Country-Wide Ins. Co. v Brownsville Chiropractic PC
2021 NY Slip Op 32296(U)
October 28, 2021
Supreme Court, New York County
Docket Number: Index No.654487/2021
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** **PART** **35**

Justice

----------X

COUNTRY-WIDE INSURANCE COMPANY

Petitioner,

- v -

BROWNSVILLE CHIROPRACTIC PC,

Respondent.

----------X

INDEX NO. 654487/2021

MOTION DATE 08/24/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

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

Upon the foregoing documents, it is

ORDERED that the application of Petitioner Country-Wide Insurance Company (Motion Seq. 001) is partially granted to the extent that this matter is remanded for a Framed Issue Hearing; and it is further

ORDERED that the issues of whether Respondent Brownsville Chiropractic PC's claims were received and verified prior to exhaustion of Petitioner's policy such that the arbitration award should be confirmed, and the amount of attorney's fees, if any, to which Respondent is entitled, are hereby referred to a Special Referee to Hear and Determine. It is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov), for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the 'References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on

the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within twenty (20) days.

MEMORANDUM DECISION

In this Article 75 action, Petitioner Country-Wide Insurance Company seeks, pursuant to CPLR 7511(b)(1)(i) and (iii), an order vacating a no-fault arbitration award (the "Award") issued in favor of Respondent Brownsville Chiropractic PC, or in the alternative, an order remanding this matter for a Framed Issue Hearing on the matter of policy exhaustion (Motion Seq. 001).

Respondent opposes the petition in its entirety and cross-petitions for an order confirming the Award along with an award of attorney's fees and costs incurred with the instant motion.

BACKGROUND

Ms. Mayra I. Machuca ("Ms. Machuca"), Respondent's assignor, was injured in an automobile accident on September 2, 2017. She sought medical services from Respondent who performed chiropractic treatment on Ms. Machuca on dates ranging from September 6, 2017 to March 15, 2018. Respondent thereafter sought reimbursement from Petitioner for fifteen bills totaling $4,001.12, which was later adjusted to $1,421.88 to reflect fee schedule reductions and prior payments. Petitioner denied Respondent's claim for reimbursement based on a peer review report (the "Report") by Dr. Ji. Hoon Kim, who found that the chiropractic treatment was not medically necessary.

The parties then proceeded to arbitration before arbitrator Michael Korshin (the "Lower Arbitrator") on February 5, 2021. At said proceeding, the Lower Arbitrator found Dr. Kim's findings "sufficient to set forth a factual basis and medical rationale for the conclusion that further services were not medically necessary" (NYSCEF doc No. 3). However, the Lower

Arbitrator held that Ms. Machucha's medical records overcame Dr. Kim's findings, as the records demonstrated continued injury warranting further chiropractic treatment, specifically "decreased range of motion, spasm, tenderness, and positive orthopedic testing" (*id.*). Accordingly, the Lower Arbitrator issued the Award in favor of Respondent herein and granted its claim in the amount of $1,421.88 plus interest and attorney's fees (*id.*).

Petitioner thereafter sought review of the Award on the ground that the Award was irrational and exceeded the Lower Arbitrator's power as it directed payment in excess of Petitioner's policy limits (NYSCEF doc No. 5). In support, Petitioner submitted a payout ledger and declaration page that it claimed demonstrated policy exhaustion.

On April 21, 2021, Master Arbitrator Jeffrey Grob (the Master Arbitrator), affirmed the Award, finding no basis to disturb the Lower Arbitrator's findings on the matter of medical necessity (NYSCEF doc No. 6). The Master Arbitrator declined to consider Petitioner's argument on appeal regarding policy exhaustion, noting that the argument was not raised before the Lower Arbitrator, and the scope of a master's review is limited to "[t]hose matters which were the subject of the arbitration below or which were included in the arbitration award appealed from" (*id.*).

The Instant Proceeding

Petitioner now seeks vacatur of the Award pursuant to CPLR 7511 (b)(1)(iii). Petitioner argues that the Lower Arbitrator exceeded his authority by issuing an award in excess of Petitioner's policy limits, and the Master Arbitrator erred in affirming the same. Petitioner argues that the Master Arbitrator further erred in holding that he could not rule on the issue of policy exhaustion, as said issue may be raised at any time. In opposition, Respondent argues that it was proper for the Master Arbitrator to decline to hear Petitioner's policy evidence as said evidence

was not raised before the Lower Arbitrator and was therefore outside the scope of the Master Arbitrator's review. Respondent further argues that the Award is not subject to vacatur as Petitioner's evidence does not demonstrate policy exhaustion. Simultaneous to opposing the Petition, Respondent cross-moves for confirmation of the Award and seeks an award of attorney's fees.

