Allstate Ins. Co. v Erway Ambulance Serv.
2011 NY Slip Op 32687(U)
October 14, 2011
Sup Ct, Nassau County
Docket Number: 10600/11
Judge: Anthony L. Parga
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SCAN

SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

---X PART 8

ALLSTATE INSURANCE COMPANY,

Petitioner,

-against-

ERWAY AMBULANCE SERVICE
a/a/o HEATHER SILVER,

Respondents.

---X

INDEX NO.: 10600/11
XXX
MOTION DATE: 08/18/11
SEQUENCE NO. 001

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Upon the foregoing papers, petitioner's application for an order, pursuant to CPLR §7511(b)(1)(iii), vacating and setting aside the Master Arbitrator's Award rendered in favor of respondent, dated April 15, 2011, is denied and the within petition is dismissed.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

The instant petition arises from a dispute for benefits under the New York No-fault Law and seeks to vacate a master arbitration award dated April 15, 2011 that was rendered in favor of respondent. On or about May 22, 2010, respondent provided ambulance services to assignor Heather Silver. On June 23, 2010, respondent submitted a bill in the amount of $635.00, of which petitioner reimbursed only $350.59 based on what it believed was a reasonable approximation of the local prevailing rate for where the services were provided and issued a denial for the remainder, leaving $284.41 in dispute. Respondent filed an AR-1 and initiated the underlying arbitration proceeding, claiming that it was entitled to reimbursement in the amount

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of the remaining $284.41. The no-fault fee schedule, adopted by the Superintendent of Insurance pursuant to Section 5108 of the Insurance Law, does not include a fee schedule for reimbursement of ambulance services under the no-fault law. In the absence of a fee schedule for the reimbursement of ambulance services, the Superintendent has promulgated Appendix 17-C, Part G, of Regulation 83 to address the permissible charges for ambulance services. Appendix 17-C, Part G, of Regulation 83 provides that "[t]he maximum permissible charge for ambulance service is the local prevailing charge for such service."

Erway Ambulance Service (hereinafter "Erway") is located in Chemung County, New York, where, petitioner contends, Erway is the sole ambulance provider servicing the Chemung County area. Petitioner contends that the issue in the underlying arbitration was whether Allstate's use of the Medicare/Medicaid Ambulance Fee Schedule ("MMAFS") as a guide to establish a reasonable approximation of the local prevailing charge for ambulance services in areas, such as Chemung County, where the local prevailing charge cannot be established because there is an absence of meaningful competition which prevents such a determination, was in accordance with the intent of the no-fault law.

On December 6, 2010, a hearing on this matter was held before Arbitrator Mary Ann Theiss. By decision dated December 16, 2010 (hereinafter the "underlying award"), Arbitrator Theiss issued an award finding that despite the fact that Respondent is the only ambulance provider operating in the area, their charges were reasonable and reflected the prevailing fee for the area.

Following the issuance of the underlying arbitration award, petitioner appealed the decision to a master arbitrator. On April 15, 2011, Master Arbitrator William Laffan issued an award (hereinafter the "master arbitrator's award") affirming the underlying arbitration award issued by Arbitrator Theiss.

Petitioner moves this court for an order vacating and setting aside the master arbitrator's award, pursuant to CPLR 7511(b)(1), as "arbitrary and capricious, irrational or without plausible basis." Petitioner claims that the master arbitrator's award superficially confirmed the underlying award. Petitioner contends that the master arbitrator's award was irrationally based, arbitrary, capricious, and incorrect as a matter of law in that the Master Arbitrator erred in confirming the underlying award that found that despite the fact that respondent is the only ambulance provider operating in the area, the charges were reasonable and reflected the prevailing fee for the area and finding that petitioner was not permitted to rely on the MMAFS as guidance in determining a reasonable approximation of the local prevailing charge for ambulance services in a specific geographic location.

In addition, petitioner contends that the underlying award fails to adhere to the Arbitrator Theiss's own prior precedent or indicate a reason for reaching an opposite result on the same issues.

The Petitioner has not set forth the necessary grounds to vacate the master arbitrator's award. 11 NYCRR §65.410(h), entitled, "Master arbitration procedures under section 5106(b) of the Insurance Law" sets forth the grounds upon which a party may appeal a master arbitrator's award and states:

> (1) A decision of a master arbitrator is final and binding except for:
> (i) court review pursuant to an article 75 proceeding; or (ii) if the award of the master arbitrator is $5,000 or greater, exclusive of interest and attorney's fees, either party may, in lieu of an article 75 proceeding, institute a court action to adjudicate the dispute de novo.
> (2) A party who intends to commence an article 75 proceeding or an action to adjudicate a dispute de novo shall follow the applicable procedures as set forth in article 75....

As this claim does not meet or exceed the $5,000 threshold, petitioner is required to request relief, which it has, under the provisions of CPLR Article 75, and this court shall not review the underlying award *de novo* and shall not make any determinations thereon. Judicial review of a master arbitrator's award is restricted to the grounds for review set forth in article seventy-five of the CPLR. (*Petrofsky v. Allstate Ins. Co.*, 54 N.Y.2d 207, 429 N.E.2d 508 (1970)). The section under which petitioner seeks relief, CPLR §7511(b)(1)(iii) states that the award shall be vacated only if the court finds that the rights of the moving party were prejudiced where "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." CPLR §7511 allows a court to vacate an arbitrator's award and, by judicial construction, a master arbitrator's award in accordance with the terms set forth therein. (*Petrofsky v. Allstate Ins. Co.*, 54 N.Y.2d 207, 429 N.E.2d 508 (1970)). Accordingly, the question then becomes whether the master arbitrator exceeded his power in affirming the underlying award. (*Id.*).

In cases of compulsory arbitration, which the petitioner contends this was, the court has held that CPLR article 75 includes review of whether the award the award is supported by evidence or other basis and reason, which has been interpreted to import into an article 75 review of compulsory arbitrations, the arbitrary and capricious standard of an article 78 review. (Id.; *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 N.Y.2d 214, 652 N.Y.S.2d 584 (1996)(an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious).

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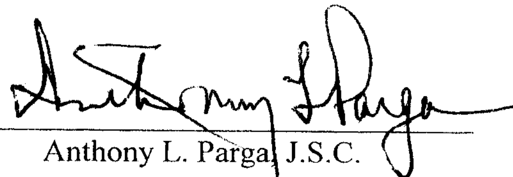
A review of the master arbitrator's award, dated April 15, 2011, reveals that the master arbitrator did not exceed his power in affirming the underlying award. There is also no evidence that the petitioner's rights were prejudiced. Additionally, even accepting that this was a compulsory arbitration, which the respondent contests, this Court finds that the master arbitrator's award affirming the underlying award was not arbitrary and capricious and was not unsupported by the evidence submitted. The master arbitrator reviewed the evidence before him and sufficiently set forth the reasons for his affirmation of the underlying award, and there is no basis to vacate same.

It is uncontested that Regulation 83 is the controlling no-fault regulation and mandates that the "permissible charge for ambulance services is the local prevailing charge for such service. " Based upon a review of the submissions herein, this Court finds that the master arbitrator's upholding of the finding of Arbitrator Theiss that Erway's charges were reasonable and reflected the prevailing fee for the area and that petitioner was not permitted to rely on the MMAFS as guidance in determining a reasonable approximation of the local prevailing charge for ambulance services in that region was not arbitrary or capricious and was supported by the evidence. Further, petitioner's contention that the underlying award failed to adhere to Arbitrator Theiss's prior (2009) precedent is without merit. In Arbitrator Theiss's 2009 awards, she declined to allow the insurance company to compensate an ambulance service at the MMFAS rate, but rather, awarded another rate found in a newspaper article which she categorized as the proper rate. In all of the arbitrations between the parties to this matter regarding the issue herein, where the petitioner made the same arguments, Arbitrator Theiss has made the same finding that the amounts charged by Erway were consistent with the language found in Regulation 83. Accordingly, there is no prior inconsistent award.

A party seeking to vacate an arbitration award must meet a heavy burden, which the petitioner herein has failed to meet. (*See, North Syracuse Cent. School Dist. v. North Syracuse Ed. Ass'n,* 45 N.Y.2d 195, 379 N.E.2d 1193 (1978); *Caso v. Coffey*, 41 N.Y.2d 153, 359 N.E.2d 683 (1976)). Contrary to petitioner's contentions, the master arbitrator's award was supported by ample evidence in the record and was not arbitrary or capricious. Accordingly, a vacatur of the award is not warranted and the petition is hereby dismissed.

Dated: October 14, 2011



Anthony L. Parga, J.S.C.

ENTERED
OCT 17 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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