

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MARY JO STOLLE, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 CHRISTINE BENNETT, )  
 )  
 Employer, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

**IC 04-001592**

Filed July 15, 2005

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on March 10, and April 5, 2005. Claimant was present and represented by Scott Rose of Boise. Natalie Camacho Mendoza, also of Boise, represented Defendant. Oral and documentary evidence was presented. The parties took no post-hearing depositions but submitted post-hearing briefs. This matter came under advisement on June 21, 2005, and is now ready for decision.

**ISSUES**

The issues to be decided as the result of the hearing are:

1. Whether Claimant suffered an accident resulting in a personal injury arising out of and in the course of her employment on December 18, 2003, and, if so,
2. Whether Claimant was an employee or independent contractor at the time.

**CONTENTIONS OF THE PARTIES**

This is a credibility case. Claimant contends she slipped on some ice as she was exiting a limousine at Defendant’s limousine business on December 18, 2003, and suffered injuries. She

alleges that Defendant and Defendant's boyfriend not only witnessed her slip and fall, but they both fell as well. After her fall, Defendant and others assisted her into Defendant's home to care for her injuries. After she recovered somewhat, Claimant drove home with Defendant's father following her to make sure she made it. Once there, Claimant's son observed her condition and met Defendant's father. Finally, Claimant was not an independent contractor, but rather was employed by Defendant as a limousine driver.

Defendant contends that Claimant's alleged accident is a figment of her imagination, i.e., it never happened. Defendant and her boyfriend did not even see Claimant that day, let alone witness her fall or fall themselves. Further, Defendant's father was not there either, and could not have followed Claimant to her residence. Finally, even if the Commission finds a compensable accident and injury, Claimant was an independent contractor and is not subject to the provisions of the Idaho Workers' Compensation Law in any event.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, Officer John Tudbury of the Boise City Police Department, Christopher Bartley, Bonnie Cazier, Defendant Christine Bennett, Robert Baker, Patricia Ann Grothe, Gina Thornton, David Duro, and Cecil Bennett presented at the hearing;
2. Claimant's Exhibits A-D, I, J, L, R, U, W, and X-Z, and bb, admitted at the hearing; and,
3. Defendant's Exhibits 1-12 admitted at the hearing.

### **FINDINGS OF FACT**

1. Defendant, Christine Bennett, is the owner of a limousine service in Boise. Although presently insured for workers' compensation purposes, she was not so insured on the

date of Claimant's alleged accident and injury. Defendant testified that she considered her on-call drivers to be independent contractors.

2. Claimant, Mary Jo Stolle, began working as a driver for Defendant in July 2001. She was on a list with a few other drivers that Defendant would call to drive a limousine for clients who would arrange for limousine services through Defendant. Defendant operated her business from her home.

3. Claimant alleges that on December 18, 2003, she was called to drive a group of people on a Christmas light tour. She arrived at Defendant's home to pick up a limousine at approximately 4:30 p.m. Claimant backed the limousine out of Defendant's garage and as she was proceeding down the street on her way for her pick-up, she noticed that the limousine was low on fuel. She then went back to Defendant's house to obtain a fuel credit card from Defendant.

4. Claimant testified as follows regarding the events as she returned to Defendant's house:

Q. (By Mr. Rose): Okay, now, in detail tell us what happened next.

A. I pulled in the driveway. Put the car in park. Mrs. Bennett was running through the garage towards me, towards the driveway. Her boyfriend at the time Rob Baker was in the garage getting a second car ready. She came running out to me. I opened the door of the limousine. I put my left foot out and put my right foot out and I fell. I hit my head, my shoulder, on the right side and in this area. Mrs. Bennett came through the garage, [and] also fell on the ice. Mr. Baker saw what happened, he ran out of the garage into [sic] driveway. He fell on the ice. And Mrs. Bennett immediately tried to help me up. She got up. Mr. Baker got up. I didn't get up so fast. I remember kind of pulling on my arm and I'm like my arm hurts, give me a minute here. I bit my tongue and I was bleeding and I felt nauseous. I did get up off the driveway. I went into the house. Mrs. Bennett has white carpeting, I was a little concerned, because there was blood and I was also nauseous. I went into her guest room. Her son Cody and herself and her dad were both all assisting. One with ice, one with aspirin, one with a towel, because I was bleeding. Then, she had me go lay down in her

bedroom, which it's a very nice house, very expensive bed covering, and I felt uncomfortable, because I didn't want to make a mess on it. Then I told her [I] wanted to go home. She didn't want me [to] go home, she was concerned about me driving. I told her that I thought I would be okay, I would be fine. She insisted on having her father follow me home for safety, and which he did. I went home. My son greeted me and Mr. Gummert [Defendant's father]. And I went home. I needed to make a few phone calls. I had dinner plans that evening.

Hearing Transcript, Vol. 1, pp. 56-57.

5. Both Defendant and her boyfriend testified that they were not at Defendant's house at the time of Claimant's alleged accident, neither of them witnessed Claimant fall, and neither of them fell themselves. Further, Defendant testified that Claimant no longer worked for her on December 18<sup>th</sup> and Claimant did not do any work for her on that date.

