79 Misc.3d 1236(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, Kings County, New York.

AMERICAN TRANSIT INSURANCE COMPANY, Petitioner,
v.
RUTLAND MEDICAL, PC, a/a/o Shania M Pessoa Craig, Respondent.

Index No. 531225/2022
|
Decided on August 4, 2023

Attorneys and Law Firms

Larkin Farrell LLC, New York City (Anthony R. Troise of counsel), for Petitioner.

Roman A. Kravchenko, Garden City, for Respondent.

Opinion

Aaron D. Maslow, J.

***1** The following numbered papers were read on this petition:

Petition (NYSCEF Doc No. 1)

Notice of Petition (NYSCEF Doc No. 2)

Exhibit A — Arbitration Award (NYSCEF Doc No. 3)

Exhibit B — Master Arbitration Award (NYSCEF Doc No. 4)

Exhibit C — Respondent's Arbitration Request Form and Arbitration Submission (NYSCEF Doc No. 5) ("Rutland's Arbitration Request Form & Submission")

Exhibit D-1 — Petitioner's Arbitration Submission and Master Arbitration Appeal (NYSCEF Doc No. 6) ("ATIC's Arbitration Submission and Master Arbitration Brief")

Exhibit D-2 — Petitioner's Arbitration Submission (NYSCEF Doc No. 7)

Exhibit D-3 — Petitioner's Arbitration Submission (NYSCEF Doc No. 8)

Exhibit D-4 — Petitioner's Arbitration Submission (NYSCEF Doc No. 9)

Exhibit D-5 — Petitioner's Arbitration Submission (NYSCEF Doc No. 10)

Exhibit D-6 — Petitioner's Arbitration Submission (NYSCEF Doc No. 11)

Statement of Authorization for Electronic Filing (NYSCEF Doc No. 12)

Request for Judicial Intervention (NYSCEF Doc No. 13)

Affidavit of Service (NYSCEF Doc No. 14)

Statement of Authorization for Electronic Filing (NYSCEF Doc No. 15)

Affidavit of Service (NYSCEF Doc No. 16)

Statement of Authorization for Electronic Filing (NYSCEF Doc No. 17)

Notice of Cross-Petition (NYSCEF Doc No. 18)

Cross-Petition (NYSCEF Doc No. 19)

Stipulation to Adjourn (NYSCEF Doc No. 20)

Statement of Authorization for Electronic Filing (NYSCEF Doc No. 21)

Affirmation in Opposition to Cross-Petition and Reply in Support of Petition (NYSCEF Doc No. 22)

Reply Affirmation in Support of Cross-Petition (NYSCEF Doc No. 23)

Issue Presented

In a No-Fault insurance master arbitration, where the master arbitrator failed to address the issue of law asserted by the insurer, but the issue of law was previously decided by the court in a different Article 75 proceeding, must the master arbitration award be vacated?

Background

Petitioner American Transit Insurance Company ("ATIC") commenced this CPLR Article 75 proceeding by notice of petition, seeking an order and judgment vacating a No-Fault insurance master arbitration award of Richard B. Ancowitz, Esq. (dated July 25, 2022), which affirmed the arbitration award of Wendy Bishop, Esq. (dated April 8, 2022) granting Respondent Rutland Medical, PC's ("Rutland") claim for No-Fault insurance compensation for range of motion testing, muscle testing, physical performance testing, outcome assessment testing, trigger point injections, and chiropractic treatment reflected in a total of 25 bills.[1, 2] Arbitrator Bishop awarded $2,713.58 to Rutland as compensation.[3] The services at issue were provided to Shania M. Pessoa Craig, who claimed to have been injured in a motor vehicle accident on April 18, 2019. She assigned her No-Fault insurance benefits to Rutland, and is denoted as "Assignor."[4] (*See* NYSCEF Doc No. 1, Petition ¶¶ 2, 16-22; NYSCEF Doc No. 6, ATIC's Arbitration Submission and Master Arbitration Brief at 145[5].)

***2** Respondent Rutland has opposed ATIC's petition to vacate the master arbitration award and it cross-petitioned for a judgment confirming the master arbitration award and awarding $2,713.58 as principal, statutory interest, the $40.00 arbitration filing fee, attorney's fees, and costs and disbursements (*see* NYSCEF Doc No. 18, Notice of Cross-Petition; NYSCEF Doc No. 19, Cross-Petition).

The petition and cross-petition came before the undersigned for oral argument on June 23, 2023. At that time, both parties appeared by counsel.

The underlying arbitration which is the subject of this proceeding was organized by the American Arbitration Association ("AAA"), which assigned Case No. 17-20-1175-4211[6] to it. The AAA has been designated by the New York State Department of Financial Services to coordinate the mandatory arbitration provisions of Insurance Law § 5106 (b), which provides:

> Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party ["No-Fault insurance"] benefits, or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent.

