

American Tr. Ins. Co. v 21st Ave. Med. Plaza, P.C.
2008 NY Slip Op 31371(U)
May 8, 2008
Supreme Court, New York County
Docket Number: 0116685/2007
Judge: Kibbie F. Payne
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

AMERICAN TRANSIT INSURANCE COMPANY

Petitioner,

- v -

21st AVENUE MEDICAL PLAZA, P.C.,

Respondent.

INDEX NO. 116685/07

MOTION DATE 02/07/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Order decided as Indicated.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

Dated: May 8, 2008


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 4

-----X
AMERICAN TRANSIT INSURANCE COMPANY,
Petitioner,

Index No. 116685/07

-against-

Judgment/Decision

21st AVENUE MEDICAL PLAZA, P.C.,
A/O DENNENE BAKER,

Respondent.

UNFILED JUDGMENT
This judgment has not been filed with the County Clerk
and notice of entry of judgment has not been served on the
respondent. The respondent must appear in person at the
Judgment Clerk's Desk (Room 1410).

-----X
KIBBIE F. PAYNE, J.:

In this Article 75 proceeding, petitioner, American Transit Insurance Company ("American Transit or "petitioner") seeks an order vacating the September 15, 2007 master arbitration decision that affirmed the lower arbitrator's April 23, 2007 decision granting reimbursement to respondent, 21st Avenue Medical Plaza's ("respondent") on its claims for payment for NCV/EMG studies it performed and physical therapy services it provided to Denenne Baker. Respondent answered the petition seeking dismissal of the petition and an order and judgment confirming the September 15, 2007 award.

On July 5, 2006, Denenne Baker was injured when the car service vehicle she was riding in was rear ended by another vehicle. Following the accident Baker complained of restricted movement due to pain and respondent conducted NCV/EMG studies "to rule out and determine exact diagnosis, lesion localization and extent of the injury as well as [sic] better predict prognosis

Respondent also provided Baker with physical therapy treatments from August 31, 2006 through October 20, 2006. (Petitioner's Ex. 2 at 2) Respondent submitted the bills for these services to American Transit which, based on a peer review report and an independent medical examination (IME), declined to pay for the services. Thereafter, respondent submitted the issue of payment for the EMG/NCV study and physical therapy treatments to compulsory no-fault arbitration.

In an April 23, 2007 decision, the lower arbitrator found that:

[American Transit] timely denied reimbursement for the NCV/EMG studies based on peer review analysis by its consulting physiatrist, Dr. Rosarion. Dr. Rosarion opined that the upper and lower NCV/EMG studies were not medically necessary. Dr. Rosarion's opinion is not very persuasive, he merely lists the general guidelines for performing NCV/EMG studies as delineated by the American Association of electrodiagnostic Medicine without any specific analysis regarding their applicability to Patient's particular clinical signs and symptoms.

In addition, relying on *A.B. Medical Services, PLLC a/a/o I.W. v. Geico*, (12 Misc3d 30 [App. Term 2d Dept. 2006])¹, the lower arbitrator found that respondent's denial of reimbursement for the physical therapy treatments based on the IME performed by

¹ In *A.B. Medical Services*, the Appellate Term concluded that the insurer's denials were insufficient because they failed to set forth the specific medical rational upon which the denial was based.

a consulting physiatrist, was defective because a copy of the IME was not sent to Baker within thirty days of American Transit's issuing the denial. The lower arbitrator stated that because the IME was not timely sent to the claimant, she was "constrained to preclude the IME report." (Pet., Ex. 2, at 3) This arbitrator made the finding that respondent "has established a prima facie case of medical necessity for the disputed services. Appellant [Respondent] is therefore entitled to reimbursement in the amount of \$3162.52."

American Transit appealed the lower arbitrator's decision to the master arbitrator on the ground that one day after the lower arbitrator released her decision, the Appellate Division, Second Department, in *A.B. Medical Services, PLLC v. GEICO*, (39 AD3d 778 [2nd Dept 2007]), reversed the Appellate Term's decision. In its decision the Second Department relied on the Insurance Department Regulation, 11 NYCRR Section 65-3.8(b)(4)² and held that the regulation clearly states that if the denial is based on a peer review or medical report requested by the insurer, then the insurer must release a copy of the report to, *inter alia*, the

² 11 NYCRR 65-3.8(b)(4) provides:

If the specific reason for a denial of a no-fault claim, or any element thereof, is a medical examination or peer review report requested by the insurer, the insurer shall release a copy of that report to the applicant for benefits, the applicant's attorney, or the applicant's treating physician, upon the written request of any of these parties.

claimant upon written request. The court expressly wrote: "Had it been the intent of the Department of Insurance to require the carrier to set forth a medical rationale in the prescribed denial of claim form, it would have so provided." (*Id.* at 779 [citations omitted])

However, in his September 17, 2006 decision, the master arbitrator relied on the Appellate Term decision in *A. B. Medical Services* as support for his refusal to disturb the lower arbitrator's decision, stating:

It has been held that a notice of disclaimer must promptly appraise the claimant with a high degree of specificity of the ground or grounds upon which the disclaimer is predicated. Absent such specific notice, a claimant might have difficulty assessing whether the insurer will be able to disclaim successfully. The failure of [American Transit] to do any of the above³ forced the arbitrator to preclude the IME report.