6. Claimant is not a credible witness.

#### **DISCUSSION AND FURTHER FINDINGS**

An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(17)(b). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special*

#### **FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 4**

*Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as having “more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

7. Defendant kept a desk calendar to reflect various jobs and the drivers that performed them. Defendant’s Exhibit 2. The calendar is blank for December 18, 2003, which could presumably prove that Claimant did not work that day. Defendant testified that the calendar was accurate to the best of her knowledge. However, Claimant was successful in impeaching the calendar’s accuracy and the fact that there was no entry for December 18<sup>th</sup> is given no weight.

8. Defendant testified that her father, Mr. Gummert, was out of state and could not have followed Claimant home the evening of the alleged accident, thus casting doubt on the testimony of Claimant and her son in that regard. Claimant scheduled Mr. Gummert’s deposition in Boise; however, Mr. Gummert was ill and living out of state at the time of the scheduled deposition. Prior to the deposition, Mr. Gummert conveyed that information to Defendant’s attorney who so informed Claimant’s attorney. Mr. Gummert also indicated that he would be available to have his deposition taken telephonically. Nonetheless, the deposition proceeded as scheduled wherein it was noted on the record that Mr. Gummert was not present and the substance of the telephone messages left by Mr. Gummert for Defendant’s attorney were also noted. Claimant then filed with the Commission a motion for certification for contempt pursuant to Idaho Code § 72-715. Claimant’s motion was denied because a subpoena requiring Mr. Gummert to appear at his deposition was only served two days prior to the deposition; it was not known whether the deposition was pre-arranged with Mr. Gummert or Defendant’s counsel; and it could not be determined whether Claimant’s counsel ever again contacted Mr. Gummert to

reschedule either a personal or telephonic deposition. The Commission determined that Mr. Gummert had not intentionally failed to appear at his deposition and the reasons he proffered for not attending were reasonable.

In her reply brief, Claimant asserts: “Mr. Gummert disobeyed his Subpoena. The Referee denied certifying the matter to District Court [citations omitted]. Claimant was denied access to a key witness and was denied her substantial rights to take testimony. She was prejudiced by being denied the substantial right to take testimony. The refusal to certify the matter was taken in excess of the authority of the Industrial Commission.” Claimant’s Responsive Brief, p. 9, FN 1.

Claimant’s assertion is not well taken. First, it was not the undersigned that denied certification; it was the three members of the Commission. Second, the Order Denying Certification was filed on December 14, 2004, well before the hearing on March 10, 2005, giving Claimant’s attorney more than ample time to re-explore the taking of Mr. Gummert’s deposition, either in person or telephonically. It was Claimant’s attorney’s lack of due diligence that prevented Claimant’s access to and the taking of testimony of a “key witness,” not the actions of this Referee or the Industrial Commission.

9. The only person called by Claimant to corroborate her testimony that Mr. Gummert was present and witnessed the events surrounding her alleged accident was Claimant’s son, Christopher Bartley. He testified that he had a “vague” memory of seeing his mother and Defendant’s father on the evening of December 18, 2003, but could not remember the time of day it was. He described Claimant as looking pale and complaining that her head hurt. He testified because Claimant wanted him to.

## **FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 6**

10. Claimant attempted to impeach Defendant's testimony regarding her father's presence by alluding to a police report prepared in response to Defendant's filing a complaint with the Boise Police Department for Claimant's harassing telephone calls. In that report, the reporting officer wrote that Defendant informed him that her father had been staying with her at the time in question. Defendant testified that she adheres to her deposition and hearing testimony (under oath both times) that her father was not there. Claimant has not impeached her testimony in that regard by the "vague" testimony of Mr. Bartley and a reference in a police report and Defendant did not depose or call Mr. Gummert as a witness in spite of having the opportunity to do so.

11. Robert Baker, Defendant's boyfriend, referred to as being present when Claimant fell and also allegedly falling himself, credibly testified that he was at work as an Albertsons store director at the time of Claimant's alleged accident. His regular hours were from 7:00 a.m. to 6:30 p.m. He also testified that he did not witness Claimant falling, nor did he fall himself.

12. Defendant testified that on December 18, 2003, she went to a grocery store in the afternoon to buy cookies and cider for her children and to stock the limousines for Christmas light tours. She produced a cash register receipt from Albertsons dated December 18, 2003, indicating that someone, presumably Defendant, purchased a quantity of cookies and cider at 3:09 p.m. Defendant's Exhibit 6.

13. Defendant testified that after her grocery shopping she went to a local YMCA where she is a member. The purpose of her trip was to inquire about a personal trainer. She produced a letter from Y Health and Fitness signed by Christine Malach, Health and Fitness Coordinator, dated December 18, 2005, that stated, *inter alia*, "I would like to take the opportunity to thank you for meeting with me **today** and for purchasing a package of 10 Personal

Training Sessions. As we discussed **today** we will meet twice a week **at this same time from 4:00 p.m. to 6:00 p.m.** for a period of five weeks.” Defendant’s Exhibit 7. Emphasis added. Defendant testified that after her visit to the Y, she returned home arriving at between 6:30 and 7:00 p.m., well beyond the time of Claimant’s alleged accident.