Insurance Law Article 51 provides for the payment of basic economic loss incurred by persons injured in motor vehicle accidents. Included within basic economic loss are first-party benefits for medical and other professional health services.[7] First-party benefits are more commonly known as "No-Fault benefits."[8]

In furtherance of the statutory scheme, a comprehensive set of No-Fault Regulations was promulgated by the Superintendent of Insurance (presently Superintendent of Financial Services). They are contained at 11 NYCRR Part 65. Said part is subdivided into five subparts which encompass the following topics: prescribed insurance policy endorsements, rights and liabilities of self-insurers, claims for benefits, arbitration, and unauthorized providers of health services. Part 65 is also known as Insurance Regulation 68.

Generally, the claims process for health service bills[9] for No-Fault insurance compensation begins with the submission by a health service provider of a claim form (usually, but not always, a Form NF-3 verification of treatment by attending physician or other provider of health service).[10] Besides providing information regarding the injured person, the accident, the subject insurance policy, the billing health service provider, diagnoses, and projected treatment, the claim form includes a bill for services performed. The claim form can be submitted directly by the injured person to the No-Fault insurer but over many decades a practice developed whereby the health service providers submit the claim forms. As noted in footnote 4, they possess standing to do so by virtue of having received signed assignments of benefits from the injured persons.[11, 12] The insurer must then either pay or deny the bill within 30 days, or seek additional verification within 15 business days. If it denies payment, it must issue a Form NF-10 denial of claim[13] explaining why the bill was not paid. (*See* Insurance Law § 5106 [a]; *Viviane*

Etienne Med. Care, P.C. v Country-Wide Ins. Co., 25 NY3d 498, 505 [2015].)

***3** The record evidence submitted in this Article 75 proceeding revealed that the underlying arbitration involved 25 claim forms covering services for a period of April 30, 2019-December 16, 2019, as per the Form AR Arbitration Request Form (*see* NYSCEF Doc No. 5, Rutland's Arbitration Request Form & Submission at 14). Apparently, one claim form was neither paid nor denied and there is no evidence that it was pended for additional verification. The other claim forms (bills) were timely denied, either on the basis of respective peer reviews from Dr. Peter Chiu, M.D. (dated July 16, 2019; September 23, 2019; and December 6, 2019) or an IME (independent medical examination) report of Dr. Glenn Berman, D.C. Dr. Chiu had opined that the services were not medically necessary. Dr. Berman opined that further chiropractic was not medically necessary. (*See* NYSCEF Doc No. 3, Arbitration Award at numbered pp 1-2.)

Arbitrator Wendy Bishop's Award

The record evidence reveals further that on April 7, 2002, Arbitrator Wendy Bishop, Esq., conducted a hearing at which Ryan Woodworth, Esq., from Russell Friedman & Associates LLP, appeared for Rutland, and nobody appeared for ATIC (*see id.* at numbered p 1).

In her award, Arbitrator Bishop noted that the hearing documents were contained in Modria [14] . With respect to the bill for which there was no appurtenant denial of claim, she noted that Rutland provided proof of its mailing and she awarded compensation. (*See id.* at numbered p 2.) Regarding the denials premised on a peer review of Chiu, she found them insufficient as lacking a standard of care and/or a medical rationale; ATIC therefore failed to satisfy an initial burden of establishing lack of medical necessity (*see id.*).

With regard to bills denied on the basis of Dr. Berman's IME report, she found that ATIC did meet its initial burden of establishing lack of medical necessity; Dr. Berman's conclusion that Assignor's injuries had resolved was supported by negative range of motion and neurological testing. The burden therefore shifted to Rutland to demonstrate the medical necessity of the respective services. "[Rutland] submits the reports of its clinical examinations of the Assignor performed on July 15, 2019 and August 19, 2019. Range of motion in the Assignor's cervical spine and lumbar spine was restricted. There were muscle spasms in the areas of the Assignor's cervical spine and lumbar spine. Applicant has thus rebutted Dr. Berman's IME report, and demonstrated the medical necessity of further treatment." (*Id.* at numbered p 3.)

Arbitrator Bishop awarded $2,713.58 as principal. She also awarded interest of 2% per month, an attorney's fee, and return of the $40.00 filing fee (*see id.* at numbered pp 4-5; Insurance Law § 5106 [a]; 11 NYCRR 65-4.5 [s]).

