STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Marci J. LaBrie	)	State File No. H-9075
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
	)	For: R. Tasha Wallis
LBJ's Grocery and Peerless Insurance Co.	)	Commissioner
	)	
	)	Opinion No. 29-02WC

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Lon McClintock, Esq. for the claimant
Richard Windish, Esq. for the defendant, Peerless Insurance Company

Claimant Marci LaBrie moves for summary judgment in her favor, seeking a judgment as a matter of law that whatever agreement the parties entered into is not enforceable because it was not approved by the Commissioner; and that Peerless is not entitled to a lien against a recovery from her personally purchased insurance policy under 21 V.S.A. § 624(e). Defendant Peerless opposes Claimant's motion, and further moves for a judgment as a matter of law in its favor that the agreement in question does not require Commissioner approval; and that the Department of Labor and Industry lacks jurisdiction to interpret the terms of the agreement and to determine whether a valid contract has been formed.

Procedural History

Peerless Insurance Company, Defendant in this case, filed a complaint against Claimant Marci LaBrie in the Bennington Superior Court on counts of Breach of Contract, Restitution, Promissory Estoppel, and Waiver. Judge Richard W. Norton granted Marci LaBrie's motion to dismiss pursuant to V.R.C.P. 12(b)(1), lack of subject matter jurisdiction. *Peerless v. LaBrie*, Bennington Superior Court, Dck. No. 213-6-01, Bncv, (unpublished opinion) (Oct. 26, 2001). Peerless filed a Form 6, Notice and Application for Hearing, received by the Department on November 15, 2001, on the issue of whether the agreement between the parties required Departmental approval.

ISSUES:

1. Does 21 V.S.A. § 662(a) require commissioner approval of agreements concerning statutory liens for reimbursement under 21 V.S.A. § 624(e) in order for an agreement to be enforceable as a matter of law?

2. Does the Department of Labor and Industry have original and exclusive jurisdiction in interpreting a contract relating to insurance liens under 21 V.S.A. § 624(e)?

3. Does the 1999 amendment to § 624(e) protecting a payment from a personally purchased insurance policy from subrogation by a workers' compensation insurance carrier, except in the case of double recovery, apply retroactively?

FINDINGS OF FACT:

For purposes of this motion the undisputed material facts stipulated by the parties are as follows:

1. Claimant Marci LaBrie was injured in a motor vehicle accident that occurred on or about June 7, 1994, while she was acting in the scope of her employment for LBJ's Grocery. The other driver ("tortfeasor") was entirely at fault.

2. At the time of the accident, Peerless Insurance Company insured LBJ's Grocery for workers' compensation purposes. Marci LaBrie filed a workers' compensation claim against Peerless, which was accepted.

3. The tortfeasor's vehicle was insured by The Concord Group, and the policy carried liability limits of $20,000.

4. The vehicle driven by Marci LaBrie was insured by CIGNA, and the policy provided for uninsured/underinsured motorist coverage in the amount of $20,000.

5. Marci LaBrie has a policy covering her own vehicle through Allstate, which has uninsured/underinsured policy limits of $100,000.

6. The total amount of coverage available under the three auto insurance policies as a result of the June 7, 1994 accident is less than the amount paid by Peerless in workers' compensation benefits to and on behalf of Marci LaBrie.

7. Ms. LaBrie and Peerless reached an agreement to compromise and share the proceeds from the liability and underinsured motorist insurance benefits from The Concord Group, CIGNA and Allstate, on a "1/3, 1/3, 1/3" basis (LaBrie, LaBrie's attorney, and Peerless). The terms of the agreement are disputed.[1]

[1] Although Peerless states in its brief that there was a written agreement between the parties, it did not include a copy of an agreement with its brief or motion. The Department understands from conversations with the attorneys in this action that there was a phone conversation between the Claimant's attorney and a representative of Peerless, followed by a series of three letters regarding the phone conversation. The Department has not received copies of the letters.

8. The parties did not seek or obtain approval from the Commissioner of the Vermont Department of Labor and Industry regarding their "1/3, 1/3, 1/3" agreement.

