

**Matter of Baker v Met Life Auto and Home Ins. Co.**

2008 NY Slip Op 33172(U)

November 25, 2008

Supreme Court, New York County

Docket Number: 08/112069

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD  
Justice

PART 35

In the matter of  
Lucy Baker

- v -

INDEX NO. 112069/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for vacate Award

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**  
NOV 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by petitioner pursuant to CPLR §§ 7511(b)(i),(iii) to vacate the decision of Master Arbitrator Joel J. Flick, dated June 26, 2008, is granted; and it is further

ORDERED that the arbitration award of Arbitrator Connor, dated February 21, 2008, is vacated; and it is further

ORDERED that this matter be remanded to a different arbitrator on the issue of reimbursement for lost wages in accordance with this decision; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 11/25/08

*[Signature]*

HON. CAROL EDMEAD s.c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 35

\_\_\_\_\_  
IN THE MATTER OF ARBITRATION BETWEEN  
LUCY BAKER,

Respondent,

Index No. 08/112069

-and-

DECISION/ORDER

MET LIFE AUTO AND HOME INSURANCE CO.,

Petitioner.

\_\_\_\_\_  
EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, petitioner Met Life Auto & Home Insurance Co. ("petitioner") moves, the Court, under CPLR §§ 7511(b)(i) and (iii), to modify the arbitration award granted to respondent Lucy Baker ("respondent") by deducting respondent's long-term disability payments as an offset against the award, or, alternatively, to vacate the award and remand this matter for a new arbitration before a different arbitrator. Petitioner asserts that such payments constituted social security benefits, thus mandating the offset statutorily and through a signed agreement by respondent. Petitioner additionally moves to have the branch of the award that granted respondent hospital fees vacated for lack of standing.

*Background*

On November 3, 2004, respondent was in an automobile accident. Respondent submitted medical receipts for injuries allegedly sustained in the accident and documentation regarding lost wages to petitioner, with whom she had an insurance policy to cover such losses. Her claim was granted in part and denied in part. The parties submitted to arbitration, as required under no-fault law, the denial of reimbursement for certain expenses and lost wages.

**FILED**

NOV 26 2008

COUNTY CLERK'S OFFICE  
NEW YORK

On February 15, 2008, at the start of the arbitration proceedings, respondent was cross-examined by counsel to petitioner. According to the award,<sup>1</sup> respondent “started receiving long-term disability payments from the state of Oregon in the amount of \$602.00 per month. The payments began one year after the accident.” The arbitrator also found respondent’s testimony to be “credible and persuasive.”

Regarding respondent’s claim for reimbursement for lost wages, according to Arbitrator Connor, the record revealed that “Respondent paid Applicant \$2,312.80 from April 6, 2005 through March 15, 2007, including the 20% statutory offset.” Arbitrator Connor then held:

Applicant is entitled to reimbursement for lost wages from March 15, 2007 through November 3, 2007, for an additional 7 ½ months, which equals \$17,346.00. The disability payments Applicant received during this time equals \$4,522.50. Therefore, the total amount of lost wages due Applicant is \$12,823.50.

Regarding respondent’s claims for reimbursement for medical expenses, Arbitrator Connor held that Applicant was entitled to \$448.00 for “out-of-pocket expenses she paid to the Hospital for Special Surgery for a medical examination” and two different “radiological stud[ies].”

Arbitrator Connor additionally ordered that, “[w]ith respect to each of the aforementioned claims, the insurer shall compute and pay Applicant interest computed from September 7, 2007 to the date of payment of the award, but excluding September 7, 2007 from being counted within the period of interest.”

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<sup>1</sup>Petitioner asserts that respondent reported receiving long-term disability payments from the States of Oregon and New York, and respondent’s reply includes documentation of disability payments from the private entity of the First Rehabilitation Life Insurance Company of America, located in Great Neck, NY. Such document referenced payments for seven weeks only, however. In a telephone conference with counsel for both parties, respondent’s counsel acknowledged that the document provided to this Court was not the only document reflecting long-term disability payments paid to the respondent, but that such document was *not* provided to the Arbitrator.