Master Arbitrator Richard Ancowitz's Award

ATIC filed for master arbitration to appeal Arbitrator Bishop's award. It presented two arguments. The first was that Rutland was an entity formed by a No-Fault insurance fraud ring, as evidenced by an attached indictment. The second was that Arbitrator Bishop erred as a matter of law and her award was irrational because when she assessed medical necessity, she did not take into account well settled case law concerning the need for a medical claimant to meaningfully rebut and discuss the conclusions of the insurer's expert (citing *Innovative Chiropractic, P.C. v Mercury Ins. Co.*, 25 Misc 3d 137[A], 2009 NY Slip Op 52321[U] [2d, 11th & 13th Dists 2009]). (*See* NYSCEF Doc No. 6, ATIC's Arbitration Submission and Master Arbitration Brief at 148-153.)

***4** Master Arbitrator Ancowitz summarized the issues in dispute as follows: "Did the arbitrator err in finding that respondent's lack of medical necessity defense was insufficiently stated? Was the award irrational or incorrect as a matter of law?" (NYSCEF Doc No. 4, Master Arbitration Award at 2.)

His findings and conclusions were as follows:

> The award indicates that $2,713.58 was in dispute, relating to billing submitted to respondent by applicant for various medical and chiropractic services rendered to the Eligible Injured Person (EIP). The arbitrator rejected respondent's physical examination and peer review-based defense of lack of medical necessity, and rendered an award for applicant.
>
> Specifically, the arbitrator found that applicant had rebutted respondent's physical examination report, and also found that respondent's peer review report failed to adequately

support the assertion of lack of medical necessity with a standard of care and/or medical rationale.

Respondent has submitted a brief which contends that the arbitrator erred in rejecting their defense. Respondent further contends in conclusory fashion that the award was irrational and should be vacated. Respondent contends that their proof was sufficient to sustain their defense.

Applicant has submitted a brief which contends that the award was rational and should not be disturbed.

Upon review of the contentions of the respondent, I see no reason to disturb the arbitrator's weighing of the evidence, and in particular, the arbitrator's determination that respondent's peer review report was insufficient to support their lack of medical necessity defense. I also find no error in the arbitrator's factual determination that applicant had rebutted respondent's physical examination report.

Clearly, a no-fault arbitrator has wide latitude in deciding whether to credit and how to weigh such evidence. 11 NYCRR 65-4.5 (o)(1). See also, *Matter of Bay Needle Acupuncture v. Country-Wide Ins. Co.*, 176 AD3d 806 (2nd Dept 2019); *Matter of Jasser v. Allstate Ins. Co.*, 77 AD3d 751 (2nd Dept 2010); *Allstate Ins. Co. v. Keegan*, 201 AD2d 724 (2nd Dept 1994).

As per these cases, the weighing of evidence is generally not the function of a master arbitrator. In any event, in this case I find that the award here clearly was not irrational or otherwise infirm.

The award must be affirmed. *Matter of Petrofsky v. Allstate Insurance Co.*, 54 NY2d 207 (1981).

(*Id.* at 2-3.)

ATIC's Petition to Vacate

ATIC's petition to vacate asserted that "The arbitration decision was arbitrary and capricious, irrational and without a plausible basis" (NYSCEF Doc No. 1, Petition ¶ 35), in that "Arbitrator Wendy Bishop, Esq. failed to follow well settled law" (*id.* ¶ 37). It also made reference to the grounds set forth in CPLR 7511 (b) (1) for vacating an arbitration award (*see id.* ¶ 33):

The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(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; or

***5** (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.

The petition proceeded to argue that the claims at issue were properly and timely denied for lack of medical necessity as per the attached peer review and IME report (*see id.* ¶ 39). ATIC's evidence submitted to the hearing arbitrator "clearly satisfied its burden" (*id.* ¶ 40). Ultimately the medical provider Rutland in this instance had to prove by a preponderance of the evidence that its services were medically necessary, claimed ATIC; the petition to vacate cited to *Dayan v Allstate Ins. Co.* (49 Misc 3d 151[A], 2015 NY Slip Op 51751[U] [App Term, 2d Dept, 2d, 11th & 13th Dists 2015]), and *Park Slope Medical and Surgical Supply, Inc. v Travelers Ins. Co.* (37 Misc 3d 19, 22 n. [App Term, 2d Dept, 2d, 11th & 13th Dists 2012]) (*see id.* ¶ 41). "In order for an applicant to prove that the services were medically necessary, it must meaningfully refer to, or rebut, the conclusions set forth in the peer review," maintained the petition, which cited to *Pan Chiropractic, P.C. v Mercury Ins. Co.* (24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] [App Term, 2d Dept, 2d, 11th & 13th Dists 2009]) (*id.* ¶ 42). Rutland failed to offer any rebuttal at all, and certainly did not meaningfully refer to the peer review and the IME report, as was required by *Pan Chiropractic, P.C.* and the more than 100 published decisions citing to it, insisted ATIC (*see id.* ¶ 43).

