

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

2022 NY Slip Op 30037(U)

January 3, 2022

Supreme Court, New York County

Docket Number: Index No. 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 EDMEAD PART 35

Justice

-----X

COUNTRY-WIDE INSURANCE COMPANY

Petitioner,

- v -

WALTER E. MENDOZA CHIROPRACTIC P.C.,

Respondent.

-----X

INDEX NO. 651101/2020

MOTION DATE 11/18/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for ATTORNEY - FEES.

Upon the foregoing documents, it is

ORDERED that Respondent's application for an award of attorney's fees in accordance with Ins. Law § 5106(b) and 11 NYCRR § 65-4.10(j)(4) in the sum of \$7,290 (Motion Seq. 003) is granted to the extent that Petitioner is directed to pay Respondent \$6,555 within thirty (30) days; and it is further

ORDERED that Petitioner shall pay 20% of the total arbitration award, \$817.72, plus 2% monthly interest, running from April 6, 2018 until the entry of a judgment, for a total award to be calculated by the Clerk of the Court not to exceed \$1,360, in accordance with 11 NYCRR 65-4.6 (d) within thirty (30) days; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of Respondent in the above amounts; and it is further

ORDERED that counsel for Respondent shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

MEMORANDUM DECISION

In this Article 75 action, Respondent Walter Mendoza Chiropractic P.C. seeks (1) an award of attorney's fees pursuant to 11 NYCRR § 65-4.10 (j) (4) in the amount of \$7,290; (2) an order directing the clerk to calculate entry of attorney's fees in the sum of 20% of the principle plus interest pursuant to 11 NYCRR § 65-4.6 (d); and (3) interest calculated at two percent and running from the date of the arbitration filing (Motion Seq. 003).

Petitioner Country-Wide Insurance Company opposes Respondent's motion in its entirety.

BACKGROUND FACTS

Petitioner commenced this proceeding in February 2019 seeking to vacate an arbitration award for reimbursement of medical bills issued in favor of Respondent in an underlying no-fault arbitration proceeding.

By Decision and Order dated April 21, 2020, this Court granted Petitioner's motion to vacate on the grounds that the Master Arbitrator's award obligated Petitioner to make payment in excess of the monetary limit of the subject no-fault insurance policy and, therefore, the arbitrator exceeded its power. (NYSCEF doc No. 18). In reliance on the Court of Appeal's holding in *Nyack Hospital v General Motors Acceptance Corp* (8 NY3d 294 [2007]), this Court held that Petitioner could satisfy already "verified" and uncontested claims while awaiting an arbitration decision as to the disputed claim. Respondent could not recover on the disputed claim as Petitioner already made payments exceeding the policy's monetary limit at the time the award was rendered. (NYSCEF doc No. 18).

On June 14, 2021, Respondent moved for leave to reargue the April 2020 decision. Respondent maintained that this Court misconstrued the holding of *Nyack Hospital*, and that

Petitioner's payout ledger failed to clearly show the policy was exhausted prior to its obligation to pay the claim. Petitioner opposed this motion on the grounds that it was untimely but did not address the merits of Respondent's arguments¹.

By Decision and Order dated October 15, 2021, the Court granted Respondent's application and, upon reargument, upheld the Master Arbitrator's award, finding that it had exceeded its judicial review powers under Article 75 by assessing the sufficiency of Petitioner's payout ledger submitted to the Master Arbitrator. As the evidentiary record reflected that the Master Arbitrator reviewed the payout ledger and found it did not sufficiently demonstrate policy exhaustion, the Court erred in conducting its own analysis. (NYSCEF No. 30 at 8-9).

Having obtained a favorable judgment, Respondent brought the instant motion on October 18, 2021, seeking attorney's fees under Insurance Laws 11 NYCRR § 65-4.10 (j) and 11 NYCRR § 65-4.6 (d) for legal work performed throughout the arbitration proceeding. Petitioner opposes the motion, arguing that Respondent seeks fees above and beyond those customarily awarded in No-Fault matters, and that some additional fees sought were incurred due to Respondent's untimeliness in filing its appeal of the April 2020 decision.

