

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF UNINSURED)	Case No. 1971-2001
EMPLOYERS' FUND EMPLOYMENT)	
RELATIONS DIVISION,)	
UNINSURED EMPLOYERS' FUND,)	FINDINGS OF FACT;
Complainant,)	CONCLUSIONS OF LAW;
vs.)	AND
)	FINAL ORDER
JUDY SANDER & WILLIAM DAVIS,)	
d/b/a VALLEY MONUMENT,)	
Respondents.)	

I. INTRODUCTION

On March 22, 2001, the Uninsured Employer Fund (UEF) received an appeal from Judy Sander appealing its finding that Judy Sander and William Davis were liable as partners for a penalty assessed on Valley Monument for the period January 1, 1998 through February 13, 2000. Sander contended that William Davis, her former spouse, was the owner of the business during the penalty period, and thus, was liable for the assessed penalty. William Davis contended that Sander was solely liable for the penalty because the divorce settlement awarded her full ownership of the business, including business debts.

Bernadine Warren, Hearing Officer for the Department of Labor and Industry, conducted a hearing in this matter on September 10, 2001. Julia Swingley, attorney, represented the UEF in person. Steven LaVoie and Terry Wilson appeared in person as witnesses for the UEF. Thomas Trigg, attorney, represented Judy Sander by telephone. Judy Sander testified on her own behalf from Trigg's office. William Davis represented himself, and testified on his own behalf by telephone.

Exhibit 1, offered by Judy Sander, was admitted into the record without objection. Exhibits A, D, E, F and G, offered by the UEF, were admitted into the record without objection. Exhibit B, offered by the UEF, was admitted into the record over Sander's irrelevance and jurisdictional objections. Exhibit C, offered by the UEF, was admitted into the record over Davis' objection that the document had been mailed to an incorrect address. The testimony showed that Davis had received the document in a timely fashion, and that he had not provided the UEF with an alternate address. Exhibits K and L, offered by the UEF, were not admitted as irrelevant.

II. ISSUE

Whether Judy Sander, William Davis, or both are liable for Valley Monument's indebtedness of \$2,292.34 to the Uninsured Employer Fund for the uninsured period of January 1, 1998 through February 13, 2000, pursuant to § 39-71-501, et seq., MCA.

III. FINDINGS OF FACT

1. Judy Sander and William Davis married on March 18, 1995.
2. William Davis had been involved in the tombstone monument business in Illinois with his family for more than 25 years. After Davis lost his Montana employment, Sander encouraged him to consider opening his own monument business. Davis obtained a loan from relatives and purchased equipment and inventory.
3. Sander ran a rental business from her home office. Davis set up a similar office in the home. He obtained orders and produced finished tombstones from an outbuilding located on the home property, which was owned by Sander.
4. Sander performed the bookkeeping for Valley Monument. Davis conducted the majority of business, such as obtaining orders, hiring employees, assigning work, carving tombstones, setting the stones, and working with cemeteries and funeral homes. Sander wrote checks to pay bills.
5. In early 1997, Sander and Davis were having marital problems. Sander obtained a restraining order, so Davis could not run his business. In February 1997, Davis closed the Valley Monument checking account and opened a new account on which Sanders had no signature authority. Davis placed his two minor daughters on the account so they could have access to the business funds in case of an emergency. The account listed Davis as the owner of the account and sole proprietor.
6. By May 1997, Sander and Davis had reconciled. Sander obtained a form from the bank allowing her to have signature authority on the Valley Monument bank account. Davis granted the authority, and Sander once again began paying Valley Monument bills. The account continued listing Davis as the owner of the account, and as a sole proprietor of the business.
7. Sander had little involvement, other than performing minor bookkeeping functions, in Valley Monument. She occasionally rode with Davis to set stones, but knew little about ordering, designing, carving or setting stones. She tried to learn how to sandblast the stones, but could not continue due to sinus problems.
8. By late 1999, Sander and Davis were once again experiencing marital difficulties. They decided to separate and divorce. Rather than allow the business to close, employees encouraged Sander to run the business. She agreed to purchase the business from Davis. Davis began training her in the operations of the business. Davis left Montana in December 1999, and did not return.

