

United Healthcare Ins. Co. of N.Y. v Azar

2011 NY Slip Op 32351(U)

September 1, 2011

Sup Ct, NY County

Docket Number: 105236/11

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lohis

PART 6

Index Number : 105236/2011
UNITED HEALTHCARE INSURANCE
vs.
AZAR, ANTHONY
SEQUENCE NUMBER : 001
CONFIRM AWARD

INDEX NO. _____
MOTION DATE 6/27/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED
1-5
6-7
8-26

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

Answering Affidavits — Exhibits _____ x mot

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
ORDER

Dated: 9/1/11

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
**UNITED HEALTHCARE INSURANCE COMPANY
OF NEW YORK and OXFORD HEALTH PLANS (NY),
INC.,**

Petitioners,

Index No. 105236/11

-against-

Decision and Order

**ANTHONY AZAR, Temporary Administrator of the
Estate of CYNTHIA WU, M.D.,**

Respondents.

-----X
JOAN B. LOBIS, J.S.C.:

Petitioners United Healthcare Insurance Company of New York (“United”) and Oxford Health Plans (NY) Inc. (“Oxford”)¹ bring this special proceeding under Article 75 of the C.P.L.R, seeking an order confirming the arbitration award of March 9, 2011 (the “Award”) and granting a judgment in their favor. Respondent Anthony Azar cross-petitions for an order vacating the Award on the grounds of arbitrator bias.

The underlying arbitration relates to separate healthcare provider agreements between petitioners and Cynthia Wu, M.D., a gynecologist-obstetrician who died on January 9, 2005. In September 1998, Oxford and Dr. Wu entered into an agreement which provided, in pertinent part, that Dr. Wu would provide covered services to covered patients in exchange for compensation from Oxford. In June 2000, United and Dr. Wu entered into a similar agreement. In the statement of claim from the underlying arbitration, petitioners set forth that United conducted an audit of Dr.

¹ According to testimony during the arbitration hearings, United bought Oxford’s health plans in 2006 and the two companies merged. However, in the award, the arbitrator treats the two entities separately.

Wu's patient files and uncovered overpayments in excess of \$380,000 due to Dr. Wu submitting improper claims. The claim alleged that Dr. Wu had separately billed patients for antepartum and/or postpartum appointments when she had also billed them for a "global delivery," which encompasses antepartum and postpartum appointments; separately billed patients for inpatient and hospital care when she had also billed them for a "global delivery," which encompasses hospital care related to delivery; and billed patients more than once for "global" antepartum care, which encompasses, as is relevant herein, blocks of seven or more antepartum visits, and so should not be billed multiple times for a single patient. As to Oxford, petitioners set forth in the statement of claim that Dr. Wu had improperly billed Oxford for ultrasound testing that she did not actually perform or that was not medically appropriate; Oxford claimed that it had sustained damages in excess of \$700,000.

In May 2006, petitioners demanded arbitration of their breach of contract claims against Dr. Wu; as Dr. Wu had died, petitioners proceeded against the administrator of her estate (respondent herein). By letter dated July 6, 2006, the parties were informed that the American Arbitration Association (the "Association") had appointed Leslie Trager to arbitrate the case. The letter further set forth that Mr. Trager had accepted the appointment and was disclosing that both the firm of Robinson & Cole, LLP (counsel for United and Oxford) and Einiger & Associates (counsel for Dr. Wu's estate at the commencement of the arbitration proceedings) had appeared before him on opposing sides of another arbitration that was still in the telephone conference phase. The July 6, 2006 letter informed the parties that any objections to the appointment of Mr. Trager must be raised by July 13; neither side objected.

The pre-hearing phase of the arbitration lasted over four years. In April 2008, the firm of Mark M. Basichas & Associates, P.C. (the "Basichas Firm"), was substituted as counsel for Dr. Wu's estate. Eventually, the hearing was set down for May 2010. On March 26, 2010, the arbitrator made a further disclosure that subsequent to his appointment as the arbitrator in this matter, he was selected to be the arbitrator in another case in which Oxford was the claimant. He set forth that he did not believe that the subsequent appointment would affect his decision in this case, but that he wished to bring this to the attention of the parties. By letter, the Association informed the parties of the arbitrator's supplemental disclosure and advised them that any objections to his appointment must be raised by April 13, 2010. On April 10, 2010, respondent's attorney contacted the Association and his adversary and suggested that "to avoid any appearance of impropriety, it would be appropriate to appoint someone else to handle this arbitration." Petitioners' attorney strongly disagreed on the grounds that there was no appearance of impropriety; that it was impractical to remove an arbitrator from consideration in all future cases involving a party once the arbitrator was selected in a case; and that removal would be prejudicial given the delay and the additional costs that would be incurred should the arbitrator be removed. Respondent's attorney disagreed and argued that removal of the arbitrator "would benefit both sides and prevent any issues that may arise in view of an adverse finding for either party." By letter dated April 15, 2010, the Association informed the parties that after considering their contentions, it had determined that Mr. Trager would be reaffirmed as their arbitrator.