In an attempt to impeach Defendant’s testimony regarding being at the Y, Claimant called David Duro, the chief operating officer for the Treasure Valley Family YMCA as a witness. Mr. Duro testified that upon searching his records, he found no communications between Defendant and Ms. Malach, including Defendant’s Exhibit 7. He also testified on cross-examination that his records would not contain individual instructor’s own paperwork. Claimant has failed to impeach Defendant’s testimony regarding her whereabouts on December 18, 2003.

13. Claimant has alleged that the reason for ice being on Defendant’s driveway on December 18, 2003, was because Defendant washed the limousines there and the water from the washing froze. Defendant testified that she did not wash the limousines in the driveway in the winter because it was too cold and the roads were such that the limousines’ exteriors would not stay clean for long in any event. If she did wash the limousines’ exteriors, she would take them to a car wash. Credit card receipts show five car washes at a Chevron station for the month of December 2003. Claimant’s Exhibit I. She did testify that the limousines’ exteriors would be wiped down in the garage with a towel on occasion. In support of her allegation, Claimant called Cecil Bennett, Defendant’s ex-father-in-law. Mr. Bennett testified that he financed 85% of Defendant’s limousine business when she was still married to his son and “. . . then, they kicked me to the curb.” Hearing Transcript, Vol. 2, p. 281. He further testified that “they” washed the limousines in the driveway in December generically and that ice would build up and he fell and “busted his butt” on the ice himself. Mr. Bennett’s testimony was clearly acrimonious and

biased and is deserving of no weight. Defendant's testimony regarding washing limousines outside in the driveway on or about December 18, 2003, has not been impeached.

14. Defendant kept a day planner or personal journal wherein she would record certain happenings on any given day. Defendant's Exhibit 3. The entry for Monday, December 15, 2003, reads: "Every one paid. Mary Joe [*sic*] called and said that I am a bitch and she and other comp. are going to put me out of business [*sic*] I have to realize that I didn't do anything to spark any of this but JR<sup>1</sup> just wants me out of bis [*sic*] & will pay anyone off to hurt me in any way he can." *Id.* Claimant admitted that she probably called that morning as that was her habit but she denied calling Defendant a bitch. Unlike Claimant's Herculean effort to discredit Defendant's desk calendar, no such effort was made regarding her personal journal. Defendant was asked at hearing:

Q. (By Referee Powers): And do you recall what prompted that entry (December 15, 2003)? Why did you write that?

A. It was upsetting to have her call and say that and I just wanted to make sure that I wrote it down on the day that she called and said that.

Q. Did you ever hire her again after that entry?

A. Not that I recall. I was scared of her. I –

Hearing Transcript, Vol. 1, p. 225.

While not conclusive proof that Defendant did not hire Claimant after December 15, 2003, it is nonetheless persuasive that she did not.

15. Finally, Claimant's description of her slipping and falling on the ice is not credible and defies logic and common sense. She testified that the limousine's driver's side door

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<sup>1</sup> J.R. is Defendant's ex-husband who got half of the limousine business in a "messy" divorce. Claimant worked for him after her employment with Defendant until he fired her.

was open when she fell, yet she did not strike any part of her body on the door or any part of the vehicle, nor did she attempt to avoid or minimize the fall by grabbing onto the door, seat, or doorframe. She slipped on the ice with both feet as she was getting out. If so, one could reasonably assume she would have fallen backwards onto the seat or doorframe, rather than fall directly down onto the driveway, hitting her head and shoulder as she testified.

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). However, the Idaho Supreme Court has held that the Commission is not required to construe the facts liberally in favor of the claimant when the evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

16. The Referee will not construe the facts liberally in favor of Claimant in this case. After having heard all of the testimony and having reviewed the record, the Referee concludes that Claimant has failed to prove she suffered an accident causing injury in the course and scope of her employment on December 18, 2003.

17. Based on the foregoing, the remaining issue of whether Claimant was an employee or independent contractor is moot.

#### **CONCLUSIONS OF LAW**

1. Claimant has failed to prove she suffered an accident causing injury arising out of and in the course of her employment.

2. The remaining issue of whether Claimant was an employee or an independent contractor is moot.

**RECOMMENDATION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 8<sup>th</sup> day of July, 2005.

INDUSTRIAL COMMISSION

/s/  
Michael E. Powers, Referee

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of July, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

SCOTT ROSE  
300 MAIN ST STE 153  
BOISE ID 83702

NATALIE CAMACHO MENDOZA  
623 W HAYS ST  
BOISE ID 83702

/s/

ge



\_\_\_\_\_  
James F. Kile, Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
R. D. Maynard, Commissioner

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_15<sup>th</sup>\_\_ day of \_\_\_\_July\_\_\_\_, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

SCOTT ROSE  
300 MAIN ST STE 153  
BOISE ID 83702

NATALIE CAMACHO MENDOZA  
623 W HAYS ST  
BOISE ID 83702

\_\_\_\_\_/s/\_\_\_\_\_

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