

**Wesco Ins. Co. v GEICO Gen. Ins. Co.**

2022 NY Slip Op 33216(U)

September 21, 2022

Supreme Court, New York County

Docket Number: Index No. 651645/2022

Judge: Lyle E. Frank

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. LYLE E. FRANK PART 11M

Justice

-----X

WESCO INSURANCE COMPANY

Petitioner,

- v -

GEICO GENERAL INSURANCE COMPANY A/S/O
NANCYANNE CORCIONE,

Respondent.

-----X

INDEX NO. 651645/2022
MOTION DATE 05/05/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 20, 21, 22, 26, 27, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Petitioner, WESCO INSURANCE COMPANY ("Wesco"), seeks an order pursuant to CPLR § 7511(b)(1)(iii) to vacate the arbitration award #I068-08977-21-00 from Arbitration Forums, Inc. in favor of Respondent GEICO GENERAL INSURANCE COMPANY ("Geico") dated January 27, 2022 ("Award"), on the basis that the arbitrator exceeded his/her powers, alleging that the award was so imperfectly executed that a final award upon the subject matter submitted was not issued. Petitioner also seeks an order for a judgement on the merits or, in the alternative, referring this matter back to Arbitration Forums Inc. for a re-hearing and final determination based on the merits. For the reasons set forth below the petition is granted and respondents' cross-petition to confirm the decision is denied.

Background

Respondent GEICO filed for loss transfer arbitration against Petitioner WESCO, seeking reimbursement for Personal Injury Protection ("PIP" or "No-Fault") benefits paid on behalf of its named insured, Davina Walsh, as a result of an accident occurring on August 23,

2018("Underlying accident"), while GEICO's insured was operating a "loaner car" owned by Respondent WESCO's insured to be used while the GEICO insured vehicle was out of service due to repairs from August 14-23, 2018.

## **Discussion**

### **Vacating the Award**

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]).

In the award, Arbitrator 2000448554 of Arbitration Forums, Inc. bases their decision on a similar case involving the same parties from Nassau County Supreme Court (Index # 601078/2019), only stating that "The decision is most persuasive when it states: "That agreement purported to transfer PIP Liability to [the driver/loanee]'s insurer in the first instance. But that agreement cannot be controlling. Otherwise, New York's insurance priority regulations - written for the benefit of the insurers - could be altered at the whim of the insureds." The arbitrator did not provide further justification for the award. It is the Court's opinion that the basis for the decision

of the arbitration award is insufficient and is so imperfectly executed that a final and definite award upon the subject matter submitted was not made.

### **Judgement on the merits**

The PIP endorsement specifically incorporates the liability section of the policy when determining coverage. Under the liability section of the GEICO policy, GEICO is obligated to provide coverage when an insured person is operating a "Temporary Substitute Auto." More specifically, under the liability section of the policy, a "Temporary Substitute Auto" is included in the owned auto definition. The policy states:

(6) Owned Auto means:

(a) A vehicle described in this policy for which a premium charge is

shown for these coverages ...

(d) a temporary substitute auto.

(10) Temporary Substitute Auto means an auto or trailer, not owned by you, temporarily used with the permission of the owner. This vehicle must be used as a substitute for the owned auto or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

Under the liability section GEICO agrees to provide liability coverage that would, cover a "Temporary Substitute Auto" as this section states as follows:

#### LOSSES WE WILL PAY FOR YOU

Under Section I, we will pay damages which an insured becomes legally obligated to pay because of:

1. bodily injury sustained by a person; and
2. property damage

Arising out of the ownership, maintenance or use (including loading or unloading) of the owned auto or a non-owned auto ...

In *ELRAC, Inc, v, M.ehlinger, 258 A.D.2d 500, 501-502 (2nd Dept, 1999)*, the Second Department has stated that:

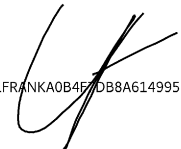
The purpose of a substitution clause is to afford continuous coverage to the insured during the period that a vehicle scheduled under the policy is out of commission, and at the same time limit the risk of the insurer to one operating automobile at a time for a single, fair premium (see, *VanMinos v Merkley, 48 AD2d 281, 285; 12 Couch, Insurance § 45:219, at 512 [2d ed]*). The protection is limited to the occasional or infrequent use of a vehicle not owned by the insured; it is not intended as a substitute for insurance on vehicles regularly used by the insured (see, *Liberty Mut. Ins. Co. v Sentry Ins., 130 AD2d 629, 630, rearg granted 135 AD2d 508; see also, Federal Ins. Co. v Allstate Ins. Co., 111 AD2d 146, 147*). The significant question in the present case is whether Mehlinger's van, expressly designated as the insured vehicle under the Commercial insurance policy, was "out of normal use" as that term may be construed in the context of the "temporary substitute" provision of the policy.

The law is clear that a "loaner", or "temporary substitute vehicle", is covered under an insureds policy. Upon the foregoing, it is therefore

ORDERED that the petition of Petitioner WESCO INSURANCE COMPANY is granted; and the Award #I068-08977-21-00 from Arbitration Forums, Inc. is vacated; and it is further

ORDERED AND ADJUDGED that GEICO is required to provide coverage to insured Davina Walsh in the underlying accident; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

20220922094047LFRANKA0B4F7DB8A614995BAB43B11A0BF2A42  
  
LYLE E. FRANK, J.S.C.

9/21/2022  
DATE

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