SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ALLSTATE INSURANCE COMPANY,

Petitioner,

- v -

NEW HAMPSHIRE INSURANCE COMPANY,

Respondent.

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Index No.
652020/2016

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

This petition arises from a dispute between petitioner Allstate Insurance Company ("Allstate") and respondent New Hampshire Insurance Company ("New Hampshire") as to the benefits payable for injuries claimed by Joseph Miraglia, a pedestrian who was allegedly injured on February 12, 2014 by an Allstate insured vehicle operated by Arthur A. Walker, Jr. and owned by Ann Nugent and Arthur Walker. Following the incident, New Hampshire (the workers' compensation carrier) paid workers' compensation benefits to Joseph Miraglia. New Hampshire then claimed entitlement to no-fault benefits from Allstate.

On March 25, 2015, New Hampshire filed an arbitration demand under Insurance Law section 5105, seeking the recovery of $50,000.00 from Allstate based on "priority of payment." Arbitrator Robert Miller of Arbitration Forums, Inc. decided in favor of New Hampshire in the amount of $50,000.00.

On September 18, 2015, Allstate filed a petition to vacate the arbitration award in the Civil Court of the City of New York, County of New York. By an order dated February 11, 2016, the Court dismissed Allstate's petition without prejudice to commence in the appropriate forum as the amount in controversy exceeded the statutory subject matter limitation of the Civil Court.

Allstate now seeks an order, pursuant to CPLR 7511, vacating the arbitration award. Allstate submits the affirmation of Michael Zeleznock, Esq., annexing *inter alia* (i) the Amended Notice of Petition to Vacate, filed in New York County Civil Court on September 18, 2015; (ii) the arbitration decision, dated July 14, 2015; (iii)

New Hampshire's contentions at arbitration; (iv) Allstate's contentions at arbitration; (v) the police accident report; (vi) a summary of the Allstate policy, reflecting that the vehicle in the accident, a 2012 Honda Pilot, was covered by Allstate beginning December 12, 2013 through June 12, 2014; (vii) a printout of the Kelley Blue Book specifications for the 2012 Honda Pilot, indicating a curb weight of 4608 lbs.; and (viii) the order of the Civil Court of the City of New York, dismissing Allstate's petition to vacate the arbitration award without prejudice.

Allstate argues that (1) the arbitrator applied the incorrect category—"priority of payment" rather than "loss transfer"—to the claim; (2) workers' compensation coverage is primary for coverage of the within claim and there is no coverage under Allstate's policy of insurance; (3) the handling of the matter violated the rules and procedures of Arbitration Forums, Inc.; and (4) the award was beyond the scope of power of the arbitrator. Allstate contends that New Hampshire procured the award by fraud with its concealment of the fact that New Hampshire paid workers' compensation benefits as opposed to no-fault benefits. Allstate maintains that the arbitrator did not consider pertinent evidence to determine if coverage existed and that the arbitration award must be vacated because it was incorrect as a matter of law, arbitrary and capricious, and lacked a rational basis.

New Hampshire opposes and cross-petitions for an order, pursuant to CPLR 7510, confirming the July 14, 2015 arbitration award. New Hampshire submits the affirmation of Aaron E. Meyer, Esq., annexing (a) the arbitration decision; (b) New Hampshire's contentions at arbitration; and (c) Allstate's contentions at arbitration. Meyer avers that, at the time of the accident, Miraglia was afforded workers' compensation benefits through New Hampshire, the workers' compensation carrier of Miraglia's employer, United Technologies Corp. After Miraglia filed for workers' compensation benefits, New Hampshire paid $50,000.00 in worker's compensation benefits to and on behalf of Miraglia. Meyer further avers that New Hampshire requested "a full recovery via priority of payments" and never identified its payments as "no-fault" during arbitration. Meyer states that "[a]t no point in the arbitration did Allstate attempt to argue that Workers' Compensation benefits were paid. While the arbitration award stated 'No Fault benefits' in place of Workers' Compensation benefits, such a typographical error has no bearing on the matter at hand."

New Hampshire contends that Allstate waived any jurisdictional argument as a matter of law by failing to properly seek a stay of arbitration. New Hampshire further contends that Allstate's workers' compensation argument is unpreserved for review since it was not raised during the arbitration. New Hampshire asserts that the arbitrator's determination that it was unnecessary to engage in loss transfer

analysis based on the evidence before him is neither subject to judicial review nor unsupported. New Hampshire argues that the award must be confirmed as a matter of law pursuant to CPLR 7511(e) because it was predicated on sufficient evidence and supported by more than a reasonable hypothesis.

