

Country-Wide Ins. Co. v AMSC, LLC

2023 NY Slip Op 32091(U)

June 20, 2023

Supreme Court, New York County

Docket Number: Index No. 651546/2023

Judge: Sabrina Kraus

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. SABRINA KRAUS PART 57TR

Justice

-----X

COUNTRY-WIDE INSURANCE COMPANY

Petitioner,

- v -

AMSC, LLC,

Respondent.

-----X

INDEX NO. 651546/2023

MOTION DATE 07/08/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
 MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23
 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

BACKGROUND

Patricia Rivera (Assignor), was injured in a motor vehicle accident on October 18, 2019. As a result, Assignor suffered injuries, which required healthcare services. Respondent, AMSC, LLC provided Assignor with cervical epidural steroid injection, trigger point injection and epidurogram on October 5, 2020. Plaintiff, Geico Insurance Company, did not pay or deny the claim, as they assert they never received it.

The amount in dispute was \$2249.59.

The parties submitted to arbitration to resolve the underlying dispute regarding no fault benefits. Tali Philipson (TP) the Arbitrator, held a hearing on October 12, 2022, and issued a decision on the same day. The decision found in favor of Respondent. Specifically, TP found,

A review of the competent evidence in the record reveals that Applicant established a prima facie case of entitlement to reimbursement of its claim, by submitting evidence that the prescribed statutory billing form was mailed and received, and that the Respondent failed to either pay or deny the claim within the requisite 30-day period. Mary

Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

Respondent asserted that it never received the Applicant's claim. Respondent submitted an affidavit by No-Fault Litigation/Arbitration Supervisor Jessica Mena-Sibrian stating that she had personal knowledge of the procedures for processing incoming mail and there was no record of receiving this claim.

Applicant submitted proof of mailing PS Form 3877, identifying this Assignor, date of service, proper address for the Respondent and post office stamp showing the date of mailing (October 26, 2020) and postage paid. I find this sufficient proof to show that a proper mailing took place. I therefore find that Applicant established a prima facie case of entitlement to reimbursement of this claim.

Petitioner appealed to the Master Arbitrator on the grounds that the award by the Lower Arbitrator was not rationally based upon the evidence presented and was arbitrary and capricious. Petitioner also argued, for the first time, that the Lower Arbitrator's award should not be sustained because the policy was exhausted.

On December 28, 2022, Jeffrey Grob (RT), the Master Arbitrator found Petitioner failed to meet the burden needed to vacate the lower Arbitrator's award. The decision provided:

Focusing initially on the asserted transmission of the underlying bill, a review of the Record demonstrates that the Arbitrator below assessed and evaluated the divergent positions of the respective parties, together with the evidence adduced in support thereof, and, based thereon, resolved the issue in the provider's favor...

Keeping in mind the relevant law and the limited scope of review available in this context, the undersigned finds that the Lower Arbitrator's determination on point rested on a foundation of substantial evidence in the Record and may not be disturbed.

Focusing next on the issue of policy exhaustion, the forum notes that while an award that exceeds the contractual limits of an insurance policy may be subject to vacatur on that ground (see, CPLR 7511 [b] [iii]; 11 NYCRR § 65-4.10 [a] [3]; *Matter of Motor Veh. Acc. Indem. Corp. v American Country Ins. Co.*, 126 AD3d 657 [1 st Dept. 2015]; *Spears v New York City Transit Auth.*, 262 AD2d 493, lv den 94 NY2d 761; see also, *Countrywide Ins. Co. v Sawh*, 272 AD2d 245 [1st Dept. 2000]), and while such defense is not subject to preclusion (see, *Presbyterian Hosp. v Liberty Mut. Ins. Co.*, 216 AD2d 448 [2nd Dept. 1995]) and has been successfully advanced in confirmation proceedings initiated under Article 75 of the CPLR (see, *Countrywide Ins. Co. v Sawh*, supra), the

carrier neither brought the matter to the attention of the Lower Arbitrator nor made its supporting proof part of the Record below.

The issue thus framed is not that of waiver, but rather authority, as Appellant seeks consideration of evidence being proffered for the first time on appeal.

