BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BARBARA KELLY, Claimant, v. BLUE RIBBON LINEN SUPPLY, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2013-024694** **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** **Filed April 3, 2018**

INTRODUCTION

This matter was originally decided on stipulated facts resulting in an Industrial Commission decision in Defendants' favor filed on September 26, 2014.[1] Claimant appealed to the Idaho Supreme Court, which reversed the Commission.[2] On May 22, 2017, Claimant filed her Request for Emergency Hearing asking the Commission to determine whether Defendants' right to Idaho Code § 72-223(3) subrogation is barred by reason of Defendant's negligence. Upon receiving Defendants' response to Claimant's calendaring request, this matter was set for hearing for September 29, 2017 in Lewiston. The parties then agreed to submit this matter based on the same stipulated facts previously relied upon by the Commission and Supreme Court. The parties submitted briefs. The undersigned Commissioners have chosen not to adopt the Referee's

[1] Michael T. Kessinger of Lewiston represented Claimant and Wynn Mosman of Moscow represented Defendants at all times relevant to these proceedings.

[2] See *Kelly v. Blue Linen Supply, Inc.*, 159 Idaho 324, 360 P.3d 333 (2015).

recommendation and hereby issue their own findings of fact, conclusions of law and order. Although the Commission has reached the same result recommended by the Referee, the Commission has expanded the negligence analysis. This matter is now ready for decision.

ISSUE

The sole issue to be decided is whether Defendants' Idaho Code § 72-223(3) subrogation claim is nullified by the "*Liberty Mutual* rule."

CONTENTIONS OF THE PARTIES

Claimant contends that Defendants were negligent in requiring Claimant, who lives in Lewiston, to travel to Post Falls in November to attend a Surety-mandated IME when a safer alternative was readily available in December in Lewiston. Employer/Surety's negligence was a contributing cause of Claimant's accident and injuries and, pursuant to the "*Liberty Mutual* rule"[3] nullifies its statutory subrogation rights.

Defendants argue that Surety was not negligent in choosing November for Claimant's IME rather than wait until December, as had they chosen the December date, they could be accused of unreasonably delaying the adjusting of the claim. Further, sureties would be required to "guess" regarding how far from a claimant's residence an IME should be scheduled and in what sorts of conditions. The reality is that many, if not most, claimants live and work many miles from towns such as Boise, Idaho Falls, Coeur d'Alene, etc., where medical specialists are located and travel is necessary to reach those locations for IMEs.

EVIDENCE CONSIDERED

[3] See *Liberty Mutual Insurance Company v. Adams,* 91 Idaho 151, 417 P. 2d 417(1966).

The record in this matter consists solely of the parties' Stipulation of Facts and their legal briefing; there are no exhibits or depositions.

STIPULATION OF FACTS

The parties' Stipulation of Facts is set out verbatim as follows:

1. On September 16, 2013, Claimant Barbara Kelly (hereafter Claimant) was an employee of Blue Ribbon Linen Supply, Inc. (hereafter Blue Ribbon), in Lewiston, Idaho. At said time, Blue Ribbon was insured for its obligations under the Idaho Workers' Compensation Act by the Idaho State Insurance Fund (hereafter Surety).

2. On or about September 16, 2013, Claimant, Employer, and Surety were subject to the provisions of Idaho's Workers' Compensation Law.

3. Claimant suffered a compensable workers' compensation injury when a cart rolled over her left foot while in the course and scope of her employment with Blue Ribbon on September 16, 2013.

4. Surety paid medical and time loss benefits to Claimant as a result of the injury to her left foot.

5. On or about November 8, 2013, Julie Estes, an agent of Surety, sent Claimant a letter, which reads as follows:

> We [Surety] have arranged for you to be seen in an independent medical evaluation with Robert Friedman. This appointment is scheduled for November 15, 2013, at 1:00 p.m. and will be held at Kootenai Health Plaza, which is located at 1300 East Mullan Avenue, Post Falls, Idaho.
>
> Please make the necessary arrangements to keep this appointment and **bring copies of all x-rays/MRI films with you.** Failure to do so may result the termination of benefits and the responsibility for any "no show" charges.
>
> You may submit a report of all travel expenses to this office for reimbursement. This should include the date traveled, destination, and round trip mileage.

6. It is approximately 125 miles each way from Claimant's workplace in Lewiston, Idaho, to Post Falls, Idaho.

7. Dr. Robert Friedman performs medical evaluations in Lewiston, Idaho. Appointments with Dr. Friedman were available in November in Post Falls and in December in Lewiston. Claimant was scheduled for the November appointment in Post Falls.

8. On November 15, 2013, Claimant travelled to Post Falls, Idaho, for the [S]urety-scheduled medical evaluation. On said date she was still an employee of Blue Ribbon and was receiving time loss benefits from Surety.

9. Directly after meeting with Dr. Friedman, Claimant began her return trip from Post Falls, Idaho, to Lewiston.

10. Claimant did not make any stops or take any detours on her way home from the appointment with Dr. Friedman.

11. At 3:50 p.m. on November 15, 2013, on US 95 approximately five miles south of Potlatch, it was snowing and the road was covered in snow. At said location Claimant was southbound in her Ford Expedition when a northbound Ford F150 lost traction, crossed the center line, and collided head-on with Claimant's vehicle. Claimant's actions did not cause or contribute to the collision.

12. As a result of the automobile collision, Claimant suffered severe physical injuries to her lower extremities. Due to the extent of her injuries, Claimant's doctors restricted her from any weight-bearing on her lower extremities until further notice. As a result of the crash, Claimant was in a skilled nursing home in Lewiston, Idaho, until February 28, 2014.

DISCUSSION AND FURTHER FINDINGS

1. Idaho Code § 72- 223(3) provides:

> If compensation has been paid and awarded, the employer having paid such compensation or having become liable therefor, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer's compensation liability.

Idaho has judicially created the "*Liberty Mutual* rule." The latest Idaho Supreme Court case to discuss this "rule" is *Maravilla v. J.R. Simplot Co.*, 161 Idaho 455, 387 P.3d 123 (2016). There, Claimant, a Simplot employee, was injured at work, arguably as the result of the negligence of both Employer and a third party. Claimant settled his claim against the third party. Employer attempted to exercise its right of subrogation under Idaho Code § 72-223. Claimant objected, contending that Employer's negligence barred it from subrogation. The Commission ruled that Employer's negligence did not constitute an outright bar to its right of subrogation under Idaho Code § 72-223; because the legislature has abolished joint and several liability, an employer's negligence is no longer an absolute bar to the right of subrogation, but an employer's right of subrogation will be reduced by its proportionate share of fault in contributing to the claimant's damages (comparative negligence).

2. The Supreme Court, citing *Liberty Mutual Insurance Company v. Adams*, 91 Idaho 151, 417 P.2d 417 (1966), held that an employer who was concurrently negligent in the workers' compensation injury was not entitled to subrogation. The Court explained that "…where the employer is concurrently at fault for the worker's injury it should not be allowed the benefits of subrogation because it runs counter to the policy of law to allow someone to "take advantage of his own wrong." (Citations omitted). *Id.*, at 463.

3. Here, the Commission must determine whether Employer and/or its Surety were to some degree negligent in contributing to Claimant's injuries sustained in the motor vehicle

collision on her way back to Lewiston from a Surety-arranged IME in Post Falls. This task is difficult due to the limited information provided in the stipulation of facts.

4. In support of her position that Surety was negligent, Claimant relies on IDJI 2.20, the definition of negligence that is given to a jury in a civil negligence case:

> When I use the word "negligence" in these instructions, I mean failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something a reasonably careful person would do, under circumstances similar to those shown by the evidence. [The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.]

The elements of negligence were recently recited by the Idaho Supreme Court in *Henrie v. Corporation of President of Church of Jesus Christ of Latter-Day Saints* 162 Idaho 204, 395 P.3d 824 (2017) as follows:

> "A cause of action for common law negligence in Idaho has four elements: "(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage."

Id. at 830. Therefore, the first step in analysis is determining whether the Employer/Surety owed a duty to Claimant. What type of duty owed depends on the relationship or lack thereof between the parties:

> "Under Idaho law, "one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury."… Conversely, "[t]here is ordinarily no affirmative duty to act to assist or protect another absent unusual circumstances, which justify imposing such an affirmative responsibility. An affirmative duty to aid or protect arises only when a special relationship exists between the parties."
>
> A special relationship can have two separate but related aspects. The Restatement (Second) of Torts states that "(a) a special relation exists between the actor and a third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which

> gives the other a right to protection." Thus, having control over someone or a duty to protect that person is indicative of a special relationship."

Id. at 828-829 (internal citations omitted). The inquiry then becomes: if there is a duty owed by Surety to Claimant, is it an affirmative duty premised on a special relationship or a general, circumstantial duty that every person can owe another?

