Reyes v New York City Tr. Auth.
2012 NY Slip Op 31192(U)
May 1, 2012
Supreme Court, New York County
Docket Number: 103890/2011
Judge: Michael D. Stallman
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SCANNED ON 5/4/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21

Justice

DANIEL REYES,

Petitioner,

-v-

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

INDEX NO. 103890/11

MOTION DATE 3/1/12

MOTION SEQ. NO. 002

The following papers, numbered 1 to 5 were read on this petition to confirm an arbitration award; cross petition to vacate an arbitration award

Order to Show Cause— Amended Petition—Affirmation— Exhibits A-D	No(s). 1-3
Notice of Cross Petition–Affirmation — Exhibits A-K	No(s). 4-5

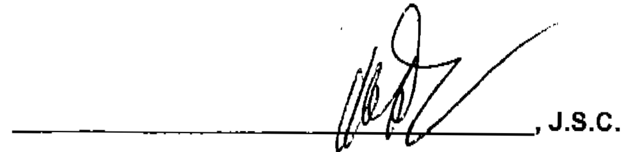
Upon the foregoing papers, the petition and cross petition are decided in accordance with the annexed memorandum decision and judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

HON. MICHAEL D. STALLMAN



Dated: 5/1/12
New York, New York

_______________, J.S.C.

1. Check one: .... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:............ PETITION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:............ ☐ SETTLE JUDGMENT ☐ SUBMIT JUDGMENT ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

---X
DANIEL REYES,

Petitioner,

Index No. 103890/2011

- against -

NEW YORK CITY TRANSIT AUTHORITY,

Decision and Judgment

Respondent.
---X

HON. MICHAEL D. STALLMAN, J.:

Petitioner seeks a judgment confirming a Master Arbitration Award dated December 15, 2011, which affirmed in its entirety a No-Fault Arbitration Award dated November 15, 2010, which awarded petitioner the statutory maximum for basic economic loss, with interest, plus attorneys' fees, and the arbitrator's fee paid by petitioner. Respondent cross-petitions to vacate the awards.

BACKGROUND

Petitioner was allegedly injured while he was exiting Bus #9504, on the M57 route, on February 28, 2006. Petitioner submitted a claim for no-fault benefits, which respondent denied. According to respondent's NF-10 dated August 1, 2006, petitioner's claim was denied based on policy issues (i.e., "policy conditions violated"), and loss of earnings was denied because "claimed loss not proven." (Mancino Affirm., Ex C.)

UNFILED JUDGMENT
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According to the petition, a no-fault arbitration hearing was held on May 14, 2010, July 12, 2010, and September 17, 2010, and the no-fault arbitrator declared the hearing closed on October 25, 2010.

By an award dated November 15, 2010, the no-fault arbitrator awarded petitioner the statutory maximum for basic economic loss, with interest, plus attorneys' fees, and the arbitrator's fee paid by petitioner. (Wimpfheimer Affirm., Ex A [Award].)

According to the Award, respondent had argued that the claim should be denied because petitioner's no-fault claim was late, that petitioner was not entitled to lost earnings from February 28, 2006 through at least August 15, 2006, because wage documentation purportedly revealed that he had been paid during that period, and that any lost earnings were not caused by the underlying accident, but rather the result of budget cuts at petitioner's place of employment. (Award, at 5.)

The no-fault arbitrator rejected respondent's arguments, reasoning that respondent's late denial of petitioner's no-fault claim precluded respondent from raising defenses. The Award states, in pertinent part:

> "In light of the fact that Respondent's denial was late, it is precluded from its defense with regard to the question of whether Applicant sustained loss of earnings from work which he would have performed had he not been injured. Even if this were not so, there is absolutely nothing in the record to refute the medical evidence in the record, or

> Applicant's quite persuasive testimony, that as a result of the accident he was no longer able to perform the requirements of his job, and was terminated from employment for this reason, and has been unable to obtain new employment as a result of his injury. While Applicant testified that he was told that his position was no longer available due to funding issues, there is no evidence of this reason for his termination in the record, and the only evidence in the record on this issue is his credible testimony that as a result of the accident he was unable to perform the functions of his employment any more. . . to hold that the reason that he was terminated was for any reason other than his ankle injury would be pure speculation. Respondent submitted no evidence on this issue, and called no witnesses at the three hearing dates of this case, at all. . . .
>
> Therefore, based on all of the above, Applicant has established that he has sustained loss of earnings from work which he would have performed had he not been injured in the underlying accident on Respondent's bus on 2/28/06, and he is entitled to an award of lost earnings for three years after the date of the accident, at the maximum allowable amount of $2,000 per month, subject to the statutory cap of $50,000."

