

**STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU**

**IN THE MATTER OF THE WAGE CLAIM ) Case No. 1314-2001**  
**OF SADIE M. TODD, )**

**Claimant, )**

**vs. )**

**JLK CONSTRUCTION, INC, a Montana )**  
**corporation, d/b/a FRED'S LOUNGE AND )**  
**CASINO )**

**Respondent. )**

**FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND ORDER**

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**I. INTRODUCTION**

On January 24, 2001, the Claimant, Sadie M. Todd, filed a wage claim with the Wage and Hour Unit of the Montana Department of Labor and Industry pursuant to § 39-3-201, et seq., MCA. The Claimant alleged she had been employed by Respondent, JLK Construction, Inc., d/b/a Fred's Lounge and Casino, and was owed \$1,126.00 in wages for work performed during the period from September 1998 to March 2000. On February 5, 2001, the Respondent filed answers to the claim alleging that the Claimant had been paid all wages owed.

On June 15, 2001, the Wage and Hour Unit issued a determination finding that the Respondent owed the Claimant \$400.69 in wages pursuant to § 39-3-201, et seq., MCA, plus penalty pursuant to § 39-3-206, MCA.

The parties stipulated that an in-person hearing would be held on November 20, 2001, in Missoula, Montana, and Hearing Officer Gordon D. Bruce conducted the hearing at the time and place set. The Claimant was present and represented herself. The Respondent was represented by its attorney, Nancy K. Moe. Exhibits 000001 through 000522 were admitted into the record, except for Exhibits 000413 and 000414, and Exhibits 000021 and 000022 which were withdrawn. Exhibits 1-A, 2-B, and pages 7 & 8 of 3-C and Exhibit B were also admitted into the record. The Claimant, Jo Krieg, Cathy Crane, Suzanne DeMarinis, Diane Christensen, Linda Burton, Polly Bosch, Louise Schneller, Heather Anderson, and Jody Wians gave sworn testimony.

**II. ISSUE**

Whether the Respondent owes the Claimant wages pursuant to § 39-3-201 et seq., MCA, and statutory penalty pursuant to § 39-3-206, MCA.

### III. FINDINGS OF FACT

1. JLK Construction, Inc., d/b/a Fred's Lounge and Casino, employed Sadie Todd as an exotic dancer on February 16, 1998. Todd continued working as a dancer until Fred's Lounge and Casino dismissed her on December 22, 2000.

2. Fred's Lounge and Casino paid Todd \$7.00 an hour plus tips during times pertinent to her wage claim.

3. Fred's Lounge and Casino had written lounge dance rules (Fred's Lounge Dance Rules) which Todd acknowledged and signed on December 21, 1998. The rules read in pertinent part:

4. Be on time for your shift. Bar time is 15 minutes fast. You will be fined \$1.00 for every minute you are late, not to exceed \$60.00.

5. Arrive at the club prepared for your shift with your make-up on and your hair done.

7. Your music must be ready in advance for each set. Make your stage entrance when your music begins.

11. After your shift is over take your belongings with you. The club will not be responsible for your possessions. Keep the dressing room clean

12. You will be fined if you do not show up for your scheduled shift.

#### FINES - FINES WILL BE PAID IMMEDIATELY

\$5.00 for being late to stage.

\$5.00 for not having music ready.

\$5.00 for drinking, eating or smoking on stage.

\$1.00 PER MINUTE FOR BEING  
LATE TO THE BAR FOR YOUR  
SHIFT. FINE WILL NOT EXCEED  
\$60.00.

\$50.00 for missing a shift.

4. Fred's Lounge and Casino required Todd to be at work and prepared to conduct her dance performance (set) according to her work schedule which was set by Fred's Lounge and Casino. Fred's Lounge and Casino furnished a dressing room on the premises for dancers so they could change into their costumes for their dance sets. Todd was expected to be prepared to perform her beginning set at her start time (i.e., on the 8:00 p.m. to 2:00 a.m. shift, she had to be on the stage at exactly 8:00 p.m. for her performance). To meet the schedule, she had to arrive

early to arrange her costumes, dress, and have her music score prepared prior to the start of her set.

5. At the end of Todd's last performance, which was also the end of the shift for which she was being paid, she then had to return to the dressing room to change clothes and pick up around her dressing station. She also had to take her final tips to the bartender for the tip pool and daily accounting of her tips for distribution. Todd had to wait for the bartender to take the time to deal with the tips, and she often waited 15 minutes or more for the distribution of her tips.

6. Pursuant to the rules of Fred's Lounge and Casino, each dancer was expected to pool tips and each shared 20% of her tips with certain employees. The bartender was in charge of the tip pool. Tips were maintained in individual envelopes for each dancer. Generally, after each set the dancer would bring her tips to the bartender and the bartender would note the amount on that dancer's envelope. After the final set and end of the work shift, the bartender would account for all the tips and distribute them according to policy. Pursuant to rules in place for dancers, the bartender was generally in charge of assessing fines for any dancer late for work, and any fine assessed would also be deducted from that dancer's tips.

7. Todd generally worked two rotating shifts scheduled by Fred's Lounge and Casino.

Her work shift rotated similar to this example for the work period Monday, June 5, 2000 through Sunday, June 18, 2000: June 5 - 8:00 p.m. to 2:00 a.m.; June 6 - 2:00 p.m. to 8:00 p.m.; June 7 - 8:00 p.m. to 2:00 a.m.; June 12 ? 2:00 p.m. to 8:00 p.m.; June 13 - 8:00 p.m. to 2:00 a.m.; June 14 - 2:00 p.m. to 8:00 p.m. and June 18 - 4:30 p.m. to 1:30 a.m.