[\* 4 ]

By a letter dated February 18, 2008, petitioner requested a technical correction of the award to account for the disability benefits that respondent had received which had not been applied to offset benefits already paid by petitioner. Respondent subsequently submitted a counter-request for a technical correction of the award. Citing 11 NYCRR 65-3.16(b)(1)(iii), respondent asserted that “there is no offset available to insurers for contractual or long-term disability plans, i.e., those that become effective six months after the date [sic] disability begins!” and that the award should not have been reduced by 20%. Petitioner next requested that respondent furnish Arbitrator Connor with documentation regarding the long-term disability respondent had been receiving, and respondent refused.

On February 21, 2008, Arbitrator Connor issued a technical correction of the award and removed the offset previously applied for respondent’s long-term disability payments. Citing only to 11 NYCRR 65-3.16(b)(1)(iii), Arbitrator Connor held that “there is no offset for the long-term disability payments Applicant received,” and awarded respondent the increased amount of \$17,794 for lost wages and health service benefits.

Thereafter, petitioner again requested, *via* e-mail, that respondent provide documentation relevant to the long-term disability payments received by respondent to determine whether or not these were, in fact, social security disability payments. Respondent refused. The request and refusal were reiterated, again *via* e-mail, and copied to the American Arbitration Association.

On April 14, 2008, petitioner appealed the award and technical correction to Master Arbitrator Joel J. Flick regarding Arbitrator Connor’s failure to apply the disability benefits to offset the award. On June 26, 2008, Master Arbitrator Flick quoted the following language from Arbitrator Connor’s original decision: “After carefully reviewing the evidence presented,

[\* 5 ]

including Applicant's testimony, which I found to be credible and persuasive, I find that Applicant has established her entitlement to additional No-Fault benefits." He asserted that the question before him was whether Arbitrator Connor's award decision was arbitrary and capricious, and explained that his role was not to conduct a *de novo* review. Arbitrator Flick then affirmed Arbitrator Connor's award in its entirety.

*Petitioner's Contentions*

In support of its petition, petitioner contends that the arbitration award should be modified on the grounds of "misconduct" under CPLR 7511(b)(1)(i), as respondent withheld crucial information regarding her long-term disability benefits. That is, petitioner was unaware that respondent had been receiving long-term disability benefits until respondent was cross-examined at the start of the arbitration proceedings.

In the alternative, petitioner asserts that the arbitrator's failure to off-set the award by the long-term disability payments received by respondent is "violative of a strong public policy and/or is totally irrational and, therefore, in excess of the Arbitrator's powers under CPLR 7511 (b)(1)(iii)." Respondent points to the State of New York's policy against claimants receiving double or "windfall benefits" under the no-fault law. Respondent points to New York State Insurance Law § 5102(b)(2) and 11 NYCRR 65-3.19, which require that insurance payments be off-set by Social Security disability benefits received by the claimant. Petitioner also points to respondent's testimony that she received disability benefits from state entities as compelling the conclusion that these were social security benefits.

Petitioner further claims that the award is irrational because it is contrary to respondent's signed Agreement to Pursue Social Security Disability Benefits, in which she agreed to apply for

and reimburse petitioner for any received social security benefits recoverable on the basis of injuries caused by the accident.

Petitioner additionally contends that the award is irrational because it is based on an incomplete record. That is, according to petitioner, Arbitrator Connor erred in relying on respondents' testimony regarding her long-term disability, including the date when payments began. Thus, in failing to make a full inquiry, the arbitrator lacked the necessary material information to make a rational award decision. Petitioner additionally asserts that the award is irrational because, in failing to apply the statutorily mandated offset, it is not supported by sufficient evidence and lacks a basis in reason.

Petitioner also claims that Arbitrator Connor's award to respondent of \$448 for hospital expenses should be vacated due to respondent's lack of standing to apply for such an award. Respondent executed a valid assignment of her benefits from the insured to the provider of the medical services and there was no evidence that the assignment was revoked. Furthermore, Arbitrator Connor's failure to set forth the basis for her conclusion that the respondent was entitled to reimbursement for the hospital expenses makes a review of the record on this issue impossible.

