

STATE OF MICHIGAN
COURT OF APPEALS

BRENDA C. CHASE, Personal Representative of
the Estate of JOHN L. CHASE,

Plaintiff-Appellee,

v

TERRA NOVA INDUSTRIES, W.E. O'NEIL
CONSTRUCTION COMPANY, INC.,
ARGONAUT INSURANCE COMPANY,
AMERISURE INSURANCE COMPANY,
TAUBMAN COMPANY, INC.,
TRANSCONTINENTAL INSURANCE
COMPANY, M.D. PLUMBING & HEATING
COMPANY, ST. PAUL GUARDIAN
INSURANCE COMPANY, and SARDONI
SKANSKA CONSTRUCTION COMPANY, a/k/a
SORDONI SKANSKA CONSTRUCTION
COMPANY,

Defendants-Appellees,

and

STATE FARM FIRE & CASUALTY
COMPANY,

Defendant-Appellant.

BRENDA C. CHASE, Personal Representative of
the Estate of JOHN L. CHASE,

Plaintiff-Appellee,

v

TERRA NOVA INDUSTRIES, STATE FARM
FIRE & CASUALTY COMPANY, AMERISURE
INSURANCE COMPANY, TAUBMAN

UNPUBLISHED
December 11, 2012

No. 295138
WCAC
LC Nos. 00-000148
04-000116
04-000218

No. 295251
WCAC
LC Nos. 00-000148
04-000116
04-000218

COMPANY, INC., TRANSCONTINENTAL
INSURANCE COMPANY, M.D. PLUMBING &
HEATING COMPANY, ST. PAUL GUARDIAN
INSURANCE COMPANY, and SARDONI
SKANSKA CONSTRUCTION COMPANY, a/k/a
SORDONI SKANSKA CONSTRUCTION
COMPANY,

Defendants-Appellees,

and

W.E. O'NEIL CONSTRUCTION COMPANY,
INC., and ARGONAUT INSURANCE
COMPANY,

Defendants-Appellants,

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Defendant State Farm Fire & Casualty Company ("State Farm") appeals by leave granted in Docket No. 295138, and defendants W.E. O'Neil Construction Company, Inc. ("O'Neil"), and its insurance carrier, Argonaut Insurance Company ("Argonaut"), appeal by leave granted in Docket No. 295251 from an order of the Worker's Compensation Appellate Commission (WCAC) in this dispute among insurance companies concerning which insurance carrier is responsible for the payment of benefits arising from an August 20, 1998, work-related foot injury to John Chase¹ during the construction of the Great Lakes Crossing Mall. We affirm the WCAC's determination that State Farm is responsible for payment of benefits, but remand for an initial determination of O'Neil and Argonaut's entitlement to reimbursement and interest under MCL 418.852(2).

This case has a lengthy procedural history, which includes a prior appeal to this Court that resulted in this Court's decision in *Chase v Terra Nova Indus*, 272 Mich App 695; 728 NW2d 895 (2006). The present appeals address issues that have arisen since this Court decided *Chase*, which contains a summary of the underlying facts and procedural history.

In reviewing a decision of the WCAC, this Court looks first to the WCAC's decision and not the decision of the magistrate. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709, 732; 614 NW2d 607 (2000). Questions of law involved with any final order of the WCAC are

¹ John Chase died in 2007.

reviewed de novo. *Id.* at 697 n 3, 732. The WCAC’s factual decisions are treated as conclusive “[a]s long as there exists in the record any evidence supporting the WCAC’s decision, and as long as the WCAC did not misapprehend its administrative appellate role (e.g., engage in de novo review; apply the wrong rule of law).” *Id.* at 703-704.

I. APPLICABILITY OF ST. PAUL WRAP-UP POLICY

State Farm argues in Docket No. 295138, and O’Neil and Argonaut argue in Docket No. 295251, that the WCAC erred in determining that a wrap-up policy issued by St. Paul Guardian Insurance Company (“St. Paul”) did not provide coverage for Chase’s work-related injury. We disagree.