5. In determining whether a duty will arise in a particular instance, both in a special relationship and otherwise, the Court considers several factors including:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Henrie 162 Idaho 204, 395 P.3d 824, at 829. The Court only engages in weighing these factors when extending a duty beyond a scope previously recognized. *Id.*

6. The Court analyzes these factors in extending <u>both</u> a special relationship duty and a general duty. *Beers v. Corporation of President of Church of Jesus Christ of Latter-Day Saints* 155 Idaho 680, 316 P.3d 92 (2013); *Boots ex rel. Boots v. Winter*, 145 Idaho 389, 179 P.3d 352 (2008). See also *Rife v. Long*, 127 Idaho 841, 908 P.2d 143 (1995). Here, it is a matter of first impression whether Surety owes Claimant any kind of duty and therefore the Commission analyzes these factors *infra*.

<u>The Evidence Does Not Demonstrate the Existence of a Special Relationship</u>

7. As noted by the Court in *Henrie*, the duty to protect and/or control are separate but related and frequently analyzed together to determine a special relationship.[4] This is best

[4] See *Coghlan v. Beta Theta Fi Fraternity* 133 Idaho 388, 987 P.2d 300 (1999)(Analyzing a duty to protect but noting that colleges did not have the same type of control

explained by the Restatement (Third) of Torts example of a jailer transporting a prisoner. In that scenario, the jailer owes both a duty to protect the prisoner (§40) and a duty to protect third persons from the dangerous propensities of that prisoner (§41).

8. In *Henrie*, the Court listed examples of both the "control" and/or "protect" special relationships. Examples of a special relationship based on a duty to control conduct include: "a parent's duty to control his child, an employer's duty to control an employee while at work, or a law enforcement officer's duty to control a dangerous prisoner." *Id.* at 830. The Court has emphasized the important components for special relationships based on control are "foreseeable risk and right and ability to control" the other person's conduct. *Id.* In *Sterling v. Bloom* 111 Idaho 211, 723 P.2d 755 (1986), the Court explained "the key to this duty is not the supervising individual's *direct* relationship with the endangered person or persons, but rather is *the relationship to the supervised individual*." *Id.* at 769 (emphasis in original, superseded in part by statute on other grounds).

9. Special relationship examples based on a duty to protect included: a common carrier to its passengers, an innkeeper to his guests, a possessor of land who holds his land open to members of the public who enter upon the land in response to his invitation, and one who takes custody of another. *Henrie*, 162 Idaho 204, 395 P.3d 824 at FN 2. The duty to protect was summarized in *Keller v. Holiday Inns, Inc*, 105 Idaho 649, 671 P.2d 1112 (1983):

> [A]n actor's duty to protect others from the conduct of third parties or from conditions on property is more limited. The scope of duty in such cases is measured by the knowledge which the actor had or should have had concerning the risk, and the control which the actor should or could have exercised over the source of the risk and the persons endangered. Where the risk is created by the conduct of third parties, the criterion of control is emphasized.

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as a parent); *Beers v. Corporation of President of Church of Jesus Christ of Latter-Day Saints* 155 Idaho 680, 316 P.3d 92 (2013)(Analyzing a duty to protect, but noting the Church did not have control over their minor member).

Id. at 652, 1115. In *McGill v. Frasure*, a duty to protect was imposed on tavern keepers to protect their patrons from foreseeable harm that the tavern keeper "knew or should have known" about. *McGill v. Frasure* 117 Idaho 598, 790 P.2d 379 (1990). A duty to protect was not imposed on a university to protect its students from their own intoxication because college students are considered adults, nor upon a church to protect its minor member during a camping trip because the church had no control over the minor, nor upon a school to prevent the murder of another student because it was not foreseeable the defendants/students would murder that student. *Coghlan v. Beta Theta Fi Fraternity* 133 Idaho 388, 987 P.2d 300 (1999); *Beers v. Corporation of President of Church of Jesus Christ of Latter-Day Saints* 155 Idaho 680, 316 P.3d 92 (2013); *Stoddart v. Pocatello School Dist. #25*, 149 Idaho 679, 239 P.3d 784 (2010). A duty to protect is an affirmative duty and is generally premised on policy considerations that "a particular plaintiff is entitled to protection." *Coghlan* 133 Idaho 388, at 399, 987 P.2d 300 (1999).