#### *Respondent's Opposition*

In opposition, respondent contends that this Court's review must be limited to a determination of whether the Master Arbitrator's decision to affirm the arbitrator's award was rational. Respondent additionally contends that the Master Arbitrator was compelled to affirm the arbitrator's decision, applying the same standard of rationality. The respondent asserts that the arbitrator was convinced, through documentation and the respondent's testimony, that the

long-term disability payments were, in fact, private.

Respondent asserts that her counsel was, in fact, aware of these disability payments, in contrast to petitioner's assertions. Furthermore, petitioner had failed to prepare or conduct a proper verification of the claim. Respondent points to 11 NYCRR 65-3.16(b)(1)(iii) and asserts that offsets for "contractual or long-term disability" are not available to insurers. Respondent additionally maintains that whether the disability payments were private or social security is a question of fact, not law, and thus is not reviewable. Respondent points to caselaw holding that errors of fact or law are beyond the scope of judicial review.

In response to petitioner's claim that the arbitrator erred in awarding hospital expenses to respondent, respondent asserts that the testimony and proof presented at the arbitration hearing established that respondent paid the expenses out of her own pocket, and that if the payment were made to the hospital, that would actually be "double dipping."

Respondent further asserts that petitioner's "post-arbitration award" request for documentation concerning the long-term disability payments is "unconscionable and clearly untimely." Respondent also asserts that it was the petitioner's duty to "request verification" to obtain such documentation, pursuant to the New York State No-Fault Rules and Regulations. Respondent asserts that "no such 'disability award' exists"; yet, respondent attaches documentation regarding respondent's private disability records.

#### *Analysis*

Under CPLR § 7511, an arbitration award can be vacated or modified if:

the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; . . . or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a

[\* 8 ]

final and definite award upon the subject matter submitted was not made . . .

The Court of Appeals has held that “it is basic that an arbitrator’s award, so long as it stays within the bounds of rationality, may not be vacated for errors of law or fact” (*Matter of Allen [New York State]*, 53 NY2d 694, 696 [1981]). Furthermore, “[e]rrors in the arbitration proceeding, whether of fact or law, are beyond the scope of judicial review and clearly may not . . . be raised in [a] subsequent judicial proceeding” (*Matter of American Ins. Co. [Messinger-Aetna Cas. and Sur. Co.]*, 371 NE2d 798, 802 [1977] see also *Matter of SCM Corp. [Fisher Park Lane Co.]*, 40 NY2d 788, 792-93 [1976]). Similarly, “the master arbitrator is also expressly precluded from reviewing factual or procedural errors” (*Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 212 [1981]).

Nonetheless, even in voluntary arbitration proceedings, an award must be vacated if it is “violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator’s] power” (*Matter of Silverman [Benmore Coats]*, 61 NY2d 299, 308-09 [1984]). Furthermore, when reviewing an award entered in a compulsory arbitration, as in no-fault insurance law, the award must be “supported by evidence or other basis in reason, as may be appropriate, and appearing in the record” (*Karmilowicz v Allstate Ins. Co.*, 77 AD2d 131, 133 [1<sup>st</sup> Dept 1980], internal citations and quotations omitted). Therefore, in a case such as this, the court has discretion to evaluate whether the awards are supported by any facts in the record before the Arbitrators.

New York State no-fault insurance law requires that, to avoid “windfall” awards, insurance benefits provided to compensate for lost income be offset by social security benefits intended to compensate for same (see *Karmilowicz*, 77 AD2d at 135).

In her original award, Arbitrator Connor determined that respondent was entitled to reimbursement for lost wages for 7½ months, but deducted \$4,522.50 from the amount to which she found respondent was entitled (*i.e.*, \$17,346), and awarded \$12,823.50. Evidently, said deduction was derived from respondent's own testimony that she received \$602.00 per month in "long-term disability benefits from the state of Oregon," which began "one year after the accident." Whether Arbitrator Connor deemed such benefits social security or state related benefits is unclear, as she failed to identify such benefits as such. However, in her original award, Arbitrator correctly cited Section 5102(b)'s provision for a deduction of amounts "recoverable on account of such injury under state or federal laws providing social security disability benefits . . . ." The Court also notes that before the Arbitrator was respondent's "agreement to pursue social security disability benefits," which entitles petitioner to (1) reimbursement from respondent "for any amounts that may have been or may be advanced by the insurer pursuant to this agreement, pending receipt of Social Security Disability benefits" or (2) "deduct the estimated Social Security Disability benefits from loss of earnings benefits . . ." in the event respondent "fails to sign and return this Agreement and Authorization or to apply for Social Security Disability benefits. . . ." Thus, there is evidence to support to Arbitrator Connor's deduction of long-term disability benefits in the amount of \$4,522.50 in her original award.

