

**Country-Wide Ins. Co. v Comfort Choice
Chiropractic P.C.**

2022 NY Slip Op 32945(U)

August 31, 2022

Supreme Court, New York County

Docket Number: Index No. 656334/2022

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

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COUNTRY-WIDE INSURANCE COMPANY

Petitioner,

- v -

COMFORT CHOICE CHIROPRACTIC P.C.,

Respondent.

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INDEX NO. 656334/2022

MOTION DATE 05/17/2022

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

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

Petitioner, Country-Wide Insurance Company ("CWI"), seeks an order pursuant to CPLR § 7511(b)(1)(iii) to vacate a No-Fault Master Arbitrator's decision, dated October 11, 2021, on the basis that the lower arbitrator exceeded his/her powers, alleging that the award was so imperfectly executed that a final award upon the subject matter submitted was not made, and that the Master Arbitrator erred in affirming the decision. For the reasons set forth below the petition is denied and respondents' cross-petition to confirm the decision is granted.

Background

An underlying accident occurred on March 10, 2019, involving a vehicle registered in New York State and insured by CWI. Edwin Durazno ("Edwin") was the passenger of the vehicle insured by CWI that was involved in the motor accident. Following the accident, Edwin allegedly received healthcare services from respondent Comfort Choice Chiropractic P.C., which later submitted medical bills for reimbursement for alleged healthcare services provided to Edwin. This matter then proceeded to arbitration on September 27, 2021, before Arbitrator Debbie Kotin Insdorf, Esq.

Arbitrator Insdorf held Respondent CWI could not sustain the IME No Show defense. Arbitrator Insdorf stated that the Respondent CWI's IME No Show evidence was insufficient as there was no proof submitted that the scheduling letters were mailed. CWI then pursued Master Arbitration, on the grounds that the award of the No-Fault Arbitrator was not rationally based upon the evidence presented below, was arbitrary and capricious, and the policy was exhausted. The Master Arbitrator affirmed the lower arbitration award, holding that the arbitrator's review of the facts was not incorrect as a matter of law.

Petitioner now appeals to this Court and reasserts its position that the award should be vacated on the grounds that the lower arbitrator exceeded his power and the Master Arbitrator erred in affirming the award. Respondent cross-petitions to confirm the decision and for attorney's fees pursuant to 11 NYCRR 65-4.10(j)(4) and 11 NYCRRR 65-4.10(j)(2)(i).

Discussion

Applicable Law

Pursuant to CPLR §7511(b)(1), an arbitration award can be vacated or modified on the grounds that:

- (i) corruption, fraud, or misconduct in procuring the award;
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession;
- (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.

To be upheld, the award must have evidentiary support or other basis in reason, appear in the record, and not be arbitrary or capricious (*Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *Mount St. Mary's Hosp. v Catherwood*, 26 NY2d 493 [1970]).

Discussion

The Court decides this matter on narrow grounds. The respondent argues that 11 NYCRR 65-4.10 (a)(2) does not permit Master Arbitrator review of the possible exhaustion of the policy unless the amounts that were not above the policy limits are paid prior to such review.

The Court agrees with that interpretation. As such, since there were amounts not in dispute as being above the policy limits that should have been paid prior to the Master Arbitrator's review, the Master Arbitrator was correct in not reviewing the issue of policy exhaustion. As the petitioner admits in its papers that the policy was not exhausted at the time of the petition, saying \$69/42 remained on the policy, then at the time of the submission of this matter to the Master Arbitrator, there were funds left on the policy. Thus, in order to have raised the issue of exhaustion with the Master Arbitrator, some money must have been paid which was not. As such, the Master Arbitrator was correct in not granting an exhaustion defense.

Based on this finding, the Court need not reach the remaining contentions of the parties, except as to the issue of attorney's fees, discussed below.

Attorney's fees

Respondent seeks an award of attorney's fees pursuant to 11 N.Y.C.R.R. §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. 5). In the affirmation, Respondent's counsel avers that they spent a total of 4 hours of legal work. Respondent seeks attorney's fees in the amount of \$2,000 pursuant to counsel's billing rate

of \$500 an hour. The Court finds that Respondent is entitled to attorney’s fees. In *Matter of Country-Wide Ins. Co. v. Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407 [1st Dept 2018], the court held that the “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), which, in pertinent part, provides: "The attorney's fee for services rendered in connection with . . . a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter.” (see also *Matter of GEICO Ins. Co. v. AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]). Respondent also seeks Attorney’s fees of \$260.00 pursuant to 11 NYCRRR 65-4.10(j)(2)(i). Thus, Respondent’s application for attorney’s fees in the total amount of \$2,260 is granted. Based on the foregoing, it is hereby

ORDERED that the petition of Petitioner Country-Wide Insurance (Motion Seq. 001) is denied in its entirety; and the Award of the Lower Arbitrator, as affirmed by the Master Arbitrator, is confirmed; and it is further

ORDERED that Respondent’s cross-petition for attorney’s fees in the total amount of \$2,260 is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

8/31/2022

DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE