

**SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota**

HARVEY S. JENNESSE,

HF No. 98, 2010/11

Claimant,

**DECISION AND ORDER ON
MOTION TO DISMISS**

v.

**TIPTON & SONS CONSTRUCTION,
INC.,**

Employer,

and

**AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,**

Insurer.

This matter comes before the Department of Labor on a claim for workers' compensation benefits pursuant to SDCL 62-7-12 and ARSD Chapter 47:03:01. Claimant, Harvey S. Jennesse, (Claimant), is represented by Donald A. Porter of Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter, LLP. The Employer, Tipton & Sons Construction, Inc. (Employer) and the Insurer, American Family Mutual Insurance Company (Insurer) are represented by Jennifer L. Wollman of Woods, Fuller, Shultz, & Smith, P.C. Employer/Insurer has made a Motion to Dismiss pursuant to SDCL §15-6-12(b)(5) for the reason that the named Insurer is not a proper party to the action. Claimant has submitted a Response to the Motion. Employer/Insurer submitted a Reply to Claimant's Response. The Department having been fully advised in the matter does hereby Grant the Motion to Dismiss.

FACTS:

1. Claimant was working for a subcontractor, Kim Lettau Construction, on January 14, 2008.
2. Claimant alleges to have sustained a work-related injury on January 14, 2008.

3. On January 14, 2008, Kim Lettau Construction was subcontracting for Tipton & Sons Construction, Inc., the general contractor.
4. Kim Lettau Construction was covered with general liability insurance on January 14, 2008. They did not own any workers' compensation insurance on January 14, 2008.
5. On July 12, 2007, Tipton & Sons Construction Inc. cancelled its workers' compensation insurance with American Family Mutual Insurance Company.
6. At the time of Claimant's alleged injury, Tipton & Sons Construction Inc. was not insured for workers' compensation insurance by American Family Mutual Insurance Company.
7. On January 14, 2008, neither Kim Lettau Construction Inc. nor Tipton & Sons Construction owned workers' compensation insurance.

ANALYSIS:

Employer/Insurer makes the argument that as American Family did not cover Tipton & Sons at the time of injury, that American Family is not a proper party to the action, and that this case should be dismissed or in the alternative that Summary Judgment should be granted to Employer/Insurer. Claimant responds that because neither Tipton & Sons nor American Family responded to correspondence sent by Claimant in May 2009, that the parties should be estopped from arguing lack of coverage.

As this is an administrative proceeding, SDCL §1-26-18 applies instead of SDCL §15-6-12(b)(5), but the Motions are similar in nature and are treated as such. SDCL §1-26-18 reads in pertinent part: [E]ach agency, upon the motion of any party, may dispose of any defense or claim: (1) If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law.

Furthermore, jurisdiction for the Department in cases such as these is found at SDCL §§62-3-11 and 62-5-7, which read:

62-3-11. Any employee, who is employed by an employer who is deemed not to operate under this title in accordance with § 62-5-7, or the dependents of such deceased employee may elect to proceed against the employer in any action at law to recover damages for personal injury or death; or may elect to proceed against the employer in circuit court under the provisions of this title, as if the employer had elected to operate thereunder by complying with §§ 62-5-1 to 62-5-5, inclusive. The measure of benefits shall be that provided by § 62-4-1 plus twice the amount of other compensation allowable under this title. However, no employee nor any dependent of the employee may recover from both actions.

62-5-7. Any employer other than the state, a municipality, or other political subdivision of this state, who has failed to comply with the provisions of §§ 62-5-1

to 62-5-5, inclusive, shall be deemed to have elected not to operate under the provisions of this title.

The evidence shows that Tipton & Sons Construction, by cancelling their workers' compensation insurance with American Family, elected not to operate under the provisions of SDCL Title 62. The Department does not have original jurisdiction over entities that do not have coverage under Title 62. The law states the manner in which injured employees may recover from an employer that is not insured with workers' compensation insurance.

ORDER:

The Department does not have jurisdiction in this matter. This case is dismissed.

The Parties may consider this to be the Final Order of the Department.

Dated this 6th day of September, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Catherine Duenwald
Administrative Law Judge