

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CORRINNE MAYNARD,)	
)	
Claimant,)	IC 2006-007360
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
TORCH CAFÉ & LOUNGE, INC.,)	AND RECOMMENDATION
)	
Employer,)	
)	
and)	
)	filed March 26, 2007
TRAVELERS INDEMNITY COMPANY,)	
)	
Surety,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on December 1, 2006. Claimant, Corrinne Maynard, was present in person and represented by John F. Greenfield, of Boise. Defendant Employer, Torch Café & Lounge, Inc., and Defendant Surety, Travelers Indemnity Company, were represented by W. Scott Wigle, of Boise. The parties presented oral and documentary evidence. This matter was then continued for the submission of briefs, and subsequently came under advisement on January 5, 2007.

ISSUES

The noticed issues to be resolved are:

1. Whether Claimant suffered an accident within the course and scope of her

- employment;
2. Whether, for purposes of computing Claimant's average weekly wage, she performed custodial duties as an employee or independent contractor; and
 3. Whether Claimant is entitled to attorney's fees.

ARGUMENTS OF THE PARTIES

Claimant argues she was acting within the course and scope of her employment when she fell and fractured her ankles at the Nampa Torch on May 5, 2006. She maintains that her average weekly wage should include not only her earnings as a door bouncer, but also her earnings for custodial duties for which she was paid in cash. Lastly, Claimant requests attorney's fees for Defendants' unreasonable denial of her claim.

Defendants allege that Claimant was not acting within the course and scope of her employment when she fractured her ankles. They assert that she was an independent contractor in her custodial duties, so her earnings there have no effect on her average weekly wage. Lastly, Defendants contend they reasonably contested her claim.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Darrell Barrett, Derrick Barrett, Mary Barrett, and Janis Smith taken at the December 1, 2006, hearing;
2. Claimant's Exhibits 1 through 8 admitted at the hearing; and
3. Defendants' Exhibits 1 through 3 admitted at the hearing.

After having fully considered all of the above evidence, and the arguments of the parties, the Referee submits the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

FINDINGS OF FACT

1. At all relevant times, Defendant Employer Torch Café & Lounge was a bikini bar with one location in Nampa. Mans Montgomery (Mans) and Darrell Barrett (Darrell) each owned 50% of the Nampa Torch. Mans was the president, and Darrell was the manager. Mans and Darrell also owned and operated the Boise Vista Torch. Mans owned the Boise Main Street Torch and the Coeur d'Alene Torch. All of the Torch locations were insured under the same workers' compensation policy.

2. Claimant was 53 years old at the time of the hearing. She began working as a door bouncer at the Boise Main Street Torch in approximately 1997. Her duties included checking patron identification, controlling crowds, and providing on-site security for female dancers and female bartenders. Claimant routinely watched and/or escorted dancers and bartenders to and from their vehicles as they arrived or left the premises.

3. In 1999, Claimant moved from the Boise area and worked as a bouncer and security person at the Coeur d'Alene Torch. She also assumed the duties of cleaning the premises each day before the bar opened.

4. Claimant subsequently returned to Boise and, at Mans' request, resumed working at the Boise Main Street Torch as a door bouncer. Claimant worked from two to six days each week. She often worked from 8:00 p.m. until 2:00 a.m. Claimant was an hourly employee at the Main Street Torch, and taxes were deducted from her paychecks. She occasionally worked as a door bouncer at the other Torch locations on special occasions when larger than average crowds were expected. Other Torch employees, including bouncers, also worked occasionally at multiple Torch locations.

5. After returning to Boise, Claimant began performing custodial duties at the Boise Vista Torch and at the Nampa Torch. She swept, mopped, vacuumed and cleaned the bars and restrooms daily before the bars opened. Claimant used a backpack vacuum cleaner, cleaning rags, mops, and cleaning agents provided by Mans and/or Darrell. Claimant did not provide any custodial equipment or supplies herself. Darrell paid Claimant \$175 weekly for cleaning the Boise Vista Torch, and \$210 weekly for cleaning the Nampa Torch. Claimant was paid in cash. She received no W-2, W-9, nor any document whatsoever pertaining to her earnings for cleaning the Torch locations. Claimant believed Mans could fire her from her custodial duties. Indeed, Mans and Darrell discussed firing Claimant on one occasion shortly prior to May 2006.