ATIC reiterated in several paragraphs of its petition that a health service provider seeking No-Fault medical expense compensation must meaningfully refer to and rebut an insurer's peer reviewer's and IME doctor's conclusions (*see*

id. ¶¶ 47-51). "This proposition is widely accepted as 'well settled' law in the industry" (*id.* ¶ 51). "In this case the arbitrator also ruled for Respondent [Rutland] despite the fact that there was no rebuttal. In doing so the arbitrator failed to follow well settled law. As such, this Court should vacate the arbitration award for the same reasons the Appellate Term reversed the trial courts in *Pan Chiropractic*, *Eastern Star Acupuncture*, *Jaga Med. Servs., P.C.* and *High Quality Medical*." (*Id.* ¶ 54.)

"This decision was arbitrary and capricious, without rational basis and incorrect as a matter of law because zero evidence simply cannot outweigh evidence" (*id.* ¶ 57). The petition concluded by asserting that Arbitrator Bishop ignored ATIC's "evidence and/or well settled legal precedent in order to justify a determination in favor of Applicant [Rutland]" (*id.* ¶ 58). Therefore, ATIC's rights were prejudiced by the arbitrator's partiality "and the arbitrator exceeded his/her power and failed to make a final and definite award and the decision must be vacated" (*id.* ¶ 59). The relief sought was vacatur of the awards of both Arbitrator Bishop and Master Arbitrator Ancowitz that they "have no force or effect" (*id.* ¶ 60).

Rutland's Cross-Petition to Confirm

Rutland argued in its cross-petition most significantly that the arbitration awards had to be confirmed if they were supported by evidence or other basis in reason (citing *Matter of Petrofsky v Allstate Ins. Co.*, 54 NY2d 207 [1981]); rational (citing *Matter of Unigard Mut. Ins. Co. v Hartford Ins. Group*, 108 AD2d 917 [2d Dept 1985]); and not inapposite to settled law (citing *Matter of Global Liberty Ins. Co. v Therapeutic Physical Therapy, P.C.*, 148 AD3d 502 [1st Dept 2017]). ATIC did not meet its burden of establishing that the master arbitration award did not meet these criteria. (*See* NYSCEF Doc No. 19, Cross-Petition.)

***6** Rutland did not submit any calculation of an attorney's fee for its opposition to the petition and maintenance of the cross-petition.

No-Fault Insurance Arbitration

When the No-Fault Law was first enacted by the Legislature in Chapter 13 of the Laws of 1973 to take effect February 1, 1974, § 675 of the Insurance Law was added. In subdivision 2 thereof, insurers were required to provide claimants with an arbitration option for disputes involving liability for first-party benefits. This provision was amended in Chapter 892 of the Laws of 1977, when several changes were made to the 1973 version. [15] The provision regarding arbitration in § 675 was amended to add the following language:

> An award by an arbitrator may be vacated or modified by a master arbitrator in accordance with simplified procedures to be promulgated or approved by the superintendent [of insurance]. The grounds for vacating or modifying an arbitrator's decision by a master arbitrator shall not be limited to those grounds for review set forth in article seventy-five of the civil practice law and rules. The decision of a master arbitrator shall be binding except for the grounds for review set forth in article seventy-five of the civil practice law and rules, and provided further that where the amount of such master arbitrator's award is five thousand dollars or greater, exclusive of interest and attorney's fees, the insurer or the claimant may institute an action in a court of competent jurisdiction to adjudicate the dispute de novo. [16]

The provisions regarding No-Fault insurance arbitration remained in the recodification of the Insurance Law enacted in Chapters 367 and 805 of the Laws of 1984. The arbitration provisions were set forth in § 5106, and subdivisions (b) and (c) now read as follows:

> (b) Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party benefits, or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent. Such simplified procedures shall include an expedited eligibility

> hearing option, when required, to designate the insurer for first party benefits pursuant to subsection (d) of this section. The expedited eligibility hearing option shall be a forum for eligibility disputes only, and shall not include the submission of any particular bill, payment or claim for any specific benefit for adjudication, nor shall it consider any other defense to payment.
>
> ***7** (c) An award by an arbitrator shall be binding except where vacated or modified by a master arbitrator in accordance with simplified procedures to be promulgated or approved by the superintendent. The grounds for vacating or modifying an arbitrator's award by a master arbitrator shall not be limited to those grounds for review set forth in article seventy-five of the civil practice law and rules. The award of a master arbitrator shall be binding except for the grounds for review set forth in article seventy-five of the civil practice law and rules, and provided further that where the amount of such master arbitrator's award is five thousand dollars or greater, exclusive of interest and attorney's fees, the insurer or the claimant may institute a court action to adjudicate the dispute de novo.