DISCUSSION

Under CPLR Article 75, a final and definite arbitration award will not be vacated unless "it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power." (*See Matter of Isernio v Blue Star Jets, LLC,* 140 AD3d 480, 480 [1st Dept 2016]). Where arbitration is compulsory, "judicial review under CPLR Article 75 is broad, requiring that the award be in accord with due process and supported by adequate evidence in the record" (*Motor Veh. Mfrs. Ass'n of U.S. v State of New* York, 75 NY2d 175 [1990])

While compulsory arbitration decisions, such as the one herein, require a stricter scrutiny than consensual ones, courts are still bound by the arbitrator's factual findings, interpretation of relevant documents, and judgment concerning remedies. To be upheld, an award in a compulsory arbitration proceeding need only have evidentiary support and not be arbitrary and capricious (*See Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223, [1996]). Even though the decision must have evidentiary support, "[a]ssessment of the evidence presented at an arbitration proceeding is the arbitrator's function rather than that of the court." (*Peckerman v D & D Assocs.*, 165 AD2d 289, 296 [1st Dep't 1991]). Awards are also not vacated even where the arbitrator errs in the correct application of a rule of substantive law, unless the error is so

'irrational as to require vacatur." (*Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224, 232 [1982]).

A no-fault insurance arbitration award in excess of the contractual limits of an insurance policy is irrational and in excess of the arbitrator's power. Accordingly, such awards are subject to vacatur (*See Matter of Brijmohan v. State Farm Ins. Co*., 92 NY2d 821, 822 [NY Ct App, 1998]; *Countrywide Ins. Co. v. Sawh*, 272 AD2d at 245 [1st Dept 2000]; 11 NYCRR 65-1.1).

The Master Arbitrator's Determination on Consideration of Policy Exhaustion

The Court first addresses the dispute raised by the parties regarding whether the Master Arbitrator erred in declining to consider Petitioner's evidence of policy exhaustion.

The Master Arbitration procedures under Section 5106(b) of the Insurance Law are set forth in 11 NYCRR-65-4.10. The grounds for vacatur or modification of a Lower Arbitrator's award are identified in Section 65-4.10(a) as follows:

> "(1) any ground for vacating or modifying an award enumerated in article 75 of the Civil Practice Law and Rules (an article 75 proceeding), except the ground enumerated in CPLR subparagraph 7511(b)(1)(iv) (failure to follow article 75 procedure);
>
> (2) that the award required the insurer to pay amounts in excess of the policy limitations for any element of first-party benefits; provided that, as a condition precedent to review by a master arbitrator, the insurer shall pay all other amounts set forth in the award which will not be the subject of an appeal, as provided for in section 65-4.4 or 65-4.5 of this Subpart".

Section 65-4.10(c), "Scope of master arbitration review", outlines the proper parameters under which a Master Arbitrator may review the findings of a Lower Arbitrator. As relevant here, subpart (6) of 65-4.10(c) provides:

> "The master arbitrator shall *only consider those matters which were the subject of the arbitration below* or which were *included* in the arbitration award appealed from."
>
> (emphasis added).

Here, the Master Arbitrator relied on 65-4.10(c) in determining that he could not consider Petitioner's policy exhaustion evidence, holding:

> "The issue thus framed is not that of waiver, but rather authority, as Appellant seeks consideration of evidence being proffered for the first time on appeal. This submission runs afoul of 11 NYCRR § 65-4.10 (c) (6) which limits the scope of a Master's review to '[t]hose matters which were the subject of the arbitration below or which were included in the arbitration award appealed from'…Under the facts presented here, this forum simply lacks the authority to consider evidence which was supplied post-hearing. (See, Allstate Ins. Co. v Espinal, 205 AD2d 531 [2nd Dept. 1994] ['In basing his determination to modify the award upon a matter which was never raised before the hearing arbitrator, the master arbitrator exceeded his power to review the award rendered.'])
>
> Simply stated, no cognizable basis in law has been presented which would permit vacatur or modification of the award under review or support the matter's remand for reconsideration."
>
> (NYSCEF doc No. 6).