9. Ms. LaBrie separately settled with The Concord Group and CIGNA for the limits of each policy ($20,000 each).

10. Ms. LaBrie paid Peerless one-third of the amounts recovered from The Concord Group policy, $6,660.00.

11. Some months later, Marci LaBrie paid Peerless one-third of the amounts recovered from the CIGNA policy, $6,660.00.

12. After Peerless received payment of its share of the CIGNA policy, Peerless informed Ms. LaBrie that it intended to take a "holiday" from the payment of future workers' compensation benefits pursuant to 21 V.S.A. § 624(e) until Ms. LaBrie has exhausted the funds that she has received or will receive through the Concord Group, CIGNA and Allstate policies.[2]

13. Ms. LaBrie disagrees with Peerless's claim of right to take a "holiday" from payments of workers' compensation benefits.

14. Ms. LaBrie settled her claim against Allstate for a total of $80,000, which is being held in escrow pending a decision in this matter.

DISCUSSION AND CONCLUSIONS OF LAW:

ISSUE 1: Does 21 V.S.A. § 662(a) require commissioner approval of agreements concerning statutory liens for reimbursement under § 624(e) in order for an agreement to be enforceable as a matter of law?

1. Pursuant to V.R.C.P. 56(c), summary judgment is appropriate when the moving party demonstrates that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. *Toy, Inc. v. F. M. Burlington Co*., 155 Vt. 44, 48 (1990). Allegations to the contrary must be supported by specific facts sufficient to create a genuine issue of material fact. *Samplid Enterprise, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).

[2] The Department takes notice of the fact that it did not receive a Form 27 (Notice of Intention to Discontinue Payments) from Peerless at the time it notified Ms. LaBrie of its intention to take its so-called "holiday." Form 27 requires supporting evidence to be submitted to the Department explaining the reason for a discontinuation of payments. If it is unquestioned that a claimant is entitled to benefits under the Workers' Compensation Act, "the burden shifts to the employer to establish the propriety of either ceasing or denying further compensation." *Ian Smith v. Whetstone Log Homes*, Opinion No. 70-96WC (Nov. 25, 1996) (citing *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974).

2. Commissioner approval is required for "an agreement in regard to compensation payable under the provisions of this chapter . . . However, a compromise agreement may be approved by the commissioner when he is clearly of the opinion that the best interests of [the claimant] will be served thereby." 21 V.S.A. § 662(a).

3. A lien under 21 V.S.A. § 624(e) is a statutory mechanism for an employer/insurance carrier to recoup from responsible third parties the amount of benefits paid or payable to a claimant so as to prevent double recovery. See *Traveler's v. Liberty Mutual Insurance Co.*, 164 Vt. 368, 373 (1995).

4. Peerless argues that Commissioner approval of agreements under § 662 is only applicable when agreements include a settlement or compromise of the workers' compensation claim itself. Peerless argues it is not questioning the amount of benefits due by the employer (through its carrier) to the Claimant, and maintains that the agreement does not affect the amount of compensation due to her under her workers' compensation claim. Rather, Peerless argues, the agreement concerns only Peerless's right to reimbursement of benefits already paid and future credit against third party recoveries under 21 V.S.A. § 624(e).

5. The Claimant argues that the agreement deals both with third-party recovery liens and future worker compensation benefits, but argues for the purposes of this motion that any agreement the parties entered into is not enforceable if it was not approved by the Commissioner of the Department of Labor and Industry under 21 V.S.A. § 662(a).

6. If a disputed term in the parties' agreement is material to the question of law, summary judgment is not appropriate. V.R.C.P. 56(c). Here, the terms are disputed, so the Claimant must be asking the Commissioner to rule that all agreements between a claimant and an employer or insurance carrier relating to statutory liens against third party recoveries, whether or not the agreement affects benefits paid under the claim, are unenforceable as a matter of law. The Department is not able to make such a blanket pronouncement. Whether or not the agreement between the parties requires approval by the Commissioner depends on the terms, which are material facts in dispute.

7. Claimant asserts that this department's decision in *Walker v. Johnson Fuel Service* is dispositive and stands for the proposition that all agreements between parties to a workers' compensation claim require approval by the commissioner. However, in *Walker* the Department had the benefit of making a decision based on an express, written agreement, which included a bar to a future claim for workers' compensation benefits as well as a compromise of the carrier's lien. The relevant portion of the express agreement between the parties in *Walker* is as follows:

> Employer's worker compensation insurance carrier shall pay claimant's medical expenses incurred for the treatment of claimant's work related injuries incurred prior to the date claimant's permanent partial disability award is finally determined *and not thereafter*.

