

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JODI DELMER,)
)
 Claimant,)
)
 v.)
)
 SODEXHO / INSURANCE COMPANY)
 OF THE STATE OF PENNSYLVANIA,)
)
 Employer / Surety,)
)
 and)
)
 TREASURE VALLEY ALL-STAR)
 CHEERLEADERS BOOSTERS, INC.,)
 IDAHO CHEER UNIVERSITY ALL-STAR)
 BOOSTER CLUB, INC., IDAHO CHEER)
 UNIVERSITY BOOSTER CLUB, INC.,)
 TERRI RENO, and PAM OWENS / UNINSURED,)
)
 Employer,)
)
 Defendants.)
 _____)

IC 2007-007370

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

Filed: October 7, 2009

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 October 20-22, 2008. Claimant, Jodi Delmer, was present in person and represented by Paul Penland, of Eagle. Defendant Employer Sodexho and Defendant Surety Insurance Company of the State of Pennsylvania were represented by Scott Wigle, of Boise. Defendant Employers Wings, Inc., and Wings, Inc., d/b/a Idaho Cheer University (Wings), and Defendant Surety Idaho State Insurance Fund were represented by Max Sheils, of Boise. Defendant Employers Treasure Valley All-Star Cheerleaders Boosters, Inc., Idaho Cheer University All-Star Booster Club, Inc., Idaho Cheer

University Booster Club, Inc., Terri Reno, and Pam Owens (collectively, the Booster Club) were represented by Lora Rainey Breen, of Boise. The parties presented oral and documentary evidence. No post-hearing depositions were taken, and briefs were later submitted. Claimant acknowledged post-hearing that she had not proven a case against Wings and, pursuant to a stipulation executed by Claimant and Wings, the Commission dismissed Wings from this action. The matter came under advisement on June 17, 2009.

POST-HEARING MOTIONS

In her opening post-hearing brief, Claimant moved to amend her complaint to add Idaho Cheer University Booster Club, Inc., as a defendant herein. Said motion is denied as moot in that Idaho Cheer University Booster Club, Inc., is already a defendant herein by virtue of Claimant's Amended Complaint filed November 9, 2007.

On May 19, 2009, Claimant filed a motion to strike portions of Sodexho's post-hearing brief relating to the Booster Club's status and compliance with IRS regulation 501(c)(3). Claimant's motion is denied, as Maria Patrick testified at hearing regarding this matter and it is further addressed by several of the Booster Club's exhibits.

ISSUES

The issues to be decided are:

1. Whether there was an employer/employee relationship between Claimant and the Booster Club and/or Sodexho.
2. Whether Claimant's employer at the time of her injuries was uninsured.
3. If Claimant's employer was uninsured, whether Sodexho was a statutory employer.

CONTENTIONS OF THE PARTIES

Claimant was injured on November 12, 2006, while staffing a concession booth operated by the Booster Club pursuant to an independent contractor agreement with Sodexho. Claimant

asserts that she was an employee of the Booster Club and/or Sodexho when she was injured. Claimant also asserts that Sodexho was her statutory employer pursuant to Idaho Code § 72-216.

Defendants contend that no employment relationship was intended by the parties, that at the time of Claimant's injury she was a fundraising volunteer and not an employee of the Booster Club or Sodexho, that the Booster Club had no employees, and that the Booster Club was an independent contractor for Sodexho. Defendants argue that similar fundraising strategies are used by many nonprofit organizations to support charitable interests and that everyone who volunteers services in exchange for a donation to a charitable organization of their choice does not thereby become an employee of the charitable organization for whom services are rendered, nor of the entity making the donation. Defendants essentially contend that funds paid to a charitable organization for a volunteer's services, but not available for the personal use of the volunteer, are not compensation to the volunteer even though they may result directly from the volunteer's services.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Claimant taken March 19, 2008;
3. The testimony of the following individuals taken at the October 20-22, 2008, hearing: Claimant, Kerry Halford, Vickie Hibbard, Mary Tidwell, Pam Owens, Julie Claiborne, Carrie Rose, Robert Reno, Susan Beesley, Denice Price, Kim Ferguson, Terri Reno, and Maria Patrick;
4. Claimant's Exhibits 1 through 9, admitted at the hearing;
5. Sodexho's Exhibits A through C, admitted at the hearing; and
6. Booster Club's Supplemental Exhibits 1 through 6, 10, and 11, admitted at the hearing.

