

American Tr. Ins. Co. v Jong Won Yom

2023 NY Slip Op 31949(U)

June 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 532166/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of June 2023

HONORABLE FRANCOIS A. RIVERA

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AMERICAN TRANSIT INSURANCE COMPANY,

DECISION & ORDER

Petitioner,

Index No.: 532166/2022

- against -

DR. JONG WON YOM, DC, LAC, RPH, MS, A/A/O
MANN JOUNG CHON,

Respondents.

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By notice of petition and petition filed on November 3, 2022, under motion sequence number one, petitioner American Transit Insurance Company (hereinafter ATIC) seeks an order and judgment pursuant to CPLR 7511, Insurance Law 5016(c), 11 NYCRR 65-4.10(h)(1)(i) and 11 NYCRR 65-4.10(h)(2) vacating the no-fault insurance master arbitration award of A. Jeffrey Grob, Esq. (hereinafter Grob), dated August 22, 2022, which affirmed the arbitration award of Gregory Watford, Esq. (hereinafter Watford), dated May 26, 2022, granting respondent Dr. Jong Won Yom, DC, LAC, RPH, MS, A/A/O Mann JounG Chon (hereinafter the Applicant) claim for No-Fault insurance compensation in the amount of \$3,798.90.00 for acupuncture treatment services performed on its assignor, Mann JounG Chon (hereinafter the Assignor).

By notice of cross petition filed on February 13, 2023, under motion sequence number two, Dr. Jong Won Yom, DC, LAC, RPH, MS, A/A/O Mann JounG Chon seeks an order: (1) confirming the no-fault arbitration award, pursuant to CPLR 7510, that was affirmed by the Master Arbitrator on August 22, 2022, in the sum of \$3,798.90; (2) Interest at rate of 2% from January 25, 2021, until entry of a judgment; (3) No-fault statutory attorneys' fees in the sum of 20% of combined principal and interest up to a maximum of \$1,360.00, in an amount to be calculated by the clerk; (4) No-fault Master Arbitration fees in the sum of \$130.00; (5) reasonable Attorney's fees to be determined by the Court in accordance with 11 NYCRR § 65-4.10(j)(4); (6) Arbitration filing fee of \$40.00; (7) Costs and disbursements of this action as taxed by the Clerk; and (8) Such other and further relief as this Court may deem just, proper and equitable.

NYSCEF documents numbered one through and including sixteen were considered in determining the instant petition and cross petition.

BACKGROUND

This petition arises out of a motor vehicle collision which occurred on November 2, 2019 (hereinafter the subject accident). Mann Joung Chon, the Assignor of the no fault benefits, is a 56-year-old driver who allegedly sustained injuries to his neck, upper back, lower back, right knee, and right shoulder. In dispute in this case were the fees for five (5) bills for acupuncture treatment services provided to the Assignor from January 15, 2020, through February 17, 2020. Dr. Jong Won Yom, the Applicant and the assignee of the no fault benefits, applied for reimbursement for services he provided to the assignor. The Applicant submitted the bills to ATIC for payment. ATIC initially denied two of the bills on the ground that the NYS Worker's Compensation Board (WCB) was the proper forum for the claims on the belief that Assignor was working at the time of accident. ATIC also denied some of the bills on the grounds that they were not submitted to it within 45 days from the date that services were rendered.

ATIC then denied the claims on the grounds that the Assignor's injuries did not arise out of an insured event based on a lack of causation. ATIC based this defense upon the examination under oath of the Assignor and the report, dated October 9, 2020, of biomechanical science expert Omid Anthony Bellezza, Ph.D.

The issues that were to be decided at the no fault arbitration hearing were the following: (1) whether the applicant established entitlement to No-Fault compensation for acupuncture treatment service provided to assignor; (2) whether the applicant provided

proof that it submitted the bill for services rendered from February 19, 2020 through March 30, 2020 to ATIC within forty-five (45) days after services were rendered; or provided reasonable justification for the late submission of the bill; whether ATIC sufficiently established that this matter should be referred to the Worker's Compensation Board (WCB) for adjudication, if not; whether ATIC sufficiently established that Assignor's injuries were not causally related to the November 2, 2019 motor vehicle accident.

Watford agreed with ATIC's denial based on the applicant's failure to submit the bills within 45 days of the service for the dates of service on February 19, 21, and 22, 2020. Watford found that the applicant's bills for all other requested dates of service were timely submitted.

Watford rejected ATIC's denial based on its contention that the assignor was working at the time of accident. Watford based the rejection on the fact that the Electronic Case File contained a Notice of Decision from the WCB dated May 11, 2020, disallowing the Assignor's claim based upon his credible testimony that he was not working at the time of the subject motor vehicle accident.

For all the bills submitted, ATIC also argued that the injuries being treated were not caused by the subject motor vehicle accident based upon the biomechanical analysis of Dr. Bellezza. Dr. Bellezza concluded, after reviewing the Assignor's medical records and testimony, that within a reasonable degree of biomechanical certainty, the loads and mechanisms required to cause acute traumatic injuries to the Assignor's right knee, right shoulder, and spine, except for strains or sprains, were not present on the subject

accident. Watford did not credit the conclusion. Watford determined that Dr. Bellezza, not being a medical expert, was not qualified to testify about the timing of medical care, or the nature and extent of the injuries or treatment required. Watford then awarded the Applicant a total of \$3,798.00 for the services rendered. Watford also awarded the Applicant attorney's fees in accordance with 11 NYCRR 65-4.6(d) subject to a maximum fee of \$1,360.

Master Arbitrator Grob reviewed the record, including the findings, law and award determined by Watford and stated the following. The determinations of fact, the weight and credibility of the evidence, and the light in which the evidence is viewed, are purely discretionary matters and that the master arbitrator cannot conduct a de novo review of the above nor can the master arbitrator review errors of fact. Grob further stated that the claims raised by ATIC in their appeal were addressed by the arbitrator below and that the arguments were outside the scope of a master review. Grob further found that the award below was clearly articulated, had a rational and plausible basis in the evidence, and that there was no reason to disturb the arbitrator's decision and award.

LAW AND APPLICATION

The Petition

A court reviewing the award of a master arbitrator is limited to the grounds set forth in CPLR Article 75, which include, in this compulsory arbitration, the question of whether the determination had evidentiary support, was rational, or had a plausible basis (*see Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 212 [1981]). Notably, the master arbitrator's review power is broader than that of the courts' because it includes the

power to review for errors of law (*see id.* at 211-212; 11 NYCRR 65-4.10[a][4]). In contrast, the courts generally will not vacate an arbitrator's award where the error claimed is the incorrect application of a rule of substantive law, unless it is so irrational as to require vacatur (*Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224, 232 [1982]; *see also Matter of Liberty Mut. Ins. Co. v Spine Americare Med.*, 294 AD2d 574, 576 [2nd Dept 2002]).

The Master Arbitrator reviewed the record and award of the No-Fault Arbitrator and did not find the No-Fault Arbitrator's interpretation of the evidence and applicable law pertaining to this dispute to be arbitrary, capricious, or contrary to law. Consequently, the master arbitrator upheld the award to the respondent in the amount of \$3,798.90.00.

The instant petition is a special proceeding. The procedure for special proceedings contemplates that the petition will be accompanied by affidavits demonstrating the evidentiary grounds for the relief requested (*see* CPLR 403[a]). It is settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised (CPLR 409 [b]; *Saadia Safdi Realty, LLC v Melvin Press*, 207 AD3d 633, 635 [2d Dept 2022], citing *Matter of Arben Corp. v Durastone, LLC*, 186 AD3d 599, 600 [2d Dept 2020]).