Pursuant to CPLR 7511(b), the grounds for vacating an arbitration award are "(i) corruption, fraud or misconduct in procuring the award; ... (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; ... (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; [and] (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection." CPLR § 7511(b).

Generally, an arbitration award made after all parties have participated will not be overturned merely because the arbitrator committed an error of fact or of law. *Motor Vehicle Acc. Indemnification Corp. v. Aetna Casualty & Surety Co.*, 89 N.Y.2d 214, 223 (1996). "[W]here the arbitration is pursuant to the voluntary agreement of the parties, in the absence of proof of fraud, corruption, or other misconduct, the arbitrator's determination on issues of law as well as fact is conclusive." *Id.*

Where arbitration is compulsory, however, the arbitrator's determination is subject to "closer judicial scrutiny." *See MVAIC v. Aetna Casualty & Surety Co.*, 89 N.Y.2d at 223; *Mount St. Mary's Hosp. of Niagara Falls v. Catherwood*, 26 N.Y.2d 493, 508 (1970) (explaining that CPLR article 75 "includes review in the case of compulsory arbitration (but only in such case) of whether the award is supported by evidence or other basis in reason, as may be appropriate, and appearing in the record"); *Petrofsky v. Allstate Insurance Co*, 54 N.Y.2d 207, 211 (1981) ("[A]rticle 75 review "questions whether the decision was rational or had a plausible basis."). An award in a compulsory arbitration proceeding "must have evidentiary support and cannot be arbitrary or capricious" to be upheld. *MVAIC v. Aetna Cas. & Surety Co.*, 89 N.Y.2d at 223; *State Ins. Fund v. Country Wide Ins. Co.*, 276 A.D.2d 432 (1st Dept. 2000) (motion court correctly held that the arbitrator's acceptance of respondent's statute of limitations defense was subject to judicial review under an arbitrary and capricious standard).

Arbitration Forums, Inc., a "No-Fault Intercompany Arbitration Program for the New York State Insurance Program," resolves two general categories of disputes: "Loss Transfer" and "Priority of Payment." According to Arbitration Forum's website:

> Loss Transfer cases are filed to recover No-Fault Payments made to an injured party as a result of an accident or occurrence involving a vehicle that weighs over 6,500 lbs. unloaded, or, is a vehicle-for-hire used principally for the transportation of persons or property (including livery). Loss transfer liability is based on the New York Pure Comparative Negligence Law.

Section 5105(a) of the Insurance Law provides:

> Any insurer liable for the payment of first party benefits to or on behalf of a covered person and any compensation provider paying benefits in lieu of first party benefits which another insurer would otherwise be obligated to pay pursuant to subsection (a) of section five thousand one hundred three of this article or section five thousand two hundred twenty-one of this chapter has the right to recover the amount paid from the insurer of any other covered person to the extent that such other covered person would have been liable, but for the provisions of this article, to pay damages in an action at law. *In any case, the right to recover exists only if at least one of the motor vehicles involved is a motor vehicle weighing more than six thousand five hundred pounds unloaded or is a motor vehicle used principally for the transportation of persons or property for hire.* * * *
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> (Emphasis added.)

"Priority of Payment" disputes, on the other hand, are submitted pursuant to 11 NYCRR 68-D Section 65-3.12(b), which provides:

> If a dispute regarding priority of payment arises among insurers who otherwise are liable for the payment of first-party benefits, then the first insurer to whom notice of claim is given shall be responsible for payment to such person. Any such dispute shall be resolved in accordance with the arbitration procedures established pursuant to section 5105 of the Insurance Law and section 65-4.11 of this Part.

Section 5105(b) of the Insurance Law requires arbitration of claims arising under section 5105(a), and disputes between insurers regarding priority of payment among insurers who otherwise are liable for the payment of first-party benefits:

> The sole remedy of any insurer or compensation provider to recover on a claim arising pursuant to subsection (a) hereof, shall be the submission of the controversy to mandatory arbitration pursuant to

> procedures promulgated or approved by the superintendent. Such procedures shall also be utilized to resolve all disputes arising between insurers concerning their responsibility for the payment of first party benefits.