All objections posed during Claimant's pre-hearing deposition are sustained. After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Sodexho is a corporation, operating in Idaho and other states, that serves food and beverage to the public. Sodexho provides all food services in the Qwest Arena where various sporting events, mostly basketball and hockey games, are held. Sodexho has employees that work at several areas within Qwest Arena, including Blimpies and the Sport Zone Restaurant and Bar. Sodexho also contracts with nonprofit organizations as independent contractors to prepare and sell food and beverages at multiple concession booths within Qwest Arena. Sodexho executes an independent contractor agreement with each nonprofit organization that desires to staff a concession booth. Sodexho splits the earnings from each concession booth with the nonprofit organization that operates it. Various nonprofit organizations use this opportunity to raise funds for the charities they support. Sodexho provides a shirt, apron, and visor for each individual staffing a booth. Sodexho provides the food and equipment necessary to prepare the food sold at each booth and requires strict adherence to specific procedures in food preparation and clean up to maintain compliance with applicable health codes. Sodexho also retains the right to remove any individual not abiding by such procedures.

2. Wings is a corporation providing cheerleading and gymnastics training for young athletes. Wings provides periodic cheerleading competitions and prepares young athletes to participate in local and regional cheerleading competitions.

3. The Booster Club is a nonprofit corporation, which has changed its name on several occasions, organized by and consisting of parents of young cheerleaders receiving training at Wings. Its purpose is to financially support the cheerleaders in obtaining cheerleader training, participating in competitions, and attending year-end recognition banquets.

Membership in the Booster Club is entirely voluntary. The Booster Club is supervised by an all-volunteer board and volunteer officers who are parents of cheerleaders. Terri Reno and Pam Owens were Booster Club officers at the time of Claimant's injury. Except for Claimant's allegations that she was a Booster Club employee, the Booster Club has no paid staff or employees, no office or telephone. The Booster Club promotes car washes, conducts pizza, cookie dough, and lollipop sales, and staffs a concession booth at Qwest Arena, all to raise funds for the cheerleaders training at Wings. The Booster Club maintains a separate account for each cheerleader. These individual athlete accounts are used exclusively to help reimburse each cheerleader's expenses of cheerleader training, cheerleader competition entry fees, travel, and related competition expenses. The Booster Club also maintains a group account for the benefit of all of the cheerleaders collectively. This account is used to fund an annual end-of-season recognition banquet for all of the cheerleaders. The Booster Club controls the allocation and expenditure of the athlete account funds to ensure the organization and the accounts qualify as tax exempt under IRS 501(c)(3). The athlete accounts are solely for the cheerleaders' expenses and are not taxable as income to the parents of the cheerleaders.

4. Claimant is the parent of a daughter who received cheerleader training at Wings. At all times relevant herein, Claimant's daughter was approximately 12 years old. Claimant participated in the Booster Club as a squad delegate, helping notify other Booster Club members of fundraising opportunities. Without the fundraising opportunities promoted by the Booster Club, Claimant's daughter may not have been financially able to participate in cheerleader training at Wings or in cheerleader competitions.

