STATE OF MINNESOTA
IN COURT OF APPEALS
A15-2082

Minnesota Workers' Compensation Assigned Risk Plan as administered by RTW, Inc.,
Respondent,

vs.

Dimas Reyes,
Respondent,
Advanced Designs Siding and Roofing, Inc.,
Appellant,
L M G Construction, Inc.,
Respondent,
Robert Garza, Jr.,
Respondent,
Jose Luis Gonzalez-Cervantes,
Respondent,
Michelle Rivera,
Respondent,
Special Compensation Fund,
Respondent.

Filed August 22, 2016
Affirmed
Stauber, Judge

Freeborn County District Court
File No. 24-CV-14-923

Sarah E. Bushnell, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondent Minnesota Workers' Compensation Assigned Risk Plan)

Aaron W. Ferguson, Aaron Ferguson Law, St. Paul, Minnesota (for respondent Demas Reyes)

Kevin A. Velasquez, Blethen, Gage & Krause, P.L.L.P., Mankato, Minnesota; and

Richard C. Scattergood, Stich, Angell, Kreidler, Dodge & Unke, P.A., Minneapolis, Minnesota (for appellant Advanced Designs)

LMG Construction, Inc., c/o Jose Luis Gonzalez-Cervantes, Albert Lea, Minnesota (pro se respondents LMG Construction and Gonzalez-Cervantes)

Robert Garza, Albert Lea, Minnesota (pro se respondent)

Michelle Rivera, Albert Lea, Minnesota (pro se respondent)

Lori Swanson, Attorney General, Rory H. Foley, Margaret Jacot, Assistant Attorney General, St. Paul, Minnesota (for respondent Special Compensation Fund)

Considered and decided by Stauber, Presiding Judge; Ross, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Appellant construction general contractor challenges summary judgment in favor of respondent workers' compensation assigned-risk-plan provider in a declaratory judgment action to determine insurance coverage. We affirm because the district court did not err in concluding that under the terms of the assigned-risk-plan policy, the subcontractor's workers' compensation insurance was effectively cancelled before the date of the worker's injury and because other issues raised by appellant were not properly preserved for appeal.

FACTS

Appellant Advanced Designs Siding and Roofing, Inc. (Advanced Designs) challenges summary judgment granted in favor of respondent "Minnesota Workers' Compensation Assigned Risk Plan as Administered by RTW, Inc." (RTW) in a

declaratory judgment action arising out of a workers' compensation insurance-coverage claim. Respondent Dimas Reyes was injured at work on October 4, 2010, while employed by respondent LMG Construction, Inc. (LMG), a subcontractor of appellant Advanced Designs Siding and Roofing, Inc. (Advanced Designs).[1] Reyes sought compensation for his injuries from RTW, a private insurance carrier that administered workers' compensation insurance to LMG in accordance with the assigned-risk plan. He also sought to recover from other individuals and entities, including Advanced Designs, and respondents LMG, Robert Garza, Jr., Jose Gonzalez-Cervantes, Michelle Rivera, and the Special Compensation Fund.

The assigned-risk plan "provide[s] workers' compensation coverage to employers [who have been] rejected by a licensed insurance company." Minn. Stat. § 79.252, subd. 1 (2014). An assigned-risk-plan insurer may deny or terminate workers' compensation coverage provided under the plan if a covered employer "persistently refuses to permit completion of an adequate payroll audit." Minn. Stat. § 79.252, subd. 3a(3) (2014). The RTW policy requires LMG to "let us examine and audit all your records that relate to this policy," and allows RTW to cancel "a new policy . . . [that] has been in effect for fewer than 90 days" by providing written notice to LMG's last known mailing address. LMG's address was identified as 422 East 7th Street in Albert Lea (7th Street address).

[1] Under Minnesota law, every employer must carry workers' compensation insurance for its employees, unless the employer is exempted or excluded. Minn. Stat. § 176.021, subd. 1 (2014).

LMG was insured through the assigned-risk plan under a policy effective May 15, 2009, to May 15, 2010. Initially, the policy was administered by Berkley Risk Administrators Company, LLC (Berkley), but the policy was reassigned under the plan to be administered by RTW for 2010-2011.

