONCLUSION

Petitioner's attempt to create disputed issues of material facts fails because, as shown above, there is not a single fact, cited by Respondent, that is both disputed and material. Furthermore, as is readily revealed by the record, Petitioner failed to provide his employer with any documentation of his tip income for tax purposes. As a result, and pursuant to § 39-71-123, MCA, the policies behind that statute and this Court's previous holdings in *Simons v. St. Comp. Ins. Fund* and *Sampson v. Broaddway Yellow Cab Co. & St. Comp. Ins. Fund*, Respondent is not required to include Petitioner's tip income in his time of injury wages for the purpose of calculating his workers' compensation benefits.

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

Dated this 25th day of March, 2004.

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

By: _____
STEVEN W. JENNINGS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of March, 2004, a true and correct copy of the foregoing was duly served on counsel for Petitioner by depositing a copy thereof in the U. S. mail, postage prepaid, addressed as follows:

Charles Schuyler
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