9. On January 7 and 10, 2000, Sander and Davis, respectively, signed a settlement agreement, waiver of hearing and consent to entry of decree, dissolving the marriage and distributing property. The decree stated, in part, that Sander would receive Valley Monument, including all business inventory, equipment, accounts, contract rights, good will, trademarks and service marks, and vehicles held in Bill's name or in the name of Valley Monument Services, and including but not limited to the pall press, letters, monuments on display, all monument stocks, all vices, books, designs, equipment, various size letters, sandblaster, trailer with compressor, gray home-made trailer, cement mixer, concrete tools, metal rulers, shovels, all contracts, and all money account for Valley Monument. It stated, in part, that Davis would receive an amount of money payable upon entry of the decree dissolving the marriage. The agreement also stated that the parties assumed sole responsibility for repayment of all debt secured by the property they receive.

Nothing in the agreement specified that Davis was selling his portion of the business to Sander, or that the money he received from the agreement was in return for the Valley Monument business.

10. In April 2000, two Valley Monument employees spoke with Steven LaVoie, an auditor with the UEF, complaining that Valley Monument carried no workers' compensation insurance. On May 2, 2000, LaVoie issued a subpoena, and requested that the sheriff serve it upon the company. The subpoena instructed Judy Sander to meet with LaVoie on May 25, 2000, and produce company documents for the time period of January 1, 1998 through May 2000.

11. Sander and her attorney met with LaVoie and produced what documents she had available for the requested time period. Following the meeting, LaVoie went to Sander's office and copied checks and registers that he believed related to employees of the business. The majority of checks written for the business during the audit period had been signed by Sander. Sander informed LaVoie that Davis had owned and operated the business until February 13, 2000, and that she owned and operated the business beginning February 14, 2000. She showed LaVoie the divorce settlement/agreement.

12. Based upon Sander's information, LaVoie initially determined that Davis was liable for penalties incurred for failing to cover employees with workers' compensation coverage from January 1, 1998 through February 13, 2000. He determined that Sander was liable for penalties incurred for failing to cover employees with workers' compensation coverage from February 14, 2000 through May 2000.

13. LaVoie completed his audit and calculated that Davis owed \$2,292.34 in penalties for failure to provide workers' compensation coverage for employees. He forwarded the audit to the Helena UEF office in September 2000.

14. On September 25, 2000, the UEF mailed Davis, who now resided in Illinois, an Account Receivable Notice informing him of the assessment.

15. On January 25, 2001, the UEF filed a lien against Davis for failure to pay the penalty amount. Davis subsequently contacted Terry Wilson, compliance specialist with the UEF,

informing him that Sander was liable for Valley Monument debts. Wilson asked Davis to send him a copy of the settlement agreement. Davis complied.

16. After receiving a copy of the settlement agreement, Wilson spoke with agency legal staff to determine whether Sander or Davis, or both, was liable for the assessed penalty. After reviewing the canceled checks and check registers from the audit, seeing that Sander had written most of the checks, and reviewing the settlement agreement, legal staff opined that Sander and Davis were partners until February 13, 2000, and that Sander then became a sole proprietor.

17. As a result of counsel's opinion, Wilson released the lien filed against Davis.

18. On February 28, 2001, Wilson sent an Accounts Receivable Notice, assessing a penalty of \$2,292.34 for failure to provide workers' compensation coverage for employees, addressed to William Davis and Judy Sander at the Valley Monument address in Montana. Wilson sent a copy of the assessment to Davis in Illinois.

19. Sander appealed the assessment, contending that in accordance with the divorce agreement, Davis was solely liable for any penalty assessment for uninsured periods prior to February 14, 2000.

20. Neither Sander nor Davis have disputed the amount of penalty, just the liability for payment of the penalty.

IV. DISCUSSION

The purpose of the UEF is to pay benefits to injured workers of uninsured employers. § 39-71-502, MCA. The definition of uninsured employer means an employer who has not properly complied with the provisions of § 39-71-401, MCA. An employer means "each person . . . who has a person in service under an appointment or contract of hire . . .".

§ 39-71-117, MCA.