In support of its petition to vacate the Award, Petitioner argues that the Master Arbitrator was mistaken and cites to 65-410(a)(2). While Petitioner does not further elaborate, Petitioner appears to infer that the prohibition under 65-4.10(a)(2) against awards in excess of policy limits trumps the scope of review mandated by the 65-4.10(c)(6), and the Master Arbitrator thus erred in relying on the latter section. The Court, however, finds that the Master Arbitrator's reasoning was correct, as it is bottomed on the clear and unambiguous language of 65-4.10(c)(6) that precludes the Master Arbitrator from reaching policy exhaustion, given that the issue and Petitioner's evidence were not before the Lower Arbitrator.

In validating the position of the Master Arbitrator, it is incumbent upon the Court to analyze the distinction between Sections 65-4.10(a)(2) and § 65-4.10(c)(6). The sections contemplate separate issues; the former outlines what grounds the master arbitrator may vacate the lower arbitrator's award upon, and the latter delineates what matters the master arbitrator may *consider* in the process of reaching a determination on vacatur of the lower arbitrator's

award. Nothing in the language of 65-4.10(a)(2) suggests that the restrictions of 65-4.10(c)(6) can be disregarded by a master arbitrator if an insurer cites policy exhaustion as a ground for vacatur. Similarly, nothing in the language of Section 65-4.10(c) suggests that a master arbitrator's scope of review may be altered or adjusted depending on the ground for vacatur asserted by an insurer. An interpretation otherwise would acknowledge a conflict between the sections, but the two sections can be read congruously and do not directly contradict each other.

The Court, in the course of its research, was also not able to find any caselaw establishing a direct conflict between the language of the two sections. In *Ameriprise Insurance Company v Electrodiagnostic & Physical Medicine, P.C.*, (2020 WL 5874849 [N.Y. Sup. Ct. 2020], the court (Melissa A. Crane, J.) opined on the *lack* of a conflict between the two sections. In that action, the petitioner insurer, similar to the circumstances here, asserted the defense of policy exhaustion for the first time before the master arbitrator. The master arbitrator rejected this defense pursuant to 65-4.10(c). In moving to confirm the award, the respondent medical provider argued that "there is a conflict between the prohibition of 11 NYCRR 65-4.10(a)(2) against an award exceeding the policy limits, and the prohibition of 65-4.10(c)(6) against a master arbitrator's consideration of matters not before the lower arbitrator" (*id.* at 2). The court rejected this argument and quoted the First Department's holding in *Ameriprise Ins. Co. v Kensington Radiology Group, P.C.*, to wit: "[t]he defense that an award exceeds an arbitrator's power is so important that a party may introduce evidence for the first time when the other party tries to confirm the award" (179 AD3d 563, 564 [1st Dept 2020]).

This Court agrees with the *Electrodiagnostic* court that there is no conflict between the sections. However, this Court finds that the First Department's holding is inapplicable to the

issue of a conflict. The Court details the procedural history of *Ameriprise* below to demonstrate why the holding does not appear applicable to the present circumstances.

Ameriprise

In *Ameriprise*, the respondent medical provider Kensington Radiology Group, P.C. ("Kensington") initiated arbitration proceedings after Ameriprise failed to reimburse Kensington for five different MRI procedures (Index No. 701127/2016 [N.Y. Civ. Ct. 2016]). Ameriprise argued to the lower arbitrator ("the Ameriprise Lower Arbitrator") that it properly delayed payment as it requested additional verification in the form of an Examination Under Oath (EUO), a condition precedent to coverage, and then denied the claims based on Kensington's failure to appear for the scheduled EUOs (*id.* at 2). Ameriprise additionally argued to the Ameriprise Lower Arbitrator that its policy was exhausted before Kensington's claims could be verified (*id.*).

The Ameriprise Lower Arbitrator found that four of Kensington's five bills were received by Ameriprise prior to policy exhaustion, and therefore issued an award in Kensington's favor for reimbursement of the four bills. The Ameriprise Lower Arbitrator rejected Ameriprise's argument that it properly delayed payment as Ameriprise did not submit evidence to substantiate its claim that Kensington failed to comply with scheduling EOUs.

On appeal before the master arbitrator ("the Ameriprise Master Arbitrator"), Ameriprise submitted, for the first time, letters reflecting that Kensington failed to comply with scheduled EUOs ("the EUO Correspondence") (*id.* at 3). The Ameriprise Master Arbitrator did not address the new evidence and upheld the award, finding that the Ameriprise Lower Arbitrator's award was rationally based on a determination that Ameriprise failed to demonstrate policy exhaustion at the time Kensington's' first four bills were received (*id.*).