6. On May 5, 2006, Claimant cleaned the Nampa Torch while Darrell, his wife Mary, and Mans' wife Joanna, decorated the bar and discussed arrangements for the anticipated Cinco de Mayo crowd that evening. The conversation turned to whether the larger than average crowd would require a second door bouncer that evening. Darrell's 24 year old son, Derrick Barrett (Derrick), was the usual door bouncer at the Nampa Torch. Claimant offered to come in to help at the door if needed.

7. Claimant testified that later that afternoon Darrell called her and asked her to come work the door of the Nampa Torch at 7:00 that evening because Derrick was going to arrive late. Claimant agreed. Darrell admitted that he called Claimant to confirm she would be present and available to work the door at the Nampa Torch that evening if needed.

8. Claimant arrived at the Nampa Torch at approximately 6:30 that evening. At 7:00 p.m., she began checking identification and admitting patrons into the bar. Derrick arrived about 7:00 p.m. and they worked together checking identification and collecting cover charges as

they admitted patrons into the bar.

9. Approximately 8:00 p.m., Claimant and Derrick were standing at the door when a female bartender drove up and parked in a nearby lot. It was dusk. Claimant stepped from the bar doorway to the edge of the sidewalk, and then from the curb onto the parking lot to keep the female bartender in sight while she approached the bar. As Claimant stepped off the curb, her left foot landed in a pothole in the parking lot, causing her to fall and fracture both ankles and her right lower leg. Derrick witnessed Claimant's fall and promptly took her to the hospital where Gary Botimer, M.D., surgically treated her fractures.

10. After a period of recuperation, Claimant returned to the Boise Main Street Torch where she worked at the door. Claimant asked Mans if he was going to file a Form 1 for her accident. Mans declined, and also directed Darrell not to file a Form 1.

11. On June 29, 2006, Claimant sought legal counsel, who promptly filed a Form 1. Claimant testified that within a few days thereafter, she received a phone message from Mans, directing a vulgarity toward Claimant and her attorney, and telling Claimant: "you no longer work for the Torch in any way, shape, or form." Transcript p. 58, Ll. 15-16. Claimant's testimony in this regard was not challenged—let alone rebutted—even though Mans was present while she testified and remained for most of the hearing.

12. At the time of hearing, Mans and Darrell no longer shared ownership of any of the Torch bars. Darrell presently owns the former Nampa Torch, now known as Satin Dolls. Claimant performs custodial work for the Satin Dolls and receives \$30 per day. She is paid by check and understands she will receive a 1099 Form.

13. Claimant has incurred substantial medical expenses due to her May 5, 2006, injury,

and anticipates further medical expenses.

14. Having carefully examined the record herein and observed the witnesses at hearing, the Referee finds the testimony of Claimant and Derrick credible.

DISCUSSION AND FURTHER FINDINGS

15. 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, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

16. **Accident within the course and scope of employment.** 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).

17. In the present case, Claimant asserts that she suffered an industrial accident while in the course and scope of her employment on May 5, 2006. Defendants acknowledge Claimant's accident, but maintain that she was merely visiting the Nampa Torch at the time, and not actively working.

18. Claimant testified, and Derrick expressly confirmed, that Claimant was working as a door bouncer the evening of May 5, 2006, when she was injured. Derrick testified that he expected Claimant to work that evening and that such was a normal thing for an event night, such as the Cinco de Mayo. Although Darrell seemingly denied asking Claimant to actually work at the Nampa Torch that evening, Derrick testified that he expected Claimant to help him watch the door, check identifications, and take cover charges that evening, and that she did so. Darrell testified that if he

were absent, Derrick had authority to call individuals to work as needed. All witnesses agree that neither Darrell nor Mans were present at the Nampa Torch from 7:00 to 8:00 p.m. that evening. It follows that Derrick had authority to enlist Claimant's help as needed, and he unequivocally testified that he did so. Derrick witnessed Claimant's fall. There is no evidence that Claimant was ever paid other than as an hourly Torch employee when she worked as a door bouncer.