DISCUSSION

Pursuant to Insurance Law § 5106, claimants are entitled to recover an "attorney's reasonable fee for services necessarily performed in connection with securing payment of the overdue claim". 11 N.Y.C.R.R. §65-4.10(j)(4) provides: "The attorney's fee for services rendered in connection with . . . a court appeal from a master arbitration award and any further appeals,

¹ Respondent's motion for leave to reargue was technically untimely as it was filed well beyond the thirty-day time frame proscribed by CPLR 3211(d)(3). However, Respondent timely filed a Notice of Appeal of the April 2020 decision and the time to perfect its appeal was extended by the Appellate Division, First Department to February 2022 (NYSCEF doc No. 29). The Court thus exercised its discretion to consider its prior orders during the pendency of this action (*See Liss v Trans Auto Systems Inc.* (68 NY2d 15 [1986]); *see also Garcia v Jesuits of Fordham, Inc.* (6 A3D 163 [1st Dept 2004]).

shall be fixed by the court adjudicating the matter." The First Department has held the law affords this Court the authority to award reasonable attorney's fees in appeals of master arbitration awards. (*Matter of Country-Wide Ins. Co. v. Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407 [1st Dept 2018], see also *Matter of GEICO Ins. Co. v. AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]).

11 NYCRR § 65-4.6 is entitled "Limitations on attorney's fees pursuant to section 5106 of the Insurance Law." Pursuant to subdivision (d), "the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant per arbitration or court proceeding, subject to a maximum fee of \$1,360."

Here, Respondent seeks an award of attorney's fees pursuant to 11 NYCRR § 65-4.10 (j) (4) and § 65-4.6 (d). In support, Respondent submitted an affirmation detailing the hours spent by its counsel preparing the opposition to Petitioner's appeal to this Court. Respondent's counsel avers that he spent a total of 16.2 hours of legal work with a billing rate of \$450 per hour, for a total award of \$7,290. Additionally, pursuant to 11 NYCRR § 65-4.6 (d), Respondent seeks an order directing Petitioner pay the attorney's fees that the Lower Arbitrator awarded, and Master Arbitrator affirmed, for legal work performed for the initial arbitration proceeding, which consist of fees in the amount of twenty percent of the value of the claim plus interest.

In opposition, Petitioner does not dispute that §65-4.10 (j) (4) provides a court with discretion to award attorney's fees to prevailing parties in appeals of master arbitration awards or that § 65-4.6 (d) provides a basis for recovering attorney's fees at initial arbitration proceedings. However, Petitioner argues that Respondent is seeking *unreasonable* fees and the Court should use its discretion to limit the requested award. Petitioner also notes that Respondent's affirmation

includes a Master Arbitration fee of \$195 that was already paid to prior counsel and has submitted proof of payment (NYSCEF doc No. 39). On reply, Respondent's counsel maintains that the fees it seeks reimbursement for are reasonable but withdraws the demand for the \$195 Master Arbitration fee.

Following review of the parties' submissions, the Court finds that Respondent is entitled to an award of attorney's fees, but the amount sought pursuant to 11 NYCRR § 65-4.10(j)(4) exceeds the reasonable fees counsel is entitled to under the statute.

In Respondent's schedule of attorney fees, the Court notes three billings in the amounts of \$180, \$225, and \$135, which Respondent attributes to work performed seeking an extension of time to perfect its appeal of this Court's April 2020 decision before the First Department. These billings arose from work incurred not through the ordinary course of appeal of a master arbitration award, but rather due to Respondent's failure to timely perfect its appeal. Therefore, the Court finds that said billings should be excluded from the fees incurred with appeal of the master arbitration award that Petitioner is obligated to reimburse Respondent for under 11 NYCRR § 65-4.10 (j) (4). The Court additionally excludes the aforementioned \$195 "master arbitration fee" that was paid to prior counsel.

Accordingly, the Court grants Respondent's application for fees pursuant to under 11 NYCRR § 65-4.10 (j) (4) and 11 NYCRR 65-4.6 (d), but reduces Respondent's award of fees pursuant to 11 NYCRR § 65-4.10(j)(4) to \$6,555.

CONCLUSION

Based on the foregoing, it is hereby

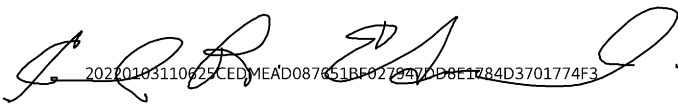
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01/03/2022
DATE

CAROL EDMEAD, J.S.C.

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