

**Matter of New Millennium Pain & Spine Medicine,
P.C. v Progressive Cas. Ins. Co.**

2023 NY Slip Op 32218(U)

June 27, 2023

Supreme Court, New York County

Docket Number: Index No. 654892/2022

Judge: John J. Kelley

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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. JOHN J. KELLEY PART 56M

Justice

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INDEX NO. 654892/2022

In the Matter of

MOTION DATE 02/28/2023

NEW MILLENNIUM PAIN & SPINE MEDICINE, P.C., as
assignee of RICHARD FISCHER,

MOTION SEQ. NO. 001

Petitioner,

- v -

**DECISION, ORDER, and
JUDGMENT**

PROGRESSIVE CASUALTY INSURANCE CO.,

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

In this proceeding pursuant to CPLR 7511, the petitioner, New Millennium Pain & Spine Medicine, P.C., as assignee of Richard Fischer, seeks to vacate the December 1, 2022 award of a master arbitrator, affirming an October 5, 2022 American Arbitration Association (AAA) arbitration award that had denied its claim for first-party (no-fault) benefits to reimburse it for medical treatment that it had rendered to Fischer in connection with an automobile accident. Upon vacatur, the petitioner requests the court to conduct an evidentiary hearing on the issue of whether the limits of the relevant policy had been exhausted or, alternatively, to remit the matter to a different arbitrator on the issue of whether its treatment of Fischer was medically necessary. The respondent insurer, Progressive Casualty Insurance Co., opposes the petition. The petition is denied, and the award is confirmed.

Richard Fischer, who was then 44 years of age, was injured in a May 1, 2020 motor vehicle accident in which he was operating his own vehicle. He complained that, as a consequence of the accident, he sustained pain to his back, neck, and right shoulder. On December 13, 2021, he presented to the petitioner, which conducted a functional capacity

evaluation. The petitioner made claim upon the respondent for reimbursement in the sum of \$614.02. When the respondent processed the claim, it rejected it, asserting that the treatment for which compensation was sought was not medically necessary, and that only \$535.15 in benefits remained on the policy in any event. The respondent thereafter processed and paid claims for no-fault medical benefits that certain of Fischer's other health-care providers subsequently had submitted, which exhausted the remaining \$535.15 by April 15, 2022.

The petitioner sought arbitration of the claim before the AAA. At the arbitration hearing, the petitioner argued that there was still money left on the policy when the respondent insurer received the petitioner's bill for services, and had thereupon denied it on the ground that the treatment was not medically necessary. It further contended that the respondent was not entitled to rely on the exhaustion defense because the subject invoice should have been paid before any of the claimant's bills that the respondent insurer subsequently received, which implicitly would require reconsideration of whether the treatment was medically necessary.

Relying upon *Harmonic Physical Therapy, P.C. v Praetorian Ins. Co.* (47 Misc 3d 137[A], 2015 NY Slip Op 50525[U], *1, 2015 NY Misc LEXIS 1143, *2 [App Term, 1st Dept, Apr 14, 2015]), the lower arbitrator concluded that claims that are timely denied by an insurer do not hold a place in the priority-of-payment queue ahead of subsequently filed claims that were paid by the insurer. The lower arbitrator consequently upheld the insurer's exhaustion-of-benefits defense. In an October 5, 2022 award, the lower arbitrator thus found in favor of the respondent insurer, and rejected the petitioner's claim for benefits. The petitioner sought review of the award before a master arbitrator. In a December 1, 2022 award, the master arbitrator affirmed the initial arbitration award. In that determination, the master arbitrator first explained that

"[s]pecifically, applicant contends that the priority of payment regulation, 11 NYCRR 65-3.15, was not applied by the arbitrator herein, and that the Court of Appeals' holding in *Nyack Hosp. v GMAC*, 8 NY3d 294 (2007) was not followed. Applicant contends that the case law that a policy cannot pay over the policy limits is not absolute, and is subject to said regulation. Applicant further contends that *Alleviation Med. Servs., P.C. v Allstate Ins. Co.* (55 Misc 3d 44

[App Term, 2d Dept, 2nd, 11th, & 13th Jud Dist. 2017]) and its progeny are good law and should be followed here.”

Nonetheless, he concluded that,

“given the procedural posture presented, I find that the award should be affirmed as same had a plausible basis. See, *Matter of Acuhealth Acupuncture, P.C. v Country-Wide Ins. Co.*, 149 AD3d 828 (2d Dept 2017). Simply stated, there is a split in appellate authority, e.g. *Harmonic v Alleviation*, which does not lead me to conclude that the award was erroneous as a matter of law or ‘imperfectly made.’ Likewise, while the priority of payment regulation surely does exist for a reason, I cannot find any basis to disturb the award based upon the arbitrator’s failure to apply it here.”

This proceeding ensued.

The grounds specified in CPLR 7511 for vacatur of an arbitration award are exclusive (see *Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 201 [1st Dept. 2009]), and it is a “well-established rule that an arbitrator’s rulings, unlike a trial court’s, are largely unreviewable” (*Matter of Falzone v New York Cent. Mut. Fire Ins. Co.*, 15 NY3d 530, 534 [2013]). An arbitration award may be vacated pursuant to CPLR 7511(b)(1)(iii) where an arbitrator exceeded his or her power, including where the award violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator’s power (see *Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480 [1st Dept 2016]). Where, as here, arbitration is compulsory (see Insurance Law § 5105), closer judicial scrutiny of the arbitrator’s determination is required under CPLR 7511(b) than that applicable to consensual arbitrations (see *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.]*, 49 NY2d 757 [1980]; *Mount St. Mary’s Hosp. v Catherwood*, 26 NY2d 493 [1970]). To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious (see *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.]*, 49 NY2d 757 [1980]).