10. In *Henrie*, *Beers*, and *Coghlan*, *supra*, the Court analyzed the nature of the relationship and the above listed factors to determine whether to extend a duty because of a special relationship. *Henrie* 162 Idaho 204, 395 P.3d 824. *Beers*, 155 Idaho at 687–88, 316 P.3d at 99–100. *Coghlan*, 133 Idaho at 400, 987 P.2d at 312. Accordingly, we first discuss whether Surety and Claimant were in a special relationship.

11. There is insufficient evidence to support the inference that Claimant and Surety were in a special relationship. The duty to control focuses on foreseeable risk (discussed *infra*), right and ability to control conduct, and the relationship to the supervised. *Henrie*, *supra*; *Sterling*, *supra*. Surety did not have an ability to control Claimant's conduct akin to the control normally exercised by a parent over a child, an employer over an employee, or a jailer over an inmate. Surety did have "control" over where and when the IME was scheduled, but it did not

have the "right or ability" to control Claimant's route, her mode of transportation, or her utilization of safety devices. Surety was not a position of authority to "supervise" Claimant for her protection or anyone else's.

12. Further, Surety did not have a special relationship based on a duty to protect. Surety did not have control over the third party driving the F150. There is no evidence Surety had knowledge about the risk when it scheduled the IME, nor did it have control over the risk, e.g., it could not plow the roads Claimant was going to drive on. Surety did not owe Claimant an affirmative duty to aid or protect her based on a special relationship.

The Evidence Fails to Establish the Existence of a General Duty

13. Having determined a duty premised on a special relationship is inapplicable, the question remains whether a general, non-affirmative duty should be extended in this case. The first factor to be examined is foreseeability. The Court has explained:

> Foreseeability is a flexible concept which varies with the circumstances of each case. Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required. Thus, foreseeability *is not to be measured by just what is more probable than not, but also includes whatever result is likely enough in the setting of modern life that a reasonably prudent person would take such into account in guiding reasonable conduct.*

Henrie, 162 Idaho 204, 395 P.3d 824, 831 (citations omitted, emphasis added). The focus is on the general risk of injury, not on the specific mechanism of injury. *Turpen v. Granieri*, 133 Idaho 244, 985 P.2d 669 (1999).

14. **Foreseeability.** Foreseeability is a complicated factor in this case. It is generally foreseeable that Northern Idaho *could* have snowy roads in November and that a reasonably prudent person (or Surety) would take that into account, but it is unclear how Surety could 'take that into account' in guiding their conduct, especially a week in advance of the appointment.

Claimant argues that Defendants should have scheduled her appointment for December in Lewiston, but contrary to their assertion, this does not eliminate the risk of snowy roads, it merely lessens Claimant's exposure to them. Public highways are generally open year round. It is expected that they will be used in inclement conditions, and they are so maintained for public use. We cannot say that it is foreseeable that Claimant was at greater risk of injury just because the trip occurred in the late fall. Other than scheduling an IME in the warmer months, it is unclear how Surety could have changed their conduct to account for this risk. Further, even if Surety had scheduled it for warmer months, there would still be the risk of rain, wind, fog, glare, crowded holiday traffic, drunk drivers, improper vehicle maintenance (potentially both Claimant's and other's), in addition to all the other hazards of driving. In other words, the risks associated with travel are foreseeable, but there is no time or place for an IME that is risk-free for Surety to examine Claimant.

15. **Degree of certainty.** The second factor, the degree of certainty that Claimant would suffer harm, weighs against an extension of duty. Accidents are a risk every time someone drives, and the risk is increased during inclement weather. However, it was by no means "certain" that Claimant would suffer a car accident and injury. After all, there is no evidence Claimant was having difficulty maintaining control of *her* vehicle at the time of the accident.

16. **Closeness of connection.** The "closeness of the connection between the defendant's conduct and the injury suffered" factor also weighs against extending a duty. The injury suffered was a car accident, and the conduct was ordering an independent medical exam. It's perhaps easiest to understand why this factor weighs against a finding of duty based on counter-hypotheticals: if Surety sent Claimant to an IME with an unlicensed physician and Claimant suffered injury from the exam that conduct would be close enough; if Surety had

ordered Claimant to take a driving test in their vehicle and Claimant suffered an accident based on their faulty maintenance alone, this conduct would be close enough. Here, the conduct and injury are not sufficiently related to support an extension of duty.

17. **Moral blame.** The "moral blame" attached to Defendant's conduct is inapplicable to these facts. Defendants exercised their statutory right to request an exam pursuant to Idaho Code § 72-433(1).

