

**Matter of Commissioners of the State Ins. Fund v
Drive N.J. Ins.**

2019 NY Slip Op 30798(U)

March 21, 2019

Supreme Court, New York County

Docket Number: 450129/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 450129/2018

In the Matter of

MOTION DATE 02/11/2019

COMMISSIONERS OF THE STATE INSURANCE FUND

MOTION SEQ. NO. 001

Petitioner,

- v -

**DECISION, ORDER, and
JUDGMENT**

DRIVE NEW JERSEY INSURANCE,

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2

VACATE -

were read on this motion to/for

DECISION/ORDER/JUDGMENT/AWARD

The Commissioners of the State Insurance Fund (SIF) filed a CPLR 7501(b)(1)(iii) petition to vacate a November 2, 2017 arbitrator's award that denied its claim, pursuant to Insurance Law § 5105, to recover inter-company loss-transfer payments from the respondent, Drive New Jersey Insurance (DNJI). DNJI submits no opposition. The court nonetheless denies the petition.

SIF issued a workers' compensation insurance policy to Halpern & Pintel, Inc. (H&P). While operating a vehicle in the course of his work for H&P, Jimmie Simmons was injured in an accident with a van owned by Bellwether Escort (Bellwether) and operated by Sharon Coward. Coward was operating the van to escort a truck carrying a wide load, as required by the Vehicle and Traffic Law. There were no passengers or cargo in the van itself.

Simmons made a claim for workers' compensation benefits. SIF, on behalf of H&P, paid Simmons a total of \$60,683.14 in benefits. Because Simmons' work accident involved a motor vehicle collision, the first \$50,000.00 of these benefits were paid in lieu of no-fault benefits, also known as first-party benefits under the Insurance Law (*see generally* Insurance Law § 5102[b]);

Workers' Compensation Law § 29[1-a]; *Dietrick v Kemper Ins. Co.*, 76 NY2d 248, 251 [1990]; *Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers*, 21 AD3d 1110, 1111 [2d Dept 2005]).

SIF then sought inter-company loss transfer payments from DNJI, the van's insurer, pursuant to Insurance Law § 5105(a) and (b). Insurance Law § 5105(a) provides, in relevant part, that:

"[A]ny compensation provider paying benefits in lieu of first party benefits which another insurer would otherwise be obligated to pay . . . has the right to recover the amount paid from the insurer of any other covered person to the extent that such other covered person would have been liable, but for the provisions of this article, to pay damages in an action at law. In any case, the right to recover exists only if at least one of the motor vehicles involved is a motor vehicle weighing more than six thousand five hundred pounds unloaded or is a motor vehicle used principally for the transportation of persons or property for hire."

Insurance Law § 5105(b) mandates that disputes under Insurance Law § 5105(a) be resolved through arbitration. DNJI disclaimed the obligation to make a loss-transfer payment to SIF on the ground that neither of the vehicles involved in the accident weighed more than 6,500 pounds or was "used principally for the transportation of persons or property for hire." SIF demanded arbitration under the statute. In a decision and award dated November 2, 2017, an arbitrator from Arbitration Forums, Inc., denied SIF's claim.

As the arbitrator explained it, "for hire" vehicles subject to the statute include:

"vehicles hired to transport people, such as taxis and buses, and vehicles hired to transport property, such as a tow truck' [quoting Arbitration Forums FAQ #3]. The Applicant's vehicle was not transporting people nor property; therefore, there is no qualifying vehicle involved in this loss. In addition, there is no indication that the vehicle that the Respondent was 'escorting' was involved in the loss."

An arbitration award may be vacated pursuant to CPLR 7511(b)(1)(iii) where an arbitrator exceeded his or her power, including where the award violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power (see *Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480 [1st Dept 2016]). Where, as here, arbitration is compulsory (see Insurance Law § 5105), closer judicial scrutiny of the arbitrator's

determination is required under CPLR 7511(b) than that applicable to consensual arbitrations (see *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.]*, 49 NY2d 757 [1980]; *Mount St. Mary's Hosp. v Catherwood*, 26 NY2d 493 [1970]; *Matter of DTG Operations v AutoOne Ins. Co.*, 144 AD3d 422 [1st Dept 2016]). To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious (see *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.]*, 49 NY2d 757 [1980]). A determination is arbitrary and capricious where is not rationally based, or has no support in the record (see *Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624 [1st Dept 2015]). “Moreover, with respect to determinations of law, the applicable standard in mandatory no-fault arbitrations is whether ‘any reasonable hypothesis can be found to support the questioned interpretation’” (*Matter of Fiduciary Ins. Co. v American Bankers Ins. Co. of Fla.*, 132 AD3d 40, 46 [2d Dept 2015], quoting *Matter of Shand [Aetna Ins. Co.]*, 74 AD2d 442, 454 [2d Dept 1980]; see *Matter of Carty v Nationwide Ins. Co.*, 212 AD2d 462 [1st Dept 1995]).

Although the arbitrator expressly found that the van involved in the accident “was not transporting people nor property” at the time of the accident, in rejecting SIF’s claim she implicitly found that the van was not “used principally for the transportation of persons or property for hire,” as that term is employed in Insurance Law § 5105(a). That statutory provision “covers only those vehicles hired to transport people, such as taxis and buses, and livery vehicles hired to transport property” (*Matter of State Farm Mut. Auto. Ins. Co. v Aetna Cas. & Sur. Co.*, 132 AD2d 930, 931 [4th Dept 1987], *affd* 71 NY2d 1013 [1988]; see *Matter of DTG Operations v AutoOne Ins. Co.*, 144 AD3d 422 [1st Dept 2016]; *cf. Matter of Progressive Northeastern Ins. Co. [New York State Ins. Fund]*, 56 AD3d 1111 [3d Dept 2008] [claim for inter-company loss-transfer payments denied even where insured vehicle may have been transporting people for hire at the time of the accident; record was devoid of proof that vehicle

principally was used for that purpose]). The subject van was operated by a lone driver who simply drove it as an escort vehicle alongside a large truck for reasons of safety. The van carried neither passengers nor cargo at the time of the accident; there was no proof whatsoever that it principally was used to carry passengers or cargo. Contrary to SIF's contention, it was not irrational for the arbitrator to conclude that a vehicle principally employed to escort other vehicles is not one principally used for the transportation of property. The arbitrator's conclusion in this regard was, at the very least, a reasonable hypothesis as to the meaning of the relevant statutory language.

The grounds specified in CPLR 7511 are exclusive (see *Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 201 [1st Dept. 2009]) and it is a "well-established rule that an arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone v New York Cent. Mut. Fire Ins. Co.*, 15 NY3d 530, 534 [2013]). Hence, the petition to vacate the arbitrator's award must be denied. Pursuant to CPLR 7511(e), "upon the denial of a motion to vacate or modify" an award, the court "shall confirm the award."

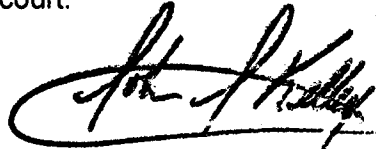
Accordingly, it is

ORDERED that the petition is denied, without opposition, and it is,

ADJUDGED that the arbitration award dated November 2, 2017, is confirmed.

This constitutes the Decision, Order, and Judgment of the court.

3/21/2019
DATE


JOHN J. KELLEY J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE