

**Country-Wide Ins. Co. v Walter E. Mendoza  
Chiropractic P.C.**

2020 NY Slip Op 31290(U)

April 21, 2020

Supreme Court, New York County

Docket Number: 651101/2020

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM**

*Justice*

-----X

**INDEX NO. 651101/2020**

COUNTRY-WIDE INSURANCE COMPANY

**MOTION DATE 03/10/2020**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

WALTER E. MENDOZA CHIROPRACTIC P.C.,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ORDERED that the petition of Country-Wide Insurance is granted in its entirety, and the award of the Lower Arbitrator, as affirmed by the Master Arbitrator, is vacated; and it is further

ORDERED that Respondent's application for fees is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that Petitioner shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

FINAL DISPOSITION

### MEMORANDUM DECISION

In this Article 75 action, Country-Wide Insurance Company (Petitioner) moves to vacate a no-fault arbitration award issued in favor of Walter E. Mendoza Chiropractic, P.C. (Respondent). Respondent opposes the petition and seeks an order directing a Framed Issue Hearing. For the reasons set forth below, the Court grants the petition and vacates the award.

### **BACKGROUND FACTS**

Domingo Cruz, Respondent's assignor, was injured in a motor vehicle accident on November 14, 2015 and sought medical treatment from Respondent. Respondent thereafter submitted medical bills to Petitioner for reimbursement. Petitioner denied the claims based on an Independent Medical Examination Report (IME Report) indicating that no further chiropractic treatment of Cruz was necessary (NYSCEF doc No. 3, at 2).

The parties then proceeded to arbitration before arbitrator Hersh Jakubowitz (the Lower Arbitrator) on September 4, 2019. In an award dated September 5, 2019, the Lower Arbitrator found in favor of Respondent herein and granted the claim in the amount of \$817.72 (NYSCEF doc No. 3). The Lower Arbitrator found that Petitioner failed to establish its defense of lack of medical necessity as it did not submit as evidence the IME Report on Cruz. On appeal before Master Arbitrator Victor J. D'Ammora Ancowitz (the Master Arbitrator), Petitioner challenged the award on the basis that the \$50,000 policy limit had already been exhausted by payments to Cruz and other health care providers before the award was issued. While the Master Arbitrator found that Petitioner could raise this defense for the first time on appeal, he nevertheless confirmed the award holding that Petitioner "has not submitted sufficient evidence that the policy has been

exhausted.” (NYSCEF doc No. 6). The Master Arbitrator upheld the rest of the Lower Arbitrator’s analysis and conclusions (*Id.*).

Petitioner now seeks vacatur of the award. Petitioner argues that the Lower Arbitrator exceeded her power as the award directs payment in excess of the monetary limit of the subject no-fault insurance policy. Petitioner draws the attention of the Court to the case of *Nyack Hospital v General Motors Acceptance Corp.* (8 NY3d 294 [NY Ct App 2007]) to justify payments of other claims that exhausted the available coverage before the challenged award was issued (NYSCEF doc No. 1, at 4-9, ¶ 17-30). As to the issue of lack of medical necessity, Petitioner claims that while it did not submit a copy of the IME report as an exhibit, Petitioner uploaded an electronic copy of it on the American Arbitration Association website under the “Medical-IME Report” section (NYSCEF doc No. 1, at 9-10, ¶ 31-34).

In opposition, Respondent argues that insurance regulations, as interpreted in the cases of *Nyack Hospital and Alleviation Med. Servs., P.C. v Allstate Ins. Co.* (2017 NY Slip Op 27097 [Sup. Ct., App. Term, 2d Dept]) require that a no-fault policy be exhausted in order of the dates the verified billings are received. Since it is unclear from the proof Petitioner submitted whether the policy was exhausted in order of the dates of the verified billings, Respondent maintains that a Framed Issue Hearing is necessary (NYSCEF doc No. 2, at 3, ¶ 10-14). Respondent also seeks an award of attorney’s fees should it prevail in this petition (*Id.*, at 4-5, ¶ 16-19).

In reply, Petitioner maintains that the question of whether the policy was exhausted is not an issue of fact that will require a Framed Issue Hearing.