5. In May 2006, the Booster Club contracted with Sodexo to staff a concession booth at Qwest Arena as an independent contractor. The Booster Club agreed to abide by Sodexo's standards in food preparation and concession sales and to use only Sodexo's products. Booster Club members were notified of booth staffing opportunities and could claim

those opportunities on a first-come, first-served basis until the positions were filled for a given event. No Booster Club members were obligated to staff the booth, and many did not. A number of Booster Club members, including Claimant, elected periodically to staff the booth during Qwest Arena events. Sodexo paid the Booster Club a percentage of the earnings from the concession booth for each event. The Booster Club then deposited the funds received from Sodexo for that event into the individual athlete accounts of those cheerleaders whose parents or friends staffed the booth according to the time served at that event.

6. When Claimant served at the Qwest Arena booth, the Booster Club deposited funds in Claimant's daughter's account. There is no indication that Claimant herself, or any other Booster Club member, received any funds personally. Claimant never reported any funds from her daughter's account as personal income. There is no indication that Claimant used, or could have used, funds in her daughter's account as Claimant's own personal funds.

7. Sodexo dealt with the Booster Club and had no employment discussions or written contract with Claimant. Claimant never entered into an express contract of employment with Sodexo, was never paid by Sodexo, and never received any W-2 or 1099 forms from Sodexo. The Booster Club had no written employment contract with Claimant. Claimant never received any W-2 or 1099 forms from the Booster Club.

8. Claimant regularly assisted in food preparation and sales at the Qwest Arena booth. She helped staff the booth during numerous sporting events from approximately May through November 2006. As specified in Sodexo's contract with the Booster Club, Claimant wore a Sodexo shirt, apron, and visor while assisting in the booth.

9. The Booster Club meeting minutes from July 11, 2006, address the Qwest Arena concession booth and indicate, "when opening[s] are available, Kerry [Halford] will send out e-mail asking for volunteers." Claimant's Exhibit 3, p. 77. The Booster Club minutes from September 18, 2006, also describe a need for "volunteers" to fill the booth at the Qwest Arena.

10. On November 12, 2006, Claimant helped staff the Qwest Arena booth from approximately 4:30 until 9:00 p.m. While cleaning up the booth that evening, Claimant slipped and fell, fracturing her ankle. For Claimant's service at the booth that evening, \$12.36 was deposited into her daughter's cheerleader account with the Booster Club. For Claimant's service at the booth from May through November 2006, a total of approximately \$900 was deposited in Claimant's daughter's cheerleader account.

11. Claimant created a résumé in which she listed herself as a member of the board of directors of the Booster Club from 2005 through 2006. After specific questioning at hearing, Claimant acknowledged that she was never a member of the board of directors of the Booster Club and her representation to the contrary in her résumé was a misstatement.

12. Having observed Claimant at hearing and compared her testimony to other evidence of record, the Referee finds that Claimant is a generally—but not entirely—credible witness. The Referee finds that the other witnesses are generally credible, although some are more articulate and precise than others. The testimony of Booster Club member and former secretary Maria Patrick was particularly precise and credible.

13. With the sole exception of Claimant, all of the Booster Club members who testified at hearing affirmed that they were not, and did not consider themselves, employees of the Booster Club or of Sodexo; they affirmed they were volunteers. When specifically questioned at hearing, Claimant acknowledged that she did not know if she was an employee of the Booster Club or of Sodexo.

DISCUSSION AND FURTHER FINDINGS

14. 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). Facts, however,

need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

15. **Employment relationship.** Coverage under the workers' compensation law depends upon the existence of an employer-employee relationship. Anderson v. Gailey, 97 Idaho 813, 555 P.2d 144 (1976). "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. 'Employer' means any person who has expressly or impliedly hired or contracted the services of another." Idaho Code § 72-102(12) and (13). Because of the master's vicarious liability arising from an employer-employee relationship and the servant's surrender of common-law tort remedies against the master, there must be mutual consent embodied by a contract between master and servant. Larson's Law of Workers' Compensation, § 64-01 (2003). The necessity of the employer's consent is well recognized in distinguishing an employee from a volunteer: "Before one can become the employee of another, knowledge and consent of the employer, expressed or implied, is required." Seward v. State Brand Division, 75 Idaho 467, 471, 274 P.2d 993, 997 (1954).