The evidentiary submissions and legal reasoning proffered by the petitioner did not make a prima facie showing that the No-Fault Arbitrator's award or the Master Arbitrator's award was either arbitrary or capricious. To the contrary, the petitioner's

evidentiary submissions established that the No-Fault Arbitrator's award and the Master Arbitrator's affirmance of the award was based on sound and well-reasoned analysis of the evidence submitted and upon the proper application of the pertinent laws and regulations.

The Cross Petition

Dr. Jong Won Yom seeks an order pursuant to CPLR 7510: (1) confirming the No-fault arbitration award, that was affirmed by the master arbitrator on August 22, 2022, in the sum of \$3,798.90; (2) interest at a rate of 2% from January 25, 2021, until entry of a judgment; (3) no-fault statutory attorneys' fees in the sum of 20% of combined principal and interest up to a maximum of \$1,360.00, in an amount to be calculated by the clerk; (4) no-fault master Arbitration fees in the sum of \$130.00; (5) reasonable attorney's fees to be determined by the Court in accordance with 11 NYCRR § 65-4.10(j)(4); (6) arbitration filing fee of \$40.00; (7) costs and disbursements of this action as taxed by the Clerk; and (8) such other and further relief as this Court may deem just, proper and equitable.

CPLR 7510 provides that the court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.

Here, No-Fault Arbitrator Watford awarded Dr. Jong Won Yom \$3,798.90 and interest beginning on January 25, 2021, with interest at the rate of 2% from January 25, 2021, until entry of a judgment. and an attorney fee of 20% thereupon to a maximum of \$1,360.00. and reimbursement of costs. ATIC appealed the award to Master Arbitrator

Grob who affirmed the award and awarded Dr. Jong Won Yom an additional \$130.00 in attorneys' fees. There is no legal basis to deny the cross petition. It is therefore granted in its entirety.

However, regarding the branch of Dr. Jong Won Yom's cross petition seeking additional attorney fees for opposing the instant petition and for cross petitioning to confirm the Master Arbitrator's award the following applies. The general rule is that in proceedings involving arbitration, as in other litigation, an attorney's fee is not recoverable unless provided for by agreement or statute (*see Myron Assoc. v Obstfeld*, 224 AD2d 504 [1996]).

Pursuant to Insurance Law § 5106(a), if a valid claim or portion of a claim for no-fault benefits is overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to the limitations promulgated by the superintendent in regulations. In a proceeding for judicial review of an award by a master arbitrator, an attorney's fee shall be fixed by the court adjudicating the matter (*Matter of Country-Wide Ins. Co. v TC Acupuncture P.C.*, 179 AD3d 414, 414 (1st Dept. 2020); *Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 139 AD3d 947, 948 [2d Dept 2016]; *see also* 11 NYCRR 65-4.10[j][4]).

Accordingly; an additional attorney fee is appropriate. Counsel for Dr. Jong Won Yom may submit an affirmation setting for the additional attorney fees sought an explanation of how the amount requested was determined. This affirmation should be filed in the NYSCEF system or before July 10, 2023. ATIC may respond to the

affirmation by filling its response on or before August 10, 2023. The parties will appear in Part 52 on August 17, 2023, at 10:30 am for the Court's decision on this branch of Dr. John Won Yom's cross petition.

CONCLUSION

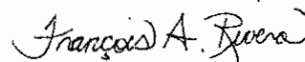
The petition by petitioner American Transit Insurance Company for an order and judgment pursuant to CPLR 7511 vacating the no-fault insurance master arbitration award of A. Jeffrey Grob dated August 22, 2022, which affirmed the arbitration award of Gregory Watford dated May 26, 2022, is denied and the petition is dismissed.

The cross petition by respondent Dr. Jong Won Yom, DC, LAC, RPH, MS to confirm the master arbitration award is granted.

Regarding the branch of respondent Dr. Jong Won Yom's cross petition seeking additional attorney fees for opposing the instant petition and for seeking confirmation of the master arbitrator's award, Dr. Jong Won Yom, DC, LAC, RPH, MS must submit an affirmation supporting this request in accordance with the instant decision and order.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.