## DISCUSSION

“Judicial review of an arbitration award is narrowly circumscribed, and vacatur limited to instances where the award is violative of a strong public policy, is irrational, or clearly exceeds a

specific limitation on an arbitrator's power" (*Matter of New York City Tr. Auth. v Phillips*, 162 AD3d 93 [1st Dept 2018] [internal citation and quotation marks omitted]).

With respect to arbitration proceedings concerning no-fault insurance benefits, "an arbitration award made in excess of the contractual limits of an insurance policy has been deemed an action in excess of authority" (*State Farm Ins. Co. v. Credle*, 228 A.D.2d 191 [1st Dept 1996]). Such excess of authority constitutes grounds for vacatur of the award (*See Matter of Brijmohan v. State Farm Ins. Co.*, 92 N.Y.2d 821, 822 [NY Ct App, 1998]; *Countrywide Ins. Co. v. Sawh*, 272 A.D.2d at 245 [1st Dept 2000]; 11 NYCRR 65-1.1). Notably, the issue of policy exhaustion may be raised at any time (*See Brijmohan v. State Farm Ins. Co.*, 92 N.Y.2d 821, 822 [NY Ct App 1998]).

Here, the contractual limit for the Personal Injury Protection (No Fault) coverage under the policy is \$50,000 (NYSCEF doc No. 7, at 2). The payout ledger annexed to the petition shows that Petitioner made payments to Cruz and other medical providers between January 2016 and March 2019 in the total amount of \$51,037.64 (NYSCEF doc No. 7, at 3-8). Thus, at the time of the arbitration proceeding in September 2019, the policy coverage was already exhausted. While Respondent's billings were received and denied between January to May 2017 (NYSCEF doc No. 4, at 8-19), Petitioner was not precluded from paying other providers' legitimate claims subsequent to such denials. To delay payment on uncontested claims pending resolution of Respondent's disputed claim by arbitration "runs counter to the no-fault regulatory scheme, which is designed to promote prompt payment of legitimate claims" (*see Allstate Prop. & Cas. Ins. Co. v Northeast Anesthesia & Pain Mgt.*, 206 NY Slip Op 50828 (U) [Sup. Ct., App. Term, 1st Dept]; *Harmonic Physical Therapy, P.C. v Praetorian Ins. Co.*, 2015 NY Slip Op 50525(U) [Sup. Ct., App. Term, 1st Dept]). This is precisely the essence of the ruling in *Nyack Hospital*, as the Court of Appeals

held that the priority-of-payment regulation does not preclude an insurer from paying already verified claims while waiting for information to verify a pending claim that causes aggregate claims to exceed the policy limit.

The Court rejects Respondent's argument that a Framed Issue Hearing is necessary as the Petitioner's papers present triable issues of fact regarding the dates when verified billings were received. Even if the Court considers Respondent's billings as received and "verified" as of the dates of their denials (*i.e.*, between January to May 2017), the Court still finds that Petitioner had the right to satisfy other bills received and "verified" thereafter (*i.e.*, from March 2017 to March 2019) pending arbitration.

Given that the coverage for the subject policy in this case was exhausted, the Lower Arbitrator's award of \$817.72 was in excess of the contractual limits. Thus, the Lower Arbitrator exceeded her power and the award must be vacated. The Court notes that on appeal before the Master Arbitrator, Petitioner submitted the papers to prove policy exhaustion. While the Master Arbitrator found them insufficient to vacate the award, he did not provide any reason at all for this finding. Thus, the Court finds that such holding is irrational further justifying the vacatur of the award.

Finally, given the Court's holding in favor of Petitioner, Respondent has not prevailed and is therefore not entitled to attorney's fees (*See Presbyt. Hosp. in the City of New York v Maryland Cas. Co.*, 90 NY2d 274, 278 [Ct App 1997]).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the petition of Country-Wide Insurance is granted in its entirety, and the award of the Lower Arbitrator, as affirmed by the Master Arbitrator, is vacated; and it is further

ORDERED that Respondent's application for fees is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that Petitioner shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

*Carol R. Edmead*  
HON. CAROL R. EDMÉAD, J.S.C.  
J.S.C.

4/21/2020  
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input 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