By Decision and Order dated November 30, 2016, the Civil Court, New York County (Erika M. Edwards, J.) denied Ameriprise's petition to vacate and confirmed the award, finding that both arbitrator's decisions were well-reasoned and had a rational basis (*id.* at 5). The court noted that the Ameriprise Lower Arbitrator properly determined that Ameriprise did not establish that payment was timely delayed as it failed to provide the EUO Correspondence. However, the court did not address whether the EUO Correspondence should have considered by the Ameriprise Master Arbitrator (*id.* at 6).

Ameriprise thereafter appealed the Civil Court's decision to the Appellate Term, First Department.

On December 22, 2017, the Appellate Term rendered an order reversing the Civil Court's decision and remanding the matter for a Framed Issue Hearing on the question of whether Ameriprise's policy was exhausted before it became obligated to pay Kensington's claims (93 NYS3d 624 [NY App. Term. 2017]). The Appellate Term held that the evidence introduced by Ameriprise in support of its petition before the Civil Court, including a declaration page showing the limit was exhausted and a list of claims paid, raised a triable issue of whether the award should be vacated as it directed payment in excess of the policy and thus exceeded the arbitrator's power. The Appellate Term did not reach Ameriprise's argument that it timely delayed payment based on the scheduled EUOs and thus did not address the EUO Correspondence.

On January 23, 2020, the First Department affirmed the Appellate Term's order in its entirety (179 AD3d 563 [1st Dept 2020]). The First Department addressed the matter of the additional verification sought by Ameriprise and held that Kensington did not establish that its claims were completely verified, as it did not appear for the requested EUOs: "Petitioner

requested verification in the form of an examination under oath (EUO). Since respondent never appeared for an EUO, its claims were never verified. The defense that an award exceeds an arbitrator's power is so important that a party may introduce evidence for the first time when the other party tries to confirm the award" (*id.* at 564) (citations omitted). As discussed *supra*, it is this holding that the *Electrodiagnostic* court relied on in determining that no conflict exists between Sections 65-4.10(a)(2) and § 65-4.10(c)(6).

Based on its review of the background of *Ameriprise*, this Court interprets the First Department's holding to mean that a party may introduce evidence to substantiate the defense of policy exhaustion that was not part of the initial hearing. This Court is hesitant to find that *Ameriprise* has trumped the prohibition of 65-4.10(c)(6) against consideration of *matters* not before the Lower Arbitrator. The issue of newly raised matters was not before the First Department in *Ameriprise*, given that the defense of policy exhaustion was raised to the Ameriprise Lower Arbitrator, unlike here where the defense was raised for the first time to the Master Arbitrator.

The circumstances are also distinguishable as the Ameriprise Master Arbitrator did not expressly state that she would not consider the EUO Correspondence pursuant to 65-4.10(c)(6), but instead did not address it at all. It is unclear whether the First Department's holding should be read as a finding that the Master Arbitrator committed an error, or rather for the proposition that a Court can consider evidence substantiating policy exhaustion when reviewing a petition to confirm an award, regardless of at what point the evidence was introduced in the underlying proceedings.

The Court thus concludes that the Master Arbitrator here correctly declined to consider the matter of policy exhaustion pursuant to the unambiguous language of 65-4.10(c)(6). The

Court further concludes that the Master Arbitrator's decision was not in conflict with 65-4.10(a)(2). The Court bases that finding on an analysis of the language of both sections, as opposed to an interpretation that *Ameriprise* has overridden the restrictions of a Master Arbitrator's scope of review.

Exhaustion of Petitioner's Policy Limits

Having determined that the Master Arbitrator correctly declined to hear Petitioner's policy exhaustion evidence, the Court now turns to conduct its own evaluation of the evidence to determine if the Award must nevertheless be vacated pursuant to CPLR 75. Petitioner has introduced an affidavit from its No Fault Litigation/Arbitration supervisor, Jessica Mena-Sibrian (NYSCEF doc No. 7). Ms. Mena-Sibrian attests that the claims file of Respondent's assignor, Ms. Machuca, reflects that the policy has been exhausted beyond its $50,000 limit (*id.*). The affidavit also contains a ledger reflecting the dates that claims by various medical providers were paid that exhausted Ms. Machuca's policy. However, critically, the ledger fails to show that the policy was properly exhausted *before* Respondent's claims at issue here were verified, triggering Petitioner's obligation to pay the same. 11 NYCRR 65-3.15 states that:

> "When claims aggregate to more than $50,000, payments for basic economic loss shall be made to the applicant and/or an assignee in the order in which each service was rendered or each expense was incurred, provided claims therefor were made to the insurer prior to the exhaustion of the $ 50,000. If the insurer pays the $50,000 before receiving claims for services rendered prior in time to those which were paid, the insurer will not be liable to pay such late claims. If the insurer receives claims of a number of providers of services, at the same time, the payments shall be made in the order of rendition of services."