(Award, at 12-13.)

Respondent's request for review before a Master Arbitrator was denied. According to the Master Arbitrator, a copy of the Award was not contained in the notice of appeal. By decision and judgment dated July 11, 2011, this Court granted respondent's cross petition to vacate the Master Arbitrator's award and remanded the matter for rehearing and determination of the appeal, because respondent demonstrated that a copy of the Award had been supplied with its Demand for Master Arbiration. (Wimpfheimer Affirm., Ex C.)

By a Master Arbitration Award dated December 15, 2011, the Master Arbitrator affirmed the Award in its entirety. The Master Arbitration Award states, in pertinent part:

> "There is no question that the claimant sustained a left tri-malleolar fracture which required and had an open reduction the day following the accident, this was accomplished and [*sic*] insertion of a plate and eight screws.
>
> The claimant then underwent a course of physical therapy for two months followed by an additional surgery to have the hardware removed several months later. . . .
>
> The applicant submitted considerable materials in which he fully supported his claim and the lower NFA found the inability of him to continue work and was unable to perform the functions of his employment any more. . .
>
> The denial of [*sic*] respondent submitted its denial [*sic*]on a weak and poorly submitted [*sic*] its denial [*sic*] insufficient to overcome the claimant's proof [*sic*] which comes to the same conclusions by this lower arbitrator and similarly found under its conclusion and should be affirmed."

(Wimpfheimer Affirm., Ex D [Master Arbitration Award].)

DISCUSSION

"[R]eview of the master arbitrator's decision is limited to whether it was 'arbitrary and capricious, irrational or without plausible basis.'" (*Matter of Kolesnik [State Farm Mut. Auto. Ins. Co.]*, 266 AD2d 630, 630 [3d Dept 1999].) "The master arbitrator's role is to review the arbitrator's determination to assure that it was

reached in a rational manner and that the decision was not arbitrary and capricious. It does not include the power to review, de novo, the matter originally presented to the arbitrator." (*Matter of Jasser v Allstate Ins. Co.*, 77 AD3d 751, 752 [2d Dept 2010][citations and quotation marks omitted].) "If the determination of the arbitrator is challenged based upon an alleged factual error, the master arbitrator must uphold the determination if it has a rational basis." (*Mattter of Liberty Mut. Ins. Co. v Spine Americare Med.*, 294 AD2d 574, 575-576[2d Dept 2002].)

Respondent argues that the no-fault arbitrator incorrectly ruled that respondent's denial of petitioner's no-fault claim was untimely. Respondent takes the position that, because petitioner did not submit a "complete" proof of claim for lost wages, it "had no real duty to issue a denial." (Mancino Affirm. ¶ 45.) According to respondent, petitioner "never even submitted a claim for lost earnings prior to his submission for arbitration." (*Id.* ¶ 57.)

Respondent also argues that the no-fault arbitrator incorrectly ruled that respondent's untimely denial of petitioner's claim precluded respondent from contesting that petitioner's claimed lost earnings were not related to the alleged accident. According to respondent, this argument was in the nature of a coverage defense that it could assert notwithstanding a late denial, citing *Central General Hospital v Chubb Group of Insurance Companies* (90 NY 2d 195 [1997].) In any

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event, respondent contends that petitioner not only failed to meet his prima facie burden of proving lost wages, but also that the no-fault arbitrator improperly awarded lost wages for some periods where petitioner purportedly testified that he was actually working.

Lastly, respondent argues that the master arbitrator failed to address the arguments that respondent raised before the no-fault arbitrator.

Contrary to respondents' arguments, the master arbitrator correctly determined that the no-fault arbitrator's determination had a rational basis, and the no-fault arbitrator's decision was not arbitrary and capricious.

Respondent's contention that petitioner had not submitted a claim for lost earnings prior to the arbitration does not appear to have been raised before the no-fault arbitrator (*see generally* Award; *see also* Mancino Affirm., Ex H). Therefore, the issue was not preserved for review on appeal to the Master Arbitrator, and may not be raised here (*Matter of Empire Mut. Ins. Co. v Jones*, 151 AD2d 754, 755 [2d Dept 1989]; *see also* 11 NYCRR 65-4.10 [c] [6] ["The master arbitrator shall only consider those matters which were the subject of the arbitration below or which were included in the arbitration award appealed from"].) In any event, respondent's contention is belied by the record. Although Form NF-2 that petitioner signed on June 1, 2006 contains contradictory statements as to the length of time during which

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petitioner was not working,[1] Box 17 of Form NF-2 clearly indicates that petitioner claimed that he lost time from work, and that the absence from work began on February 28, 2006 (the date of the accident). (Mancino Affirm., Ex B.) For the question, "Have you returned to work?", petitioner checked "No." (*Id.*)

Respondent's argument that it "had no real duty to issue a denial" of petitioner's claim also appears not to have been raised before the no-fault arbitrator (*see generally* Award; *see also* Mancino Affirm., Ex H), and therefore may not be raised here to challenge the Master Arbitration Award.