16. Claimant herein acknowledges that she had no written contract of employment with any of the Defendants. Defendants uniformly testified that Claimant was a volunteer, that none hired her, and none were aware she considered herself an employee until long after her accident. However, Claimant asserts that she was Defendants' employee pursuant to an implied-in-fact contract of hire arising from the conduct of the parties.

17. Implied-in-fact contract. An implied-in-fact contract of hire arising from the conduct of the parties is sufficient to support a claim for workers' compensation benefits. Kennedy v. Forest, 129 Idaho 584, 930 P.2d 1026 (1997). A contract of hire creates an employer-employee relationship under which: "the employer has the right to control the details of work performance, and ... pays the worker's salary or wages." Daleiden v. Jefferson County

Joint School Dist. No. 251, 139 Idaho 466, 469, 80 P.3d 1067, 1070 (2003), quoting Black's Law Dictionary, 7th ed.

18. Claimant herein urges consideration of basic contract principles of offer and acceptance. She asserts that each time she accepted an e-mail invitation to Booster Club members to work at the Qwest Arena booth, a contract was created. However, even a volunteer customarily has an agreement with the organization he or she serves to access the organization's premises at specific times to offer the requested services. See Frieda v. Self-Insured Employer, 2003 IIC 0681 (2003). The relevant inquiry is whether the parties had an agreement rising to the level of an implied-in-fact contract of hire, creating a direct employment relationship.

19. In the present case, Claimant's assertions that she was an employee pursuant to an implied-in-fact contract of hire may be evaluated by considering the alleged Employers' right to control the details of Claimant's work and pay Claimant's salary or wages.

20. Right to control. To distinguish an employee from an independent contractor: "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." Roman v. Horsley, 120 Idaho 136, 137, 814 P.2d 36, 37 (1991). In Bradford v. Roche Moving & Storage, --Idaho --, -- P.3d --, 2009 WL 1929359 (July 7, 2009), the Idaho Supreme Court affirmed the Commission's finding that Bradford had not proven he was an employee of either of two moving companies at the time of his accident. In reaching its conclusion, the Commission considered evidence of the right to control as customarily analyzed to distinguish an employee from an independent contractor, noting: "Control is the hallmark of a direct employment relationship. The extent of the right to control distinguishes a direct employee from an independent contractor, and even more so, from a volunteer." Bradford v. Roche Moving & Storage, 2007 IIC 0812 (2007). The Commission considered the four-part test

of Roman v. Horsley and evidence that Bradford acted gratuitously and concluded that Bradford was a volunteer.¹

21. Claimant's assertions herein may be analyzed under the above principles of Seward, Daleiden, and Roman. As a practical matter, if Claimant cannot satisfy the principles espoused in Roman, then she has failed to prove an implied-in-fact employment relationship with either the Booster Club or Sodexho. The factors include: "(1) direct evidence of the right [of control]; (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, 120 Idaho at 137, 814 P.2d at 37; 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). The first two factors parallel the principles described above in Daleiden. All four factors merit examination. Because the law recognizes corporations properly organized and functioning as distinct legal entities, the Booster Club is a separate and independent legal entity from Sodexho. Thus Claimant's allegations will be examined as against each entity.

22. **The Booster Club as Claimant's alleged employer.** The clear weight of the evidence indicates that no express contract of hire existed between Claimant and the Booster Club. Evidence of the Booster Club's consent under an implied-in-fact contract of hire giving the Booster Club the right to control the details of Claimant's work performance must therefore be sought under the four factors of Roman.

23. Direct evidence of control. The Idaho Supreme Court in Roman listed three elements conjunctively over which an employer assumes the right to control: "the times, manner and method of executing the work of the employee." Roman, 120 Idaho at 137, 814 P.2d at 37.