In a compulsory no-fault arbitration, a party aggrieved by a lower arbitrator’s award may seek vacatur or modification of that award solely by appeal to a master arbitrator, and only upon

the grounds articulated in 11 NYCRR 65-4.10(a), which, as relevant here, include a contention that the award “was incorrect as a matter of law” (11 NYCRR 65-4.10[a][4]; see Insurance Law § 5106[b]). Hence, the function of the master arbitrator in reviewing the decision below is to confirm that the decision was arrived at in a rational manner, that the decision was not arbitrary and capricious (11 NYCRR 65.17[a][1]) or incorrect as a matter of law (11 NYCRR 65.17[a][4]).

Inasmuch as the master arbitrator did not make his own factual determinations, review alleged factual or procedural errors made in the course of the arbitration, weigh the evidence, or resolve credibility issues, he did not exceed his authority (see *Matter of Richardson v Prudential Prop. & Cas. Co.*, 230 AD2d 861 [2d Dept 1996]).

Moreover, the court concludes that the master arbitrator’s determination was not incorrect as a matter law. As the master arbitrator noted, there is a split in appellate authority on the issue of priority of claims in the face of the potential exhaustion of the limits of a no-fault insurance policy, with the Appellate Term, First Department, holding that claims that are timely denied by an insurer do not hold a place in the priority-of-payment queue ahead of subsequently filed claims that were paid by the insurer; thus exhausting available coverage (see *Harmonic Physical Therapy, P.C. v Praetorian Ins. Co.*, 47 Misc 3d 137[A]), and the Appellate Term, Second Department, holding that fully verified claims were payable in the order they were received, and that there was no merit to an insurer’s contention that it need not pay the denied claim because its payment of subsequent claims had the effect of exhausting the available coverage (see *Alleviation Med. Servs., P.C. v Allstate Ins. Co.*, 55 Misc 3d at 45, *affd other grounds* 191 AD3d 934 [2d Dept 2021]).

In *Harmonic Physical Therapy*, the Appellate Term, First Department, explained that

“[c]ontrary to plaintiff’s contention, defendant was not precluded by 11 NYCRR 65-3.15 from paying other providers’ legitimate claims subsequent to the denial of plaintiff’s claims. Adopting plaintiff’s position, which would require defendant to delay payment on uncontested claims, or, as here, on binding arbitration awards - pending resolution of plaintiff’s disputed claim – ‘runs counter to the no-fault regulatory scheme, which is designed to promote prompt payment of legitimate claims’ (*Nyack Hosp. v General Motors Accept. Corp.*, 8 NY3d at 300)”

(*Harmonic Physical Therapy, P.C. v Praetorian Ins. Co.*, 2015 NY Slip Op 50525[U], *1). The rule articulated in *Harmonic Physical Therapy* expressly has been applied by courts on numerous occasions to permit insurers to invoke the exhaustion defense under circumstances identical to those presented in the instant matter (see *Matter of Galaxy RX, Inc. v GEICO Ins. Co.*, 2023 NY Slip Op 31974[U], *1-2, 2023 NY Misc LEXIS 2912, *2-3 [Sup Ct, N.Y. County, Jun. 12, 2023] [denying petition to vacate master arbitrator's award affirming lower arbitrator's award]; *Advantage Radiology, P.C. v Motor Veh. Acc. Indem. Corp.*, 78 Misc 3d 126[A], 2023 NY Slip Op 50139[U], 2023 NY Misc LEXIS 751 [App Term, 1st Dept, Feb. 27, 2023] [insurer raised triable issue of fact as to whether it exhausted the coverage limits by payments to other providers and to the assignor for lost wages, and whether such payments were made in compliance with the priority of payment regulations]; *Allstate Fire & Cas. Ins. Co. v Branch Med., P.C.*, 74 Misc 3d 134[A], 2022 NY Slip Op 50277[U], 2022 NY Misc LEXIS 1365 [App Term, 1st Dept, Apr. 19, 2022] [affirming vacatur of a master arbitrator's award to a medical provider that was made despite the fact that subsequent claims had exhausted the policy limits, and holding that, when an insurer has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease]). In the *Allstate* decision, the Appellate Term explicitly concluded that, "[c]ontrary to respondent's contention, petitioner was not precluded by 11 NYCRR 65-3.15 from paying other legitimate claims subsequent to the denial of respondent's claims" (*Allstate Fire & Cas. Ins. Co. v Branch Med., P.C.*, 2022 NY Slip Op 50277[U], *1, 2022 NY Misc LEXIS 1365, *2]).

There is no merit to the petitioner's remaining contentions, including those challenging the respondent's determination that the subject treatment was not medically necessary.

Inasmuch as the master arbitrator's award was not contrary to law or arbitrary and capricious, he properly affirmed the lower arbitrator's award. Hence, the petition to vacate the

master arbitrator's award must be denied. Pursuant to CPLR 7511(e), "upon the denial of a motion to vacate or modify" an award, the court "shall confirm the award."

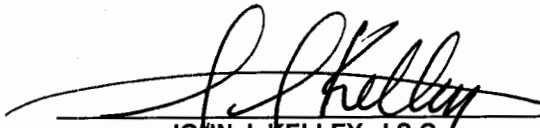
Accordingly, it is

ORDERED and ADJUDGED that the petition is denied; and it is further,

ADJUDGED that, upon the denial of the petition, the December 1, 2022 award of Master Arbitrator Richard B. Ancowitz, made in American Arbitration Association Case No. 99-22-1240-0542, be, and hereby is, confirmed.

This constitutes the Decision, Order, and Judgment of the court.

6/27/2023
DATE


JOHN J. KELLEY, J.S.C.

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