The no-fault arbitrator's determination that respondent's late denial of petitioner's no-fault claim precluded respondent from asserting certain defenses, including the question of whether Applicant sustained loss of earnings from work which he would have performed had he not been injured, was not irrational. Respondent's reliance upon *Central General Hospital* is misplaced. "Determining whether a specific defense is precluded under *Presbyterian* or available under *Chubb* entails a judgment: Is the defense more like a "normal" exception from coverage (e.g., a policy exclusion), or a lack of coverage in the first instance (i.e., a defense

[1] Although petitioner indicated in Box 17 that he had not returned to work and that his absence began on February 28, 2006, the NF-2 amount of time lost from work was only "3 weeks" instead of three months (i.e., from February 28, 2006 until June 1, 2006, the date of Form NF-2). Meanwhile, in Box 21 of Form NF-2, petitioner indicated that he was "Unemployed for six months." (Mancino Affirm., Ex B.)

'implicat[ing] a coverage matter')?" (*Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d 556, 565 [2008].) Here, respondent's defenses were not defenses based on a lack of coverage. Put differently, the no-fault arbitrator's enforcement of preclusion did not have the effect of creating coverage where it never existed.

Contrary to respondent's argument, the no-fault arbitrator's award of lost earnings, and the amount of lost earnings, had a rational basis, and was not arbitrary and capricious. As the Master Arbitration Award indicates, "the claimant sustained a left tri-malleolar fracture which required and had an open reduction the day following the accident. . . .The claimant then underwent a course of physical therapy for two months followed by an additional surgery to have the hardware removed several months later." (Master Arbitration Award.) At the no-fault arbitration, petitioner testified that "He remained in the hospital for four days after the operation, and did not go back to work until five to six weeks later." (Award, at 7.) Thus, the no-fault arbitrator's decision to award petitioner lost earnings for the period from February 28, 2006 to April 15, 2006 had a rational basis.

The no-fault arbitrator's decision to award petitioner lost earnings for the period from August 15, 2006 through February 28, 2009 also was not irrational, because it was consistent with 11 NYCRR 65-3.16 (b) (6) and (7). Insurance

Department Regulations [11 NYCRR] § 65-3.16 state, in pertinent part: -

> "b) Loss of earnings. In determining loss of earnings from work:
>
> * * *
>
> (6) If the applicant, while disabled, is discharged from employment solely because of inability to work due to the injury, benefits for basic economic loss *shall continue at the same level while the disability continues*. [emphasis added]
>
> (7) If an applicant, while disabled, is discharged from employment, benefits shall cease if the position would have been lost had the accident not occurred (e.g., plant shutdown, strike, etc.). However, the insurer shall reimburse the applicant for benefits lost which would have been received had the applicant not been disabled (e.g., union strike benefits, unemployment, etc.)."

Thus, the issue presented to the no-fault arbitrator was whether petitioner's discharge from employment was "solely because of inability to work due to the injury" or "if the position would have been lost had the accident not occurred." The no-fault arbitrator's determination was based on petitioner's own testimony that

> "In August, 2006, he was told by Loisada that his job was terminated because they were 'going part time,' and because the contract for his program was up for renewal and had not yet been renewed and funds were not available. He testified that he did not know whether this was true or not. He was also told that he was not doing his job up to the full parameters of the job. Applicant testified he would have stayed at this job had he not been terminated."

(Award, at 7.) Thus, the no-fault arbitrator's determination was based, in part, on assessment of the credibility of petitioner, and the credibility of hearsay explanations attributed to the employer as to the reasons for petitioner's termination. Indeed, the

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Award states,

> "While Applicant testified that he was told that his position was no longer available due to funding issues, there is no evidence of this reason for his termination in the record, and the only evidence in the record on this issue is his credible testimony that as a result of the accident he was unable to perform the functions of his employment any more. . . To hold that the reason that he was terminated for any reason other than his ankle injury would be pure speculation."