¹ At least one neighboring jurisdiction has expressly considered the factors distinguishing an employee from an independent contractor to distinguish an employee from a volunteer: "This Court has articulated several factors to be considered in establishing whether an employment relationship exists. The cases have concerned independent contractors primarily, but the same principles apply." Board of Education of Alpine School District v. Olsen, 684 P.2d 49, 52 (Utah 1984).

Significantly, the Court first specified control over the times of executing the work. Control over the employee's manner and method of executing the work is illusory if the employee is not obligated to perform the work at all, or at the times the employer chooses. The employer's right to control the times an employee will work is so fundamental that an employee's failure to work at the times dictated by the employer constitutes misconduct justifying termination of employment for cause and denial of unemployment compensation benefits. See Gunter v. Magic Valley Regional Medical Center, 143 Idaho 63, 137 P.3d 450 (2006).

24. In the present case, the record overwhelmingly establishes that staffing the Qwest Arena booth was strictly voluntary. The Booster Club had no right to compel Claimant to staff the booth on November 12, 2006, or on any other day. Claimant could have elected to help staff the booth at every opportunity, or infrequently, or not at all. Claimant acknowledged that she had the option to serve at the booth or not; that she participated voluntarily. The Booster Club's absence of control over the times that Claimant served, including on November 12, 2006, demonstrates that the Booster Club did not have or exercise the control customary of an employer. Claimant's times of service were entirely at her own discretion and voluntary.

25. Claimant argues that she staffed the booth regularly for a period of several months, and thus her services were ongoing, substantial, and known to the Booster Club. This however does not change the reality that the Booster Club had no right to dictate the times when Claimant was obligated to staff the booth. The record of the conduct of the parties does not establish the Booster Club's control of the times that Claimant staffed the booth. Claimant assisted at the booth at her sole discretion.

26. Claimant also emphasizes that those staffing the booth were held to Sodexo's prescribed standards of food service and marketing. However, there is no indication that the Booster Club prescribed the manner or methods of operating the booth. Furthermore, without

power to control when Claimant would staff the booth, if at all, any alleged control by the Booster Club of Claimant's manner and method of operating the booth is meaningless.

27. Payment for services. Claimant asserts she was not a volunteer because she did not voluntarily and gratuitously provide services; rather, she expected and received payment for staffing the booth. Claimant also alleges that other Booster Club members received payment for staffing the booth.

28. Claimant repeatedly glosses over the reality that for her services in the booth, the Booster Club deposited funds in her daughter's cheerleader account—an account which could only be used to reimburse her daughter's cheerleading expenses. Claimant herself received no compensation. She clearly understood this. In her deposition Claimant testified that prior to her accident she "worked" for the Booster Club for six or seven years, earning \$3,000 to \$4,000 annually, but never received a W-2 or 1099 form for any amount. Claimant testified she was not concerned because the funds resulting from her service "went directly to the child's cheer account, and not directly into my pocket." Claimant's Deposition, p. 99, Ll. 2-3. The Booster Club carefully restricted the cheerleaders' accounts to reimbursement of the cheerleaders' expenses. Parents could not access the funds for personal use.

29. The Booster Club required receipts for reimbursements of expenses incurred by the cheerleaders, including airfare, hotel, and competition entry fees. Former Booster Club secretary Maria Patrick testified that in approximately 2004, the Booster Club consulted the IRS and legal counsel and adopted procedures to be compliant with 501(c)(3). Pursuant to IRS 501(c)(3) and the Booster Club's articles and bylaws, no Booster Club member can benefit personally from the accounts. Claimant had no reasonable basis to expect to be paid for her services at the booth. Her only reasonable expectation was that funds would be deposited in her daughter's cheerleader account, to be used exclusively to reimburse Claimant's daughter's cheerleading expenses, including training, travel, and competition. Claimant did not consider the funds her income,

reportable on her income taxes. That this account at the Booster Club may have borne Claimant's name was only a consequence of Claimant's daughter's legal status as a minor.