In this Court’s prior decision in *Chase*, this Court vacated the WCAC’s decision holding that St. Paul was responsible for the payment of benefits under its wrap-up policy and remanded the case to the WCAC for further proceedings concerning the applicability of the wrap-up policy. *Chase*, 272 Mich App at 697, 704-705. One of the issues to be considered on remand concerned the absence of Exhibit A agreements. This Court stated, “Paragraph 6(A) of the deputy director’s authorization order stated that St. Paul’s policy was to cover all employers working at the designated site, ‘except where an agreement specified in paragraph 5 above has not been executed.’” *Id.* at 704. Paragraph 5 of the deputy director’s authorization order required that “[e]very general insurer whose insured employer is to become engaged upon work on the site designated above . . . shall enter into an agreement with the specific risk insurer in the form attached hereto as Exhibit A[.]” *Id.* at 704. This Court then stated:

Therefore, appellant St. Paul was required to cover all employers working at the site, except those employers that had not executed an Exhibit A agreement. In this case, it appears that neither plaintiff’s employer nor the contractor who hired plaintiff’s employer executed an Exhibit A agreement with St. Paul. Without an explanation from the WCAC regarding why such an agreement was not required in this case, the WCAC’s decision was incomplete. On remand, the WCAC shall determine whether the requisite Exhibit A agreements were executed, and, if that query is answered in the negative, the WCAC shall determine whether that failure precludes appellants’ liability. [*Id.* at 704-705.]

On remand, the magistrate found, and the WCAC agreed, that the requisite agreements were not executed. That failure was one of the reasons that the WCAC determined that St. Paul was not liable under the wrap-up policy. In the present appeal, State Farm advocates a holding that the absence of the Exhibit A agreements has no bearing on St. Paul’s liability. Such a holding is incompatible with the unambiguous language in the authorization order, as well as this Court’s prior decision. The WCAC’s decision that the wrap-up policy did not provide coverage is consistent with this Court’s prior decision. The absence of executed Exhibit A agreements is sufficient by itself to affirm the WCAC’s decision in this regard.

II. EQUITABLE ESTOPPEL

State Farm next argues that the WCAC exceeded its statutory authority by relying on principles of equitable estoppel to determine that State Farm was the responsible insurer. We disagree.

The jurisdiction of the Workers' Compensation Agency is prescribed in MCL 418.841(1). *Aetna Life Ins Co v Roose*, 413 Mich 85, 90; 318 NW2d 468 (1982). MCL 418.841(1) states:

Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau^[2] and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable.

MCL 418.852(1) provides that "[t]he liability of a carrier or fund regarding a claim under this act shall be determined by the hearing referee or worker's compensation magistrate, as applicable, at the time of the award of benefits." In this subsection, the Legislature specifically indicated that a carrier's liability to pay a claim under the Worker's Disability Compensation Act (WDCA) is within the jurisdiction of the agency. Thus, the WCAC properly may decide the insurance coverage afforded by a carrier.

The WCAC also properly may apply equitable principles. In *Chase*, 272 Mich App at 700 n 1, this Court stated, "While the WCAC has no equitable jurisdiction, it is well established that the WCAC may apply equitable principles in appropriate instances to further the purposes of the Worker's Disability Compensation Act." In *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 55; 658 NW2d 460 (2003), our Supreme Court approved the WCAC's consideration of a no-fault insurer's claim for reimbursement "under the doctrine of equitable subrogation" from an employer that was self-insured for worker's compensation. The Court recognized that "the theory of equitable subrogation . . . is separate and independent of the remedies contained in the WDCA." *Id.* at 63.

State Farm contends that the WCAC exceeded its statutory authority because the WCAC lacks equitable jurisdiction. In support of its contention that the WCAC lacks jurisdiction to decide issues of estoppel, State Farm primarily relies on *Woody v American Tank Co*, 49 Mich App 217; 211 NW2d 666 (1973), and *Sieman v Postorino Sandblasting & Painting Co*, 111 Mich App 710; 314 NW2d 736 (1981). However, those cases involved the issue whether a carrier was liable to an employer to pay benefits in excess of the limits in their respective out-of-state policies. *Woody* and *Sieman* both recognized that the former WCAB (now the WCAC) does not have authority to change or set aside the limits in a carrier's policy because reformation of a policy is equitable relief. See also *Auto-Owners Ins Co v Elchuk*, 103 Mich App 542, 546; 303 NW2d 35 (1981).