19. Claimant has proven that she suffered an accident while in the course and scope of her employment on the evening of May 5, 2006.

20. **Earnings for custodial work as part of average weekly wage.** Claimant asserts her average weekly wage should include her earnings for custodial work performed as an employee at the Boise Vista Torch and the Nampa Torch. Defendants allege Claimant rendered custodial services as an independent contractor, not an employee. The circumstances surrounding her custodial duties must therefore be examined to determine the nature of the employment relationship involved.

21. Idaho Code § 72-102, defines employee, employer, and independent contractor thus:

(12) "Employee" is synonymous with "workman" and means any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer.

(13)(a) "Employer" means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors.

(17) "Independent Contractor" means any person who renders service for a specified recompense for a specific result, under the right to control or actual control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

22. The Idaho Supreme Court has set forth the test for distinguishing an employee from an independent contractor:

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 7

The ultimate question in finding an employment relationship is whether the employer assumes the right to control the times, manner and method of executing the work of the employee, as distinguished from the right merely to require certain definite results in conforming with the agreement. Four factors are traditionally used in determining whether a 'right to control' exists, including, (1) direct evidence of the right; (2) payment and method of payment; (3) furnishing major items of equipment; and (4) the right to terminate the employment relationship at will and without liability.

Roman v. Horsley, 120 Idaho 136, 137, 814 P.2d 36, 37 (1991); quoting Burdick v. Thornton, 109 Idaho 869, 871, 712 P.2d 570, 572 (1985); see also Stoica v. Pocol, 136 Idaho 661, 39 P.3d 601 (2001).

23. Direct evidence of control. The first factor distinguishing an employee from an independent contractor is direct evidence of the right to control the manner and method of performing the work.

24. If services must be rendered personally, then the right to control is suggested. Control is indicated if set hours of work are established by the person for whom services are performed. If the worker devotes substantially full time to the business of the person for whom services are rendered, then such person has control over the amount of time the worker can work and impliedly restricts the worker from doing other gainful work. If a worker makes his services available to the general public on a regular and consistent basis this indicates an independent contractor relationship. If the principal uses some competitive means for reducing his own cost in selecting a subcontractor, then the principal may be a prime contractor instead of an employer. A continuing relationship between the worker and the principal indicates a direct employment relationship, even if the work is performed at recurring irregular intervals. Stoica v. Pocol, 1999 IIC 0734.

25. In the present case, Claimant personally rendered all custodial services. Claimant

worked exclusively with the Torch regularly and apparently continuously from well before her accident. There is no evidence she worked for any entity other than the Torch. There is no indication Claimant made her services available to the general public nor that she had the equipment necessary to do so. The present record does not establish that Claimant submitted any bid to Darrell or Mans for custodial services.

26. Examination of direct evidence of the right to control suggests that Darrell generally controlled Claimant's work. The indicators of direct control, taken as a whole, suggest a direct employment relationship.

27. Method of payment. The next factor in distinguishing an employee from an independent contractor is the method of payment. The method of payment test generally refers to whether income and social security taxes are withheld from a person's wages. Withholding is customary in an employer-employee relationship. Where the claimant was paid by the hour, but no income or social security taxes were withheld, the method of payment should be deemed a factor in favor of independent contractor status. Livingston v. Ireland Bank, 128 Idaho 66, 910 P.2d 738 (1995).

28. In the present case, Defendant paid Claimant by the week, but made no deductions or withholdings from Claimant's pay at any time. However, Defendant maintained no records whatsoever and paid Claimant entirely in cash. Critically, Defendant provided no 1099 statement.