30. Contrary to Claimant's assertion, the other Booster Club members who staffed the booth did not receive, or expect to receive, compensation personally for their services. Sodexo paid a percentage of earnings from the booth to the Booster Club, who deposited these earnings in the individual cheerleaders' accounts to reimburse expenses, including cheerleading training tuition, competition fees, and expenses for travel to competitions. The Booster Club members themselves receive no compensation. None of the parents declare their children's cheerleader accounts at the Booster Club as the parents' earnings on their personal income taxes.

31. Claimant asserts that the benefit she received is comparable to that in Larson v. Independent School Dist. No. 11J of King Hill, 53 Idaho 49, 22 P.2d 299 (1933), which cannot be distinguished from the instant case. In Larson, the school district contracted with Larson as school custodian. Although not named in the written contract, school board members expected and were aware that Larson's wife assisted him with custodial duties. In addition to Larson's salary, the school district provided housing for the Larson family. After several months of working, Larson's wife died in an accident while performing custodial work at the school. The Commission denied Larson's workers' compensation claim. The Idaho Supreme Court reversed, noting that the school district fully expected and actually knew that Larson's wife assisted him in custodial duties and that the school district compensated Larson's wife by providing her housing and had the right to control her services.

32. Larson is distinguishable from the present case in that Larson's wife personally received compensation for her work in the form of housing accommodations. As noted above, Claimant herein received no personal compensation for staffing the booth. Moreover, the Court in Larsen expressly found that the school district had the right to control Larson's wife's

services. In contrast, the Booster Club neither had, nor exercised, control over when Claimant staffed the Qwest Arena booth, if at all. Claimant served at her sole discretion.

33. Furnishing equipment. Independent contractors typically furnish their own equipment. Employers typically furnish major equipment used by their employees. In the present case, the Booster Club furnished no equipment. The Booster Club had no office, no telephone, and no employees. It neither had, nor exercised, any control over Claimant by virtue of providing equipment for the booth.

34. Terminating the relationship. The ability to terminate a working relationship without incurring liability is generally indicative of direct employment as opposed to an independent contractor relationship where the contractor often remains liable to complete the work prescribed in the parties' contract. However, the freedom to elect to cease offering services is a hallmark of a volunteer who is not contractually obligated to complete any work whatsoever. Claimant herein offered her services at the Qwest Arena booth at her sole discretion and free from any obligation to continue.

35. Where Claimant's attendance and participation in staffing the booth were entirely at her discretion, Claimant personally received no payment for her services, and the Booster Club furnished no equipment, the right to control commensurate with an employment relationship is not demonstrated. Absent control of Claimant's work performance, an implied-in-fact contract of employment is not established by the conduct of the parties. The record establishes that Claimant was not an employee of the Booster Club.

36. **Sodexo as Claimant's alleged employer.** Claimant next alleges that she was an employee of Sodexo pursuant to several theories. Each will be addressed.

37. Implied-in-fact contract of hire. There is no evidence that anyone from Sodexo expressly discussed or offered Claimant employment or hired her. However, Claimant alleges she was an employee of Sodexo under an implied-in-fact contract of hire arising from the

conduct of the parties. Claimant specifically asserts that Sodexo exercised so much control over her and other Booster Club members in staffing the Qwest Arena booth, that under an employee-independent contractor analysis pursuant to Roman, Sodexo was effectively Claimant's employer. As noted above, evidence of Sodexo's knowledge and consent under an implied-in-fact contract of hire giving Sodexo the right to control the details of Claimant's work performance must be sought under the four factors of Roman.

38. Direct evidence of control. Direct evidence of the right to control the times, manner, and method of performing the work, including the right to establish set hours of work, are all indicative of an employment relationship.