The present case does not involve a request to reform an insurance policy. It involves whether State Farm may be liable for insurance coverage because of the actions of its insurance

² As explained in *Reed v Yackell*, 473 Mich 520, 542 n 2; 703 NW2d 1 (2005), the bureau (WCAB) is now known as the Workers' Compensation Agency.

agent, Michael Neveau. The determination whether coverage exists is within the jurisdiction of the WCAC. MCL 418.852(1). In deciding this issue, the WCAC may apply equitable principles. *Chase*, 272 Mich App at 700 n 2; *Auto-Owners Ins Co*, 468 Mich at 55.

State Farm also challenges whether its liability may be based on an erroneous certificate of insurance. State Farm relies on a portion of this Court's decision in *Woody*, 49 Mich App at 230, in which this Court cautioned that a party (the city of Fremont) that hires independent contractors has an obligation to determine whether the contractor is adequately insured. This Court stated:

It was the burden of Fremont, as it was and remains the burden of every principal hiring independent contractors to see that the selected contractor has clear, unquestioned, approved, and adequate workmen's compensation coverage. We caution that a mere 'certificate of insurance' of the existence of a policy, inadequate or inapplicable, does not suffice. See the litany of cases beginning with *Burt v Munising Woodenware Co*, 222 Mich 699; 193 NW 895 (1923), through and including cases on into 1959 (except *Roman v Delta Broadcasting Co*, [334 Mich 669; 55 NW2d 147 (1952)]), which we do not attempt to explain, distinguish or reconcile except to say that the weight of Supreme Court precedent is all *contra*). [*Woody*, 49 Mich App at 230.]

This discussion was directed at Fremont's liability as a statutory employer under MCL 418.171. There is no other reference to a certificate of insurance in the decision. This Court did not discuss the circumstances in which an agent's issuance of a certificate of insurance can bind an insurer to coverage, which is the key to State Farm's liability here. Therefore, State Farm's reliance on this portion of *Woody* is misplaced.

State Farm's reliance on *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305; 583 NW2d 548 (1998), is also misplaced. In that case, the Birch Agency, as an independent insurance agent, was deemed an agent of the insured (Floormaster). *Id.* at 310. In the present case, the magistrate deemed Neveau "an exclusive agent for State Farm Insurance," and the WCAC referred to that finding in its most recent decision. *West American* did not concern whether the Birch Agency's actions were binding with respect to the insurer (Meridian) or the legal effect of the issuance of a certificate by an insurer's exclusive agent. That difference in the agency relationship makes *West American* inapposite. State Farm has not presented a persuasive reason for this Court to interfere with the WCAC's determination that State Farm is liable for the payment of benefits.

III. AMERISURE POLICY

State Farm next challenges the WCAC's refusal to remand the case to the board of magistrates for the purpose of re-opening the record to ascertain whether an Amerisure policy was in effect at the time of Chase's injury. State Farm's argument concerning the re-opening of the record is within the scope of this Court's order granting leave to appeal to the extent that State Farm is claiming that the WCAC erred in denying State Farm's December 1, 2010, motion to effectuate the WCAC's order of March 19, 2004, for remand to the board of magistrates and a January 27, 2011, motion for a delayed appeal.

MCL 418.861a(12) states:

The commission or a panel of the commission may remand a matter to a worker's compensation magistrate for purposes of supplying a complete record if it is determined that the record is insufficient for purposes of review.

Because “the term ‘may’ presupposes discretion,” we review the WCAC’s discretionary ruling for an abuse of discretion. See *In re Estate of Weber*, 257 Mich App 558, 562-563; 669 NW2d 288 (2003). This Court also reviews for an abuse of discretion the WCAC’s decision on a motion for a delayed appeal. *Pankey v Bigard/Drillers, Inc*, 222 Mich App 15, 18-19; 564 NW2d 464 (1997).

The WCAC’s denial of State Farm’s December 1, 2010, motion to effectuate its order of March 19, 2004, for remand to the board of magistrates was not an abuse of discretion. State Farm had ample opportunity to contest Amerisure’s liability and to pursue the development of the record after State Farm became aware of the existence of the form 400. After obtaining a favorable ruling from the WCAC on reconsideration in 2004, State Farm essentially abandoned the issue, apparently because it believed that the St. Paul wrap-up policy would apply. In addressing the reason for not raising the issue of the March 2004 WCAC order until after this Court issued a remand order in October 2010, State Farm contends that after Magistrate Harris’s March 2004 decision finding that St. Paul was liable, issues regarding M.D. Plumbing & Heating Company’s direct insurance coverage were “moot” and remained moot until this Court issued the remand order on October 14, 2010. We disagree that the liability of St. Paul under the wrap-up policy rendered as moot the issue of Amerisure’s potential liability under a policy that may have been issued to M.D. Plumbing & Heating Company. Both policies could have provided coverage. Having neglected to pursue the issue during the six years when the matter bounced between the WCAC, the board of magistrates, and this Court, State Farm’s contention that the WCAC abused its discretion in failing to grant its motion in 2010 is not persuasive.