(Award, at 12.) Because the determination of the causal relationship between the termination of petitioner's employment and his injury turned on a matter of credibility and the weight of petitioner's own testimony, the master arbitrator did not have the power to disturb this determination. (*Matter of Jasser*, 77 AD3d at 752 ["A master arbitrator exceeds his [or her] statutory power by making his [or her] own factual determination, by reviewing factual and procedural errors committed during the course of the arbitration, by weighing the evidence, or by resolving issues such as the credibility of the witnesses"].) Neither does this Court.

As respondent points out, petitioner testified at the arbitration that "he obtained a job as a security guard. . . He tried to work as a security guard on and off for approximately 3 months out of the year, and made minimum wage. He eventually received unemployment benefits." (Award, at 7.) Respondent also indicates that the no-fault arbitrator's award of lost earnings for the period from August 15, 2006 through February 28, 2009 therefore spanned a period where petitioner himself

testified that he was working, albeit at minimum wage.

However, the Court cannot say that the amount of lost earnings awarded for this period was irrational. First, respondent has not demonstrated that 11 NYCRR 65-3.16 (b) (6) permitted such an offset, especially where the no-fault arbitrator ruled that respondent was precluded from raising any defenses not related to lack of coverage. Second, respondent has not demonstrated that an offset in the amount of lost earnings from petitioner's brief employment at a minimum wage security job would have resulted in lost earnings that were less than the statutory maximum of $2,000 per month. The no-fault arbitrator determined, based on a Summary of Federal Form W-2 statements, petitioner's 2006 income tax return, and other documents, that petitioner's earnings prior to the accident amounted to "$1,541.67 biweekly, or $3,083.34 per month." (Award, at 8.)

In sum, respondent's cross petition to vacate the Master Arbitration Award and Award is denied. The petition to confirm the Master Arbitration Award is granted.

The no-fault arbitrator awarded petitioner $50,000 for basic economic loss, $40 to reimburse him for the fee paid to the "Designated Organization [the American Arbitration Association No-Fault Arbitration Tribunal], unless the fee was previously returned pursuant to an earlier award," and attorneys' fees. (Award, at 15.) The no-fault arbitrator did not award a specific dollar amount of attorneys' fees, but

employed the following formulation:

> "The insurer shall also pay the applicant for attorneys' fees as set forth below.
>
> With respect to this claim for which compensation was awarded, Respondent shall pay Applicant an attorney's fee, in accordance with 11 NYCRR 65-4.6 (e). Since the within arbitration request was filed on or after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than Respondent's written offer during the conciliation process, then attorney's fees shall be based upon the provisions of 11 NYCRR 65-4.6 (b)."

(*Id.*) Respondent did not contend that, due to this formulation, the award was not final and definite. However, because the no-fault arbitrator did not set a specific dollar amount for attorneys' fees, this Court is constrained to confirm this part of the award as a judgment directing specific performance for payment of attorneys' fees in the manner set forth in the Award.

CONCLUSION

Accordingly, it is

ADJUDGED that the petition is granted and the award rendered in favor of petitioner and against respondent is confirmed; and it is further

ADJUDGED that petitioner Daniel Reyes, having an address at 540 West 55th Street, New York, NY 10019, do recover from respondent New York City Transit Authority, having an address at 130 Livingston Street, Brooklyn, NY 11201, the

amount of $50,000, plus interest at the rate of 2% per month from the date of May 3, 2006 until August 1, 2006 (but excluding 5/3/06 from being counted within the period of interest), and plus interest at the rate of 2% per month from the date of March 3, 2010 until the date of entry of this decision and judgment (but excluding 3/3/10 being counted within the period of interest), as computed by the Clerk in the amount of $ ________________, plus $40, together with costs and disbursements in the amount of $ __________________ as taxed by the Clerk, for the total amount of $________________, and that the petitioner have execution therefor; and it is further

ADJUDGED that interest shall accrue at the rate of 2% per month from the date of entry of this decision and judgment until the date of payment of the award; and it is further

ORDERED and ADJUDGED that respondent shall pay petitioner attorney's fees in accordance with 11 NYCRR 65-4.6 (e). If the benefits and interest awarded thereon is equal to or less than Respondent's written offer during the conciliation process, then attorney's fees shall be based upon the provisions of 11 NYCRR 65-4.6 (b); and it is further

ADJUDGED that the cross petition to vacate the award is denied.

Dated: ~~April~~ May 1, 2012
New York, New York

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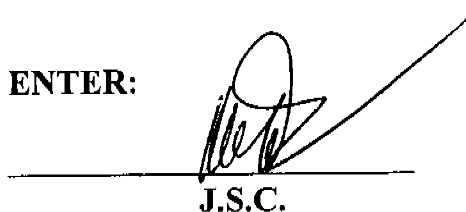

J.S.C.

HON. MICHAEL D. STALLMAN

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