As set forth in the Award, the hearing ultimately took place over four separate days in September, October, and November 2010, during which petitioners and respondent each proffered

witnesses and exhibits. As to Oxford, the arbitrator found that Oxford's experts' opinion as to the overbilling for ultrasound testing was credible and was supported by the evidence. He rejected respondent's contention that New York Insurance Law § 3224-b barred petitioners from recovering payments made over two years prior to the date on which their claim was filed, because Section 3224-b states that a health plan's right to pursue recovery of overpayments that occurred prior to the effective date of the statute (January 1, 2007) would not be restricted by the two-year limitation of the statute as long as notice of such recovery efforts was provided prior to January 1, 2007 (which, in this case, it was). The arbitrator accepted Oxford's evidence that the statistical calculation of the overpayment was \$569,030. He calculated interest as to Oxford as running at 9% per annum from September 1, 2002, based on an approximate midpoint date of the claimed dates of overpayments.

As to United, the arbitrator addressed respondent's contention that he should not have admitted into evidence a computer printout from United purportedly showing the overlapping billing. The arbitrator determined that there had been no objection raised at the hearing and that the printout reflected United's records made in the ordinary course of business so it was otherwise admissible. He rejected respondent's expert's opinion that the only way to determine inconsistency in billing is to look directly at patients' files because respondent failed to pursue this investigation himself in order to show that the billing was, indeed, appropriate. The arbitrator determined that Dr. Wu had been overpaid in the amount of \$346,460.24 for antepartum billings overlapping with global care billings; that she had been overpaid in the amount of \$27,136.64 for multiple billings for seven or more antepartum visits for the same patient; and that she had been overpaid in the amount of \$13,037.45 for hospital care billings overlapping with global care billings. He denied the remainder

of United's claims for overlapping coverage on the basis that the claimant's witness was not sure whether those claims were, in fact, inconsistent. The total overbilling with respect to United was \$386,634.33. The arbitrator calculated interest as to United as running at 9% per annum from January 1, 2003, based on a midpoint date of the claimed dates of overpayments.

Additionally, the arbitrator determined that the parties' agreement to arbitrate included costs and attorneys fees and calculated that respondent must pay petitioners a total of \$131,014.95 in costs and fees. He further determined that respondent must pay the Association's fees of \$11,250 and his fees of \$10,380, and must therefore reimburse petitioners in the amount of \$16,440, representing that portion of the fees in excess of the apportioned costs previously paid by petitioners. In summary, the arbitrator set forth that Oxford shall recover against respondent \$569,030 plus interest of \$435,089.72 for a total of \$1,004,119.72; that United shall recover against respondent \$386,634.33 plus interest of \$284,095.03 for a total of \$670,729.36; and that the total amount to be awarded to petitioners, who filed for arbitration together, is \$1,674,849.08.

Petitioners now seek an order confirming the Award, together with interest since the date of the Award, and a judgment upon the confirmation of the award. Respondent cross-petitions for an order vacating the award. The crux of respondent's argument is that the Award must be vacated because the arbitrator was biased and failed to timely and appropriately disclose that he received and continues to receive work from Oxford/United. Respondent argues that where there is an existing relationship between an arbitrator and a party that is not timely disclosed, there is a presumption of bias warranting vacatur of the arbitrator's award. The Basichas Firm states that from

the date it took over the representation of respondent in the underlying arbitration, "it appeared quite obvious that [the arbitrator] continuously demonstrated partiality" toward petitioners in matters involving setting deadlines and scheduling. Respondent contends that the arbitrator's "relationship" with petitioners was "finally disclosed for the first time on the eve of the hearing of this arbitration[.]" but that the Association failed to disclose how much the arbitrator had earned from his relationship with Oxford/United or the nature of the work he performed and continued to perform for Oxford/United. Respondent sets forth that the "extent of [the arbitrator's] prior dealings were never disclosed" to either Einiger & Associates or the Basichas Firm, once it was retained. Respondent maintains that had he known the extent of the relationship between the arbitrator and Oxford/United earlier in the proceedings he would have requested removal. As proof of bias, respondent's attorney states that Oxford's experts' testimony was inconsistent; that United improperly submitted a computer printout of billing codes which was not the best evidence available on the issue of improper billing; that United failed to satisfy its burden of establishing breach of contract; that the arbitrator largely ignored instances where respondent's experts' testimony conflicted with petitioners' experts' testimony; and that Insurance Law § 3224-b does serve to bar petitioners from recovering payments prior to May 1, 2004, or two years prior to the commencement of arbitration.