For similar reasons, the WCAC’s denial of State Farm’s motion for a delayed appeal was not an abuse of discretion. In general, a claim for review to the WCAC must be filed within 30 days after the mailing date. MCL 418.859a(1). Mich Admin Code, R 418.3(2). “For sufficient cause shown, the commission may grant further time in which to claim a review.” MCL 418.859a(1); see also R 418.3(4). “A motion for delayed appeal shall specify why the claim for review is late.” R 418.3(6). In *Pankey*, 222 Mich App at 18-19, this Court explained:

The “sufficient cause” standard contained in § 859a(1) is less stringent than a good-cause standard. Sufficient cause is by its nature fact specific and must be determined case by case. Appropriate factors to consider include the length of the delay, the reason for the delay, and any resulting prejudice. Cf. *Laudenslager v Pendell Printing, Inc*, 215 Mich App 167; 544 NW2d 721 (1996). The decision to grant a motion for delayed appeal upon a showing of sufficient cause is within the discretion of the WCAC.

The WCAC did not expressly address the factors noted above. However, the length of the delay was more than a decade. The stated reason for the delay from 2000 until February 2002 was that the form 400 was evidently not supplied when Amerisure’s records were subpoenaed. From

2002 until 2004, State Farm made some effort to persuade the WCAC to remand for development of the record. In its motion for a delayed appeal, State Farm explained that all coverage issues involving M.D. Plumbing & Heating Company “remained moot” until this Court’s October 14, 2010, remand order. As previously explained, St. Paul’s apparent liability did not render moot issues involving the potential liability of another carrier. With respect to prejudice, State Farm’s delay affected the ability of the board of magistrates, the WCAC, and the parties, to promptly and efficiently dispose of the matter. Cf. *Laudenslager*, 215 Mich App at 172. Under the circumstances, the WCAC did not abuse its discretion by denying State Farm’s motion for a delayed claim for review.

IV. REIMBURSEMENT AND INTEREST

In Docket No. 295251, O’Neil and Argonaut argue that the WCAC erred by failing to expressly provide that they are entitled to reimbursement with interest at 12 percent per annum pursuant to MCL 418.852(2).

This Court “lacks the power to address legal questions that have not been raised before or addressed by the WCAC.” *Calovecchi v Mich*, 461 Mich 616, 626; 611 NW2d 300 (2000). Where an argument is raised before the WCAC, but the WCAC does not address it, this Court may remand the case to the WCAC to address the matter. See *Chase*, 272 Mich App at 701. Although the interpretation and application of statutes presents a question of law that we review de novo, the correct application of MCL 418.852(2) may depend on whether O’Neil and Argonaut made a timely request for reimbursement. See, e.g., *Stein v Braun Engineering*, 245 Mich App 149, 154-155; 626 NW2d 907 (2001), and *Dennis v Waterland Trucking Serv, Inc*, 2009 Mich ACO 164. Accordingly, the issue should be initially addressed by the WCAC, and we remand for that purpose.

We note that although State Farm, plaintiff, O’Neil, and Argonaut have filed supplemental authority briefs that pertain to interest, the interest addressed in those briefs is *not* the interest that O’Neil and Argonaut seek from State Farm. Rather, the supplemental authorities concern the interest rate on past due benefits payable to an employee under MCL 418.801(6), as amended by 2011 PA 266. The interest rate applicable to past due benefits owing to plaintiff is beyond the scope of this Court’s order granting leave to appeal and, therefore, we do not consider it.

We affirm the WCAC’s determination of liability and remand for an initial determination of O’Neil and Argonaut’s entitlement to reimbursement and interest under MCL 418.852(2). We do not retain jurisdiction.

/s/ Peter D. O’Connell

/s/ Mark J. Cavanagh

/s/ Pat M. Donofrio