(Petitioner's Ex. 1, at 2)

The master arbitrator held that the lower arbitrator's decision should be affirmed because the lower arbitrator did not have to justify his award, "but rather it must merely be evident that there exists a rational basis for it upon a reading of the record." (Petitioner's Ex. 1, at 2 [citations omitted])

Petitioner contends that the master arbitration award was arbitrary and capricious and incorrect, as a matter of law,

³ In the Appellate Term decision in *A.B. Medical* the court stated that, in order to sustain the denial, the insurer was required to either: (1) state a reason for the denial with particularity; or (2) provide a copy of the medical report simultaneously with the denial; or (3) establish that a copy of the medical report was sent within 30 days of the denial.

because there is no requirement that the insurer state the reason for denial with particularity in the denial form and that there is no requirement that the insurer supply the medical report or peer review report unless the applicant requests those reports from the insurer, in writing.

In opposition to the petition, and in support of confirmation of the award, respondent argues that the petition only requests vacatur of that portion of the award that, based on the Appellate Term's decision in *A.B. Medical*, precluded consideration of the IME regarding physical therapy treatments. It contends that even though the case law that the lower arbitrator relied upon was overruled, the record as a whole provides a rational basis to support the award.

As to the EMG/NCV testing, respondent claims that the lower arbitrator found, and the master arbitrator confirmed, that the peer review report was legally and factually deficient and unpersuasive.

In reply, American Transit claims that the entire award must be vacated because it was not permitted to submit either Dr. Rosarion's peer review report regarding the EMG/NCV study or the IME relating to the physical therapy treatments.

Judicial review of an arbitration award is ordinarily limited by statute, specifically CPLR 7511 (*Matter of Greenberg v Ryder Truck Rental, Inc.*, 70 NY2d 573,577 [1987]; *Matter of*

Petrofsky, [Allstate Ins. Co.], 54 NY2d 207, 210 [1981]). However, in the case of a compulsory arbitration, such as this one, an award may be vacated where the arbitrator or master arbitrator's decision is arbitrary and capricious or irrational (see, *MVAIC v. Aetna*, 89 NY2d 214, 223 [1996]) or if the arbitrator's award exhibits a manifest disregard the law or is incorrect as a matter of law (see, *Matter of DeRaffele Manufacturing Co., Inc. v Kaloakas Management Corp.*, 48 AD3d 807, 808 [2nd Dept 2008]). The role of the master arbitrator is to review the determination of the lower arbitrator to assure that the arbitrator reached his/her decision in a rational manner and that the decision is not incorrect as a matter of law (*Matter of Petrofsky* [Allstate Ins. Co.], 54 NY2d at 210). Like the courts, the master arbitrator may not engage in a de novo review or review factual or procedural errors (*id* at 212).

As demonstrated by the April 23, 2007 arbitration decision, the lower arbitrator considered the contents of the Dr. Rosarion's peer review report when she found the report to be legally and factually deficient and unpersuasive. Contrary to American Transit's argument that it was precluded from submitting the EMG/NCV peer review report, it is evident that the arbitrator reviewed Dr. Rosarion's finding that the lower NCV/EMG studies were not necessary. (See, Petitioner's Ex. 2 at 2) The arbitrator was unpersuaded by Dr. Rosarion's report and found that the

carrier was entitled to reimbursement of the medical necessity for the disputed services. Since the lower arbitrator's finding was supported by the facts and the law, the master arbitrator's affirmance on this issue was not arbitrary, capricious or incorrect as a matter of law.

However, as to the denial letter concerning physical therapy services, the lower arbitrator relied on the Appellate Term's decision in *A. B. Medical Services* and found the denials defective because they were based on IME's that were not forwarded in a timely manner and denial letters that failed to set forth the medical basis for the denial with sufficient particularity. The day after the lower arbitrator issued her decision, the Appellate Division, Second Department overturned the Appellate Term's decision in *A.B. Medical Services* and held that there was no requirement that the insurer set forth a medical rationale for denying a claim in the prescribed denial of claim form (see, *A.B. Medical Services v. Geico*, 39 AD2d at 779).⁴ Therefore, the master arbitrator's affirmance of the lower arbitrator's preclusion of the IME regarding physical therapy treatments cannot be sustained because that branch of the

⁴ Recently, in *Countrywide Insurance Co. v. 563 Grand Medical, P.C.*, __ AD3d__, 2008 NY Slip Op 03059 [1st Dept 2008], the First Department adopted the Second Department's reasoning in *A.B. Medical*, holding that the insurer was not required to set forth the medical rationale in the prescribed denial of claim form.

master arbitrator's decision violated existing law and was not rationally based (see, *Matter of Petrofsky* [Allstate Ins. Co.], 54 NY2d at 212).

Accordingly, it is

ORDERED and ADJUDGED that branch of the petition seeking to vacate the master arbitrator's decision affirming the lower arbitrator's decision regarding reimbursement for the EMG/NCV procedure is denied and respondent's request for an order affirming that branch of the master arbitrator's decision is granted; and it is further

ORDERED and ADJUDGED that the petition is granted to the extent of remanding the issue of whether the physical therapy treatments were medically necessary to the lower arbitrator for a further hearing on the merits of the claims, and it is otherwise denied; and it is further

ORDERED and ADJUDGED that respondent's application for an order confirming the September 15, 2007 Master Arbitration Award in its entirety is denied and it is further

ORDERED and ADJUDGED that respondent's request for attorney's fees is denied.

The foregoing decision constitutes the order and judgment of

the court and the Clerk is directed to enter judgment accordingly.

Dated: May 8, 2008

ENTER:



KIBBIE F. PAYNE
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).