SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Country-Wide Insurance Company,

Petitioner,

- against -

Excel Surgery Center, LLC A/A/O Anthony Marcelle,

Respondent.

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Index No. 652741/2018

Decision and Order

Mot. Seq. 1

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

Petitioner, Country-Wide Insurance Company ("Petitioner" or "CWI"), brings this Petition to vacate the arbitration award ("the Award") rendered by Arbitrator Lester Hill ("Arbitrator Hill") and affirmed by Master Arbitrator Victor J. D'Ammora ("Master Arbitrator D'Ammora") on March 5, 2018 on the grounds that Arbitrator Hill exceeded his authority and Master Arbitrator D'Ammora erred in affirming the Award. More specifically, CWI contends that the Award should be vacated because the amount awarded to Respondent, Excel Surgery Center, LLC A/A/O Anthony Marcelle ("Respondent" or "Excel"), was more than the permissible amount under the New Jersey fee schedule. Excel opposes and files a Cross-Motion seeking to confirm the Award.

Background/Factual Allegations

This proceeding arises out of a rear collision on October 9, 2015 involving CWI's claimant, Anthony Marcelle ("Claimant"). Claimant was injured in a motor vehicle that she owned, which was insured by CWI. After the accident, Claimant allegedly received epidural injections at Excel's surgical facility on April 1, 2016. Following the services rendered to Claimant, Excel submitted bills for reimbursement to CWI for Claimant's use of the surgical center and anesthesia services. After Claimant appeared for an examination under oath, CWI served various demands for verification upon Excel. Excel responded to these demands. On June 15, 2016, CWI denied Excel's claim for reimbursement based upon policy exhaustion.

An arbitration was commenced on November 3, 2017 before Arbitrator Hill. Arbitrator Hill stated that "at issue is whether the claim for a facility fee and anesthesia service for lumbar injections therapy performed on April 1, 2016 was properly denied upon exhaustion of the policy limits." Arbitrator Hill first determined that Excel's claim for reimbursement was verified as of March 6, 2016 because at that point, Excel had fully responded to CWI's verification requests specific to the claim and CWI was in receipt of Excel's claim. Arbitrator Hill wrote that, "resending the verification requests over and over does not extend the time that the claim was not verified. It is at that point that the respondent had 30 days to either pay the claim, deny the claim or seek additional reasonable verification." CWI therefore had until June 5, 2016 "to either pay the claim, deny the claim or seek additional reasonable verification." Arbitrator Hill then addressed "[t]he question of what effect the untimely denial of the claim (on June 15, 2016) has upon the respondent's defense of policy exhaustion." Arbitrator Hill stated that the documentation submitted by CWI showed that the policy was exhausted by a payment on June 9, 2016. Arbitrator Hill then reviewed the relevant law on policy exhaustion and no-fault priority and determined that "an arbitrator may award claims in excess of policy limits, at a minimum, in those instances where the respondent acted in gross disregard of the claims process as I find in this case" where CWI "failed timely deny the claim after abusing the claims process by endless verification requests for the same material."

Arbitrator Hill awarded Excel $3,105.16 for medical costs, plus 2% interest from the date of filing the case on August 25, 2016 until payment of the Award. Arbitrator Hill also directed CWI to pay Excel "attorney's fees, in accordance with 11 NYCRR 65-4.6, at the rate of 20% of the total amount awarded, including interest, to a maximum attorney's fee of $1360.00" and $40.00 for the fee paid to the Designated Organization, unless the fee was previously returned to an earlier award. Arbitrator Hill noted that CWI had "asserted a fee schedule defense, asserting that the appropriate fee for the services rendered is $2571.27." Arbitrator Hill stated, however, CWI "did not submit an affidavit from a certified bill coder or medical expert providing a basis to demonstrate that the applicant's amended claim was inconsistent with the fee schedule."

Master Arbitrator D'Ammora affirmed Arbitrator Hill's Award and awarded additional costs, finding that the Award was rational, and it was not arbitrary and capricious. CWI commenced this proceeding to challenge the Award on June 1, 2018.

## Parties' Contentions

CWI contends that the Award "was irrational, not supported by the evidence, and [was] arbitrary and capricious" and that the Master Arbitrator erred in affirming Arbitrator Hill's Award. CWI contends that Master Arbitrator D'Ammara exceeded his power by affirming an award more than the permissible amount under the New Jersey fee schedule, which is applicable because Excel is an ambulatory surgical center located in northern New Jersey and the bills at issue are for services that were rendered in Hackensack, New Jersey. CWI states that it raised the defense during arbitration, but Arbitrator Hill failed to look at the New Jersey statutes and fee schedule before issuing an Award. CWI further contends that Master Arbitrator D'Ammara further exceeded his power by affirming the Award in excess of the policy limits.

Excel contends that Arbitrator Hill and Master Arbitrator D'Ammora's decisions were not arbitrary and capricious and were in compliance with the case law that the Arbitrators cited in their decisions. Excel contends that in affirming Arbitrator Hill's decision, Master Arbitrator D'Ammora extensively reviewed the relevant law on policy exhaustion and no-fault priority and determined that "an arbitrator can award more than the policy limits where the Respondent, as here, acted in gross disregard of the claims process."

## Legal Standard

CPLR §7511(b) provides four grounds on which an application to confirm an arbitration award may be denied: fraud; partiality by the arbitrator; the arbitrator exceeding his or her authority; and a failure to follow the procedures of CPLR Article 75.

Judicial disturbance of an arbitration award on the grounds that an arbitrator exceeded his powers is appropriate "only if the award violated a strong public policy, was totally irrational, or the arbitrator in making the award clearly exceeded a limitation on [his] power specifically enumerated under CPLR 7511(b)(1)." *Rice v. Jamaica Energy Partners, L.P.*, 13 A.D.3d 255 [1st Dept. 2004] (*citing New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 [1999]). "Where arbitration is compulsory, our decisional law imposes closer judicial scrutiny of the arbitrator's determination under CPLR 7511(b)." *Motor Vehicle Acc. Indemnification Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 214, 223-24 [1996]. "To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious." *Id.* at 224.

Further, 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." *Petrofsky v. Allstate Insurance Company,* 54 NY2d 207 [1981]. Courts are required to uphold the determinations of the master arbitrator on questions of substantive law if there is a rational basis for the finding. *Liberty Mutual Insurance Company v. Spine Americare Medical, P.C.,* 294 AD2d 574 [2d Dept. 2002].

"Assessment of the evidence presented at an arbitration proceeding is the arbitrator's function rather than that of the court." *Fitzgerald v. Fahnestock & Co., Inc.*, 48 A.D.3d 246, 247 [1st Dep't 2008] (quoting *Peckerman v. D & D Assoc.*, 165 A.D.2d 289, 296 [1st Dep't 1991]). "Absent provision to the contrary in the arbitration agreement, arbitrators are not bound by principles of substantive law or rules of evidence." *Lentine v. Fundaro*, 29 N.Y.2d 382, 385 [1972]. Nor can an arbitration award "be overturned merely because the arbitrator committed an error of fact or law." *Matter of Motor Veh. Accident Indem. Corp.,* 89 N.Y.2d at 223.

Discussion

Here, CWI fails to meet its heavy burden of demonstrating that Arbitrator Hill and Master Arbitrator D'Ammara's decisions violate a strong public policy, were totally irrational or in violation of any of the grounds enumerated under CPLR 7511(b). A review of those decisions demonstrates no indication that they were arbitrary, capricious or subject to any of the defects set forth in CPLR 7511. The record shows that the Arbitrator Hill weighed all relevant evidence and based upon the evidence presented, concluded that CWI could not rely upon an exhaustion of policy defense. Master Arbitrator D'Ammara examined the entire record in rendering his decision to affirm the Award including CWI's contentions. CWI therefore fails to meet its burden of demonstrating that either of the Awards should be disturbed by the Court. CWI's Petition to vacate the Awards is therefore denied. Excel's cross motion to confirm them is granted.

Wherefore it is hereby

ORDERED that the petition brought by Country-Wide Insurance Company to vacate an arbitration award dated December 6, 2017 issued by Lester Hill, Esq., and a subsequent award by Master Arbitrator Victor J. D'Ammora, dated March 5, 2018, is denied; and it is further

ORDERED that the Petition is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Respondent Excel Surgery Center, LLC, A/A/O Anthony Marcelle's Cross-Motion to confirm the arbitration award of Master Arbitrator, Victor J. D'Ammora, dated March 5, 2018, which affirmed the lower arbitration award of Lester Hill, Esq., dated December 6, 2017, is confirmed; and it is further

ORDERED and ADJUDGED that Excel Surgery Center, LLC, A/A/O Anthony Marcelle have judgment and recover against Country-Wide Insurance Company (a) the sum of $3,105.16, representing medical costs, together with interest at the rate of 2% per month, simple, from the date of August 25, 2016 and ending with the payment of the award; (b) attorney's fees, in accordance with 11 NY CRR 65-4.6, at the rate of 20% of the total amount awarded, including interest, to a maximum attorney's fee of $1360.00; (c) forty dollars ($40) representing reimbursement for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award; and it is further

ORDERED that counsel for Respondent shall serve a copy of this Order, along with notice of entry on all parties within 15 days of entry.

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

Dated: DECEMBER 21, 2018

EILEEN A. RAKOWER, J.S.C.