As relevant in an intercompany arbitration involving a workers' compensation carrier, the Legislature amended the Workers' Compensation Law in 1978 to add section 29(1-a), which provides:

> Notwithstanding any other provision of Law, the state insurance fund, if compensation and/or medical benefits are payable therefrom, or otherwise the person, association, corporation, insurance carrier, or statutory fund liable for the payment of such compensation and/or medical benefits does not have a lien on the proceeds of any recovery received pursuant to law pertaining to causes of action under the Comprehensive Motor Vehicle Insurance Reparations Act whether by judgment, settlement, or otherwise for compensation and/or medical benefits paid which were in lieu of first-party benefits which another insurer would have otherwise been obligated to pay under the Act. *The sole remedy of any of the foregoing providers to recover the payments specified in the preceding sentence is pursuant to the settlement procedures contained in section [5105] of the insurance law.*
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> Workers' Compensation Law § 29(1-a) (emphasis added).

While the amendment removed workers' compensation carriers' right to liens for benefits paid in lieu of no-fault benefits, it permitted workers' compensation carriers to seek recovery for benefits paid in lieu of no-fault benefits under the inter-company loss transfer provisions of Insurance Law section 5105. As the Court of Appeals explained:

> Although Workers' Compensation Law § 29(1) grants a workers' compensation carrier a lien on the proceeds of an employee's direct party action for the amount of compensation awarded, Workers' Compensation Law § 29(1–a) correspondingly denies that lien on the proceeds from any direct party action received pursuant to Insurance Law § 5104(a), i.e., "for compensation and/or medical benefits paid which were *in lieu of first party benefits* which another insurer would have otherwise been obligated to pay under [the No–Fault Automobile Insurance Law]."

Dietrick v. Kemper Ins. Co., 76 N.Y.2d 248, 251 (1990) (emphasis in original).

The amendment was conceived to correct the "harsh, unintended result" flowing from *Matter of Granger v. Urda*, 44 N.Y.2d 91 (1978), which held that the workers' compensation carrier's lien on the settlement proceeds of an injured employee's direct party action was inviolable even in the No-Fault Automobile Insurance Law context. *Dietrick*, 76 N.Y.2d at 252.

In sum, a workers' compensation carrier who pays out workers' compensation benefits in lieu of no-fault benefits is afforded the mandatory intercompany arbitral process to recoup payment of those benefits through a loss transfer pursuant to section 5105 of the Insurance Law. *State Farm Mutual Automobile Insurance Co v. City of Yonkers*, 21 A.D.3d 1110, 1111 (2d Dept. 2005). While the workers' compensation carrier is entitled to claim "loss transfer" against the no-fault carrier for the first $50,000 paid in lieu of no-fault benefits, section 5105(a) imposes statutory weight and use prerequisites that "at least one of the motor vehicles involved" either weighs more than 6,500 pounds unloaded or is "used principally for the transportation of persons or property for hire" as a "condition precedent to ultimate recovery" on its loss transfer claim. Insurance Law § 5105(a); *Progressive Casualty Insurance Co v. New York State Insurance Fund*, 47 A.D.3d 633, 634 (2d Dept. 2008) (noting that the statute's minimum weight requirement is a "condition precedent to ultimate recovery, not a condition precedent to "access to the arbitral forum"). The right to reimbursement applies only to "the extent that such other covered person would have been liable ... to pay damages in an action at law." Insurance Law § 5105(a).

As noted above, 11 NYCRR section 65.15(k)(1) addresses "priority of payment" disputes, allocating the responsibility for payment of first-party benefits among several insurers in descending order of priority. *See* 11 NYCRR § 65.15(k)(1)(i)–(x). The regulation does not mention workers' compensation carriers, but rather contemplates priority of payment disputes between two or more no-fault carriers responsible for the same first-party benefits. As between a workers' compensation carrier and no-fault insurer, it is well established that the workers' compensation carrier has primary responsibility to pay first-party benefits. *See, e.g.*, *Arvatz v. Empire Mut. Ins. Co.*, 171 A.D.2d 262, 268 (1st Dept. 1991) ("As between no-fault and worker's compensation, the latter is 'primary' and an injured party may not 'elect' between workers' compensation benefits and no-fault benefits."); *see also* Insurance Law § 5102(b)(2) (providing that workers' compensation benefits serve as an offset against first-party benefits payable under no-fault as compensation for "basic economic loss").