39. In the present case, the witnesses uniformly testified that staffing the booth was entirely voluntary. Sodexo had no right to compel Claimant to staff the booth on any particular day or time. The conduct of the parties does not establish Sodexo's control of the times that Claimant staffed the booth. Claimant voluntarily offered to assist at the concession booth on November 12, 2006. Claimant's service was entirely at her own discretion. As noted above, this is a fundamental departure from traditional employment where the employer dictates the times when the employee will work and the employment may be terminated for failure to so report.

40. Claimant alleges that because Sodexo had direct employees at the arena, solicited nonprofit organizations to staff some of the booths, required booth staffers to follow a procedures manual, and compensated booth staffers, that this makes Claimant Sodexo's employee. However as noted above, Claimant had no obligation to work at all. The fact that Sodexo may have been aware Claimant chose to work on November 12, 2006, is immaterial. Sodexo had no means to obligate Claimant to work at the booth at all. Claimant chose if and when she would serve at the booth. Although Sodexo required compliance with food marketing and safe food handling procedures by those operating the booth, without power to control when

Claimant would staff the booth, if at all, any alleged control by Sodexho of Claimant's manner and method of operating the booth is largely meaningless.

41. Payment for services. Payment by the hour, week, day, month, or other regular periodic interval generally suggests an employment relationship. Withholding income and social security taxes from a person's wages is also indicative of direct employment.

42. In the present case, Claimant asserts that she did not voluntarily and gratuitously provides services at the booth; she expected compensation. She maintains that her motive for the service she rendered makes her an employee not a volunteer. Certainly Claimant's intent merits consideration. However, her intent cannot alone make her an employee where no similar intent on the part of Sodexho is shown.

43. The record is clear that Sodexho made no payment whatsoever to Claimant for her services at the booth on November 12, 2006, or at any other time. As noted previously, Claimant knew that she would not be personally compensated for her services; rather, any funds attributable to her services would be paid by Sodexho to the Booster Club and deposited by the Booster Club in an account for the exclusive use of Claimant's daughter, solely to reimburse Claimant's daughter's cheerleading expenses. There was no agreement by Sodexho to compensate Claimant personally for her services. Sodexho expressly contracted with, and paid a percentage of the booth's earnings to, the Booster Club—not Claimant.

44. Furnishing equipment. Furnishing major items of equipment is typical of an employment relationship. In the present case, the concession booth, the foodstuffs, and essentially all items used at the booth were furnished by Sodexho through its contract with the Qwest Arena owner. However, the weight and significance of this factor is open to question, since common experience teaches that it is not customary for volunteers to furnish major items of equipment.

45. Terminating the relationship. While Claimant emphasizes that the right to terminate the relationship at any time without liability is characteristic of a direct employment

relationship, it is also one salient hallmark of a volunteer. Claimant had the absolute freedom to serve at the concession booth or not.

46. Considered collectively, the principles of Roman do not demonstrate that Sodexo had the right to control the time, manner, and method of Claimant's work performance as would be customary of an employer.

47. Virtual proprietor or operator. Claimant also asserts that Sodexo was her employer pursuant to Idaho Code § 72-102(13)(a), as the "person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason is not the direct employer of the workers there employed." Although Sodexo may be considered virtually the proprietor of the concession business at Qwest Arena, this does not necessarily make Sodexo Claimant's employer. The language of the statute refers to "the workers there employed." Thus Claimant must prove she was employed at the booth before Idaho Code § 72-102(13)(1) imposes liability on Sodexo. Claimant has failed to prove she was the employee of either the Booster Club or Sodexo.