29. Payment at regular periodic intervals generally suggests an employer-employee relationship. A worker who can realize a profit or suffer a loss as a result of his services (beyond the profit or loss ordinarily realized by employees) is generally an independent contractor. Stoica v. Pocol, 1999 IIC 0734. In the present case, Claimant was paid a fixed amount weekly and there is no

indication she could have profited beyond the profit ordinarily realized by an employee.

30. Overall, the manner of payment factor somewhat suggests an independent contractor relationship.

31. Furnishing major items of equipment. The next factor in distinguishing an employee from an independent contractor is whether the principal furnishes major items of equipment. If the person for whom services are performed furnishes significant tools, materials, or other equipment, this indicates a direct employment relationship. Hanson v. BCB, Inc., 114 Idaho 131, 754 P.2d 444 (1988). In the present case, Darrell and/or Mans provided the backpack vacuum cleaner, cleaning rags, mops, and cleaning agents. Claimant furnished no tools or supplies of her own. This strongly suggests a direct employment relationship.

32. Liability upon terminating relationship. The final factor in distinguishing an employee from an independent contractor is whether the principal can terminate the relationship without incurring liability.

33. In the present case, Claimant believed Mans could fire her. Darrell testified he and Mans discussed firing Claimant shortly prior to her accident. Mans' telephone message to Claimant after the filing of her Form 1 clearly advised she no longer worked for the Torch. There is no evidence Claimant made any arrangements for anyone to provide custodial services after her injury, nor that Mans or Darrell expected her to arrange for such.

34. The absence of liability upon termination weighs in favor of a direct employment relationship.

35. Considered collectively, the four factors that evaluate the right to control, and distinguish an employee from an independent contractor, establish that Claimant was a direct

employee in performing her custodial duties. Furthermore, "When a doubt exists as to whether an individual is an employee or an independent contractor under the worker's compensation act, the act must be given a liberal construction in favor of finding the relationship of employer and employee." Hanson v. BCB, Inc., 114 Idaho 131, 133, 754 P.2d 444, 446 (1988). The Referee finds that Claimant was a direct employee in the performance of her custodial duties.

36. Defendants assert that even if Claimant could be deemed an employee in performing custodial work, she should be estopped from taking that position and asserting that her custodial earnings be considered in calculating her average weekly wage.

37. Defendants note that Claimant preferred to receive cash payments under the table for custodial services because those earnings escaped taxes and garnishment by creditors. However, Defendant Employer ostensibly benefited financially from this arrangement as well, by avoiding worker's compensation and unemployment premiums on Claimant's custodial work. More significantly, Defendant Employer had the final say in how Claimant would be paid for custodial work. While Claimant preferred cash, Defendant Employer, as holder of the funds, determined how payment was actually made.

38. One necessary element of equitable estoppel is "a false representation or concealment of a material fact with actual or constructive knowledge of the truth." Knudsen v. Agee, 128 Idaho 776, 779, 918 P.2d 1221,1224 (1996). There is no evidence that Claimant herein has ever represented that she was not an employee.

39. Regarding the related doctrine of quasi estoppel, the Idaho Supreme Court has noted:

Quasi estoppel prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken. Floyd v. Bd. of

Comm'rs of Bonneville County, 137 Idaho 718, 726, 52 P.3d 863, 871 (2002) (citing E. Idaho Agric. Credit Ass'n. v. Neibaur, 133 Idaho 402, 410, 987 P.2d 314, 322 (1999)). Quasi estoppel applies when it would be unconscionable to allow the party to be estopped to change positions from one they acquiesced in or from one they accepted a benefit. Id. For quasi estoppel to apply, the party to be estopped must have either gained some advantage against the other party, produced a disadvantage to the other party, or the other party must have been induced to change positions. Id.

C&G, Inc., v. Canyon Highway District No. 4, 139 Idaho 140, 144-145, 75 P.3d 194, 198-199 (2003).

40. There is no evidence that Claimant herein changed her position regarding her status as an employee in her custodial duties. Her acceptance of cash under the table did not amount to a representation that she was not an employee any more than Defendant Employer's payment of cash under the table and failure to provide a 1099 Form amounted to a representation that Claimant was not an independent contractor. It is no more unconscionable to allow Claimant to accept cash under the table and assert she was an employee, than to allow Defendant Employer to pay Claimant cash under the table—never provide a 1099 Form—and now assert Claimant was an independent contractor.

41. The Referee concludes that Claimant's earnings from her custodial duties should be included in calculating her average weekly wage.

42. **Attorney's fees.** Idaho Code § 72-804 provides:

Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed

by injured employees or their dependents shall be fixed by the commission.

43. Attorney's fees are not granted to a claimant as matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804. The decision that grounds exist for awarding a claimant attorney's fees is a factual determination which rests with the commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

44. Claimant seeks attorney's fees for Defendants' refusal to acknowledge she was injured within the course and scope of her employment. Defendants did not concede Claimant was injured in the course of employment even though Derrick testified that Claimant worked with him for approximately one hour at the door of the Nampa Torch right up to the time of her accident. Inasmuch as Mans and Darrell were not present at the time of the accident, and given that Darrell expressly deferred to his son Derrick as to whether Claimant was working at the time of her accident, Defendant Employer's denial that Claimant suffered an accident within the course and scope of her employment was virtually unsupported, and is unreasonable.

45. Claimant asserts that the Surety's conduct was also unreasonable. The Surety's denial was initially supported by statements from Darrell to the effect that Claimant was not working at the time of her May 5, 2006, accident, and that both he and his son Derrick would so testify. However, at hearing, Darrell's testimony established that he was not present, and that Derrick had authority to put Claimant on the door as a bouncer in Darrell's absence. Derrick's testimony expressly established that he enlisted Claimant to work as a door bouncer and that she was injured while so working. The Surety's continued denial of the claim thereafter was unsupported and unreasonable.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 13

CONCLUSIONS OF LAW

1. Claimant has proven she suffered an accident within the course and scope of her employment as a door bouncer at the Nampa Torch on May 5, 2006.

2. Claimant has proven she was a direct employee of the Torch in her custodial duties in 2006 and her earnings therefrom should be included in calculating her average weekly wage.

3. Claimant has proven she is entitled to an award of attorney's fees for Defendants' unreasonable denial of her claim.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this 16th day of March, 2007.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March, 2007, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

JOHN F. GREENFIELD
PO BOX 854
BOISE ID 83701-0854

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CORRINNE MAYNARD,)	
)	
Claimant,)	IC 2006-007360
)	
v.)	
)	ORDER
TORCH CAFÉ & LOUNGE, INC.,)	
)	filed March 26, 2007
Employer,)	
)	
and)	
)	
TRAVELERS INDEMNITY COMPANY,)	
)	
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Alan Reed Taylor submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven she suffered an accident within the course and scope of her employment as a door bouncer at the Nampa Torch on May 5, 2006.
2. Claimant has proven she was a direct employee of the Torch in her custodial duties in 2006 and her earnings therefrom should be included in calculating her average weekly wage.
3. Claimant is entitled to attorneys fees from Defendants pursuant to Idaho Code

§ 72-805. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum setting forth the amount and basis for attorney fees requested in this case on a contingent fee and/or hourly basis. Counsel shall also provide a copy of the fee agreement executed by Claimant and his attorney, and an affidavit in support of the claim for fees. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of such documentation, Defendants may file a response to Claimant's information. If Defendants object to any representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced response, Claimant's counsel may file a reply. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 26th day of March, 2007.

INDUSTRIAL COMMISSION

/s/
James F. Kile, Chairman

/s/
R.D. Maynard, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 26th day of March, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

JOHN F. GREENFIELD
PO BOX 854
BOISE ID 83701-0854

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701

lbs

/s/