COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 015588-97 030262-97**
Carmelo Melendez	Employee
Gibraltar Associates, Inc.	Employer
Gibraltar Limited Partnership	Employer
Liberty Mutual Insurance Co.	Insurer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Wilson)

APPEARANCES
Karen E. Wier, Esq., for the employee
Gerard Pugsley, Esq., for the Liberty Mutual Insurance Co.
Richard A. Fairbrothers, Esq., for the Workers' Comp. Insurance. Trust Fund

MAZE-ROTHSTEIN, J. The Workers' Compensation Trust Fund appeals from a decision that ordered it to pay benefits to an employee of an uninsured putative employer, Gibraltar Limited Partnership. The Trust Fund argues that the judge should have held Liberty Mutual, insurer for a related entity, Gibraltar Associates, Inc., liable as the real employer. The threshold question, according to the administrative judge, was which of these two entities was the employer. Because the Gibraltar Limited Partnership never came into being, G. L. c. 109, and because the decision lacks findings with respect to the identity of the employer when the employee started this job in June 1995, we reverse and recommit for further findings.

In June 1995, Carmelo Melendez started working in building maintenance for either Gibraltar Associates, Inc. or Gibraltar Limited Partnership, both of which were located at 51A Humboldt Avenue in Boston. (Dec. 5, 8.) Gibraltar Associates, Inc., was incorporated in 1990, and was insured for workers' compensation by Liberty Mutual. Gibraltar Limited Partnership was proposed for formation in 1994, and was uninsured for workers' compensation. (Dec. 5; October 28, 1998 Tr. 8.) On March 25, 1997,

while painting an apartment Mr. Melendez fell from a ladder landing on his back. (Dec. 10.) The injury left him totally incapacitated for work. (Dec. 13.) The only issue in this appeal is the identity of the employer on the date of the industrial injury.

After the employee's injury, Liberty Mutual audited Gibraltar Associates, Inc., to assess whether the premium accurately reflected an appropriate risk rating in accordance with then current payroll and job classifications. The auditor determined that Gibraltar Associates, Inc., had only two clerical employees, with an annual payroll of $125,000, although the information sheet for the policy, (Ex. 8), indicated that it carried two maintenance workers. The auditor also determined that Gibraltar Limited Partnership had thirty-nine employees, with a total payroll of $989,000. (August 18, 1998 Tr. 54.) Five hundred and thirty thousand dollars of that payroll was for maintenance workers. The auditor's conclusion was based on the payroll records and quarterly federal tax forms. Armed with this audit, Liberty Mutual concluded that its policy holder, Gibraltar Associates Inc., was entitled to a rebate and denied compensation for the employee's industrial accident, because maintenance workers were not included in the policy coverage. (Dec. 3, 6.)

The judge addressed the issue of the employer's identity in the following findings of fact:

> The following evidence supports a finding that Mr. Melendez was employed by Associates: all documents related to Melendez' work activity were on Associates letterhead: the insurance cover sheet for Associates had job classification for maintenance workers; release ([June 14, 1995] –Ex.11) indicates Associates was the employer.
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> The following evidence supports a finding that Melendez was employed by Partnership: All payroll checks for Melendez were drawn on the Partnership checking account (Ex. 3); the payroll records of Associates reflect no wages paid to maintenance workers; the payroll records reflect that Partnership had a maintenance worker payroll of $530,000 per year; when the employee was injured on March 25, 1997, the First Report of Injury prepared by Carolyn Snow named Partnership as the employer; job assignments were sometimes made by Carolyn Snow.
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> Carolyn Gibson was sole officer of Associates, which on March 25, 1997, was responsible for 900-1200 housing units, and had 39 employees, and was, she believed, covered by workers' compensation insurance. Partnership was intended

> to be a limited partnership, with five limited partners. No corporation was ever formed. Because no corporation was formed, Partnership did business under the name of Associates, which in essence became a "masthead" as a cover for Partnership. Associates and Partnership had the same address, the same workers, and the same clients. Gibson thought Partnership had workers' compensation coverage, but it did not.
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> The preponderance of the evidence supports a conclusion that, although the forms in the employee's personnel folder all bear the letterhead of Associates, the documents submitted to the federal government and to Liberty Mutual lead inexorably to the finding that Associates had no actual maintenance employees, whereas Partnership had 39 employees, and a maintenance payroll of $530,000. I therefore find Melendez to be an employee of Partnership, a finding which is supported by the fact that all the employee's payroll records indicate Partnership as the payer. Although all job orders for work to be performed by the employee were on Associates letterhead, all wages paid to the employee were on checks issued by Partnership.

(Dec. 7-8.) The judge concluded that the uninsured Gibraltar Limited Partnership was the employer, and therefore ruled that the Trust Fund was liable for payment of compensation benefits to the employee for his March 25, 1997 industrial injury. (Dec. 13.) This conclusion is grounded in evidence which has little or no bearing on the question as to who hired Mr. Melendez.

The Trust Fund argues on appeal, inter alia, that the uninsured Gibraltar Limited Partnership was really not a legal entity, separate from the insured Gibraltar Associates, Inc. (Trust Fund br., 6-10.) We agree.

