

Matter of Continental Ins. Co. v Whethers

2009 NY Slip Op 31365(U)

June 19, 2009

Supreme Court, Nassau County

Docket Number: 6106/09

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

In the Matter of the Application for an Order
Vacating a master Arbitration Award between,
CONTINENTAL INSURANCE COMPANY,

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 6106/09

Petitioner,

Motion Sequence No. 001

- against -

ROBERTA WHETHERS,

Respondent.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The petitioner seeks an order pursuant to CPLR 7511 to vacate the decision of the Master Arbitrator on the ground he exceeded his authority by substituting his finding of fact for that of the lower arbitrator, and rendered a decision that was arbitrary and capricious, and to stay all future proceedings between the parties pending the outcome of the petition to vacate. The respondent opposes the petition. This Court has carefully reviewed and considered all of the papers submitted with respect to this petition.

A no-fault arbitration resulted in the arbitrator deciding the petitioner fully

reimbursed the respondent for lost earnings from August 9, 2004 through August 13, 2004, as the respondent suffered an actual pecuniary loss for those dates. The arbitrator further held the petitioner was liable for the respondent's lost wages from May 15, 2004 and May 18, 2004 through May 21, 2005. The petitioner sought review of the lower arbitrator's decision by a Master Arbitrator on the ground the lower arbitrator's decision was capricious and incorrect as a matter of law. The Master Arbitrator subsequently vacated the lower arbitrator's decision, and remanded the matter back to the lower arbitrator.

The petitioner contends the Master Arbitrator on February 2, 2009 rendered an award which was incorrect on law, arbitrary and capricious by improperly disturbing the lower arbitrator's findings of fact. The petitioner asserts the award rendered by the Master Arbitrator should be vacated because the petitioner's rights were prejudiced when the Master Arbitrator exceeded his authority by substituting his finding of fact for that of the lower arbitrator

The respondent's counsel states, in opposition to the petition, the respondent made certain admissions, in September 23, 2008 testimony concerning economic loss with regard to her employer, BWD Group, LLC, and based upon that testimony and documentary evidence, the arbitrator incorrectly interpreted the no-fault regulations, and made a finding the respondent did not suffer any economic loss for certain periods, so she was not entitled to first party no-fault benefits for lost wages. The respondent's counsel

states the respondent subsequently sought review of that lower arbitrator's decision as capricious and incorrect as a matter of law. The respondent's counsel claims the Master Arbitrator rendered an award overturning the lower arbitrator's decision, and that award by the Master Arbitrator was clearly correct on the law, and not arbitrary and capricious. The respondent's counsel requests, as established in Insurance Law § 5106 (a), statutory interest and \$3,850.00 attorney fee, based upon 11 hours of legal work at the rate of \$350.00 per hour plus costs and disbursements of this proceeding, and reimbursement for a \$40.00 filing fee for the original arbitration and a \$75.00 filing fee for the Master arbitration.

CPLR 7511 (b) provides, in pertinent part:

The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by: (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

A master arbitrator has the authority to vacate or modify an arbitration award based upon a ground set forth in CPLR article 75 (*see* 11 NYCRR 65.19[a] [1]). The power of the master arbitrator to review factual and procedural issues is limited to "whether the arbitrator acted in a manner that was arbitrary and capricious, irrational or without a plausible basis" (*Matter of Petrofsky*, 54 N.Y.2d 207, 211, 445 N.Y.S.2d 77, 429 N.E.2d 755). If the determination of the arbitrator is challenged based upon an alleged factual error, the master arbitrator must uphold the determination if it has a rational basis (*see Matter of Richardson v. Prudential Prop. & Cas. Ins. Co.*, 230 A.D.2d 861, 646 N.Y.S.2d 850). However, pursuant to 11

NYCRR 65.19(a) (4), the review powers of the master arbitrator include the power to determine if the arbitrator's award was "incorrect as a matter of law" (*Matter of Smith*, 55 N.Y.2d 224, 231, 448 N.Y.S.2d 444, 433 N.E.2d 509; *see Matter of Petrofsky, supra* at 211, 445 N.Y.S.2d 77, 429 N.E.2d 755). If the master arbitrator vacates the arbitrator's award based upon an alleged error of "a rule of substantive law," the determination of the master arbitrator must be upheld unless it is irrational (*Matter of Smith, supra* at 232, 448 N.Y.S.2d 444, 433 N.E.2d 509)

Liberty Mut. Ins. Co. v. Spine Americare Medical, P.C., 294 A.D.2d 574, 575-576, 743 N.Y.S.2d 144 [2nd Dept., 2002].