8. *Walker v. Johnson Fuel Services*, Opinion No. 07D-99WC, Findings of Fact, 6 (Feb. 16, 1999) (emphasis added).

9. In *Walker*, the inclusion of the provision barring payment of future medical expenses, regardless of any amount recovered from a third party claim, was pivotal to the decision that the agreement was invalid under § 662(a). See id. Conclusions of Law, 4-12. "[W]ithout receiving Commissioner approval for a settlement agreement pertaining to a claimant's workers' compensation benefits, the agreement is ineffective and unenforceable within the confines of the workers' compensation system." Id. at 10. The opinion also expressed that the "Stipulation for Payment of Carrier's lien" was invalid "as applied to the present factual scenario." Id. at 11. The opinion did not go so far as to pronounce that any and all stipulations for payments of carrier's liens would necessarily be invalid.

10. Therefore, based on the differences between the facts in *Walker* and the question posed by Claimant's motion—whether any and all agreements concerning carrier's statutory liens require Commissioner approval—*Walker* is not dispositive, as it did not reach the same question. For all the foregoing reasons, the Claimant's motion on this issue is denied.

11. Defendant's motion that the Department find, as a matter of law, that the agreement in question does not require Commissioner approval is also denied. Again, because the parties have stipulated that the terms of the agreement are in dispute, and no written agreement has been submitted for the Department to interpret the terms, any decision regarding the terms of the agreement would need to be made after a hearing to determine the facts or a stipulation of the terms by the parties. This issue cannot be determined in this case on a motion for summary judgment.

12. **ISSUE 2:** Does the Department of Labor and Industry have exclusive, original jurisdiction over interpreting a contract relating to insurance liens?

13. Peerless argues that the Department does not have jurisdiction to determine whether the agreement between the parties is a contract or to determine the terms of a contract. Peerless maintains that these questions must be resolved by the Superior Court. A look at the procedural history in this case is a starting point. The Superior Court addressed the question of the Commissioner's jurisdiction in this case when it granted Marci Labrie's motion to dismiss Peerless's claim for lack of subject matter jurisdiction.

14. Peerless asserts that "[t]hese issues were raised in the preceding action in Superior Court, which was dismissed without prejudice by Judge Norton, with an instruction to the parties to bring the issues concerning Department approval and statutory retroactivity to this forum." Defendant's Supplemental Memorandum of Law in Support of Motion for Summary Judgment and in Opposition to Claimant's Cross-Motion, at 2. Contrary to what Peerless implies in this statement, Judge Norton's order did not limit the issues to be decided by the Commissioner of Labor and Industry. Rather, Judge Norton's order reads in pertinent part as follows:

> 21 V.S.A. § 606 requires that '[q]uestions arising under the provisions of this chapter, if not settled by agreement of the parties interested therein with the approval of the commissioner, shall be determined, except as otherwise provided, by the commissioner.' Since the questions raised by the parties concern the proper interpretation of 21 V.S.A. § 624 and § 662 and the policies behind their implementation, 21 V.S.A. § 606 mandates that this matter be settled under the expertise of the Commissioner of Labor and Industry . . . . Finally, the issues concerning estoppel, waiver, and equity all depend on the outcome of the contractual dispute. These issues are directly related to contractual issue (sic) and should similarly be determined by the Commissioner of Labor and Industry. *Peerless v. LaBrie*, Bennington Superior Court, Dck. No. 213-6-01, Bncv, at 4-5 (Oct. 26, 2001) (citing *Demag v. American Ins. Co.*, 146 Vt. 608, 610 (1986)).

15. The Department agrees with Judge Norton's interpretation of 21 V.S.A. § 606 as applied to this case. The resolution of this dispute requires interpreting the terms of the agreement, including whether there was a compromise involving the continuation of payment of benefits to LaBrie and/or if there was a compromise involving a waiver by the insurance carrier of its entire lien against third party recovery or only a portion of its lien (as against only those benefits paid as of the date of the recovery). These are questions arising under the provisions of the Workers' Compensation Act, specifically 21 V.S.A. § 624 and § 662.

16. Decisions by the Vermont Supreme Court also support the Department's jurisdiction in this case. An examination of the cases cited by Peerless in support of its position that the department has no jurisdiction to determine any contract dispute fail to include any analysis of how those cases are similar to this case, except that the cases involved contracts. In fact, they are easily distinguished.