Insofar as is here relevant, the No-Fault Insurance Regulations promulgated by the Superintendent of Insurance provided that a master arbitrator may vacate or modify a hearing arbitrator's award where it "was incorrect as a matter of law (procedural or factual errors committed in the arbitration below are not encompassed within this ground)" (11 NYCRR 65.18 [a] [4]). This regulatory language was carried over into the revised Regulations promulgated in 2002, in 11 NYCRR 65-4.10 (a) (4). [17] A master arbitrator may also vacate or modify a hearing arbitrator's award under certain other grounds also (*see* 11 NYCRR 65-4.10 [a]). [18]

***8** Discussion

ATIC's contention in its master arbitration appeal that Rutland was an entity formed by a No-Fault insurance fraud ring has not been pursued in this Article 75 proceeding and, therefore, is not before this Court. Remaining is ATIC's contention that Arbitrator Bishop failed to follow well settled law that a medical provider applicant in arbitration must meaningfully refer to, or rebut, the conclusions set forth in the peer review and/or IME report and, therefore, Master Arbitrator Ancowitz's affirmance was erroneous.

The proper standard of review by a No-Fault insurance master arbitrator is whether he or she reached their decision in a rational manner, i.e., whether it was arbitrary and capricious, irrational, or without a plausible basis, or incorrect as a matter of law; the master arbitrator may not engage in an extensive factual review, which includes weighing the evidence, assessing the credibility of various medical reports, and making independent findings of fact (*see Matter of Petrofsky v Allstate Ins. Co.*, 54 NY2d 207 [1981]).

The standard for Article 75 court scrutiny of a master arbitrator's review of a hearing arbitrator's award in terms of whether there was an error of law is whether it is so irrational as to require vacatur (*see Matter of Smith v Firemen's Ins. Co.*, 55 NY2d 224, 232 [1982]; *Matter of Acuhealth Acupuncture, PC v Country-Wide Ins. Co.*, 170 AD3d 1168 [2d Dept 2019]; *Matter of Acuhealth Acupuncture, P.C. v New York City Transit Authority*, 167 AD3d 869 [2d Dept 2018]; *Matter of Acuhealth Acupuncture, P.C. v Country-Wide Ins. Co.*, 149 AD3d 828 [2d Dept 2017]). The master arbitrator's determination of the law need not be correct, and mere errors of law are insufficient to set aside the master arbitrator's award; on questions of substantive law, the master arbitrator's determination must be upheld if there is a rational basis for his determination; if the master arbitrator's errors on a matter of law are irrational, his award may be set aside (*see Matter of Liberty Mut. Ins. Co. v Spine Americare Med., P.C.*, 294 AD2d 574 [2d Dept 2002]).

This Court has previously discussed the issue raised by ATIC — whether a medical provider applicant in No-Fault insurance arbitration must submit expert medical opinion evidence which specifically refers to and either discusses or rebuts the insurer's expert medical opinion evidence. This Court held that it need not, because the case law ATIC relied upon governs summary judgment motions in court, not No-Fault arbitrations. (*See American Tr. Ins. Co. v Right Choice Supply*, 78 Misc 3d 890 [Sup Ct, Kings County 2023].) Assessment of medical necessity entails a factual review of evidence and this is committed to the arbitrator's discretion (*id.*). As this Court wrote,

> In part, this Court's present determination is based on the additional provision in 11 NYCRR 65-4.10 (a) (4) which provides that "procedural or factual errors committed in the arbitration below are not encompassed within this ground." The reference to "factual errors" conveys impliedly that when it comes to assessing evidence for the purpose of fact-finding, an arbitrator has wider latitude and should not be required to comply with settled or established

law concerning what specific evidence suffices to refute the opposing party's evidence. This Court also takes into account the general proposition that the admissibility of evidence and the determination of issues of fact are left to the arbitrator's discretion (*see* *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 483 [2006] ["Manifest disregard of the facts is not a permissible ground for vacatur of an award ...."]; *Central Square Teachers Association v Board of Education of the Central Square Central School District*, 52 NY2d 918, 919 [1981] ["The path of analysis, proof and persuasion by which the arbitrator reached this conclusion is beyond judicial scrutiny."]; *Matter of Lipson v Herman*, 189 AD3d 440, 441 [1st Dept. 2020] ["error of fact ... will not result in the vacatur of an arbitrator's award"]; *Matter of* *Bernstein v On-Line Software International, Inc.*, 232 AD2d 336, 338 [1st Dept. 1996] ["It is well established, however, that arbitrators are not bound by the rules of evidence and may admit or deny exhibits on an equitable basis."]). In light of this case law with respect to the admissibility of evidence and the determination of issues of fact in arbitration, 11 NYCRR 65-4.10 (a) (4)'s "matter of law" should be limited in its breadth.