Here, in a mandatory arbitration under Insurance Law section 5105(a), the arbitrator rendered an award on the grounds of "priority of payment" in favor of the workers' compensation carrier (New Hampshire) and against the no-fault carrier (Allstate), reimbursing New Hampshire for all benefits paid in lieu of no-fault benefits. Because arbitration pursuant to Insurance Law section 5105(b) is mandatory, the arbitrator's determination is subject to "closer judicial scrutiny" than an arbitration conducted pursuant to a voluntary agreement. *See MVAIC v. Aetna Casualty & Surety Co*, 89 N.Y.2d at 223.

In the arbitration proceeding, New Hampshire requested recovery via priority of payment: "As the injury party was hit as a ped we request a full recovery via priority of payments as this is a vehicle hit vs. Ped." New Hampshire did not identify the payments it made as workers' compensation benefits: "As the Allstate Insured was backing unsafely hitting the ped that was crossing the street legally we request a full recovery of all payments up to $50,000."

In response, Allstate submitted the affirmative defense of no coverage: "Respondent pleads that New York Insurance Law 5105 must be applied to the within matter." Allstate contended that the Honda vehicle involved in the accident did not weigh more than 6,500 pounds unloaded and was not a motor vehicle used principally for the transportation of persons or property for hire. Allstate argued that New Hampshire could not recover against Allstate because "the Allstate Insured vehicle does not fit the criteria under Insurance Law 5105."

The arbitrator issued a decision on July 14, 2015, ruling in favor of New Hampshire. With respect to Allstate's affirmative defense, the decision states: "Applicant has filed for priority of payment in which respondent vehicle struck applicant pedestrian, therefore no loss transfer qualified is required." The decision also provides a summary of the dispute:

> Applicant (New Hampshire) contends they paid *No Fault benefits* for an injured party struck as a pedestrian by respondent (Allstate) and seeks recovery based on priority of payment. Respondent contends that there is no loss transfer qualified present and therefore the case should not go forward.
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> (Emphasis added.)

Contrary to New Hampshire's contention, Allstate's participation in the arbitration proceeding without first moving for a stay of arbitration did not constitute a waiver as Allstate did not take the position during the course of the

proceedings that the claim was not arbitrable. Rather, Allstate asserted at arbitration that Insurance Law 5105 "must be applied" and that section 5105 precludes New Hampshire's recovery against Allstate. *See Progressive Cas. Ins. Co. v. New York State Ins. Fund*, 47 A.D.3d 633, 634 (2d Dept. 2008) (finding that Progressive's participation in the arbitration proceeding without first moving for a stay did not constitute a waiver of its contention that the garbage truck was not "involved" in the subject accident within the meaning of Insurance Law § 5105(a); the issue of the garbage truck's "involvement" in the accident was properly litigated in the arbitration proceeding); *DTG Operations, Inc. v. Autoone Ins. Co.*, 2014 WL 4743462 (N.Y. Sup. 2014).

The record here does not support the arbitrator's conclusion that New Hampshire, the workers' compensation carrier, was entitled to priority of payment merely by virtue of payment of the claim. *See Cigna Prop. & Cas. v. Liberty Mut. Ins. Co.*, 12 A.D.3d 198, 199 (1st Dept. 2004) (affirming the Supreme Court's vacatur of an arbitration award where the arbitrator awarded the workers' compensation carrier full reimbursement from the no-fault carrier solely on the grounds of "priority of payment"). The arbitration decision incorrectly identifies New Hampshire's payments as "No-fault benefits" rather than workers' compensation benefits. While New Hampshire argues that "such a typographical error has no bearing on the matter at hand," this Court disagrees. A workers' compensation carrier's request for reimbursement from a no-fault carrier must be based on an allocation of loss pursuant to Insurance Law 5101(a) as opposed to "priority of payment." *Id.* Because the record contains no evidence that the arbitration award was based on such an allocation, the award is vacated.

Wherefore, it is hereby,

ORDERED that Petitioner Allstate Insurance Company's petition to vacate the arbitration award is granted and Respondent New Hampshire Insurance Company's cross petition to confirm the arbitration award is denied.

This constitutes the decision and order of the Court. All other relief requested is denied.

DATED: SEPTEMBER 28, 2016

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EILEEN A. RAKOWER, J.S.C.