However, upon reconsideration, Arbitrator Connor agreed with respondent's subsequent argument, and reinstated the \$4,522.50 back to the respondent, citing solely to 11 NYCRR 65-3.16(b)(1)(iii), without any additional evidence to support the amendment. Section 65-3.16(b)(1)(iii) states that "insurers shall not take a deduction for *contractual or voluntary* long-

term disability plans . . . .” (emphasis added). However, there is no indication in the “technical modification” of the award, or in the letter requests submitted to Arbitrator Connor, of any new evidence or existing evidence to support the decision to reinstate the \$4,522.50. In other words, although Arbitrator Connor applied this section to modify the original award, there is no explanation of any new facts or evidence warranting the application of such statute, or an explanation of how such statute applied to benefits respondent received through the state of Oregon or how such benefits fit within the definition of “contractual” or “voluntary” benefits under 11 NYCRR 65-3.16(b)(1)(iii). It appears that reinstating \$4,522.50 to respondent is irrational and violates public policy goals protecting against windfall benefits for claimants. Therefore, the corrected Award, dated February 21, 2008, must be vacated.

Likewise, Master Arbitrator Flick’s decision confirming Arbitrator Connor’s corrected award must also be vacated. Master Arbitrator Flick’s decision stated that Arbitrator Connor reviewed the evidence and found certain testimony credible. The Master Arbitrator stated, “[A] no-fault arbitrator is not required 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” (*Dahn v Luchs*, 92 AD2d 537, 538 [2<sup>nd</sup> Dept 1983]). However, there is no rational basis apparent upon a reading of the record to support Arbitrator Connor’s award. Therefore, Master Arbitrator Flick’s decision to affirm Arbitrator Connor’s award in its entirety must be vacated.

However, petitioner’s assertion that Arbitrator Connor’s award to respondent for hospital expenses should be vacated is without merit. Because traditional rules of procedure do not apply to arbitrations (see *Matter of SCM Corp. [Fisher Park Lane Co.]*, 40 NY2d at 792-93), the argument that respondent lacks standing lacks force. There is no apparent irrationality or

inconsistency in the award to warrant overturning arbitrator's decision in this regard.

Furthermore, this Court is satisfied that there is a reasonable basis in the record to justify such an award. Arbitrator Connor referenced testimony of respondent establishing that the \$448 granted was to reimburse respondent's "out of pocket" expenditures. Additionally, the record suggests that receipts for the expenses were before the arbitrator. That is, Arbitrator Connor denied other requested reimbursements because of respondent's lack of receipts, suggesting that receipts had been required for the expenses reimbursed by the arbitrator. Because it is not apparent that Arbitrator Connor applied the "wrong rule of law" (*see Karmilowicz*, 77 AD2d at 133), but merely relaxed the technical standards to provide a just remedy, this portion of the award is affirmed.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion by petitioner pursuant to CPLR §§ 7511(b)(i),(iii) to vacate the decision of Master Arbitrator Joel J. Flick, dated June 26, 2008, is granted; and it is further

ORDERED that the arbitration award of Arbitrator Connor, dated February 21, 2008, is vacated; and it is further

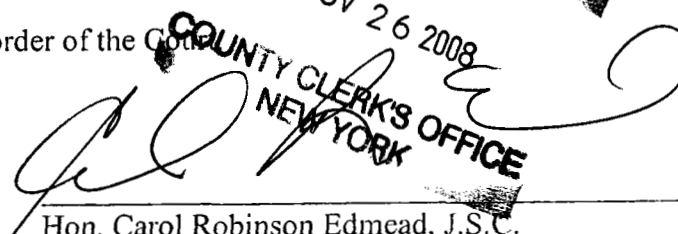
ORDERED that this matter is remanded to a different arbitrator on the issue of reimbursement for lost wages in accordance with this decision; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 25, 2008

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Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**