***9** (78 Misc 3d at 909-910.)

Therefore, this Court holds that Arbitrator Bishop did not err when she did not require a formal rebuttal from Rutland which would have specifically referred to and either discussed or rebutted ATIC's peer reviews and IME report. In point of fact, according to Arbitrator Bishop, Dr. Chiu's peer reviews did not even rise to the level of a prima facie case of lack of medical necessity. It was within the arbitrator's discretion to find that Dr. Chiu did not adequately support his conclusions. Ergo, the burden of proof did not shift to Rutland to rebut them.

The situation is a bit different with regard to Dr. Berman's IME report. Arbitrator Bishop held that ATIC did meet its initial burden of proof and the burden of proof then shifted to Rutland to prove medical necessity, which it did with examination report findings. Based on this Court's decision in *American Tr. Ins. Co. v Right Choice Supply*, however, a formal rebuttal was not necessary. It was within the arbitrator's discretion to find that the IME report was overcome by evidence which was not a formal rebuttal (clinical examination results).

This Court notes that Master Arbitrator Ancowitz did not consider the legal issue he was presented with in the master arbitration appeal. In the segment of his award reserved for a summary of the issues, he wrote, "Was the award irrational or incorrect as a matter of law?" (NYSCEF Doc No. 4, Master Arbitration Award at 2). This court's scrutiny of his master arbitration award reveals that he never discussed the issue posed by ATIC — that Rutland failed to submit a rebuttal meaningfully referring to and either discussing or rebutting ATIC's medical evidence (peer reviews and IME report). Master Arbitrator Ancowitz found no error in Arbitrator Bishop's analysis of the *factual issue* of medical necessity; it was neither arbitrary nor otherwise inform. Yet he did not mention the asserted error of law! In essence, his master arbitration award was incomplete. Despite that, however, this Court is constrained to uphold his award because the ultimate determination affirming Arbitrator Bishop was not irrational (*see Matter of Smith*, 55 NY2d 224; *Matter of Acuhealth Acupuncture, PC*, 170 AD3d 1168; *Matter of Acuhealth Acupuncture, P.C.*, 167 AD3d 869; *Matter of Acuhealth Acupuncture, P.C.*, 149 AD3d 828; *Matter of Liberty Mut. Ins. Co.*, 294 AD2d 574). The reason Master Arbitrator Ancowitz's award was not irrational is because Arbitrator Bishop was not required to apply the case law cited by ATIC regarding meaningfully referring to the insurer's peer reviews and IME reports, as this Court held in *American Tr. Ins. Co. v Right Choice Supply*. Even if Master Arbitrator Ancowitz ignored this legal issue, it was academic; Arbitrator Bishop was within her rights to ignore the absence of a formal rebuttal referring to ATIC's expert evidence. [19]

***10** "An arbitration award is indefinite or nonfinal for purposes of CPLR 7511 and subject to vacatur 'only if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy' [citations omitted]" (*Westchester County Corr. Officers Benevolent Assn., Inc. v Cheverko*, 112 AD3d 842 [2d Dept 2013]). While Master Arbitrator Ancowitz did not rule on the asserted error of law, it is inconsequential inasmuch as did not find that there was an error of law. Arbitrator Bishop's award determined the rights and obligations of the parties and resolved the submitted controversy, and her determination was sustained by Master Arbitrator Ancowitz. There has been a final and definite resolution of the parties' dispute (*see* *Civil Serv. Empls. Assn. v County of Nassau*, 305 AD2d 498 [2d Dept 2003]; *Matter of Paul v Insurance Co. of N. Am.*, 81 AD2d 671 [2d Dept 1981]; *cf. Papapietro v Pollack v Kotler*, 9

AD3d 419 [2d Dept 2004]; *Matter of Teamsters Local Union 693 [Coverall Serv. & Supply Co.]*, 84 AD2d 609 [3d Dept 1981]).

"This Court has recognized the authority of a court, before which there is a petition to confirm or to vacate an arbitration award, to remand the matter to the arbitration panel when the panel's award does not dispose of a particular issue raised by the parties or indicate the panel's intention with respect to it (*see, Matter of Ritchie Bldg. Co. [Rosenthal],* 9 AD2d 880), or when the award is ambiguous and not sufficiently explicit, since a court may not impose its own interpretation of the award (*see, Matter of Jolson [Forest Labs.],* 15 AD2d 901). Here, the award is not only ambiguous as to the intent of the panel, but also fails to address and dispose of the issues raised by the parties or to make any specific findings of fact or credibility. Given the diametrically opposed positions of the parties, the award, which apparently denied both sets of claims on the merits, cannot be harmonized or interpreted without speculation as to the panel's intent." (*Hamilton Partners v Singer*, 290 AD2d 316, 316-317 [2d Dept 2002].) Master Arbitrator Ancowitz's award is not ambiguous. His intent to affirm Arbitrator Bishop is quite manifest. His approval of her analysis is evident. There is nothing to speculate about how the master arbitrator treated the hearing arbitration award. Although he did not explicitly deal with the issue raised by ATIC asserting an error of law, Master Arbitrator Ancowitz was sufficiently explicit to enable this Court to review it without having to speculate about his intent.

