COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 005200-99
006803-99

Gertrude Soares	Employee
Steven Riccardi and Olin Aegis	Employer
Liberty Mutual Insurance Company	Insurer
Workers' Compensation Trust Fund	Insurer

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

APPEARANCES
Michael A. Rudman, Esq., for the employee
Daniel DeNardis, Esq., for the employer, Steven Riccardi
Jessica E. Coccoli, Esq., and Robert Rickey, Esq., for the Trust Fund
Andrew P. Saltis, Esq., for Liberty Mutual Insurance Company

LEVINE, J. The Workers' Compensation Trust Fund ("Trust Fund") appeals from a decision in which an administrative judge ordered it to pay compensation for the employee's January 22, 1999 injury, which she suffered while working for the employer, Steven Riccardi. Riccardi operated a cafeteria on the premises of Olin Aegis, a technology manufacturing firm. Riccardi failed to obtain workers' compensation insurance, and was uninsured at the time of the industrial accident. On the employee's claim for workers' compensation benefits, the judge, pursuant to G.L. c. 152, § 18, found that the Trust Fund stood in place of the uninsured employer and was liable to pay benefits.[1] We affirm the decision.

[1] G.L. c. 152, § 18 (inserted by St. 1911, c. 751, pt. 3, §17), provides, in pertinent part:

> If an insured person enters into a contract, written or oral, with an independent contractor to do such person's work, or if such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the insured, and the insurer would, if such work were executed by employees immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such employees any compensation which would be payable to them under this chapter if the independent or sub-contractors were insured persons. . . . This

The employee had been working for a company by the name of Executive Coffee at the Olin Aegis facility for two years, when Olin Aegis entered into a contract with Steven Riccardi to provide cafeteria food services. Riccardi asked the employee to work for him, and she agreed. The employee injured her back after working for Riccardi for about a year. (Dec. 6-7.) The issue on appeal is whether operation of the cafeteria was as a matter of law "part of or process in . . . the trade or business carried on by" Olin Aegis, thereby bringing the employee's injury within the coverage of Olin Aegis' compensation insurer.

In the course of concluding that operation of the cafeteria was not part of Olin Aegis' trade or business, the judge made the following findings:

> [T]he company's business involves manufacturing in a high technology industry. Olin Aegis performs hermetic packaging and chemical plating, a technological process which involves a number of metals, including gold. The company engages in some assembly work, and has a number of skilled machinists, office workers, and necessary support staff to effectuate the operations. The Olin Aegis plant is located in an office park setting, and although there was a restaurant approximately a hundred fifty yards away and other food services a mile away, the company decided to maintain an onsite cafeteria primarily for the use of its own employees. The cafeteria services contract with Riccardi acknowledged that Olin Aegis owned and controlled the dining area. Olin Aegis also owned two refrigerator cases, a freezer and a three foot grille. All other equipment was to be provided by Mr. Riccardi, and he or his employees were responsible for the maintenance and the repair of all of the cafeteria equipment. When Mr. Riccardi began contract negotiations with . . . Olin Aegis, he provided the sample menu and a rough sketch of what he needed to conduct his business in the cafeteria. Olin Aegis gave Mr. Riccardi an outline of what food they wanted him to prepare, and the hours of operation. Mr. Riccardi was to obtain all necessary permits and insurance certificates. Mr. Riccardi admitted that he did not obtain the appropriate workers' compensation coverage, as he was contractually obligated to do . . . .
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> The business operations of Mr. Riccardi's food service operation at Olin Aegis ran successfully and without incident for the first year. However, at one point, Olin Aegis objected to one of Mr. Riccardi's employees . . . chatting or discussing matters with another young Olin Aegis worker, and she was apparently reprimanded. On yet on [sic] another occasion, complaints were made by Olin Aegis employees that Mr. Riccardi allegedly changed expiration dates on some of the dairy products, and once again Olin Aegis intervened. Another time, Mr.

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section shall not apply to any contract of an independent or sub-contractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the insured . . . .

> Riccardi took it upon himself to advertise his business as the "Olin Aegis Caferteria" (sic) and began soliciting nearby business establishments for customers. Olin Aegis found out about these activities, and insisted that Mr. Riccardi could only use the cafeteria to provide food and drink for its employees and permitted guests. It is readily apparent from these incidents and the contract provisions themselves, that Olin Aegis exercised a fair amount of control over the operations of Mr. Riccardi's business. However, the cafeteria services to be provided by Mr. Riccardi still were "ancillary" to and not a part of Olin Aegis' business in accordance with Section 18. . . . Olin Aegis is obviously not in the food service industry, and even though it maintains an in house cafeteria for its workers and derives a benefit from having them eat or drink on site, the preparation and sale of food and other related cafeteria services to be performed by Mr. Riccardi's company was ancillary and incidental to Olin Aegis' business.

(Dec. 9-12.) The judge distinguished the case of Tindall v. Delholm & McKay Co., 347 Mass. 100 (1964), in which the Supreme Judicial Court held that an independent contractor milliner working within a department store performed work that was part of the business of that store; namely, the production and sale of clothing apparel and accessories. (Dec. 11.) The judge concluded that the Trust Fund was liable to pay compensation benefits, since Riccardi's business was uninsured at the time of the accident. (Dec. 12.)

Determining the applicability of § 18 is primarily a fact finding process. In Afienko v. Harvard Club of Boston, 365 Mass. 320 (1974), the Supreme Judicial Court stated, regarding § 18 analysis, the following:

> Our cases have clearly established that it is ordinarily a question of fact whether particular work performed by an independent contractor or his employees is or is not "part of or process in" a principal employer's business. [Citations omitted.] Only where the circumstances of a particular case indicate that such work is "plainly" a part of the employer's business have we considered this question to be one of law. [Citations omitted.]

Id. at 325. Cannon v. Crowley, 318 Mass. 373, 375 (1945), sets out the formulation for determining the applicability of § 18:

> The character and nature of the business must be determined, and if the work done by an independent contractor is really a branch or department of that business or a process in the business, it constitutes a part of the business itself. If it is customary for those engaged in a similar business to perform the work by their own employees in the ordinary course of the business or if, whatever the custom is, one

> so engaged usually has such work performed by his own employees, then such work may be found to be a part of his business.

Id. at 375. See also Poirier v. Town of Plymouth, 374 Mass. 206, 218-219 (1978); Suffreti v. Lynn Shelter Ass'n, 10 Mass. Workers' Comp. Rep. 553 (1996).

In the present case, the judge performed his fact-finding consistent with the articulated standards. Having found that the function of running a cafeteria was not sufficiently connected to the technology-based manufacturing performed by Olin Aegis, the judge's conclusion that the uninsured business of Steven Riccardi was merely ancillary to that of Olin Aegis appropriately followed. Olin Aegis' acknowledged control over Steven Riccardi's business, its ownership of the dining room and some of the cafeteria equipment, and the clear benefit of having an on-site eatery, could not change the character of Steven Riccardi's business as essentially separate and distinct from that of Olin Aegis.[2] The judge's findings are without legal error, and therefore we affirm the decision.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: **December 27, 2001**

[2] "The question is not whether the independent contractor's employees are controlled, or its supplies, equipment, or goods are owned, by the 'insured person,' but rather whether the work being done by the independent contractor is part of the insured's business." Tindall, supra at 104-105.