

**Country-Wide Ins. Co. v Progressive-Hudson
Anesthesia LLC**

2021 NY Slip Op 31587(U)

May 7, 2021

Supreme Court, New York County

Docket Number: 657374/2020

Judge: Lynn R. Kotler

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Country-Wide Insurance Company

INDEX NO. 657374/2020

- v -

MOT. DATE

Progressive-Hudson Anesthesia LLC a/a/o Joan De Los Santos

MOT. SEQ. NO. 001

The following papers were read on this motion to/for vacate award

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS DOC No(s). _____

Replying Affidavits

ECFS DOC No(s). _____

This is a petition to vacate a No-Fault Master Arbitrator's decision, dated October 2, 2020, on the basis that the lower arbitrator exceeded his/her powers, and the award was so imperfectly executed that a final and definite award upon the subject matter submitted was not made, and further, that the Master Arbitrator erred in affirming the decision. Respondent opposes the petition. The court's decision follows.

The underlying accident occurred on May 19, 2017 involving a vehicle insured by petitioner. Respondent's assignor, Joan De Los Santos was in that vehicle which was struck by another vehicle. Thereafter, the assignor received medical services from respondent, who in turn submitted medical bills for reimbursement to petitioner. Petitioner issued partial denials based on fee schedule application and the matter proceeded to no fault arbitration. The medical services provided by respondent were anesthesia during the assignor's right shoulder arthroscopic surgery, and a brachial plexus injection and associated services by Dr. Brian Lee on December 12, 2017.

In an award dated July 8, 2020, Arbitrator Andrew Horn determined that collateral estoppel barred petitioner from challenging the medical necessity of the services provided by respondent since another arbitrator rejected petitioner's challenges to the medical necessity of the underlying surgery and the causation of assignor's right shoulder injury in Sinha Orthopedics P.C. and Country-Wide Ins. Co., AAA Case No. 17-18-1097-6008 (Sept. 3, 2019), and Surgicore Surgical Center, LLC and Country-Wide Ins. Co., AAA Case No. 17-18-1100-1673 (Nov. 24, 2019). Arbitrator Horn specifically stated:

Although Respondent's attorney argued that the determinative issues in the instant case are not the same as those previously decided, I respectfully disagree. Since the issues are identical to those addressed by arbitrator Vilar in the prior

Dated: 5/7/21



HON. LYNN R. KOTLER, J.S.C.

1. Check one:

CASE DISPOSED NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED DENIED GRANTED IN PART OTHER

3. Check if appropriate:

SETTLE ORDER SUBMIT ORDER DO NOT POST

FIDUCIARY APPOINTMENT REFERENCE

proceedings and given that Respondent was a party to the earlier arbitrations and failed to establish that it had not had a full and fair opportunity to litigate its defenses at those times, I find that collateral estoppel is properly invoked.

Further, Arbitrator Horn alternatively reached the merits of petitioner's arguments, finding that petitioner failed to meet its burden and "failed to establish, *prima facie*, that the injury was not causally related to the accident." Finally, the arbitrator indicated that "Although [petitioner] also checked off box 18 on the denial of claim forms, its attorney conceded that there was no evidence of fee schedule excessiveness in the record." Thus, the arbitrator vacated petitioner's denials and granted respondent's claim in its entirety.

Petitioner then appeal to master arbitration and in an award dated October 2, 2020, Master Arbitrator Richard B. Ancowitz affirmed the lower arbitrator's award stating that "I find no reason to find fault with the basis for the award, which was primarily the arbitrator's application of the doctrine of collateral estoppel, but which was also based upon the arbitrator's finding that the evidence did not support respondent's defenses."

Petitioner now moves to vacate the award pursuant to CPLR § 7511(b)(1)(i), (iii) and (iv) on the grounds that the lower arbitrator exceeded his power or so imperfectly executed it, that a final and definite award upon the subject matter submitted was not made, the Master Arbitrator failed to follow the procedure of CPLR 75, and the Master Arbitrator erred in affirming the award. Petitioner argues that the award should be vacated because Arbitrator Horn "failed to state whether either applicant or respondent established their respective *prima facie* case". On this point, petitioner claims that Arbitrator Horn "was arbitrary and capricious in not specifically and individually addressing the objective findings of the peer review and stating the IME report presented was contradictory." Further, petitioner contends that "there was a clear absence of the full and fair opportunity to litigate the issue in the prior proceedings" and the award was arbitrary, capricious, and incorrect as a matter of law because collateral estoppel does not apply from different arbitration awards for different medical provider applicants with varying amounts in dispute for different medical services rendered.