Accordingly, this Court rejects ATIC's contentions in its petition. ATIC's rights were not prejudiced, the arbitrator was not partial, she did not exceed her powers, her decision was neither arbitrary nor capricious, it had a rational basis, and she did not render a nonfinal award.

None of the CPLR 7511 (b) (1) grounds cited by ATIC for vacating an arbitration award have been proved by ATIC. There was no corruption, fraud or misconduct in the arbitration process. There was no partiality. Neither arbitrator exceeded his or her power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. There was no failure to follow the procedure of Article 75.

Cross-Petition; Interest, Attorney's Fees, Return of Arbitration Filing Fee, Costs, and Disbursements

As mentioned above, Rutland sought in its cross-petition to confirm the arbitration determinations. Having found that no grounds exist to vacate them, the master arbitration award must be confirmed. Rutland is entitled to No-Fault compensation for health services in the principal amount of $2,713.58.

***11** Rutland also sought additional payments in the nature of interest, attorney's fees, return of the arbitration filing fee, costs, and disbursements.

Interest:
Where a claim is timely denied, interest at two per cent per month shall begin to accrue as of the date arbitration was requested by the claimant, i.e., the date the AAA received the applicant's arbitration request, unless arbitration was commenced within 30 days after receipt of the denial, in which event interest shall begin to accrues as of the 30th day after proof of claim was received by the insurer (*see* Insurance Law § 5106 [a]; 11 NYCRR 65-4.5 [s] [3], 65-3.9 [c]; *Canarsie Med. Health, P.C. v National Grange Mut. Ins. Co.*, 21 Misc 3d 791, 797 [Sup Ct, NY County 2008] ["The regulation provides that where the insurer timely denies, then the applicant is to seek redress within 30 days, after which interest will accrue."]). The plaintiff health care provider in *Canarsie Med. Health, P.C.* argued that where a timely issued denial is later found to have been improper, the interest should not be stayed merely because the provider did not seek arbitration within 30 days after having received the denial. The court rejected this argument, finding that the regulation concerning interest was properly promulgated; this includes the provision staying interest until arbitration is commenced, where the claimant does not promptly take such action. Rutland's arbitration request was received by the AAA on August 14, 2020 (*see* NYSCEF Doc No. 5, Rutland's Arbitration Request Form & Submission at 1), which was more than 30 days after ATIC's last denial of claim. Thus, interest on all of the claims herein accrued from August 14, 2020, not from the 30th day after proof of claim was received by ATIC. The end date for the calculation of the period of interest shall be the date of payment of the claims. In calculating interest, the date of accrual is excluded from the calculation (*see* General Construction Law § 20 ["The day from which any specified period of time is reckoned shall be excluded in making the reckoning."]). Where a motor vehicle accident occurred after April 5, 2002, interest is calculated at the rate of two percent per month, simple, on a pro rata basis using a 30-day month (*see* 11 NYCRR 65-3.9 [a]; *Gokey v*

Blue Ridge Ins. Co., 22 Misc 3d 1129[A], 2009 NY Slip Op 50361[U] [Sup Ct, Ulster County 2009]). CPLR 5004's nine percent per annum is superseded by Insurance Law § 5106 [a]'s two percent per month (*see Pro-Med Med., P.C. v MVAIC* (74 Misc 3d 130[A], 2022 NY Slip Op 50135[U] [App Term 2d Dept, 2d, 11th & 13th Dists 2022]).

Attorney's Fees:
After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, ATIC shall pay Rutland an attorney's fee equal to 20 percent of that sum total subject to a maximum fee of $1,360.00, as provided for in 11 NYCRR 65-4.6 [d].

Additionally, this Court sustains the $130.00 attorney's fee for preparatory services in connection with the master arbitration. This is in accordance with 11 NYCRR 65-4.10 [j] [2] [i].

Moreover, pursuant to 11 NYCRR 65-4.10 [j] [4], having successfully prevailed in this Article 75 proceeding, Rutland is entitled to an additional attorney's fee (*see Global Liberty Ins. Co. of NY v Nexray Family Chiropractic*, 178 AD3d 525 [1st Dept 2019]; *GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]).