On February 23, 2010, RTW sent an insurance renewal offer to LMG at the 7th Street address. The offer stated:

> Your current worker's Compensation Policy will expire on 05/15/2010 at 12:01 a.m. and coverage under that policy will terminate as of that date. [. . .]
>
> The indicated renewal deposit AND any past due premiums must be received on or before the expiration date of your current policy to ensure continuous coverage, otherwise there will be a gap in coverage.

RTW sent LMG a reminder letter in early May, again at the 7th Street address. The letter notified LMG that its workers' compensation policy was "pending cancellation effective 05/15/2010 for non-payment of Down Payment in the amount of $670.00 due on 05/15/2010." The letter warns, "Should payment not be received in our office by the above cancellation date your policy will cancel and coverage will cease." The policy was cancelled on May 15, 2010, because the renewal payment was not received by that date.

Cindy Kaufenberg, underwriter for RTW, provided an affidavit stating that LMG mailed the $670 deposit on Monday, May 17, 2010, and RTW received the deposit on Tuesday, May 18, 2010. RTW issued a "new" policy to LMG on May 20, 2010; the new policy was to be effective until May 15, 2011. The policy again listed the 7th Street address as LMG's proper mailing address. According to Kaufenberg, "It is very

common for insureds to pay the premium late but within the twenty day period [after the policy expiration date]. I estimate that this occurs several times daily on files for which I have responsibility. In all of these cases, the policy is cancelled and a new policy is issued after payment with a lapse of coverage."

With regard to the 2009-2010 coverage year, Berkley sent LMG a letter on May 15, 2010, at the 7th Street address. The letter asked LMG to fill out a payroll report form within 15 days so that Berkley could obtain an "actual payroll base" to determine whether any refunds or additional premiums were owed for that year. The letter contained notice that LMG's current coverage could be cancelled if it failed to provide this information. LMG did not respond to the letter. Berkley sent a second letter to LMG labeled "FINAL REQUEST" that asked for the same information. Again, LMG did not respond. On July 13, 2010, Berkley sent a third letter to LMG labelled "AUDIT CLOSEOUT NOTICE." The letter notified LMG that it was not in compliance with the audit provisions of the policy, which could "result in the cancellation of your policy" and disqualification from further coverage through the plan. To become compliant, LMG was directed to "allow an auditor [to] access . . . your records or provide the requested payroll information." On July 21, 2010, RTW sent a letter to LMG and its agent, VJ Insurance Agency Inc (VJ). The letter stated that the current policy would be cancelled effective September 20, 2010, if LMG failed to comply with the audit provisions of the 2009-2010 policy. LMG and VJ did not respond to the letter. RTW sent a notice of policy cancellation to LMG and VJ that was effective on September 20, 2010, again sending the notice letter to their respective addresses.

Jose Gonzales-Cervantes (Gonzales), an LMG officer, and Michelle Rivera, an apparent LMG employee, submitted affidavits on behalf of LMG. Rivera asserted that Gonzales directed her to contact VJ to inform them that LMG was having difficulty receiving mail at the 7th Street address and to direct them to change LMG's address to a different address in Albert Lea, which she did. Gonzales asserted that he directed Rivera to make an address change before July 21, 2010, and that he "never received notice of any request for an audit" or "notice of cancellation of the policy." But Gonzales apparently did receive a check from RTW that was sent to the 7th Street address in December 2010 and cashed in early 2011. RTW asserts that it did not receive notice of a new address for LMG or returned mail that was not delivered to LMG. RTW and Berkley consistently used the 7th Street address for LMG.

RTW filed a declaratory judgment action in 2014, seeking a determination of whether LMG's policy was in effect at the time of Reyes' injury on October 4, 2010. If LMG's policy was effectively cancelled at the time of Reyes' injury, Advanced Designs, as the general contractor, would be liable for "all compensation due an employee of a subsequent subcontractor who is engaged in work upon the subject matter of the contract." Minn. Stat. § 176.215, subd. 1 (2014). Reyes cross-claimed for negligence. RTW moved for summary judgment, arguing that no policy was in effect when Reyes was injured because at the time of the injury (1) the policy was a new policy, which was cancelled within 90 days of its issuance and (2) the policy was cancelled after LMG failed to complete the mandatory payroll audit. The district court granted summary judgment on the first issue, concluding that the contract was a new contract that could be

cancelled at any time and was cancelled on September 20, 2010, but denied summary judgment on the second issue, which concerned RTW's right to cancel the policy for LMG's persistent refusal to permit a payroll audit. Advanced Designs now appeals.[2]

D E C I S I O N

"On appeal from summary judgment, [an appellate court] reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law to the facts." *Commerce Bank v. West Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). The appellate court "view[s] the evidence in the light most favorable to the party against whom summary judgment was granted. . . ." *Id.* This court reviews questions of contract interpretation and statutory interpretation de novo. *Sleiter v. Am. Family Mut. Ins. Co.*, 868 N.W.2d 21, 23 (Minn. 2015) (statutory interpretation); *Valspar Refinish, Inc.*, v. *Gaylord's, Inc*., 764 N.W.2d 359, 364 (Minn. 2009) (contract interpretation). "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997); *see C.O. v. Doe*, 757 N.W.2d 343, 351 (Minn. 2008) ("[S]ummary judgment is not a means of deciding cases in which the facts are disputed."). "A material fact is one of such a nature as will affect the result or outcome of the case depending on its resolution." *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976).

[2] A separate appeal was brought by The Special Compensation Fund, and the two appeals were consolidated, but The Special Compensation Fund's appeal was dismissed by order of this court on April 16, 2016.

Advanced Designs argues that the district court erred by determining that the RTW policy was a new policy rather than a renewal policy. According to Advanced Designs, although LMG's insurance policy was to expire on Saturday, May 15, 2010, LMG's premium check was considered timely under Minn. Stat. § 645.151 (2014). This statute provides that

> When a[] . . . payment . . . is to be delivered to . . . a department, agency, or instrumentality of this state . . . on or before a prescribed date and the prescribed date falls on a Saturday, Sunday, or legal holiday, it is timely delivered or filed if it is delivered or filed on the next succeeding day which is not a Saturday, Sunday or legal holiday.

Id. Advanced Designs admits that LMG did not mail its renewal payment until Monday, May 17, 2010, and that the payment was received by RTW on Tuesday, May 18, 2010. Because this statute requires "delivery or filing" with the "department, agency, or instrumentality" to occur on the *first* day following the "Saturday, Sunday or legal holiday" on which the payment was to be delivered, Minn. Stat. § 645.151 does not, by operation of law, excuse the untimeliness of LMG's payment. Further, section 645.151 does not apply under the terms of the policy, which required LMG to submit its renewal payment before expiration of the coverage period. *See also* Minn. Stat. § 79.251, subd. 1(4) (2014) ("The assigned risk plan shall not be deemed a state agency"). The district court properly granted summary judgment on this issue.

The remaining issues addressed by Advanced Designs were not raised to or considered by the district court in reaching its summary-judgment decision. Briefly, they include new claims that RTW was not permitted to cancel the policy for "any

reason," that RTW violated the policy by failing to state the reason for cancellation in its notice of cancellation, and that RTW should be equitably estopped from denying coverage because it failed to properly provide Advanced Designs with notice of cancellation. As a rule, this court declines to address issues that were not raised to or considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that a reviewing court generally considers only those issues presented to and decided by the district court). We make an exception in the interests of justice, as noted during oral argument before this court. *See* Minn. R. Civ. App. P. 103.04 (stating that the scope of review on appeal "may be affected by whether proper steps have been taken to preserve issues for review on appeal" but also permitting the appellate court to "review any other matter as the interest of justice may require"). However, the interest-of-justice exception is typically applied when "the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits," and "there is no possible advantage or disadvantage to either party in not having had a prior ruling on the question by the [district] court." *Schober v. Comm'r of Revenue*, 778 N.W.2d 289, 294 (Minn. 2010) (quotation omitted). Neither reason for applying the exception exists here. We therefore decline to consider the issues raised for the first time on appeal.

Affirmed.