48. Statutory employer. Claimant asserts that Sodexo was her statutory employer pursuant to Idaho Code § 72-216. In Runcorn v. Shearer Lumber Products, Inc., 107 Idaho 389, 690 P.2d 324 (1984), the Court considered the definition of a statutory employer and noted:

The definition includes the direct employer/subcontractor, a contractor over the subcontractor, and a qualifying proprietor or operator of a business over the contractor. This does not mean that the qualifying proprietor or operator is the statutory employer of the contractor and subcontractor; it does mean that the qualifying proprietor or operator is the "employer" of the contractor's and subcontractor's employees, and the contractor is also an "employer" of the subcontractor's employees.

Runcorn, 107 Idaho at 393, 690 P.2d at 328 (emphasis in original). Thus, Idaho Code § 72-216 renders Sodexo Claimant's statutory employer only if Claimant was an employee of the Booster Club—which she was not.

49. Staffing service. Claimant lastly asserts that the Booster Club served as an employee staffing service for Sodexho and that the nonprofit workers performed the same work Sodexho's own part-time employees performed. While it appears that the Booster Club members who staffed the booth performed many of the same activities some of Sodexho's own employees performed, two significant differences remain: neither Claimant nor any Booster Club member was compensated personally for the services performed and neither Claimant nor any Booster Club member had any obligation to staff the booth, on any day or at any time.

50. Given that the key to determining whether a direct employment relationship existed is whether the alleged employer had the right to control the time, manner, and method of executing the work, as distinguished from the right to merely require the results agreed upon, it is apparent in the present case that neither the Booster Club nor Sodexho had or exercised the right to control Claimant's time, manner, or method of the service she attempted on November 12, 2006. Furthermore, neither the Booster Club nor Sodexho had even the right to merely require the results agreed upon, because there was no agreement regarding results. The absence of these customary elements of control underscores the fact that no contract of hire existed between Claimant and the Booster Club or Sodexho on November 12, 2006. "[A]n award of compensation depends on the existence of an employer/employee relationship." Parker v. Engle, 115 Idaho 860, 865, 771 P.2d 524, 529 (1989).

51. Claimant has not proven she was an employee of the Booster Club or of Sodexho at the time of her accident on November 12, 2006.

CONCLUSIONS OF LAW

1. Claimant has not proven she was an employee of the Booster Club or of Sodexho on November 12, 2006.

2. Claimant has not proven that she was in the employment of any employer at the time of her November 12, 2006, injury.

3. Claimant has not proven that Sodexho was her statutory employer at the time of her November 12, 2006, injury.

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 16th day of September, 2009.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

PAUL S PENLAND
PO BOX 1567
EAGLE ID 83616-9102

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701

LORA RAINEY BREEN
PO BOX 2528
BOISE ID 83701-2528

sc

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JODI DELMER,)
)
Claimant,)
)
v.)
)
SODEXHO / INSURANCE COMPANY)
OF THE STATE OF PENNSYLVANIA,)
)
Employer / Surety,)
)
and)
)
TREASURE VALLEY ALL-STAR)
CHEERLEADERS BOOSTERS, INC.,)
IDAHO CHEER UNIVERSITY ALL-STAR)
BOOSTER CLUB, INC., IDAHO CHEER)
UNIVERSITY BOOSTER CLUB, INC.,)
TERRI RENO, and PAM OWENS / UNINSURED,)
)
Employer,)
)
Defendants.)
_____)

IC 2007-007370

ORDER

Filed: October 7, 2009

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. 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 not proven she was an employee of the Booster Club or of Sodexho on November 12, 2006.

2. Claimant has not proven that she was in the employment of any employer at the time of her November 12, 2006, injury.

3. Claimant has not proven that Sodexo was her statutory employer at the time of her November 12, 2006, injury.

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

DATED this 7th day of October, 2009.

INDUSTRIAL COMMISSION

/s/ _____
R.D. Maynard, Chairman

/s/ _____
Thomas E. Limbaugh, Commissioner

/s/ _____
Thomas P. Baskin, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2009, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

PAUL S PENLAND
PO BOX 1567
EAGLE ID 83616-9102

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701

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sc

_____/s/_____