STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM G. BAIRD,

Plaintiff-Appellee/Cross-Appellee,

and

SAFECO INSURANCE COMPANY OF AMERICA and NORTHLAND INSURANCE COMPANY,

Intervening Plaintiffs-Appellees/Cross-Appellees,

v

AKA TRUCKING, INCORPORATED,

Defendant-Appellee/Cross-Appellant,

and

TRAVELERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 16, 2013

No. 299975
WCAC
LC No. 08-000028

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Defendant Travelers Insurance Company ("Travelers") appeals by leave granted from a decision of the Worker's Compensation Appellate Commission (WCAC), which affirmed a magistrate's open award of benefits to plaintiff William Baird. Defendant AKA Trucking, Incorporated has filed a cross-appeal that raises several challenges to the WCAC's determination that plaintiff is entitled to benefits. We affirm.

Plaintiff worked for AKA Trucking as a truck driver from April 2004 through July 24, 2004, when he was injured in a single vehicle accident as he was making a delivery. Travelers had been AKA Trucking's worker's compensation insurer for several years. At the time of the

accident, AKA Trucking had no-fault insurance with intervening plaintiff Northland Insurance Company ("Northland"). In addition, plaintiff was the named insured on a personal no-fault insurance policy with intervening plaintiff Safeco Insurance Company of America ("Safeco").

Travelers contends that its policy expired before plaintiff's accident, but acknowledges that it did not file the requisite notice of termination until after the accident. MCL 418.621(4) states, in pertinent part:

> Except as modified by the director as provided for herein, each policy of insurance covering worker's compensation in this state shall contain the following provisions:
>
> "Notwithstanding any language elsewhere contained in this contract or policy of insurance, the insurer issuing this policy hereby contracts and agrees with the insured employer:
>
> * * *
>
> Termination notice. (g) That it will file with the bureau of workmen's compensation at Lansing, Michigan, at least 20 days before the taking effect of any termination or cancellation of this contract or policy, a notice giving the date at which it is proposed to terminate or cancel this contract or policy; and that any termination of this policy shall not be effective as far as the employees of the insured employer are concerned until 20 days after notice of proposed termination or cancellation is received by the bureau of workmen's compensation[.]

Travelers does not dispute that because the required notice of termination was not filed until after plaintiff's accident, its policy remained effective with respect to plaintiff, the injured employee. It argues, however, that because the no-fault insurers, Northland and Safeco, are not "employees of the insured employer," the WCAC erred in ruling that they were entitled to reimbursement from Travelers for benefits they had paid with regard to plaintiff's injuries under the theory of equitable subrogation. This argument involves questions of statutory interpretation and the doctrine of equitable subrogation. These are questions of law, which this Court reviews de novo. *Mudel v Great Atlantic & Pacific Tea Co,* 462 Mich 691, 697 n 3; 614 NW2d 607 (2000).

The WCAC rejected Travelers' argument in light of our Supreme Court's decision in *Auto-Owners Ins Co v Amoco Prod Co,* 468 Mich 53; 658 NW2d 460 (2003). In that case, Leroy Smithingell was injured in a motor vehicle accident. His employer, which was self-insured for worker's compensation, initially denied benefits on the basis that the injury was not work-related. Smithingell sought and obtained no-fault benefits (including wage-loss and medical benefits) from the plaintiff, his no-fault insurer. *Id*. at 55. The plaintiff filed a petition for reimbursement from the employer. The magistrate, the WCAC, and this Court determined

that the no-fault insurer was entitled to reimbursement for the medical expenses[1] it had paid on behalf of Smithingell, but that reimbursement was subject to cost-containment administrative rules. Those rules limited the fees that healthcare providers could charge employers or worker's compensation carriers for treatment of work-related injuries. If Smithingell had paid the medical expenses, the cost-containment rules were not applicable. The issue before the Supreme Court was whether the no-fault insurer, having paid the medical expenses on behalf of Smithingell, was entitled to the same reimbursement that Smithingell would have been if he had paid the expenses himself.

The Supreme Court applied the doctrine of equitable subrogation, which it explained "'is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other.'" *Id*. at 59, quoting *Commercial Union Ins Co v Med Protective Co*, 426 Mich 109, 117; 393 NW2d 479 (1986) (opinion by WILLIAMS, C.J.) Although the subrogee may not be a "mere volunteer," where an insurer pays expenses on behalf of its insured, it is not acting as a volunteer. *Auto-Owners Ins Co*, 468 Mich at 59. The Court concluded that because Smithingell would have been entitled to full reimbursement from the defendant if Smithingell had paid the expenses, "[t]he principle of equitable subrogation allows plaintiff [the no-fault insurer] to assert the right of Smithingell, its insured to receive full reimbursement from defendant." *Id*. at 62-63.

On appeal, Travelers only briefly addresses *Auto-Owners Ins Co* and argues that it does not concern MCL 418.621(4)(a) - (g) because the employer in that case was self-insured. Although Travelers' factual distinction is accurate, that distinction does not make a difference. In holding that the no-fault insurer could assert the right to reimbursement in the same manner as its insured would have been able to do, the Court explained that the theory of recovery, i.e. equitable subrogation, was "separate and independent of the remedies contained in the WDCA," and "is not limited by the WDCA." *Auto-Owners Ins Co*, 468 Mich at 63-64. Travelers' arguments focus on the limits of MCL 418.621(4). But just as the cost-containment limits were not applicable in *Auto-Owners Ins Co*, the limits in MCL 418.621(4) are immaterial to the theory of recovery that the Supreme Court approved and applied in *Auto-Owners Ins Co*. Travelers has not presented a persuasive reason for this Court to reject the WCAC's conclusion that the no-fault insurers were entitled to reimbursement from Travelers under the theory of equitable subrogation.

AKA Trucking asserts that Travelers appears to be intending to blend in an argument that AKA Trucking is liable to the no-fault insurers, or that Travelers may seek reimbursement from AKA Trucking. To the extent that Travelers' briefs could be interpreted as advancing those arguments, because those arguments were not raised before or addressed by the WCAC, this Court lacks the power to address them. See *Calovecchi v Michigan*, 461 Mich 616, 626; 611 NW2d 300 (2000), citing MCL 418.861a(14).

[1] The magistrate held that the no-fault insurer was not entitled to recover from the employer for the wage-loss benefits, and that decision was not challenged on appeal. *Id*. at 56 n 1.

Travelers has filed a supplemental brief that is directed at the interest rate on past due benefits under MCL 418.801(6), as amended by 2011 PA 266. Travelers did not raise an issue involving the applicable interest rate on past due benefits in its application for leave to appeal. This Court granted leave to appeal "limited to the issues raised in the application." *Baird v AKA Trucking Incorporated*, unpublished order of the Court of Appeals, entered May 18, 2011 (Docket No. 299975). Accordingly, the interest rate issue is beyond the scope of this appeal. See MCR 7.105(D)(5) ("[u]nless otherwise ordered, the appeal is limited to the issues raised in the application"). Therefore, we decline to address this issue.

AKA Trucking has filed a cross-appeal that raises several challenges to plaintiff's entitlement to worker's compensation benefits. AKA Trucking seeks reversal of the open award of benefits in the event this Court determines that Travelers is entitled to relief on appeal. In light of our decision affirming the WCAC's determination of Travelers' liability, including its liability to reimburse the no-fault insurers, it is unnecessary to address AKA Trucking's alternative arguments on cross-appeal.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray