

Country-Wide Ins. Co. v Horizon Ortho Supply Corp.

2023 NY Slip Op 31345(U)

April 21, 2023

Supreme Court, New York County

Docket Number: Index No. 654431/2022

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57TR

Justice

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COUNTRY-WIDE INSURANCE COMPANY

Plaintiff,

- v -

HORIZON ORTHO SUPPLY CORP,

Defendant.

-----X

INDEX NO. 654431/2022

MOTION DATE 05/26/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
 MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 20, 21

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

BACKGROUND

Victoria Georgina (Assignor) a 49 year old female, was injured in a motor vehicle accident on January 13, 2020. As a result, Assignor suffered injuries, which required healthcare services. Horizon Ortho Supply (Horizon) provided Assignor with durable medical equipment from March 19 through April 9, 2020. Country-Wide Insurance Company (CW) denied the claim submitted by Horizon based upon lack of medical necessity.

The amount in dispute was \$ 3,386.22.

The parties submitted to arbitration to resolve the underlying dispute regarding no fault benefits. Matthew J. Cavalier (MC), the Arbitrator, held a hearing on June 25, 2021. On July 14, 2021, MC issued a decision finding that CW did not meet its burden in bringing forth a valid defense of lack of medical necessity. Specifically, MC found,

After reviewing the totality of the admissible and credible evidence, as well as hearing the arguments of the parties, I deem that the Applicant has successfully

rebutted the peer review report in a meaningful way. The peer review report is not sufficient to sustain the Respondent's burden of proof with regard to the lack of medical necessity.

CW pursued Master Arbitration on the grounds that the award by the Arbitrator was not rationally based upon the evidence presented and was arbitrary and capricious. CW also, for the first time, raised the issue of policy exhaustion in their brief to the Master Arbitrator. Anne L Powers, the Master Arbitrator found:

I find the lower arbitrator decided this claim based upon his review and evaluation of the record before him as well as case law. Based on the Appellants claim of policy exhaustion which cannot be ignored, the matter is remanded to the arbitrator below for a hearing on Policy Exhaustion and his determination thereto.

Based on the foregoing, I find lower arbitrator decided this claim based upon his review and evaluation of the record as well as case law. Based on the foregoing, I find the award below was cogently thought out; clearly articulated and had a rational and plausible basis in the evidence. However, once a policy exhaustion issue is raised it must be evaluated by the NFA for his determination.

After remand, MC again ruled in favor of Horizon citing medical necessity in an award dated May 26, 2022 and rejected CW's policy exhaustion defense. MC found:

The PIP ledger shows that as of the date of filing of the Master Arbitration, \$5494.36 remained of the \$50,000 PIP coverage leaving the Respondent with no rational or legal argument as to exhaustion since this award is for \$3386.22, the award for the companion case, AAA No.: 17-20-1179-8672 is \$1870.00, a total of \$5266.22, and that is less than \$5494.36, that was available when the initial decision was rendered on July 14, 2021.

Ignoring a decision and arguing priority of payments when the balance of the pending payments was subsequently submitted bills that may or not have been denied for any of a variety of reasons, and should be behind a reasoned award that has a time limit to pay promptly is specious at best and bad faith at worse given neither the exhaustion argument was raised nor the PIP ledger submitted in support of it, at the June 25, 2021, hearing by their appearing attorney, Willyne C. Michel, Esq.

Respondent also argued that the possibility of exhaustion in the Master Arbitration brief as the basis for not paying the Award made after the June 25, 2021, hearing, but the PIP ledger submitted before the May 6, 2022, hearing shows this fear was no longer present after the Master Arbitration decision was made and the Respondent made payments to various providers to exhaust the \$50,000 PIP coverage. It can be argued that the Respondent singled out the medical provider or the Applicant's Attorney firm, or both, and used the statutory appeals process and the aforementioned baseless arguments to exhaust the policy and deny the Applicant payment of the award in bad faith.