18. **Policy of preventing future harm.** The next factor is "policy of preventing future harm." The future harm here would be harm to other Claimants traveling to a Surety requested medical exam under conditions unknown to the Surety at the time of scheduling. As a matter of general policy, this factor weighs in favor of extending a duty if the Surety *knows* that the weather is terrible, however, under this set of facts, there is no evidence Surety knew what the weather would be like a week in advance. Moreover, this a rare 'harm;' claimants travel to IMEs regularly without incident as evidenced by the fact that the original *Kelly* decision was a matter of first impression both for the Commission and the Court. As applied here, this factor weighs against extending a duty.

19. **Burden and consequences.** The second to last factor is the extent of the burden on defendants and the consequences to the community of extending a duty under these circumstances. This factor weighs against extending a duty because it would burden both claimants and defendants. In order to avoid liability, sureties could schedule § 72-433 exams with 24 hours' notice, which would lend some predictability to the weather, but would burden claimants in the extreme; 24-hours' notice of a doctor's appointment, even if in the same town, complicates anyone's work, family, and/or leisure schedule. Sureties could assume complete control over IME transportation and supply cars, drivers, and the necessary insurance; not only

would this be a huge financial burden to defendants, but would it not eliminate the risk inherit in travel, only shift control of that risk to sureties and assuredly putting them in a special relationship and in the role of "custodians" for claimants. An in-home IME presents the same problem: huge increase in costs for worker's compensation insurance.

20. **Insurance cost.** The last factor is the cost and availability of insurance related to the risk. Car insurance would normally cover this risk, but per the original *Kelly* decision, Claimant is covered by worker's compensation insurance for any medical costs associated with the accident. As noted in the previous paragraph, an extension of duty in this instance would likely raise costs for sureties and therefore the cost of worker's compensation insurance to employers. This weighs against extending a duty as well.

21. Based on the foregoing, the Commission is not persuaded that Surety acted negligently when it scheduled an IME in Post Falls. It would be unreasonable to require Surety herein to divine the road conditions between Lewiston and Post Falls as early as November 8th when it sent Claimant its letter. There is no evidence regarding the road conditions between Lewiston and Post Falls on November 8th and to require Surety to anticipate whatever risks Claimant may have been exposed to on November 15th would not be reasonable.

22. It is common knowledge that snowy weather is a part of life in North Idaho. Claimant had no problems traversing the required route until she was hit head-on by an approaching vehicle through no fault of her own. Further, there is no evidence of record regarding the road conditions for the entire route between Lewiston and Post Falls. The only evidence of weather conditions is that it was snowy and the road was snow covered five miles

south of Potlatch.[5] Moreover, there is no evidence that Claimant had any problems with the snowy conditions, to whatever extent, in her snow-capable Ford Expedition.

23. To grant the relief requested under the facts of this particular case would require the application of strict liability for any surety that schedules an IME in the "winter months." In the Commission's view, that goes too far. Here, there is no evidence one way or the other regarding the timing of the Post Falls IME versus waiting until December. Why Surety decided on Post Falls rather than waiting until December is unknown. Possibly, it felt constrained by Idaho law and related rules requiring prompt handling of claims. See Idaho Code § 72-304. Regardless, the record is silent on whether there was a business reason for an earlier, rather than later, exam. Moreover, the record equally admits the possibility that Claimant herself may have requested the earlier exam.

24. The record is also silent as to whether Claimant was represented by counsel at the time the Post Falls IME was scheduled who could have requested the same be rescheduled had Claimant been concerned about driving conditions. Although under no legal obligation to do so, Claimant herself could have also requested a rescheduling but did not.

25. The Commission is unable to find, on the record presented, that Surety was negligent in contributing to the injuries claimant received in her November 15, 2013 motor vehicle accident and, thus, is entitled to subrogation pursuant to Idaho Code § 72-223(3).

CONCLUSION OF LAW AND ORDER

1. Surety's entitlement to subrogation is not nullified by the "*Liberty Mutual* rule." Surety is entitled to exercise its right of subrogation under Idaho Code § 72-223(3).

[5] The Commission's and Supreme Court's use of the term "dangerous conditions" is considered dicta and not binding regarding this decision in that the issue decided there in involved solely whether or not Claimant's MVA injuries arose out of and in the course of her employment and not whether Surety was negligent.

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

DATED this ___3rd___ day of ____April_____, 2018.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

___/s/_____
Aaron White, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___3rd____ day of __April__, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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_____/s/_____
Assistant Commission Secretary

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