The Court of Appeals holds: "An arbitrator's award may be vacated only upon the grounds specified in CPLR 7511 (*see, Geneseo Police Benev. Assn. Council 82 v. Village of Geneseo*, 91 A.D.2d 858, 458 N.Y.S.2d 384, *aff'd* 59 N.Y.2d 726, 463 N.Y.S.2d 440, 450 N.E.2d 246)" (*In the Matter of the Arbitration between Leonard Blamowski and Munson Transportation, Inc.*, 91 N.Y.2d 190, 194, 690 N.E.2d 1254, 668 N.Y.S.2d 148 [1997]). The Second Department decided:

Consistent with the public policy in favor of arbitration, the grounds specified in CPLR 7511 for vacating or modifying an arbitration award are few in number and are narrowly applied. The list of potential objections in CPLR 7511(b) is exclusive (*see Matter of Blamowski [Munson Transp.]*, 91 N.Y.2d 190, 668 N.Y.S.2d 148, 690 N.E.2d 1254; *Matter of Lurie v. Sobus*, 289 A.D.2d 578, 735 N.Y.S.2d 187; *Geneseo Police Benevolent Assn., Council 82 Amer. Federation of State, County, and Municipal Employees, AFL-CIO v. Village of Geneseo*, 91 A.D.2d 858, 458 N.Y.S.2d 384, *aff'd*. 59 N.Y.2d 726, 463 N.Y.S.2d 440, 450 N.E.2d 246) *Domotor v. State Farm Mut. Ins. Co.*, 9 A.D.3d 367, 778 N.Y.S.2d 919 [2nd Dept., 2004].

The Master arbitrator here observed the issue "was the reduction of applicant's lost wage claim because of payments under a wage continuation plan incorrect as a matter of law or irrational." The master arbitrator determined, "[i]n ascertaining and replying on whether

applicant ‘actually’ lost salary, the arbitrator applied a standard not sanctioned by regulation, requiring that portion of the award be vacated because it is incorrect as a matter of law and without a rational basis.” This Court finds the petitioner here fails to show the existence of any of the requisite statutory grounds to vacate the February 2, 2009 award by the Master Arbitrator, and that award by the Master arbitrator had a rational basis (*see Colon v. GEICO*, 18 A.D.3d 467, 794 N.Y.S.2d 431 [2 Dept., 2005]; *see generally Green v. Liberty Mut. Ins. Co.*, 22 A.D.3d 755, 802 N.Y.S.2d 379 [2nd Dept., 2005]).

CPLR 7513 provides:

Unless otherwise provided in the agreement to arbitrate, the arbitrators’ expenses and fees, together with other expenses, not including attorney’s fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. The court, on application, may reduce or disallow any fee or expense it finds excessive or allocate it as justice requires.

Insurance Law § 5106 (a) provides:

Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney’s reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations.

11 NYCRR § 65-4.6 sets forth limitations on attorney’s fees pursuant to Insurance Law § 5106. Here, the respondent’s counsel seeks attorney’s fees pursuant to 11 NYCRR § 65-10 (j) (4), which addresses Master arbitration procedures under Insurance Law § 5106.

11 NYCRR § 65-10 (j) (4) provides:

Limitations on attorney's fees pursuant to section 5106 of the Insurance Law. The following limitations shall apply to the payment by insurers of applicant's attorney's fees for services rendered in a master arbitration to resolve a no-fault dispute: (4) The attorney's fee for services rendered in connection with a court adjudication of a dispute de novo, as provided in section 5106 (c) of the Insurance Law, or in a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter. (5) No attorney shall demand, request or receive from the insurer any payment or fee in excess of the fees permitted by this subdivision for services rendered with respect to a no-fault master arbitration dispute.

This Court determines the expenses and fees incurred in the conduct of the arbitration can only be provided to the respondent as set forth in CPLR 7513 (*see Myron Associates, Inc. v. Obstfeld*, 224 A.D.2d 504, 638 N.Y.S.2d 154 [2nd Dept., 1996]). The arbitrator awarded the respondent on October 1, 2008, \$40.00 to reimburse the respondent for the fee paid to the designated organization, to wit the initial filing fee, interest, and an attorney fee of \$234.06. The Master arbitrator found the respondent had prevailed in the review, and directed the petitioner to pay the respondent \$65.00 for attorney's fees computed in accord with NYCRR 65.18 (k) computed for one hour, and \$75.00 to reimburse the respondent for the Master arbitration filing fee. With respect to statutory interest and attorney fees plus costs and disbursements of this proceeding, this Court does not award statutory interest, costs and disbursements of this proceeding, but does award \$350.00 for attorney fees regarding only the court appeal from the master arbitration award payable within 30 days after service of a copy of this order with notice of entry.

Accordingly, this petition to vacate the arbitrator's award is denied, the stay is vacated, and the petition is dismissed and the Master Arbitrator's award is confirmed in accord with this decision. This decision constitutes the decision, order and judgment of the Court.

So ordered.

Dated: **June 16, 2009**

ENTER:



J. S. C.

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

ENTERED
JUN 18 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE