Matter of Ortho Passive Motion, Inc. v Allstate Ins. Co.
2014 NY Slip Op 34051(U)
September 2, 2014
Supreme Court, Queens County
Docket Number: Index No. 701354/2014
Judge: Jr., Rudolph E. Greco
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UNOFFICIAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr. IA Part 32
Justice

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In the Matter of the Application of
ORTHO PASSIVE MOTION, INC.
Assignee of CATRINA GOROKHOVSKY

Peitioner(s),

- against -

ALLSTATE INSURANCE COMPANY,

Respondent,

For an Order Vacating an Arbitration Award pursuant to CPLR §7511

Index Number: 701354/2014

Motion Date: May 14, 2014
Motion Seq. No. 1
Motion Cal. No. 113

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COUNTY CLERK
QUEENS COUNTY

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The following papers numbered 1 to 6 read on this application for an order vacating a no-fault master arbitration award pursuant to CPLR §7511.

	Papers Numbered
Notice of Petition, Petition, Exhibits.....	1-4
Opposition.....	5
Reply.....	6

Upon the foregoing papers, it is ordered that this application is determined as follows:

FACTUAL BACKGROUND

This is a petition to vacate a master arbitration award rendered by Robyn D. Weisman on January 26, 2014 wherein the underlying arbitration award rendered by Stacey K. Erdheim on October 31, 2013 was remanded so that a fee schedule argument not addressed therein could be. In the award the following explanation, in pertinent part, is provided:

> "The fee schedule defense was apparently not raised and it was not preserved based upon the Arbitrator's findings that the denial was not timely. The Applicant/Appellant claims the timeliness of the denials precludes the fee schedule defense. The fee schedule defenses must be raised in a timely denial... (*internal citations omitted*)... . However, even in the face of a possible untimely denial, the Applicant must make out a prima facie claim for reimbursement. New York Insurance Law... §5108 (a) states that payment shall not exceed the charges permissible under the

> schedules prepared and established through the Worker's Compensation Board.... The Applicant at the underlying arbitration had the burden to prove the fee schedule. However, there appears to be no issue below of the fee schedule. ...

As to the underlying award, during the course of the hearing Petitioner amended the amount in dispute to correspond with an applicable fee schedule and Respondent did not object or offer any alternative amount. Respondent further, did not dispute the fact that they failed to issue a follow-up verification request or timely denial of claim form.

STANDARD OF REVIEW

CPLR §7511(b) sets forth the four (4) grounds for judicial review of an arbitrator's award, and by judicial extension a master arbitrator's award. However, in cases of compulsory arbitration such review requires a broader scope, (*see* Matter of Nyack Hosp. v GEICO, 139 AD2d 515, 516 [2nd Dept. 1988] *citing* Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.], 49 NY2d 757, 758-59 [1980] *and* Mount St. Mary's Hosp. v Catherwood, 26 NY2d 493, 508 [1970]). This standard has been interpreted to import the arbitrary and capricious standard of CPLR article 78 review to those made under article 75, (*see* Caso v Coffey, 41 NY2d 153, 158 [1976]; *see also* Matter of Petrofsky [Allstate Ins. Co.], 54 NY2d 207, 211 [1981]). Additionally, review under article 75 questions "whether the award is supported by the evidence" (Mount St. Mary's Hosp. at 508), was rational or had a plausible basis, (Matter of Pterofsky at 211; *see also* Vago v Country Wide Ins. Co., 145 AD2d 553, 555 [2nd Dept. 1988]). In summary, review under article 75 is not restricted to the grounds enumerated therein in the case of compulsory arbitration, and an award may be vacated if it is arbitrary and capricious, irrational or without plausible basis, (*see* Steinauer v N.Y. Central Mutual Fire Ins. Co., 272 AD2d 771, 772 [3rd Dept. 2000]).

Respondent's argument that inasmuch as no-fault arbitration is only mandatory for the carrier and not for the claimant, it is consensual not mandatory, and thus, only a narrow review is permitted is wholly rejected as against prevailing case law, (*see e.g.* Matter of Nyack Hosp. at 516, Matter of Shand [Aetna Ins. Co.], 74 AD2d 442, 446 [2nd Dept. 1980], Steinauer at 772).

Utilizing the applicable expanded standard, petitioner argues that the master arbitrator's award remanding the matter to address the fee schedule in light of an untimely denial lacked evidentiary support and was irrational, arbitrary and capricious in that she ignored overwhelming judicial authority relative to a fee schedule defense.

DISCUSSION

An insurer that fails to pay or deny a claim within 30 days following its receipt of the proof of claim, (bearing in mind any valid tolling of the statutory deadline), is precluded from asserting a defense against payment, save a very limited defense based on lack of coverage, (*see generally* Fair Price Med. Supply Corp. v Travelers Indem. Co., 10 NY3d 556, 563 [2008], Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co., 9 NY3d 312, 318 [2007], Central

Gen. Hosp. v Chubb Group of Ins. Co., 90 NY2d 195, 199 [1997]). A fee schedule defense does not fall within this narrow exception to preclusion, (*see* Westchester Med. Ctr. v American Transit Ins. Co., 17 AD3d 581, 582 [2nd Dept. 2005]; *see also* A.B. Med. Servs. PLLC v Prudential Prop. & Cas. Ins. Co., 11 Misc3d 137A, 4 [App Term 9th & 10th Jud Dists 2006], Struhl v Progressive Cas. Ins. Co., 7 Misc3d 138A, 2 [App Term 9th & 10th Jud Dists 2005]). Here, respondent, by its own admission, failed to pay or deny the subject claim within the 30 day period,[1] and they were precluded from raising a defense based on improper fee schedule calculation. Based on the fact that preclusion in this instance is the proper remedy, the master arbitrator's decision to remand to address the fee schedule issue was arbitrary, irrational and without plausible basis.

In fact, it would appear that the master arbitrator more improperly, inadvertently made compliance with Insurance Law §5108 a part of an applicant's *prima facie* case in a no-fault proceeding which, it is not (*see* Westchester Med. Ctr. v Progressive Cas. Ins. Co., 89 AD3d 1081, 1082 [2nd Dept. 2011]; *see also* Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co., 114 AD3d 33, 42 [2nd Dept. 2013], Westchester Med. Ctr. v GMAC Ins. Co. Online Inc., 80 AD3d 603, 604 [2nd Dept. 2011]; *see generally* Pesbyterian Hosp. in City of N.Y. v Maryland Cas. Co., 90 NY2d 274 [1997]). Insurance Law §5108 prohibits a medical provider from demanding payment in excess of the charges authorized therein, referring to the New York State Workers' Compensation Board fee schedules, (*see* N.Y. Comp. Codes R. & Regs. tit 11, pt. 68 [Reg. 83] at 68.1(a), 12 NYCRR §442.2[b]). While compliance with this section may not be waived, it would seem that an untimely denial could have the "substantial consequence" that an insurer pay a no-fault claim it might not have had to honor if it had timely denied the claim, (*see* Fair Price Med. Supply Corp. at 563, Presbyterian Hosp. in City of N.Y. at 285), or pay more than it would have had to pay had a timely fee schedule defense been raised, (*see e.g.* Westchester Med. Ctr. at 582, New York Hosp. Med. Ctr. of Queens v Country-Wide Ins. Co., 295 AD2d 583,584 [2nd Dept. 2002]).

By stating that the applicant, petitioner herein, had the burden to prove the fee schedule the master arbitrator reversed the burden of proof with respect to a fee schedule defense. The Court reiterates that respondent did not have this defense available given its untimely denial of the claim however, had it been available respondent must establish by evidentiary proof that the charges exceeded that permitted by law, (*see* Abraham v Country-Wide Ins. Co., 3 Misc3d 130(A) [App Term 2nd & 11th Jud Dists 2004]). Thus, even where a fee schedule defense lies the burden is on the respondent to prove its applicability, i.e. that an applicant's claims were in excess of the appropriate fee schedule (*id.*) Respondent in this case did no such thing, they provided no such proof. In fact, it appears by the language of the award that petitioner put forth arguments and evidence to demonstrate that the amount ultimately requested did comply even though they were not required to do so. In any event, not only did respondent loose the ability to raise this defense, but they also stipulated and agreed to the amount claimed which, was

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[1]The initial 30 day period had been tolled by insurer's request for verification to which petitioner replied. A second verification although contained within the record was not properly sent.

decreased from that originally claimed to correspond to an applicable fee schedule[2].

Most telling of the need to vacate the master arbitrator's award as arbitrary, capricious and without plausible basis is the statement therein that "there appears to be no issue below of the fee schedule". Based on the submissions accompanying the instant petition this sentiment appears to be correct accordingly, it is irrational and without plausible basis that the master arbitrator should have made an issue when clearly there was none.

The remaining portions of this petition seek a statutory interest penalty against the award and attorney's fees incurred in connection with the master arbitration as well as this proceeding, only the latter two of which are in dispute. It is unclear if the issue of attorney's fees with respect to the former was addressed at the arbitration or master arbitration level and this Court declines to do so, such issue being germane to the underlying dispute. However, as to those fees requested in this proceeding petitioner argues that there are no restrictions on attorney's fees rendered in connection with a petition pursuant to CPLR §7511 akin to the limitations on fees at the master arbitration level, (*compare* 11 NYCRR 65-4.10(j)(2)(i), (4) and [5]). To that effect, they are asking for an additional $2,400, (8 hours at $300 per hour) in fees.

Respondent argues that there is no documentation to support the requested amount, i.e. billing statements or time sheets, and the time indicated was unreasonable and excessive in light of the questions presented and skills necessary to prepare. Further, that the rates found in 11 NYCRR 65-4.10(j)(2)(i) should be applied by the Court if it fixes fees for services rendered in a court appeal. There is no support for this latter contention. While 11 NYCRR 65-4.10(j)(2)(i) fixes a fee of $65 per hour, subject to maximum of $650, for preparatory services in a master arbitration, 11 NYCRR 65-4.10(j)(4) enables the court adjudicating a court appeal of such arbitration to fix the attorney's fees. Respondent's argument that the limitation of subsection (j)(5) applies to court appeals is unpersuasive and improperly renders subsection four's authority moot.

The Court however, recognizes the services rendered in connection with this proceeding and the need for compensation therefor. The Court also agrees that petitioner's lack of documentary support undermines their request. In consideration of both sentiments, the Court awards attorney's fees in connection with preparing this proceeding in the amount of $520.

In light of the above, the petition to vacate the master arbitrator's award is granted, the findings and decision of the arbitration award control, and petitioner is awarded statutory interest upon the claimed amount as amended and attorney's fees in the amount of $520 for services rendered in connection with this proceeding.

Dated: September 2, 2014

Rudolph E. Greco, Jr., J.S.C.

[2]Petitioner provided a detailed explanation as to how the claimed amount was calculated, and upon which schedules and studies it was based which, was presented at the underlying arbitration.