Petitioners oppose respondent's cross petition, maintaining that the award was rational and that there was no impartiality on the part of the arbitrator. They argue that respondent failed to demonstrate that the arbitrator's award was irrational and that an arbitrator's award cannot be set aside simply because one party disagrees with the arbitrator's determinations. They maintain

that there was ample proof to justify the award but that, regardless, it is not the court's function to evaluate the arbitrator's assessment of the evidence. Petitioners further argue that Insurance Law § 3224-b does not bar them from recovering the oldest claimed overpayments in this case, despite respondent's contentions otherwise. Finally, petitioners aver that respondent has not demonstrated bias warranting vacatur of the Award and that respondent's assertion that the arbitrator was not neutral because he had been assigned to arbitrate other cases with the same parties is simply wrong. They maintain that petitioner has cited no facts supporting the allegation of bias except that, for the most part, the Award favored petitioners.

Pursuant to C.P.L.R. § 7510, "[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." Petitioners' application to confirm was made within one year after the Award was delivered, and so it shall be confirmed unless, as respondent maintains, there are grounds to vacate the award. Respondent participated in the arbitration, so pursuant to C.P.L.R. § 7511(b)(1), the award may be vacated only if the court finds that respondent's rights were prejudiced by corruption, fraud, or misconduct in procuring the award; partiality of the neutral arbitrator; the arbitrator exceeding his power; or failure to follow the procedures of Article 75 of the C.P.L.R.

"The failure of an arbitrator to disclose facts which reasonably may support an inference of bias is grounds to vacate the award under CPLR 7511." J.P. Stevens & Co. v. Rytex Corp., 34 N.Y.2d 123, 125 (1974). However, in this case, the arbitrator did disclose that he had arbitrated other claims where either Oxford/United were the claimants or petitioners' attorneys

represented the claimants. He disclosed this fact initially and, as he was under a continuous disclosure obligation, he updated his disclosure to include a more recent event as the underlying case progressed. The court is not persuaded that the supplemental disclosure was untimely since it ultimately occurred more than five (5) months before the hearings took place. The parties had a full opportunity to object to the continuing appointment of the arbitrator, and the Association—a neutral party with no interest in the outcome of the arbitration—considered respondent’s objection and determined that the arbitrator would be reappointed.

Regardless, even if the supplemental disclosure was untimely, “occasional associations between an arbitrator and a party or witness will not warrant disqualification of the arbitrator on the ground of the appearance of bias or partiality. It must be shown that the arbitrator and the party or witness have some ongoing relationship.” Artists & Craftsmen Builders v. Schapiro, 232 A.D.2d 265 (1st Dep’t 1996) (internal citations omitted). There is simply no evidence of an ongoing relationship here between petitioners and the arbitrator that would warrant disqualification. The Association appointed the arbitrator, not petitioners. The contact between the arbitrator and petitioners was limited to his capacity as a neutral appointed by the Association, and even respondent’s original attorney had the same “relationship” with the arbitrator.

There is support in the record for the Award. The complaints that respondent raises about the arbitration process and the Award are not sufficient to support an inference that the arbitrator was so biased as to have rendered a completely unsupported or irrational award. Respondent’s “subjective belief that the arbitrator’s rulings favored respondent does not create an

actual or perceived conflict of interest between the arbitrator and [petitioners] that prejudiced [respondent's] rights." Barnes v. Washington Mut. Bank, FA, 40 A.D.3d 357, 358 (1st Dep't 2007) (citation omitted). The simple fact that the arbitrator ultimately ruled against respondent is not evidence of bias. See In re County of Niagara v. Bania, 6 A.D.3d 1223, 1225 (4th Dep't 2004); In re Palencia v. New York City Bd./Dep't of Educ., 31 Misc.3d 1229(A) (Sup. Ct. N.Y. Co. 2011). The complaint that the arbitrator misapplied evidentiary rules or the law with regard to the statute of limitations is also not a reason to vacate the award. These are claims of legal error, which the courts do not generally review. In re Falzone v. New York Cent. Mut. Fire Ins. Co., 15 N.Y.3d 530, 534 (2010); In re New York City Tr. Auth. v. Transport Workers' Union of America, 6 N.Y.3d 332, 336 (2005) (holding "courts are obligated to give deference to the decision of the arbitrator. This is true even if the arbitrator misapplied the substantive law in the area of the contract"). Accordingly, it is hereby

ORDERED that the cross petition is denied in its entirety; and it is further

ORDERED that the petition is granted and the Award rendered in favor of petitioners and against respondent is confirmed; and it is further

ORDERED that the parties settle judgment.

Dated: 9/11/11

ENTER:

J.S.C.