

**Cigna Property and Casualty v Liberty Mutual
Insurance Company**

2003 NY Slip Op 30142(U)

August 28, 2003

Supreme Court, New York County

Docket Number:

Judge: Lottie E. Wilkins

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOTTIE E. WILKINS
JUSTICE

PRESENT -
0100667/2003

PART 18

CTGNA PROPERTY & CASUALTY
VS
LIBERTY MUTUAL INSURANCE CO.

INDEX NO. 100667/03
MOTION DATE 5/27/03
MOTION SEQ. NO. _____
MOTION CAL. NO. 15

SEQ 1
VACATE OR MODIFY AWARD _____

The following papers, numbered 1 to 4 were read on this motion to/for Vacate arbit. Award

	PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>	SCANNED SEP 03 2003
Answering Affidavits — Exhibits <u>CROSS -</u>	<u>2</u>	
Replying Affidavits <u>4 TRANSCRIPT</u>	<u>3-4</u>	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided pursuant to decision attached.

Dated: August 28, 2003

JW

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/ORDER IS REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PART 18

-----X
Application of CIGNA PROPERTY AND CASUALTY c/o
SEDGWICK CLAIMS MANAGEMENT SERVICES, insurer
of RED & TAN BUS LINES,

Petitioner,

Index No. 100667/03

For an Order Pursuant to Article 75 of the CPRL
Vacating the Arbitrator's Award,

v

Hon. Lottie E. Wilkins
J.S.C.

LIBERTY MUTUAL INSURANCE COMPANY,
insurer of DECAMP BUS LINES,

Respondent.

DECISION

-----X

Petitioner, Cigna Property and Casualty c/o Sedgwick Claims Management Services (Cigna), the no-fault carrier of Red and Tan Bus Lines (Red & Tan), brings this proceeding, pursuant to CPLR 7511, for an order vacating an arbitration award (the Award) issued on October 15, 2002, and a declaration that respondent Liberty Mutual Insurance Company (Liberty), the workers' compensation carrier of Decamp Bus Lines (Decamp), is not entitled to complete reimbursement of the medical benefits that it paid on behalf of the late Marshall Barnes.¹ The Award directs Cigna to make such reimbursement to Liberty.

Liberty cross-petitions for an order confirming the Award, and granting judgment upon it.²

The underlying facts are undisputed. Mr. Barnes was employed by Decamp as a bus dispatcher at the Port Authority Bus Terminal, in Manhattan. On June 1, 1999, in the

¹ In view of the decision below, the court does not address Cigna's request for a declaration.

² Liberty argues that the petition is procedurally defective inasmuch as the copy of the Award that is attached as an exhibit thereto is neither signed nor acknowledged. Signature and confirmation of an award are required only for confirmation thereof.

course of his employment, Mr. Barnes was struck by, or walked into, the side of a moving bus that was being operated by Red & Tan. Mr. Barnes fell to the ground, hitting his head on the concrete pavement. He was rushed to a hospital in New Jersey, where, after remaining comatose for five days, he died.

Some time thereafter, Liberty sent Cigna an undated letter, notifying Cigna that Liberty had received a workers' compensation file from Decamp, pertaining to Mr. Barnes, and that Liberty had a pending compensation lien on any award resulting from third-party proceedings. By a second letter to Cigna, dated November 18, 1999, Liberty advised that, up to that date, it had paid \$26,165.37 in medical benefits for Mr. Barnes. Mr. Barnes' estate did not bring a third-party action prior to the expiration of the limitations period for a wrongful death action. Accordingly, Liberty's lien remained uncollected.

On March 12, 2002, Liberty commenced a mandatory arbitration proceeding before Arbitration Forums, Inc., seeking to recover \$31,933.20 from Cigna, on the ground of "Priority of Payment." Liberty's Contentions stated that "Applicant paid no fault benefits to its insured who was a pedestrian and struck by respondent's vehicle. Under New York's no fault law, respondent is responsible for payment of no fault benefits." Cigna, which did not commence a proceeding to stay arbitration, argued to the arbitrator that, under Insurance Law § 5102 (b), a workers' compensation carrier is the primary no-fault insurer; that, in any event, there is no legislative authority for an award of reimbursement, absent an apportionment of liability between the parties; and that, absent legislative authority, such an award would deprive Cigna of property, without due process of law.

Here, Cigna also argues that there was no evidentiary proof to sustain the Award.

CPLR 7511 provides four grounds upon which an arbitration award may be vacated on the application of a party, which, like Cigna, has participated in the arbitration. The third of these, the only one here relevant, is that "an arbitrator * * * exceeded his power * * * ." CPLR 7511 (b) (iii).

Where, as here, the parties are required by law to submit their dispute to arbitration, an award "must have evidentiary support and [it] cannot be arbitrary and capricious." Motor Vehicle Accident and Indemn. Corp v Aetna Cas. & Surety Co., 89 NY2d 214,223 (1996). An award is subject to the court's review under the arbitrary and capricious standard, and an award that misapplies a governing statute will not stand. State Ins. Fund v Country Wide Ins. Co., 276 AD2d 432 (1st Dept 2000).