A limited partnership is entirely a creature of statute. It is defined as "a partnership formed by two or more persons under the laws of the commonwealth and having one or more general partners and one or more limited partners."[1] G.L. c. 109, § 1(7). Unlike a general partnership, which was not alleged here and is merely "an association of two or more persons to carry on as co-owners of a business for profit[,]" G.L. c. 108A, § 6, a limited partnership has no existence outside of the statutory

[1] Generally speaking, "a limited partner is not liable for the obligations of a limited partnership . . . ." G.L. c. 109, § 19.

provisions that establish it as a legal entity. "Limited partnerships did not exist at common law; they are statutory creatures that must be formed and conducted in substantial compliance with the statutes authorizing such a business relationship." Saulnier v. Fanaras Enterprises, Inc., 618 A.2d 841, 843, 136 N.H. 565 (1992)(applying Massachusetts law). See Fusco v. Rocky Mountain I Investments Ltd. Partnership, 42 Mass. App. Ct. 441, 446-447 (1997)(limited partnership and corporation distinguished from general partnership by statutory requirement of "notice of [the] arrangement to the world"). General Laws c. 109, § 8, establishes the requirements for the formation of a limited partnership:

> (a) In order to form a limited partnership a certificate of limited partnership shall be executed. The certificate shall be filed in the office of the secretary of state and shall set forth:
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> (1) the name of the limited partnership;
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> (2) the general character of its business;
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> (3) the address of the office and the name and address of the agent for service of process required to be maintained by section four;
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> (4) the name and the business address of each general partner;
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> (5) the latest date upon which the limited partnership is to dissolve; and
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> (6) any other matters the general partners determine to include therein.
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> *(b) A limited partnership is formed at the time of the filing of the certificate of limited partnership in the office of the secretary of state or at any later time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section.*

G.L. c. 109, § 8, as amended by St. 1988, c. 286, § 4 (emphasis added). Where there is no certificate of limited partnership, filed with the secretary of state, there is no limited partnership, regardless of any intent of proposed partners to enter into such an arrangement.[2] See Saulnier, supra ("[T]he intent of the parties to form a limited

[2] Although the judge correctly noted that a business certificate had been filed for Gibraltar Limited Partnership d/b/a Gibraltar Associates, (Dec. 9), this certificate was filed with the City of Boston, and is not at all germane to the legal existence of the limited partnership. (October 28, 1998 Tr. 8, 14.)

partnership means nothing if the parties do not comply with the statutory requirements for formation"). An employer, under G.L. c. 152, § 1(5), must be "an individual, partnership, association, corporation, or other legal entity, or any two or more of the foregoing engaged in a joint enterprise . . . ." Gibraltar Limited Partnership simply did not exist. The hearing judge must make a factual determination based on the record evidence whether the employer was one or more of the individuals who proposed to form a limited partnership or whether Gibraltar Associates Inc. was the employer.[3]

Central to the employment relationship, as defined in G.L. c. 152, § 1(4), is the concepts of service to another under a contract of hire. The employee/employer relationship is rooted in the common law master and servant concepts. See McDermott's Case, 283 Mass. 74 (1933). With the contract of hire comes subjection to direction and control. Id. This, rather than peripheral matters, such as the time spent at hearing on examination of payroll methods or the non issue arising from the insurer's belated audit and how insurance determinations were made, is the key to who employed Mr. Melendez. Once it is determined with whom the employee entered into the contract of hire, there the employee remained unless he assented to becoming an employee of a new employer. See Sargentilli's Case, 331 Mass. 193 (1954). Amidst the obfuscating evidentiary tangents offered at hearing, the judge did not distill this pivotal finding in the employment relationship. It is missing from the decision.

Accordingly, because there was absolutely no evidence adduced at hearing that Gibraltar Limited Partnership had come into existence by the appropriate filing of a limited partnership certificate in the office of the secretary of state, and could not therefore be considered a § 1(5) employer, we reverse the decision and recommit the case for additional findings on the employment relationship. "Although the evidence may suggest a certain result, additional findings are necessary before a conclusion can be

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[3] Mr. Melendez testified that he believed that he was hired by Gibraltar Associates Inc. (October 28, 1998 Tr. 8.) Carol Gibson, the president of Gibraltar Associates Inc., testified that she hired Melendez for the corporation. (August 18, 1998 Tr. 14, 20, 27.) This testimony was uncontradicted. The judge should make findings on it.

reached." O'Rourke v. Town of West Bridgewater, 13 Mass Workers' Comp. Rep. 415, 421 (1999). On recommittal, though not advanced at the original hearing, the judge may also want the parties to take a position on § 18[4] and § 26B,[5] which may have bearing on the employment relationship.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: April 25, 2001

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[4] General Laws c. 152, § 18, as amended by St. 1969, c. 755, § 2, reads in part:

> In any case where there shall exist with respect to an employee a general employer and a special employer relationship, as between the general employer and the special employer, the liability for the payment of compensation for the injury shall be borne by the general employer or its insurer, and the special employer or its insurer shall be liable for such payment if the parties have so agreed or if the general employer shall not be an insured or insured person under this chapter.

[5] General Laws c. 152, § 26B, added by St. 1957, c. 276 reads:

> When an employee employed in the concurrent service of two or more insured employers receives a personal injury compensable under this chapter while performing a duty which is common to such employers, the liability of their insurers under this chapter shall be joint and several. Each insurer or self-insurer liable under this section shall pay compensation according to the proportion of the wages paid by its insured in relation to the concurrent wage which the employee received from all insured employers.