STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Marcel Lehouillier	)	State File No. L-05188
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Cincinnati Insurance Co.,	)	
Insurer	)	For: Steve Janson
	)	Commissioner
v.	)	
	)	Opinion No. 18-99WC
Tamarack Construction,	)	
Employer	)	

RULING ON TAMARACK CONSTRUCTION'S MOTION TO DISMISS

Tamarack Construction (Tamarack), the defendant-employer in this action, by and through its attorney, Robert P. Davison, Jr., Esq., moves to dismiss the case against it. In response, Cincinnati Insurance Co. (Cincinnati), the defendant-insurer, by and through its attorney, Andrew C. Boxer, Esq., requests that Tamarack's motion to dismiss be denied. The claimant has taken no formal position on the pending motion.

This case was placed on the Department's hearing docket at the request of Cincinnati who, in July 1998, filed a Form 6 Notice and Application for Hearing against Tamarack on the issues of the legality of claimant's employment, the applicability of the Workers' Compensation Act to this claim, and whether Tamarack must reimburse Cincinnati for benefits that have or will be paid to Marcel Lehouillier. Cincinnati takes the position that its workers' compensation contract with Tamarack did not provide coverage for injuries suffered by Mr. Lehouillier who was a minor at the time of the injury.

The two issues presented for decision on this motion are: 1) whether this Department has jurisdiction to order that the employer (Tamarack) reimburse the carrier (Cincinnati), and 2) whether 21 V.S.A. § 693 bars Cincinnati from recovering from Tamarack any amounts paid to or for the benefit of Marcel Lehouillier. Because the jurisdictional question is dispositive, the applicability of § 693 need not be addressed.

Cincinnati alleges that Tamarack stated on its application for insurance that it had no employees under the age of 16 at times relevant to this action. Tamarack argues that this Department, with jurisdiction limited to authority granted it by Chapter 9 in Title 21, has no authority to construe the contract between Cincinnati and Tamarack and no authority to determine the liability between Cincinnati and Tamarack based on an alleged misstatement on an insurance application. In support of its motion, Tamarack contends that *DeGray v. Miller Bros. Construction Co., Inc*., 106 Vt. 259 (1934), stands for the proposition that there is no provision in the Vermont Act that imposes liability upon the employer to indemnify the insurance carrier for compensation it paid. If there is such a liability on the part of the insurance carrier,

Tamarack argues, it must be found in the terms of the policy issued to the employer. In *DeGray*, the court explained that on the question of indemnification, the parties "must seek relief in some tribunal other than that of the Commissioner." *Id*. Almost three decades later, in *Morrisseau v. Legac,* 123 Vt. 70 (1962), the Court cited *DeGray* with approval, noting that while the commissioner "should pass upon the primary liability of the parties defendant, he is not required or authorized under the act to pass upon the ultimate rights or liability as between carriers. For such relief or aid some tribunal other than that of the Commissioner of Industrial Relations must be resorted to." *Id.* at 78.

In its strong opposition to dismissal, Cincinnati begins with the premise that the Commissioner has jurisdiction over questions raised by the Workers' Compensation Act, a statute that includes several provisions relating to insurance, § 693 through § 697, and giving this Department authority to issue administrative penalties, § 702 et. seq. Cincinnati then asks the Department to extrapolate from those sections the Department's jurisdiction over the insurance contract dispute between an employer and its insurance carrier presented by this case. In support of its contention, Cincinnati notes that because a final determination of Mr. Lehouillier's rights has not yet been made, the insurance question becomes ancillary to the question of the claimant's rights. It then cites to *Larson's Workers' Compensation Law* § 92.41 and cases from several other jurisdictions which state that a Department of Labor has jurisdiction over insurance questions when the question is ancillary to an employee's rights.

Notably absent from Cincinnati's scholarly list of citations in support of its position is one from this State. In fact, the Vermont Supreme Court in both *DeGray* and *Morrisseau*, supra, expressly rejected the validity of the action Cincinnati seeks in this Department. As Professor Larson noted in his treatise at § 92.42, the Vermont Supreme Court made it abundantly clear that a claimant must not be used as a "litigation football" between disputing defendants. See, *Morrisseau,* 123 Vt. at 70. Had the *Morrisseau* Court distinguished between insurance questions ancillary to a claimant's rights and other insurance questions, it would not have vacated the portion of the Department award that determined respective liability of disputing defendants.

The Vermont legislature granted this Department limited authority to implement a statute that provides to injured employees a remedy which is both expeditious and independent of proof of fault, and for employers, a liability which is limited and determinate. Expanding jurisdiction to include the contract claim between Tamarack and Cincinnati would exceed that statutory authority, contravene the purpose of the Act, and strain the limited resources of this Department.

Accordingly, Tamarack's Motion to Dismiss is GRANTED.

Dated at Montpelier, Vermont, this 15th day of April 1999.

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Steve Janson

Commissioner