8. In August 2000, Fred's Lounge and Casino notified all dancers that:

We must be out of the building by 2a.m. From 1:00a.m. on each dancer's set will be shortened to 10 minutes. The shifts will end at 1:10a.m, 1:20a.m., 1:30a.m. and 1:40a.m. bar time.

These changes affected the last dance set for Todd and other dancers, but the employer paid Todd only to the end of whichever shift she was working. In Todd's case, the shift she was working coincided with the end of her dance set.

9. Beginning in September 1998 until Todd was dismissed in December 2000, she worked 391 shifts of two or more work hours after deducting sick days and vacation time shown in the record. A recap of Todd's schedules shows that she worked the following number of work shifts: 1998 - 31; 1999 - 188; 2000 -172, for a total of 391 shifts.

10. Todd worked a minimum of 15 minutes each shift for the essential benefit of Fred's Lounge and Casino for which she was not paid. Todd worked an estimated 15 minutes each of the 391 work shifts for which she was not compensated. Therefore, Fred's Lounge and Casino owes Todd \$684.25 in wages (97.750 hours times \$7.00 per hour).

11. Todd noted on the 2000 calendar deductions for fines she believed were taken from her tips. These entries are unreliable based on credible testimony of bartenders on duty during most of the times she claimed deductions were taken. Certain other entries she made in the calendar were erroneous because she did not actually work on that particular day. Fred's Lounge and Casino owes Todd no wages for fines allegedly taken from her tips.

#### **IV. DISCUSSION**

Montana law requires that employers pay employees wages when due, in accordance with the employment agreement, pursuant to § 39-3-204, MCA, and in no event more than 15 days following the separation from employment. § 39-3-205, MCA. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties. "Wages" are any money due an employee by an employer, including tips collected by the employer. § 39-3-201(6), MCA. The law further prohibits withholding from wages, other than for board, room, and other incidentals, and for deduction provided for by law. § 39-3-204, MCA.

Todd seeks wages for work she performed for Fred's Lounge and Casino from September 10, 1998 to December 21, 2000. She contends that: (1) Fred's Lounge and Casino improperly withheld \$419.00 from her tips as fines for being late to work and; (2) Fred's Lounge and Casino failed to pay her for compensable time worked prior to the start of her shift and after the end of her shift, resulting in a shortage of \$707.00 (101 hours x \$7.00 per hour).

#### Fines Deducted From Tips

The overall record shows that Todd's reconstruction on a 2000 calendar of fines allegedly deducted from her tips is unreliable. Credible testimony of bartenders who were responsible for any such deductions and who were on duty during some of the shifts Todd contends fines were taken shows that no fines were actually levied against Todd for being late. Other discrepancies were revealed showing that on a day Todd claimed she was fined, she did not work. Because of the substantial discrepancies in her calendar, Fred's Lounge and Casino does not owe wages for this aspect of the wage claim.

#### Wages For Compensable Time

The wage agreement between Todd and Fred's Lounge and Casino was to pay \$7.00 per hour. The record shows that it was customary and common practice required by Fred's Lounge and Casino for Todd to report to work before her starting time, because she had to be completely prepared for the start of her dance set which coincided with the work schedule established by Fred's Lounge and Casino. After her last dance set and the scheduled end of her shift, Todd again spent time clearing up her dressing station and then reporting to the bartender to await an accounting of all tips for her shift.

Fred's Lounge and Casino argues that the "tipping" out process at the end of Todd's shift was not its responsibility, but the responsibility of the employees. Here, Fred's Lounge and Casino set the policy for the pooling of tips and it was indeed its responsibility to monitor the procedure to be sure no workers were working uncompensated time. Fred's Lounge and Casino expected Todd to perform these activities, yet they were primarily for the benefit of Fred's Lounge and Casino in paying employees their wages for the day. Todd was paid only for the hours shown on her schedule. However, the record shows, she often spent well over 15 minutes each shift for compensable activities to the benefit of the employer that occurred outside the established schedules.

Administrative Rules of Montana 24.16.1005(1) and (3) provide:

(1) General. Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of a shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

(3) Duty of management. In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

An employer who violates the wage payment laws is subject to a penalty pursuant to § 39-2-206, MCA. Here, Fred's Lounge and Casino failed to pay Todd \$684.25 in wages for all compensable time she spent on the job in violation of § 39-3-201 et seq., MCA. Todd is entitled to a statutory penalty. ARM 24.16.7561 provides for a penalty of 110% to be assessed when the claim involves a minimum wage violation. Because Fred's Lounge and Casino did not pay Todd at all for these hours, the claim is in essence a minimum wage claim. Therefore, a penalty of 110% of the wages determined is due. Fred's Lounge and Casino is liable for penalty in the amount of \$752.68.

## **V. CONCLUSIONS OF LAW**

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under § 39-3-201 et seq. MCA. *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).

2. Sadie Todd failed to show that Fred's Lounge and Casino owed her wages for penalties allegedly taken from her tips and that claim is denied. However, Fred's Lounge and Casino violated § 39-3-201 et seq., MCA, by failing to pay Sadie Todd wages for hours worked but not paid when due. Fred's Lounge and Casino owes Sadie Todd \$684.25 in wages.

3. Fred's Lounge and Casino is liable for a penalty of 110% pursuant to § 39-3-206, MCA, for failure to pay the wages when due. Fred's Lounge and Casino owes Sadie Todd a penalty of \$752.68.

**VI. ORDER**

JLK Construction, Inc., Fred's Lounge and Casino, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,436.93 in wages and penalty made payable to Sadie M. Todd, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days from the date of this Order.

DATED this 29th day of January, 2002.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ GORDON D. BRUCE  
GORDON D. BRUCE  
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with § 39-3-216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also § 2-4-702, MCA.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to § 39-3-212, MCA. Such an application is not a review of the validity of this Order.