Upon my review of the arguments made by the parties at the remanded hearing on May 6, 2022, I once again find for the Applicant as to medical necessity and award \$1870.00 for the policy was not exhausted on July 14, 2021, when I submitted the original award.

CW again pursued Master Arbitration, on the grounds that the award of MC was not rationally based upon the evidence presented below and was arbitrary and capricious. The Master Arbitrator denied the request for master arbitration review based on his finding that the request was submitted late. Master arbitrator found:

In reviewing this claim it appears that the request for a master review was late. The award by the (Arbitrator) was mailed to Respondent by letter dated May 27, 2022. The May 27, 2022, letter triggered Respondent's 21 calendar day obligation to Appeal. Therefore, Respondent's 21 calendar days to initiate this appeal expired on June 17, 2022, hence Respondent's request for a master review dated June 23, 2022 was late. According to section "(d) Procedure for Review" regulation, 11 N.Y.C.R.R. 65-4.10(d)(2), states the first step of that procedure: "The request for review by a master arbitrator shall be in writing and shall be mailed or delivered to the designated organization's master arbitration office within 21 calendar days of the mailing of the award." According to 11 INYCRR. 65-4.10(c)(4) provides: "If the master arbitrator determines that subdivision (a) of this section has not been complied with, the master arbitrator shall, in lieu of rendering an award, deny the request for review. The procedural requirements contained in this section applicable to a master award shall also be applicable to a denial of request for review. "

THE PETITION

On November 18, 2022, CW filed a petition to vacate the lower Arbitrator's Award dated May 26, 2022, and a Master Arbitration award dated August 19, 2022, on the grounds that the lower arbitrator exceeded his authority, or so imperfectly executed it, that a final and definite award upon the subject matter submitted was not made, and the Master Arbitrator erred in affirming the award.

On February 2, 2023, Respondent filed opposition and on March 24, 2023, Petitioner filed reply. On March 27, the petition was fully submitted and the court reserved decision.

Petitioner's application for review by Master Arbitrator was untimely

Petitioner's request for Master Arbitration Review was untimely. MC's award on remand was dated May 26, 2022, and emailed on May 27, 2022. N.Y.C.R.R. 65-4.10(d)(2), states "The request for review by a master arbitrator shall be in writing and shall be mailed or delivered to the designated organization's master arbitration office within 21 calendar days of the mailing of the award."

Petitioner argues the first day for the beginning of the 21-day period for a master arbitration request was not on a business day but instead a Saturday, May 28, 2022, and that Monday, May 30, 2022, was a federal holiday (Memorial Day), the first day of reckoning was Tuesday, May 31, 2022. Petitioner relies on General Construction Law § 20, which provides,

A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. If such period is a period of two (2) days, Saturday, Sunday or a public holiday must be excluded from the reckoning if it is an intervening day between the day from which the reckoning is made and the last day of the period. In computing any specified period of time from a specified

event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning.

However, Respondent, in opposition, argues since the award was emailed on May 27, 2022, twenty-one days later is June 17, 2022, and Petitioner's request to appeal was made by email and attached letter on June 22, 2022, which was beyond the required time frame.

Respondent argues, General Construction Law § 20 does not apply as it refers only to weekends and holidays being excluded if the period is 2 days, not 21. In support Respondent cites *People v. Assi*, 14 N.Y.3d 335, 343 (2010), in which the Court of Appeals held "General Construction Law and holidays being excluded if the period is 2 days, not 21.

The court agrees with Respondent, Petitioner's application to the Master Arbitrator was correctly denied as untimely under N.Y.C.R.R. 65-4.10(d)(2).

There is no basis to vacate the underlying award on the merits

Assuming arguendo, that the application to the Master Arbitrator was timely, there still exists no basis to vacate the lower arbitrator's award.

As held by the Court of Appeals:

Judicial review of a master arbitrator's award "is restricted, by terms of the statute, to 'grounds for review set forth in article seventy-five' of the CPLR (except in those cases where the award is \$5,000 or more, and the applicant or insurer may seek *de novo* review in the courts)." (*Matter of Bamond v Nationwide Mut. Ins. Co.* 75 AD 2d 812, 813, 427 NYS2d 642, affd. 52 NY2d 957, 437 NYS2d 969, 419 NE 2d 872) CPLR 7511 allows a court to vacate an arbitrator's award and, by judicial construction, a master arbitrator's award on the application of either party if "the court finds that the rights of that party were prejudiced by:***(iii) an arbitrator, or agency or person making the award exceeded his power or ***that a final and definite award upon the subject matter submitted was not made." (CPLR 7511, subd. [b], par. 1, cl. [iii].)

MC provided a detailed basis for the award that was neither arbitrary nor capricious (*Rose Castle Redevelopment II, LLC v Franklin Realty Corp.* 183 AD3d 230). MC reviewed CW's evidence and determined it was insufficient to establish a policy exhaustion defense.

There was a "colorable justification" and a "plausible basis" for the award (*Id.*). MC provided a rational basis for rejecting the policy exhaustion defense. It was within MC's discretion to determine which evidence in the record to rely on and give weight to. Neither the Master Arbitrator, nor this court, can weigh the evidence anew (*Matter of Bay Needle Care Acupuncture v Country-Wide Ins. Co.* 176 AD3d 806, 807).

ATTORNEYS FEES

The superintendent's regulations provide that an attorney's fee for services rendered in connection with "a court appeal from a master arbitration award ... shall be fixed by the court adjudicating the matter" (Insurance Department Regulations [11 NYCRR] § 65-4.10[j][4]). The term "court appeal" applies to a proceeding such as this, taken pursuant to CPLR Article 75 to vacate or confirm a master arbitration award (*GEICO Ins. Co. v. AAAMG Leasing Corp.*, 148 AD3d 703, 705).

Respondent seeks fees totaling \$1200 for 4 hours of work, at a rate of \$300.00 per hour. Counsel supports this request with an affirmation detailing his experience and time spent preparing opposition papers. The court finds the rate of \$300.00 an hour is reasonable and appropriate for the work performed. The court finds based upon the opposition papers filed in this action, that four hours is a reasonable amount of time spent for the work performed.

Based upon all the reasons stated above, the court awards Respondent for 4 hours of work for the instant matter at a rate of \$300.00 per hour, for a total of \$1200.00 in attorneys' fees.

Wherefore, it is hereby

ORDERED that the petition is denied in its entirety, and the award of the Lower Arbitrator, is confirmed; and it is further

ADJUDGED that Respondent HORIZON ORTHO SUPPLY CORP. a/a/o VICTORIA GEORGINA, having an address at 815 Avenue H, Brooklyn, New York 11230 , do recover from Petitioner COUNTRY WIDE INSURANCE COMPANY, having an address at 40 Wall Street, 13th Floor, New York, New York 10005 , the amount of \$ 3386.22 , plus interest at the rate of 9% per annum from the date of November 18, 2022 , as computed by the Clerk in the amount of \$ _____ , together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk, for the total amount of \$ _____ , and that the Respondents have execution therefor; and it is further

ORDERED that Respondent, Horizon Ortho Supply Corp., application for attorney's fees in the amount of \$1200.00 is granted; and it is further

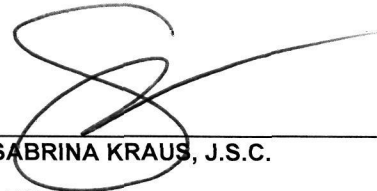
ORDERED that, within 20 days from entry of this order, Petitioner shall serve a copy of this order with notice of entry on Respondent, and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically

Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

4/21/2023
DATE


SABRINA KRAUS, 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