A workers' compensation carrier may proceed, under the intercompany loss transfer provisions of Insurance Law § 5105, to seek recovery, in an arbitration proceeding, of benefits that it has paid in lieu of first-party benefits to its insured's employee in a motor vehicle accident case. Workers' Compensation Law § 29 (1-a); A.I. Transport v New York State Ins. Fund, 301 AD2d 380 (1st Dept 2003); New York News, Inc. v State Ins. Fund, 157 AD2d 651 (2d Dept 1990); Matter of New Hampshire Ins. Co. v Utilities Mutual Ins. Co., 130 AD2d 927 (3d Dept 1987). However, insurance Law § 5105 (a), which is applicable only where, as here, "at least one of the motor vehicles involved [in an accident] is a motor vehicle weighing more than six thousand five hundred pounds unloaded or is a motor vehicle used principally for the transportation of persons or property for hire," provides, in relevant part, that:

any compensation provider paying benefits in lieu of first party benefits which another insurer would otherwise be obligated to pay pursuant to subsection (a) of section five thousand one hundred three of this article * * * has the right to recover the amount paid from the insurer of any other covered person to the extent that such other covered person would have been liable, but for the provisions of this article, to pay damages in an action at law.³

Insurance Law § 5103 (a) provides, in relevant part, that "every owner of a motor vehicle required to be subject to the provisions of this article * * * shall be liable for; the payment of first party benefits to:

- (1) Persons, other than occupants of another motor vehicle or a motorcycle, for loss arising out of the use or operation in this state of such motor vehicle."

Accordingly, under Insurance Law § 5105 (a), a compensation carrier, like Liberty, can recover the benefits that it has paid from the insurer of another covered person, but only to the extent that the other covered person, here Red & Tan, would have been liable in an action at law.

Liberty acknowledges that, had it sought recovery under Insurance Law § 5105 (a), the arbitrator would have been required to apportion liability between Mr. Barnes and Red & Tan, prior to making an award. However, Liberty argues that, because Mr. Barnes was a pedestrian at the time of the accident, Liberty could seek indemnification for the first-party benefits that it paid him, under a "priority of payment" theory, without regard to the comparative liability of Mr. Barnes and Red & Tan.

Insurance Law § 5105 (b) provides that:

[t]he sole remedy of any insurer or compensation provider to recover on a claim arising pursuant to subsection (a) hereof, shall be the submission of the controversy to mandatory arbitration pursuant to procedures promulgated or approved by the superintendent. Such procedures shall also be utilized to resolve all disputes arising between insurers concerning their responsibility for the payment of first party benefits.

[Emphasis added.]

11 NYCRR § 65.6 (j) (2) provides that:

[i]f a dispute regarding priority of payment arises among insurers who otherwise are liable for the payment of first-party benefits, then the first insurer to whom notice of claim * * * is given by or on behalf of an eligible injured person shall be responsible for payment to such person. Any such dispute shall be resolved in accordance with the arbitration procedures established pursuant to section 674 of the Insurance Law (section 65.10 of this Part).

In addition, 11 NYCRR § 65.10 (a) (5) provides, in relevant part, that:

any controversy between insurers involving the responsibility or the obligation to pay first-party benefits (i.e., priority of payment or sources of payment as

provided in section 65.15 (j) of this Part)⁴ is not considered a coverage question and must be submitted to mandatory arbitration under this section.

Thus, where two or more insurers deny responsibility for paying first-party benefits to an injured covered person, the dispute must be arbitrated pursuant to Insurance Law § 5105 (b) and the implementing regulations. Paramount Ins. Co. v Miccio, 169 AD2d 761 (2d Dept 1991); Matter of Pacific Ins. Co. v State Farm Mutual Automobile Ins. Co., 150 AD2d 455 (2d Dept 1989).

However, Insurance Law § 5102 (b) defines "first party benefits" as "payments to reimburse a person for basic economic loss * * * less * * * (2) [a]mounts recovered or recoverable * * * under state or federal laws providing * * * workers' compensation benefits * * *." This offset provision makes the workers' compensation carrier primarily responsible for the payment of basic economic loss (New York News, Inc. v State Ins. Fund, *supra*; Carlo Service Corp. V Rachmani, 64 AD2d 579 [1st Dept. 1978]), and the statutory and regulatory provisions providing for arbitration of disputes concerning responsibility for the payment of first party benefits are inapplicable to that primary responsibility. Were it otherwise, workers' compensation carriers, that had paid their insureds as the result of an injury sustained in a motor vehicle accident, would always seek to recover the sums paid from the other party's liability insurer. Absent a determination of the comparative fault of the parties involved in the accident, an arbitrator would have no rational basis for an award.

Because the Award is not based upon an apportionment of liability, as required in arbitrations governed by Insurance Law § 5105 (a), and because it is not otherwise based on law, it is arbitrary.

Accordingly, it is hereby

ORDERED that the cross petition is denied; and it is further

⁴ So in the original. The subsection intended to be referred to is 11 NYCRR § 65.15 (k).

ORDERED and ADJUDGED that the petition is granted and the Award dated October 15, 2002, against Cigna Property and Casualty and in favor of Liberty Mutual Insurance Company is vacated.

This constitutes the decision and judgment of the court.

Dated: August 28, 2003

ENTER:

A handwritten signature in black ink, appearing to read "J.S.C.", is written over a horizontal line. The signature is cursive and stylized.

J.S.C.