COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024282-04**

Lee Hutchins	Employee
United Landscaping, LLC	Employer
Zurich American Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Costigan and Horan)

APPEARANCES[1]
Frank E. Antonucci, Esq., for the employee
Michael O. Shea, Esq., for the insurer

CARROLL, J. The insurer appeals from a decision in which an administrative judge awarded workers' compensation benefits to the employee of the employer Limited Liability Company (LLC) for an injury indisputably arising out of and in the course of his employment. The insurer argues that the employee was a "member" of the LLC, under the statute creating such entities,[2] and therefore was not covered by the compulsory insurance mandate of the act. The

[1] The reviewing board solicited amicus briefs or memoranda from members of the Massachusetts Bar. None was received as of the due date of November 17, 2006.

[2] General Laws c. 156C, § 12(b), provides, in pertinent part:

> A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of organization.

General Laws c. 156C, § 22, provides, in pertinent part:

> Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be personally liable, directly or indirectly, including without limitation, by way of indemnification, contribution, assessment or otherwise, for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

insurer argues that the employee, as a member of the LLC, could elect to carry workers' compensation coverage, but had not done so. We disagree with the insurer's interpretation of the applicable statutes, and affirm the decision.

The employee worked as a laborer for the employer LLC, a landscaping company, earning between $8 and $12 per hour. He was under the direction and supervision of the employer as to what his duties on any given day would entail, and all of his tools, materials and transportation were provided by the employer. The employer proposed that the employee buy a share in the employer LLC, thereby becoming a part-owner or "member" within the meaning of G. L. c. 156C, § 20.[3] The employee agreed to do so, for which the employer deducted $18 per week out of his paycheck to pay for that share in the LLC, which was to cost a total of $1,000. The employee's stake in the LLC was nine percent. The employee's duties did not change in any way with this arrangement, and he did not participate in the management of the LLC. (Dec. 4-5.)

The employee sustained a work injury on June 28, 2004. The employee had never elected to retain his common law right to sue the employer, and he had

[3] General Laws c. 156C, § 20, provides, in pertinent part:

> (b) After the formation of a limited liability company, a person acquiring a limited liability company interest is admitted as a member of the limited liability company:
>
> (1) in the case of a person acquiring a limited liability company interest directly from the limited liability company, at the time provided in and upon compliance with a written operating agreement or, if a written operating agreement does not so provide, upon the consent of all members; or
> (2) in the case of an assignee of a limited liability company interest, as provided in section forty-one.
>
> (c) A person may be admitted to a limited liability company as a member and may receive an interest in the limited liability company without making a contribution or being obligated to make a contribution to the limited liability company.

never knowingly waived, nor could he, his workers' compensation coverage. (Dec. 6.)[4]

The insurer denied workers' compensation coverage for the employee's injury, claiming that the employee was a member/partner of the employer LLC, and that he did not request coverage under G. L. c. 152, § 1(4).[5] The judge disagreed with the insurer's interpretation of the applicable statutes, and concluded that the employee's status as a "member" of the LLC did not change his status from that of "employee" to something akin to that of a "partner" for whom coverage is elective. (Dec. 6-7.) The judge noted the difference between partnerships and corporations for the purposes of workers' compensation coverage: partners may elect coverage, whereas all employees of a corporation must be provided with coverage. The judge concluded that the employee fell within the primary § 1(4) definition of employee: "Every person in the service of another under any contract of hire." (Dec. 8.) To the extent that the employee was also a "member" of the LLC, the judge determined that such classification, without any actual management duties incumbent thereto, was essentially a meaningless designation. The judge concluded that the employee was like any other employee who owns stock in the company for which he works: such ownership has no impact on the employee's rights under c. 152. The judge therefore awarded the employee the workers' compensation benefits claimed. (Dec. 8-11.)

---

[4] The administrative judge stated that Mr. Hutchins did not sign any document waiving workers' compensation. (Dec. 6.) Section 46 states that "[n]o agreement by an employee to waive his right to compensation shall be valid." More aptly put, the employee never elected to redeem his workers' compensation rights for the right to sue his employer.

[5] General Laws c. 152, § 1(4), provides, in pertinent part, that an "employee" is:

> every person in the service of another under any contract of hire, express or implied, oral or written . . . For the purpose of this chapter, a sole proprietor at his option or a partnership at its option shall be an employee. A sole proprietor or partnership may elect coverage by securing insurance with a carrier.

The insurer argues on appeal that the judge's failure to recognize the status of the employee as a member of the LLC, and therefore not within the compulsory coverage provisions of the act, was contrary to law. The argument is based on the insurer's flawed analogy of a LLC to a partnership. (Insurer br., 12-15.) We reject the analogy, and so the insurer's premise for its argument fails, as does its appeal.

A limited liability company under G. L. c. 156C, § 1 *et seq.*, is an entity that cannot be classified as either a corporation or a partnership. However, in important respects, it is more like a corporation. See Fraser v. Major League Soccer, LLC, 97 F.Supp. 2d 130, 135 n.5 (D. Mass. 2000)(noting closer resemblance of LLCs to corporations than partnerships). The LLC is a separate entity and may sue and be sued in its own right, something not true of partnerships. See footnote 1, supra. And while a LLC may be treated as a partnership for federal tax purposes, the same is true for corporations that elect the sub chapter S option for filing returns. That mere fact is clearly not dispositive of the issue before us.

The insurer's argument fundamentally misses the point; the G. L. c. 152, § 1(4), definition of "employee" is expansive, rather than restrictive. There is no basis for inferring that members/employees of LLCs should fall under the provisions of *elective* coverage for partners in partnerships, rather than the normal *compulsory* coverage for all employees.[6] To say that the employee in this case ceased to be an employee under the act for the sole reason that he became a member of the LLC, would be abhorrent to the entire scheme of workers' compensation as it has evolved over the century of its existence. Accord Murphy's Case, 63 Mass. App. Ct. 774 (2005)(Workers' Compensation Act [c.152] is to be construed broadly to include as many employees as its terms will

[6] A member who is not an employee could conceivably be covered by a different rule. However, we need not decide that.

permit.) The employee's duties and the nature of his job with the LLC did not change at all with his becoming a "member."[7]

Accordingly, we affirm the decision. Pursuant to § 13A(6), the insurer is directed to pay employee's counsel a fee of $1,407.15.

So ordered.

_____
Martine Carroll
Administrative Law Judge

_____
Patricia A. Costigan
Administrative Law Judge

Filed: **December 13, 2006**

_____
Mark D. Horan
Administrative Law Judge

.

[7] In so deciding, we accord no deference to the circular letters cited by the insurer in support of its argument, because they are also premised on the ill-advised partnership analogy. See Rivera v. H.B. Smith Co., Inc., 27 Mass. App. Ct. 1130, 1131-1132 (1989)(circular letters, unlike regulations, have merely persuasive – not controlling – authority).