The UEF contends that Sander and Davis were partners from January 1, 1998 through February 13, 2000, and thus, are jointly and severally liable for the penalties owed by Valley Monument. Davis concurs with the UEF contention. He further argues that even if Sander was not a partner from January 1, 1998 through February 13, 2000, the divorce agreement makes her liable for all debts of Valley Monument, even those incurred prior to the divorce. Sander disagrees with the UEF's position, contending that Davis was a sole proprietor of Valley Monument for the penalty period at issue, and is thus, liable for debts incurred during his sole ownership. She argues that she was never " a person who has a person in service", and thus, cannot be considered an "employer".

A partnership is created when two or more persons associate for the purposes of carrying on a business as co-owners for profit. § 35-10-202, MCA. The following elements are also essential to the creation of a partnership: (1) an intent to associate as partners; (2) a contribution by each partner or something promotive of the enterprise; (3) joint proprietary interest and a right of

mutual control over the subject matter of the enterprise or the property involved; and (4) an agreement to share the profits. *Tondu v. Akerley*, 259 Mont. 194, 855 P.2d 116, 118 (1993). The party claiming partnership bears the burden of proving its existence. *Montana Bank of Red Lodge v. Lightfield*, 237 Mont. 41, 771 P.2d 571 (1989).

The initial test of whether a partnership exists is the intent of the parties. *Bender v. Bender*, 144 Mont. 397 P.2d 957 (1965). In this case, there was no written or oral partnership agreement. There is no evidence that Sander and Davis held themselves out as partners to the public, nor is there evidence showing that Davis and Sander split the profits of the business. Sander had no technical knowledge of the monument business. She simply paid the bills of the business. There is no evidence that Sander had a right to mutual control over the subject matter of the enterprise, monument stones, and thus had no proprietary interest in the business. The bank account listed Davis as a sole proprietor. A partnership name does not appear on any document. No accounts or correspondence identified them as partners. The UEF submitted no Valley Monument contracts signed by Sander, bank loans for Valley Monument with Sander and Davis listed as partners, tax records showing partnership filing status, or any other evidence that Davis and Sander were partners.

In *Harker v. Gail A. and Donald C. Peterson, d/b/a Boars Breath*, Cause No. DV 01-21, Montana Twentieth Judicial District Court, Sanders County, August 20, 2001, Judge Christopher upheld the Board of Personnel Appeals decision finding Gail and Donald Peterson to have been partners. In that case, Gail and Donald registered the business with the state and federal governments as a partnership and obtained business loans as a partnership. Nothing in the current record supports a similar finding. Since the UEF is the party that claimed partnership status, it has the burden to prove partnership status. It has failed in its efforts. Sander was not a partner in the business.

Davis argues that the divorce agreement proves that he and Sander were partners, by assigning Sander his half of the business for a sum of money. His argument is without merit. The agreement does not state that the money Davis was to receive was in payment for his portion of Valley Monument, nor does the agreement specify the past entity relationship between Sander and Davis. Davis also argues that Sander assumed the burden of all Valley Monument debts through the divorce agreement. As the sole proprietor of Valley Monument from January 1, 1998 through February 13, 2000, Davis was liable for the debts of the business. What impact that liability has on the divorce agreement is outside the scope of the Department's jurisdiction.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction in this matter pursuant to §§ 39-71-506 and 39-71-2401(2), MCA.
2. The UEF has the burden of proving that Sander and Davis were partners. It failed to meet that burden.
3. William Davis was the sole proprietor of Valley Monument from January 1, 1998 through February 13, 2000. He is liable for Valley Monument's indebtedness to the Uninsured Employer

Fund for the uninsured period of January 1, 1998 through February 13, 2000 pursuant to § 39-51-501 et seq., MCA. What effect the liability has on the divorce agreement/settlement is outside the scope of this decision.

VI. ORDER

William Davis d/b/a Valley Monument is hereby ORDERED to remit the amount owed to the Uninsured Employers' Fund as penalty for failure to cover workers with workers' compensation insurance from January 1, 1998 through February 13, 2000.

DATED this 24th day of September, 2001.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ BERNADINE WARREN
Bernadine Warren
Hearing Officer

Notice: This Order is signed by the Hearing Officer of the Department of Labor and Industry under authority delegated by the Commissioner. Any party in interest may appeal this Order to the Workers' Compensation Court within thirty (30) days after the date of mailing of this Order as provided in § 39-72-612(2), MCA and ARM 24.5.350. The Court's address is:

Workers Compensation Court
P.O. Box 537
Helena, MT 59624-0537
(406) 444-7794