17. Peerless correctly states the longstanding rule that the "authority of the commissioner is limited to such powers as are conferred upon him by express legislative grant, or such as arise therefrom by implication as incidental and necessary to the full exercise of the powers granted." *DeGray v. Miller Brothers Construction Co.,* 106 Vt. 259, 268, 179 A. 556, 559 (1934). The following examination of *DeGray* illustrates how the Supreme Court applied this rule.

18. *DeGray* involved a Connecticut resident killed in the course of his employment with a Connecticut company while on a job location in Vermont. The decedent's widow filed for workers' compensation in Connecticut under the Connecticut Workers' Compensation Act and the employer paid benefits. Id. at 557-58. The employer had two workers' compensation insurance carriers, one in Vermont covering its Vermont operations, and one in Connecticut covering its Connecticut and New York operations. The employer then sought indemnification in the Connecticut courts from its two workers compensation insurance carriers for benefits paid to the claimant. The Supreme Court of Errors of Connecticut held that the Connecticut insurer was not liable because the employee worked outside the coverage area, and the Vermont insurer's liability could only be determined under the Vermont Workers' Compensation Act and not by a commissioner in Connecticut. Id. at 558. The claimant then brought an action before the Vermont Commissioner of Industries for an award "for the benefit of the employer against the insurer . . . to reimburse the employer for funds expended in compliance with an order of the compensation commissioner of Connecticut." Id. at 558. The Supreme Court of Vermont held that the Commissioner of Industries in Vermont had jurisdiction to interpret provisions of the Vermont Act to determine (1) that the claimant would have been eligible for an award of $3,500 under the Vermont Act had she originally applied, and (2) that the claimant was estopped from receiving an award since she had already obtained one in Connecticut. Id. at 563-64. However, noting that there is "no provision in the Vermont act that imposes liability upon the insurance carrier to indemnify the employer for compensation paid by him," and that such liability could only be determined from the terms of the policy, the court further held that the Commissioner exceeded jurisdiction by ordering the insurance carrier to indemnify the employer for compensation it paid under the Connecticut Act to the extent of what would have been provided under the Vermont law if the claimant had filed in Vermont instead of Connecticut. Id. at 564.

19. It is not difficult to see that a dispute between an employer and its insurance carrier over whether an insurance policy requires indemnification, where the terms of the policy do not implicate terms of the Vermont Workers' Compensation Act, is very different from a case between an employee and an insurance carrier where a dispute over an alleged contract necessarily depends on the interpretation of provisions in the Vermont Workers' Compensation Act.

20. Peerless also quotes *Morrisseau v. Legac,* 123 Vt. 70, 78, 181 A.2d 53 (1962) ("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 Industries must be resorted to."). However, an examination of the facts of *Morrisseau* show that this language has little application to the issue in this case.

21. In *Morrisseau*, a worker was killed while working at a construction site, and his widow filed a workers' compensation claim. The worker was paid by a subcontractor, who in turn was reimbursed for payroll expenses by the contractor. The Commissioner's order instructed that the claimant be paid by the subcontractor's workers' compensation insurance carrier, and "in the case of its default," the subcontractor, and "in the case of its default," the contractor's workers' compensation insurance carrier, and "in the case of its default," the contractor. Id. at 72, 55. The Court determined that the Commissioner erred and exceeded jurisdiction by not entering a judgment against all four defendants "unconditionally," noting "an examination of the compensation law fails to reveal any indication that the liability of any party, if once found to exist, is secondary to any other party's liability." Id. at 78, 59. The court reasoned that the Claimant should be able to collect against any one of the defendants, so as to avoid undue burden, litigation expense, or delay in collection. The defendants would then be free to determine their respective rights or liabilities as between themselves, but any dispute between those defendants was beyond the jurisdiction of the Department of Labor and Industries. Id.

22. Peerless also cites this department's opinion in *Lehouillier v. Cincinnati Insurance Co.*, Opinion No. 18-99WC (Apr. 15, 1999), where the Department decided it did not have jurisdiction over a contract claim. Again, an examination of the facts of Lehouillier show that the dispute did not necessitate any interpretation of the provisions of the Workers' Compensation Act.

23. Although *Lehouiller* was a case brought in the name of the Claimant, it was essentially a dispute between the employer and its insurance carrier. The insurance carrier paid benefits to the Claimant, and then wanted to be reimbursed by the employer for benefits it paid or would pay in the future, claiming that the employer breached its contract with the carrier by employing a minor. There was no question raised in this case whether the insurance company was liable to the Claimant, as provided under 21 V.S.A. § 693. However, the carrier wanted the Department to find it had jurisdiction over the contract dispute between the employer and its insurance carrier from the mere existence of provisions in the Workers' Compensation Act related to insurance. The Department declined to extend jurisdiction, but it would be a stretch to take this decision to mean that the Department would never have jurisdiction over a contract dispute arising out of a workers' compensation claim. In *Lehouillier*, the resolution of the dispute between the employer and its insurance carrier did not require interpretation of any provision of the Workers' Compensation Act.

24. Peerless fails to cite any case law where the courts have determined that the Department lacks jurisdiction in a contract dispute between a claimant and an employer/insurance carrier, where the terms of the agreement and their interpretation are based in the Workers' Compensation Act. The following excerpt from *DeGray* illustrates the balance sought by the Legislature:

> We think that the provision of the act that, if an employer and an injured employee do not agree in regard to compensation payable under its provisions, the commissioner shall, on application of either party, hold a hearing, and make an award setting forth his findings and the law applicable thereto ...that questions arising under the provisions of the act, if not settled by the agreement of the parties, shall, except as otherwise provided, be determined by the commissioner . . . and that either party may appeal from an award or decision of the commissioner to the county court, where a trial by jury may be had or to the Supreme Court on questions of law. . . show clearly that it was the intent of the Legislature that the Commissioner of Industries shall have original jurisdiction to hear and determine all controverted questions of fact and law arising in the administration of the act, except as otherwise provided. It appears from the record that some of the questions before us involve the interpretation of certain provision of the act. It not appearing that any other method is provided for hearing and determining the questions raised, we hold that the commissioner has jurisdiction to entertain this proceeding.

Id. at 559.

25. This case involves questions arising under the provisions of the Act and the Commissioner has jurisdiction under 21 V.S.A § 606. Peerless's motion that the Department find it lacks jurisdiction as a matter of law to interpret the terms of the agreement and to determine whether a valid contract has been formed is denied.

ISSUE 3: Does the 1999 amendment to 21 V.S.A. § 624(e) protecting a payment from a personally purchased insurance policy from subrogation by a workers' compensation insurance carrier, except in the case of double recovery, apply retroactively?

26. The analysis as to whether, in this particular case, the amendment to § 624 could have retroactive application will necessarily depend upon whether or not there is a contract between the parties. If a contract exists between the parties, the question will involve not only statutory interpretation, but also Constitutional law. Even if the Vermont Legislature intended the statute to have retroactive effect, the U.S. Constitution prohibits states from passing laws that impair the obligations of contracts. U.S. Const. art. I, § 10. "The so-called 'Contract Clause' is aimed at limiting the government's reach in interfering with the obligations of pre-existing contracts." In re *Palme*r, 171 Vt. 464, 473, 769 A.2d 623, 629 (2000). See also *Burlington Firefighters Association v. City of Burlington*, 149 Vt. 293, 298, 543 A.2d 686, 690 (1988) (noting that an impairment of a contract will violate the clause unless the impairment is reasonable and necessary to achieve an important public purpose, citing United States *Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1997)).

27. Claimant LaBrie's argument on this issue seems to presuppose that the Department will answer this question after determining that the parties' agreement is unenforceable as a matter of law. As her motion on that issue has been denied, the Department believes it necessary to determine the facts in this case before endeavoring to expend Department resources in a full examination of the legislative history of the amendment to answer a question that could well be mooted if it is found that a contract exists between the parties. Thus, the Department takes no position at this time on whether the 1999 amendment to § 624(e) was intended by the Legislature to have retroactive effect, as the question is premature.

28. Given the factual disputes in this case, Claimant's motion that the Department find as a matter of law that Peerless is not entitled to a lien against a recovery from her personally purchased insurance policy under 21 V.S.A. § 624(e) is denied.

ORDER:

The Motions for Summary Judgment are DENIED.

Dated at Montpelier, Vermont this 10th day of July 2002.

_____

R.Tasha Wallis
Commissioner