The Court of Appeals held in *Nyack Hospital v General Motors Acceptance Corp.* (8 NY3d 294 [2007]) that under the above provision, claims are payable in the order they are received and fully verified, meaning that the provider has complied with any additional information requested by the insurer:

> "The no-fault regulations provide that "[n]o-[f]ault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim, which shall include verification of all of the relevant information requested pursuant to section 65-3.5" (11 NYCRR 65-3.8 [a] [1]). With exceptions not relevant to this appeal, an insurer may not deny a claim "prior to its receipt of verification of all of the relevant information requested pursuant to section 65-3.5" (11 NYCRR 65-3.8 [b] [3]). Section 65-3.5 (b), in turn, authorizes the insurer to request "any additional verification required . . . to establish proof of claim . . . within 15 business days of receipt of the prescribed verification forms." This language contemplates that an insurer must pay or deny only a verified claim--that is, a claim that has been verified to the extent compliance with section 65-3.5 dictates in the particular case--within 30 calendar days of receipt; and, conversely, is not obligated to pay any claim until it has been so verified."
>
> (*id.* at 299).

Here, Petitioner's evidence does not reflect whether it sought additional information from Respondent for verification and does not indicate the dates Respondent's claims were received and/or verified, or the date that its policy was exhausted. Petitioner thus has not established that it is not obligated to pay the amount awarded to Respondent in the underlying arbitration proceeding. However, as Petitioner's evidence does demonstrate that its policy has been exhausted, the Court finds that, as with *Ameriprise*, Petitioner's submissions raise triable issues of fact as to whether the award should be vacated:

> "Petitioner-insurer's submissions in support of its petition to vacate the arbitration award-including an attorney's affirmation, the policy declaration page showing the $50,000 limit and a payment ledger listing in chronological order the dates the claims by various providers were received and paid – raised triable issues as to whether the $50,000 policy limit had been exhausted by payments of no fault benefits to respondent and other providers before petitioner became obligated to pay the claims at issue here. Therefore, we remand this matter to Civil Court for a framed issue hearing on that issue"
>
> (9 NYS3d at 624) (citations omitted).

Accordingly, the Court directs that this matter of whether Petitioner's policy was exhausted at the time Respondent's claims were verified, such that the instant arbitration award directed payment in excess and must be vacated, is referred a Special Referee to Hear and Determine.

Attorney's Fees

Respondent seeks an award of attorney's fees pursuant to 11 NYCRR §65-4.10(j)(4), which provides for reimbursement of attorney's fees incurred in connection with an appeal of an arbitration award (*See Matter of Country-Wide Ins. Co. v. Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407 [1st Dept 2018] ["Supreme Court has authority to award attorney's fees as this is an appeal from a master arbitration award pursuant to 11 NYCRR 65-4.10 (j) (4)"]. In support, Respondent submitted an affirmation detailing the hours spent by its counsel preparing the opposition to Petitioner's petition and the cross-petition for confirmation (see NYSCEF doc No. 20). In the affirmation, Respondent's counsel avers that they spent a total of 6 hours of legal work. Respondent seeks attorney's fees in the amount of $3,000 pursuant to counsel's billing rate of $500 per hour.

In view of the Court's holding herein, Respondent is not entitled to attorney's fees at this juncture. However, the Court directs that, should Respondent prevail at the Framed Issue Hearing, the Special Referee shall determine the amount of attorney's fees Respondent is entitled to pursuant to 11 NYCRR §65-4.10(j)(4).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the application of Petitioner Country-Wide Insurance Company (Motion Seq. 001) is partially granted to the extent that this matter is remanded for a Framed Issue Hearing; and it is further

ORDERED that the issues of whether Respondent Brownsville Chiropractic PC's claims were received and verified prior to exhaustion of Petitioner's policy such that the arbitration award should be confirmed, and the amount of attorney's fees, if any, to which Respondent is entitled, are hereby referred to a Special Referee to Hear and Determine. It is further

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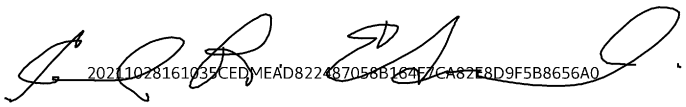

10/28/2021
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE