New York Cent. Mut. Fire Ins. Co. v Bronx Chiropractic Servs, P.C.
2014 NY Slip Op 33210(U)
December 4, 2014
Sup Ct, NY County
Docket Number: 652570/2013
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,

Petitioner,

Index No: 652570/2013
Motion Seq. No. 001
Motion Date: 8/27/2014

-against-

BRONX CHIROPRACTIC SERVICES, P.C. a/a/o RICHARD PRETTO,

Respondent.

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EILEEN BRANSTEN, J.:

Petitioner New York Central Mutual Fire Insurance Company ("Insurer") brings the instant action pursuant to CPLR 7511, seeking to vacate a "No-Fault Master Arbitration" award as arbitrary and capricious and contrary to settled law. Respondent Bronx Chiropractic Services, P.C. (the "Clinic") opposes. For the reasons that follow, the Insurer's Petition is granted and the award is vacated.

I. Background

On August 19, 2011, Richard Pretto, the Clinic's assignor, was allegedly involved in a motor vehicle accident. Four days later, Pretto was evaluated by a chiropractor at the Clinic who initiated chiropractic manipulation. On September 29, 2011, Pretto was

reexamined by the chiropractor, and on October 4, 2011, Pretto was tested prior to receiving three treatments of manipulation under anesthesia on October 4, 5 and 6, 2011.

The Insurer received two insurance claim forms from the Clinic in the amounts of $2,865.30 and $1,432.65 for the treatment Pretto received on October 5, 2011. *See* Affirmation of Cristina Carollo Ex. B at Ex. B.

However, on September 23, 2011 – prior to the date of service and prior to receipt of the claim forms for the October 5, 2011 services – the Insurer mailed a scheduling letter for an independent medical exam ("IME") to Pretto, advising him that he was required to attend a chiropractic/acupuncture IME on October 7, 2011. *Id.* The IME notice advised Pretto that "**[f]ailure to keep this appointment could result in a loss of benefits.**" *Id.* (emphasis in original). The insurer mailed a follow-up letter for that IME on September 28, 2011. *Id.*

It is undisputed that Pretto failed to appear for the October 7, 2011 IME. Accordingly, by letter dated October 20, 2011, the Insurer advised Pretto that he was required to attend a rescheduled chiropractic/acupuncture IME on November 4, 2011. *Id.* As required, the Insurer mailed a follow-up letter for that rescheduled IME on October 25, 2011. *Id.* Pretto did not appear for the rescheduled IME.

On November 30, 2011, the Insurer issued a general denial of the October 5th claim to both the Clinic and Pretto based on Pretto's violation of the "Personal Injury

Protection" endorsement[1] in Pretto's insurance policy. *Id.* Ex. B at Ex. E. The endorsement states, in pertinent part:

> Section IV-DUTIES AFTER AN ACCIDENT OR LOSS
> If the following duties are not fulfilled, we have no duty to provide coverage under this policy.
>
> * * *
>
> D. Records, Examinations by Physicians, Examinations under Oath, and Proofs of Loss
>
> Any Insured seeking coverage must do the following:
> 2. Submit to examination by physicians chosen and paid for by us as often as we reasonably require.

Id.

After receiving the general denial, the Clinic commenced an arbitration proceeding against the Insurer to collect no-fault insurance benefits for the October 5, 2011 treatments. The arbitration hearing was held on January 9, 2013. *Id.* Ex. C. On January 18, 2013, the lower arbitrator issued a decision in favor of the Clinic, determining, among other things, that: (1) the Insurer offered acceptable proof of Pretto's nonappearance at two IMEs; (2) the Insurer was obligated, but failed, to send the follow-up request for the rescheduled IME within 10 days of Pretto's nonappearance at the first

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[1] The insurance regulations provide, in the mandatory personal injury protection endorsement that "[t]he eligible injured person shall submit to medical examination . . . when, and as often as, the Company may reasonably require." (11 NYCRR 65-1.1(d).)

IME;[2] and (3) because the follow-up letter was not mailed within the mandated 10-day time period, the Insurer's denial based on Pretto's failure to appear at the IME's "must be considered untenable." *Id.* Ex. C.

Relying on *Kings Medical Supply Inc. v Kemper Auto & Home Ins. Co.*, 7 Misc.3d 128[A] (App. Term 2d Dep't 2005), the lower arbitrator rejected the Insurer's argument that its September 23rd and September 28th requests for Pretto's IME were made pursuant to the insurance policy's personal injury protection endorsement. The Insurer argued that these requests were not a post-claim verification of the October 5th claim and that as a result, the 10-day deadline mandated by the no-fault regulation 11 NYCRR 65-3.5, 3.6[3] did not apply. Although the Insurer stressed that those requests were made before Pretto received the treatment at issue and before the Insurer received the Clinic's claim, the arbitrator stated that the Clinic's "position is untenable because a single deadline must be applicable to the scheduling of all IMEs. Neither the no-fault

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[2] By letters mailed on September 23, 2011 and September 28, 2011, the Insurer directed Pretto to appear for an IME on October 7, 2011. After Pretto failed to appear for the first IME, a follow-up request was mailed on October 20, 2011, directing Pretto to appear for an IME on November 4, 2011. It is the Clinic's position that the Insurer was obligated to send the follow-up letter on or before October 17, 2011 – within 10 days of Pretto's nonappearance at the October 7th IME.

[3] 11 NYCRR 65-3.6[b], which addresses post-claim verification requests, provides, in pertinent part, "[a]t a minimum, if any requested verification has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow-up with the party from whom the verification was requested . . . ."

regulations nor the Courts have ever recognized that the scheduling of IMEs can be subject to different deadlines based on their intended use." *Id.*

Thereafter, the Insurer appealed the lower arbitrator's decision to the Master Arbitrator on the ground that the decision was arbitrary, capricious and irrational because: (1) the initial IME request was issued before the Clinic provided the treatment and before the Insurer received the Clinic's claim and, therefore it was not a post-claim verification request; (2) the IME was requested pursuant to the cooperation clause in Pretto's no-fault insurance policy; (3) the lower arbitrator's reliance on *Kings Medical Supply Inc.* was misplaced; and (4) alternatively, even if the follow-up request for an IME was untimely, late notice does not automatically result in an untimely denial. *See* Carollo Affirm. Ex. D.

On April 30, 2013, the Master Arbitrator issued his decision, addressing only the lower arbitrator's finding that the follow-up IME request mailed on October 20, 2011 was untimely. The Master Arbitrator stated that:

> Since I cannot conclude on the basis of the record before me that the arbitrator's award was incorrect as a matter of law, without basis in the evidence, or not otherwise grounded in reason, or that it was arbitrary and capricious, irrational or without plausible basis, I must affirm the award.
>
> While applicant's contention that 'an arbitrator's error of law is not a basis for judicial review' . . . may be correct, it is a basis for master arbitration vacatur. Nevertheless, I have affirmed the award because, in my opinion, the Lower Arbitrator's decision is legally correct.

Id. Ex. E (internal citations omitted).

II. **Discussion**

Petitioner now seeks to vacate the Master Arbitrator's award on the grounds that the notification requirements for verification requests, as contained in 11 NYCRR 65-3.5 and 65-3.6, apply to verification requested after the insurer receives the bill or claim. The Insurer contends that those notification requirements do not apply to pre-claim IMEs, such as occurred here, where the IME was not requested as verification for a particular bill or claim but rather, pursuant to the cooperation clause in the no-fault insurance policy.

Alternatively, the Insurer argues that even if the lower arbitrator was correct in applying 11 NYCRR 65-3.5 and 3.6 to the facts here, the late notice does not automatically result in an untimely denial. Rather, it simply reduces the Insurer's time to pay or deny the claim by the number of days the notice was delinquent.

In opposition to the Petition, the Clinic contends that the Master Arbitrator's decision was not arbitrary, capricious or contrary to settled law because the no-fault regulations mandate that, once the insurer elected to verify the claim at issue, it was under a statutory obligation to properly and timely pay or deny the Clinic's claim.

Pursuant to Insurance Law § 5106, no-fault arbitration is considered compulsory or mandatory. *Matter of Shand [Aetna Ins. Co.]*, 74 A.D.2d 442, 446 (2d Dep't 1980); *see also Matter of Roth [Phillips, Appel & Walden]*, 159 A.D.2d 447, 448 (1st Dep't 1990). CPLR 7511(b)(1)(iii) permits a reviewing body to vacate a no-fault arbitration award on the ground that the "arbitrator . . . making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter was not made."

CPLR 7511 also has been construed to include review of whether the award was arbitrary, capricious, and unsupported by the evidence in the record. *Matter of Travelers Indem. Co. v. United Diagnostic Imaging, P.C.*, 70 A.D.3d 1043, 1043 (2d Dep't 2010); *Matter of State Farm Mut. Auto Ins. Co. v. City of Yonkers*, 21 A.D.3d 1110, 1111 (2d Dep't 2005). The arbitrator's award will be upheld if the award is "supported by 'a reasonable hypothesis' and . . . not contrary to what could fairly be described as settled law." *Matter of State Farm Mut. Auto Ins. Co. v. Lumbermens Mut. Cas. Co.*, 18 A.D.3d 762, 763 (2d Dep't 2005); *see also Matter of MVAIC v. Interboro Med. Care & Diagnostic PC*, 73 A.D.3d 667, 667 (1st Dep't 2010).

Further, in *Matter of Petrofsky* [*Allstate Ins. Co.*], 54 N.Y.2d 207, 210 (1981), the Court of Appeals held that the Master Arbitrator's authority to review the award of the lower arbitrator is derived from Insurance Law § 675[4] which "states in pertinent part that

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[4] Former Insurance Law 675 is now Insurance Law 5106.

a master arbitrator may vacate or modify an award made by an arbitrator in accordance with simplified procedures to be promulgated or approved by the superintendent, but that the grounds for vacating or modifying an arbitrator's decision shall not be limited to those grounds for review set forth in article seventy five of the civil practice law and rules." Therefore, in accordance with the superintendent's directive, 11 NYCRR 65.17(a)(4), as well as the grounds set forth in CPLR Article 75, the Master Arbitrator may vacate or modify an award if, among other things, the award was incorrect as a matter of law. *Id.* at 211. However," the master arbitrator is expressly precluded from reviewing factual or procedural errors." *Id.* at 212.

In a CPLR 7511 proceeding, a court may not set aside a Master Arbitrator's determination unless it is irrational. *Matter of Liberty Mut. Ins. Co. v. Spine Americare Med.*, 294 A.D.2d 574, 576 (2d Dep't 2002); *Matter of Carty v. Nationwide Ins. Co.*, 212 A.D.2d 462, 462 (1st Dep't 1995). The Master Arbitrator's decision will be upheld if there is any reasonable basis to support it. However, the award cannot be contrary to what could fairly be described as settled law because it is arbitrary and capricious for an arbitrator not to follow clear precedent. *See Matter of State Ins. Fund* [*Country-Wide Ins. Co.*]), 276 A.D.2d 432, 432 (1st Dep't 2000); *see also Cigna Property & Cas. v. Liberty Mut. Ins. Co.*, 2003 WL 25668821 (Sup. Ct. N.Y. Cnty. Aug. 28, 2003) ("an award that misapplies a governing statute will not stand").

Here, by affirming the lower arbitrator's award, the Master Arbitrator implicitly affirmed the lower arbitrator's reliance on *King's Medical Supply Inc. v. Kemper Auto & Home Ins. Co.*, 7 Misc.2d 128(A) (App. Term 2d Dep't 2005), in determining that the request for the rescheduled IME was untimely. However, *King's Medical Supply Inc.* is inapposite. In that case, the insurer requested a post-claim IME and, therefore, insurance regulation 11 NYCRR 65-3.6 (b) was applicable. "Having requested post-claim IMEs, [the insurer] was obligated to 'follow-up' its initial verification request with a second IME request within 10 days of the date on which the party to be examined failed to respond . . ." *Id.* at *2. In *King's Medical Supply Inc.*, the arbitrator found that, because the insurer failed to timely follow-up, it abandoned its request for verification and could not use the failure to appear at an IME as a basis to deny the claim.

In the case before the court, the Insurer requested a pre-claim IME. It is well-settled that the verification procedures governing IMEs requested after the receipt of a claim (11 NYCRR 65-3.5, 3.6) do not apply to pre-claim IME demands made pursuant to the personal injury protection endorsement in the insurance policy prior to the date of service and prior to the submission of a claim form. *See Vitality Chiropractic, P.C. v. Kemper Ins. Co*, 14 Misc.3d 94, 96 (App. Term 2d Dep't 2006); *Inwood Hill Med., P.C. v. General Assur. Co.*, 10 Misc.3d 18, 19-20 (App. Term 1st Dep't 2005); *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 7 Misc.3d 18, 21 (App. Term 2d Dep't

2004), *aff'd* 35 A.D.3d 720 (2d Dep't 2006); *Lender Med. Supply, Inc. v. Hartford Ins. Co.*, 35 Misc.3d 1226(A)at *3 (Civ. Ct. Kings Cnty. 2012); *Quality Psychological Servs., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 29 Misc.3d 1228(A) at *2 (Civ. Ct. Kings Cnty. 2010).

In *Inwood Hill Med. P.C. v. Gen. Assur. Co.,* 10 Misc.3d 18, 19-20 (App. Term 1st Dep't 2005), the court recognized the distinction between pre-claim and post-claim IME requests stating:

> Pursuant to the 'Conditions' provision of the prescribed no-fault endorsement in New York, 11 NYCRR 65-1.1 . . ., an insurer may require an injured person to submit to medical examinations, when and as often as, the company may reasonably require. The request for a medical examination constitutes a request for verification by an insurer, whether it is made before a claim is submitted or after the submission of a claim as additional verification, and as such, is subject to the follow-up provisions of 11 NYCRR 65-3.6 (b).

In that case, the court held that failure to attend both pre-claim and post-claim IMEs precluded coverage since "attendance at a medical exam is a condition of coverage under section 65-1.1, it follows that an eligible injured person's failure to comply with a request for an IME precludes an action against an insurer for payment of health services provided." *Id.* at 20.

Here, the first IME scheduling letter was mailed to Pretto on September 23, 2011, prior to the date that Pretto received the service at issue and prior to the Insurer's receipt

of the claim for that service. Therefore, the right to an IME prior to the Insurer's receipt of the claim is "not afforded by the verification procedures and timetables," but rather by the personal injury protection, "which is independent of the [post-claim] verification protocols." *Stephen Fogel Psychological, P.C.*, 7 Misc.3d at 20-21. Further, these detailed verification procedures are "not amenable to application at a stage prior to the submission of the claim form." *Id.* at 21.; *see Prime Psychological Servs., P.C. v. Nationwide Prop. & Cas. Ins. Co.*, 24 Misc.3d 230, 234 (Civ. Ct. Richmond Cnty. 2009).

(*Order follows on the next page.*)

III. **Conclusion**

Accordingly, because the Master Arbitrator's decision was contrary to well-settled law when he affirmed the lower arbitrator's decision, it is hereby

ADJUDGED that the petition is granted to the extent that the Master Arbitrator's decision dated April 16, 2013 that affirmed the lower arbitrator's decision granting the clinic's application for payment of the disputed claim is vacated and annulled as arbitrary and capricious and contrary to settled law, and the matter is remanded for reconsideration and determination by the Master Arbitrator, in a manner consistent herewith.

Dated: December 4, 2014

ENTER:

Hon. Eileen Bransten, J.S.C.