Meanwhile, respondent maintains that petitioner's arguments are a regurgitation of those properly rejected by the Master Arbitrator, that this petition is a waste of judicial resources and is "frivolous in nature and should not be considered by the court."

Discussion

CPLR § 7511(b)(1) outlines the limited grounds for judicial review of an arbitrator's award on application of a party who participated in the underlying arbitration.

The award shall be vacated ... if the court finds that the rights of that party were prejudiced by:

- (i) corruption, fraud or misconduct in procuring the award; or
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
- (iii) 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; or
- (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

Certainly, petitioner has failed to establish that either award should be vacated under CPLR § 7511(b)(i) or (iv). The court rejects petitioner's claim that Arbitrator Horn improperly applied the doctrine of collateral estoppel. The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494 [1984]). Collateral estoppel applies when "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015] [internal quotation marks and citation omitted], rearg denied 25 NY3d 1193 [2015]).

"[C]ollateral estoppel, a flexible doctrine, should not be mechanically applied just because some of its formal prerequisites, like identity of parties, identity of issues, a final and valid prior judgment and a full and fair opportunity to litigate the prior determination, may be present" (*Jeffreys v Griffin*, 1 NY3d 34, 41 [2003], quoting *People v Roselle*, 84 NY2d 350, 357 [1994]).

"[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999] [internal quotation marks and citation omitted]).

The court does not find that Arbitrator Horn erred by finding that collateral estoppel barred petitioner from relitigating the issue of whether anesthesia for a surgery was medically necessary when the issue of whether the surgery was medically necessary was conclusively determined in prior arbitration proceedings and petitioner had a full and fair opportunity to litigate that issue. Petitioner contends that "[h]olding that collateral estoppel applies here is arbitrary, capricious, and incorrect as a matter of law, since the previous arbitration did not address all of the evidence presented in this arbitration." Petitioner misapprehends the law of collateral estoppel, because its specific purpose is to prevent a party from relitigating issues previously decided against them and necessarily forecloses that party from successive opportunities to present new evidence without justification.

Further, the court disagrees with petitioner that either Arbitrator Horn erred in finding that petitioner failed to sustain its burden or that the Mater Arbitrator erred in affirming the lower award. Arbitrator Horn clearly stated that it was petitioner's burden to show lack of medical necessity and his award reveals that he considered petitioner's evidence and properly found it insufficient:

Dr. Vitolo's IME report fails to set forth a sufficient factual basis or rationale for denial of the claim since the examiner noted, on one hand, that assignor had severely restricted right shoulder flexion and abduction, and then, on the other, stated that there was a "lack of objective physical examination findings" and that the injured person - a then-22-year-old woman - had reached "maximum medical improvement."

Likewise, while Dr. Granatir suggested that "the patient sustained only minor, self-limited, soft tissue injuries as a result of the accident," and the magnetic resonance imaging showed "chronic findings and not the result of a result of a recent acute trauma," he did not foreclose the possibility that the accident exacerbated or aggravated a preexisting injury.

The IME report is indeed contradictory as Arbitrator Horn concluded. While finding that claimant's right shoulder was limited to 90 degree range of motion as opposed to 150 degrees for the left shoulder, Dr. Vitolo then concluded that further treatment was unnecessary "due to lack of objective findings." That conclusion is contradictory and indeed irrational and unsubstantiated. Further, while petitioner has uploaded over a hundred pages as one exhibit in contravention to the court rules as its so-called "conciliation submission" since each document should be uploaded separately, the court has sifted through

this exhibit and cannot even locate Dr. Grantatir's report. Otherwise, petitioner has not shown that the the arbitrator's conclusion as to this peer review is arbitrary, capricious or incorrect as a matter of law, either.

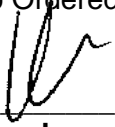
Accordingly, it is hereby **ORDERED** that the petition is denied and the award is confirmed in its entirety.

Settle judgment on notice.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 5/7/21
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.