Consideration of the Appellant's submission on its merits would violate the clear and unambiguous mandate of 11 NYCRR § 65-4.10 (c) (6) which limits the scope of a Master's review to "[t]hose matters which were the subject of the arbitration below or which were included in the arbitration award appealed from." (See, *Travelers Indemnity Company v Rapid Scan Radiology, P.C.*, 2008 NY Slip Op 30315 [U], aff'd 61 AD3d 466 [1st Dept. 2009]; see, also: *Country-Wide Ins. Co. v Brownsville Chiropractic PC*, 2021 NY Slip Op 32296 [U] [Sup. Ct., New York County [2021]])

Tellingly, "[t]he governing statutes and regulations (see, Insurance Law § 5106 [c]; CPLR 7511 [b]; 11 NYCRR 65.18 [a] [1]-[6]) do not authorize a master arbitrator to vacate the award of an arbitrator in order to permit a party to present new evidence." (*Metropolitan Prop. & Liab. v Mendelsohn*, 251 AD2d 666, 667 [2nd Dept. 1998])

Under the facts presented here, this forum simply lacks the authority to consider evidence which was supplied post-hearing. (See, *Allstate Ins. Co. v Espinal*, 205 AD2d 531 [2nd Dept. 1994] ["In basing his determination to modify the award upon a matter which was never raised before the hearing arbitrator, the master arbitrator exceeded his power to review the award rendered."])

Simply stated, no cognizable basis in law has been presented which would permit vacatur or modification of the award under review or support the matter's remand for reconsideration.

THE PETITION

On March 27, 2023, Petitioner moved to vacate the Master Arbitration award dated December 26, 2022, on the grounds that the policy had become exhausted, and that upholding said award would compel Petitioner to pay claims above the policy limits. Petitioner also argues that the lower Arbitrator exceeded his powers, and the award was so imperfectly executed that a final and definite award upon the subject matter submitted was not made, and that the Master Arbitrator erred in affirming the decision.

On June 6, 2023, Respondent filed a cross petition and opposition, seeking attorney's fees and an order denying the petition and confirming the award. On May 5, 2023, Petitioner filed opposition to the cross petition. On May 9, 2023, the petition was fully submitted and the court reserved decision.

The motion to vacate the Arbitrator's award is granted

The court finds that although the lower arbitrator provided a detailed basis for the award that was neither arbitrary nor capricious, nor was it in error for the Master Arbitrator to confirm the award, the court must nonetheless vacate the arbitration award.

When an insurer "has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease" (*Presbyterian Hosp. v. Empire Ins. Co.*, 220 A.D.2d 733, 633 N.Y.S.2d 340, citing *Presbyterian Hosp. v. Liberty Mut. Ins. Co.*, 216 A.D.2d 448, 628 N.Y.S.2d 396).

In, *Matter of DTR Country-Wide Ins. Co. v. Refill Rx Pharmacy, Inc.*, 2023 NY Slip Op 00179, 212 A.D.3d 481, 181 N.Y.S.3d 252 (App. Div. 1st Dept.), an analogous matter relied on by Petitioner, the Appellate Division, First Department recently upheld a Supreme Court decision, wherein the court found, that although the arbitrator's decisions were not arbitrary, capricious, or irrational, as Petitioner was able to establish that the policy had been exhausted prior to the underlying arbitration, the arbitrator's awards had to be vacated.

In affirming, the First Department said, in pertinent part,

An arbitrator's award directing payment beyond the monetary limit of a no-fault insurance policy exceeds the arbitrator's power and constitutes grounds for vacatur of the award (see *Matter of Brijmohan u State Farm Ins. Co.*, 92 NY2d 821, 829 [1998]; see also *Matter of Amenprrese /ns. Co. u Kensington Radiology Group, P.C.*, 179 AD3d 563 [1st Dept 2020]). Country-Wide was not precluded from raising the issue of policy exhaustion before the court, even if it was not before the arbitrators in the underling arbitration (id. at S6+).

Petitioner submits the affidavit of Jessica Mena-Sibrian, a No-Fault Litigation/Arbitration Supervisor, and affirms that the policy has been exhausted. In support, the affidavit includes a ledger reflecting the dates and amounts that were claimed and paid out to various medical providers.

Wherefore, it is hereby

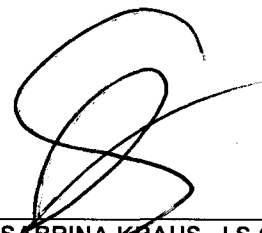
ORDERED the petition to vacate the arbitration award is granted and the arbitration award is vacated; and it is further

ORDERED the cross-petition to confirm the arbitration award and for attorney's fees is denied; 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.



SABRINA KRAUS, J.S.C.

6/20/2023

DATE

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