

<b>Matter of Country-Wide Ins. Co. v Ehrlich</b>
2018 NY Slip Op 30260(U)
February 13, 2018
Supreme Court, New York County
Docket Number: 655976/2016
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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In the Matter of  
COUNTRY-WIDE INSURANCE COMPANY

Petitioner

Index No. 655976/2016

v

DECISION AND ORDER

RANDALL V. EHRLICH, MD, P.C., as assignee  
of SANTIAGO SANTOS

Respondent.

MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

Country-Wide Insurance Company (Country-Wide) petitions pursuant to CPLR 7501(b)(1)(iii) to vacate an arbitration award dated January 17, 2016, awarding no-fault motorist benefits to Randall V. Ehrlich, MD, P.C. (Ehrlich), as assignee of Santiago Santos, and a determination of a master arbitrator dated August 16, 2016, affirming the award. Ehrlich opposes the petition and cross-petitions pursuant to CPLR 7510 to confirm the awards, and for an award of attorneys' fees. The court denies the petition and grants the cross petition.

II. BACKGROUND

Santos was allegedly injured in a motor vehicle accident on September 18, 2012. Ehrlich examined him on June 11, 2014, and

performed arthroscopic surgery on his right shoulder on July 28, 2014. Santos assigned Ehrlich his right to recover benefits under the no-fault provisions of a motor vehicle insurance policy issued by Country-Wide. Ehrlich made claim upon Country-Wide in the sum of \$5,240.44. Country-Wide denied coverage on the ground that the surgery was not medically necessary. Ehrlich demanded arbitration of the claim, and a hearing was conducted on May 22, 2015, and December 17, 2015.

Upon reviewing medical records and reports, the arbitrator found that the surgery was medically necessary. In an award dated January 17, 2016, the arbitrator awarded Ehrlich the sum of \$3,782.61 in full reimbursement of the claim. In a determination dated August 16, 2016, a master arbitrator affirmed the arbitrator's award, concluding that it was not irrational or arbitrary and capricious, the findings as to whether the surgery was medically necessary had support in the record, and the determination was not incorrect as a matter of law. See 11 NYCRR 65-4.10(a)(4).

### III. DISCUSSION

#### A. STANDARDS FOR REVIEW OF COMPULSORY ARBITRATION AWARD

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 (1<sup>st</sup> 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., supra; Matter of Furstenberg [Aetna Cas. & Sur. Co.-Allstate Ins. Co.], supra.

The burden is on the insurer to establish at the arbitration that the rationale given for the denial of the claim was proper, since it has the relevant information concerning its own investigations and claims-handling procedures. See generally Matter of New York Cent. Mut. Fire Ins. Co. v Ward, 38 AD3d 898 (2<sup>nd</sup> Dept. 2007); see also Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co., 61 AD3d 13 (2<sup>nd</sup> Dept. 2009). Where, as here, the issue is whether certain treatment was medically necessary, the insurer has the initial burden of establishing a basis for concluding

that the treatment was indeed not necessary. See Total Equip., LLC v Mercury Cas. Co., 42 Misc. 3d 131(A), 2013 NY Slip Op 52220(U) (App. Term, 9<sup>th</sup> & 10<sup>th</sup> Jud. Dists. 2013). If the insurer satisfies its burden, the burden shifts to the claimant to rebut that showing. See West Tremont Med. Diagnostic, P.C. v GEICO Ins. Co., 13 Misc. 3d 131(A), 2006 NY Slip Op 51871(U) (App. Term, 2<sup>nd</sup> & 11<sup>th</sup> Jud. Dists. 2006). The determination of the initial arbitrator that Country-Wide satisfied its burden in this regard, but that Ehrlich successfully rebutted Country-Wide's evidence, was not irrational or arbitrary and capricious, as the findings on which the determination was based, including the finding that Santos injured his right shoulder in the accident, necessitating surgery, have factual support in the record.

B. STANDARDS FOR REVIEW OF MASTER ARBITRATOR'S AWARD

"A master arbitrator has the authority to vacate or modify an arbitration award based upon a ground set forth in CPLR article 75 (see 11 NYCRR 65.19[a][1]). The power of the master arbitrator to review factual and procedural issues is limited to whether the arbitrator acted in a manner that was arbitrary and capricious, irrational or without a plausible basis. 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."

Liberty Mut. Ins. Co. v Spine Americare Med., P.C., 294 AD2d 574, 576 (2<sup>nd</sup> Dept. 2002) (some citations and internal quotation marks omitted). 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 [2<sup>nd</sup> Dept. 1996]), and properly affirmed the initial arbitrator's award.

C. CONFIRMATION OF ARBITRATION AWARD

Pursuant to CPLR 7510, the court "shall confirm an [arbitration] award upon application of a party made within one year after its delivery to him [or her] unless the award is vacated or modified upon a ground specified in section 7511." The grounds specified in CPLR 7511 are exclusive (see Bernstein Family Ltd. Partnership v Sovereign Partners, L.P., 66 AD3d 201 [1<sup>st</sup> 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).

The cross petition to confirm the arbitration award was timely filed. The court agrees with the petitioner's contention that the award was proper in all respects. Moreover, Ehrlich is entitled to an award of attorneys' fees for services rendered in connection with this "court appeal from a master arbitration

award," which are to be awarded as a matter of courser. 11 NYCRR 65-4.10(j)(4); see Matter of GEICO Ins. Co. v AAAMG Leasing Corp., 148 AD3d 703 (2<sup>nd</sup> Dept. 2017).

#### IV. CONCLUSION

Accordingly, it is

ORDERED that the petition is denied, the cross petition is granted, the awards of the arbitrator and master arbitrator are confirmed, and the Clerk of the court is directed to enter judgment in favor of the respondent, Randall V. Ehrlich, MD, P.C., and against the petitioner, Country-Wide Insurance Company, in the sum of \$3,782.61 plus statutory interest from January 17, 2016; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount due to the respondent for attorneys' fees and costs; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of

this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel shall immediately consult one another, if applicable, and counsel for respondent shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the respondent shall serve a proposed accounting of attorneys' fees within 24 days from the date of this order and the petitioner shall serve objections to the proposed accounting within 20 days from service of respondent's papers, and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to



present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part, and that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

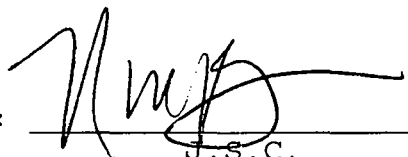
ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the respondent may enter an amended judgment adding the award of attorneys' fees and costs, if any, to the amount recovered; and it is further,

ORDERED that the respondent shall serve a copy of this order upon the petitioner within 15 days of this order.

This constitutes the Decision and Order of the court.

Dated: February 13, 2018

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ENTER:   
 J.S.C.  
**HON. NANCY M. BANNON**