***12** Rutland's counsel did not submit an affirmation specifying details with regard to work performed in this Article 75 special proceeding. It is not known whether an attorney or support staff performed the work. The cross-petition contains mostly boilerplate statements which could apply to most Article 75 proceedings to confirm No-Fault arbitration awards, with a few insertions specific to this particular claim. The same boierplate allegations have been submitted by Rutland's counsel in past Article 75 proceedings. The cross-petition asserted that Rutland "should be granted leave to serve an afirmation in order to set forth its resonable attroneys' fees in defending this action" (NYSCEF Doc No. 19, Cross-Petition ¶ 61).

A special proceeding, such as one commenced pursuant to CPLR 7511 to vacate an arbitration award, "is a civil judicial proceeding in which a right can be established or an obligation enforced in summary fashion. Like an action, it ends in a judgment (CPLR 411), but the procedure is similar to that on a motion (CPLR 403, 409). Speed, economy and efficiency are the hallmarks of this procedure." (Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C401:01.) Counsel should have included an affirmation containing details describing the work performed (*see Matter of Bay Needle Care Acupuncture, P.C. v Country Wide Ins. Co.*, 176 AD3d 695 [2d Dept 2019] [claim for hourly fee for prevailing on policy issue not substantiated with any time records]). It behooved counsel to do so considering the expedited nature of special proceedings.

In a Kings County No-Fault insurance case involving an appeal to the Court of Appeals, the court awarded $250.00 per hour but this was in connection with the litigation of a novel or unique issue (*see Viviane Etienne Med. Care PC v Country-Wide Ins. Co.*, 59 Misc 3d 579 [Sup Ct, Kings County 2018]). The issue in the case at bar was neither novel nor unique, especially since the preclusion rule for untimely assertions of lack of medical necessity is established law.

Consdering the factors delineated herein, this Court awards $375.00 for work performed by Rutland's counsel on this Article 75 proceeding. This Court considered the $70.00 per hour fee for policy issues litigated in arbitration or at the trial level, increased it to $125.00 per hour, and assumed that there was attorney involvement for two hours at the most in preparation of Rutland's papers. In addition, a $125.00 for a personal appearance in court is awarded. (*See* 11 NYCRR 65-4.6 [c].)

Return of Arbitration Filing Fee:

ATIC shall also pay Rutland $40.00 as reimbursement for the fee paid to the AAA (*see* 11 NYCRR 65-4.5 [s] [1]).

Costs and Disbursements:
As the prevailing party in this special proceeding, Rutland shall recover its costs and disbursements, to be taxed by the Clerk.

Other Requested Relief

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected.

Conclusion

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that:

(1) ATIC's petition to vacate the master arbitration award of Richard Ancowitz in AAA Case No. 99-20-1175-4211 is denied and this special proceeding is dismissed.

(2) Rutland's cross-petition to confirm said master arbitration award is granted.

(3) Said master arbitration award is confirmed in its entirety.

(4) Rutland is awarded the principal amount of $2,713.58 as No-Fault insurance health service benefits, along with simple interest thereon (i.e., not compounded) at two per cent per month on a pro rate basis using a 30-day month, computed from August 14, 2020 to the date of payment of the principal amount, but excluding August 14, 2020 from being counted within the period of interest.

***13** (5) After calculating the sum total of the principal amount of $2,713.58 plus the interest thereon, ATIC shall pay Rutland an attorney's fee equal to 20 percent of that sum total, subject to a maximum fee of $1,360.00.

(6) ATIC shall pay Rutland an attorney's fee of $130.00 in connection with the master arbitration.

(7) ATIC shall pay Rutland an attorney's fee of $375.00 for work performed by counsel on this Article 75 proceeding.

(8) Rutland shall recover from ATIC costs and disbursements as allowed by law to be taxed by the Clerk.

All Citations

Slip Copy, 79 Misc.3d 1236(A), 2023 WL 4987400 (Table), 2023 N.Y. Slip Op. 50814(U)

Footnotes

1 The notice of petition seeks vacatur of “the arbitration award issued by Arbitrator Wendy Bishop, Esq. and/or Master Arbitrator Richard Ancowitz, Esq. under Article 75 of the CPLR” (NYSCEF Doc No. 2, Notice of Petition at 1), but it must be deemed to seek vacatur of just the master arbitration award inasmuch as the latter is the final determination of the arbitration process. The No-Fault Regulations provide that “court review pursuant to an article 75 proceeding” is from the “decision of a master arbitrator” (11 NYCRR 65-4.10 [h] [1] [i]). In fact, a party may not appeal from a hearing arbitration award (*see Matter of Staten Is. Hosp. v USAA*, 103 AD2d 744 [2d Dept 1984]; *Matter of Griffith v Home Indem. Co.*, 84 AD2d 332 [1st Dept 1982]; *Matter of Lampasona v Prudential Prop. & Cas. Ins. Co.*, 111 Misc 2d 623 [Sup Ct, Kings County 1981]). “[T]he Legislature intended the provision of CPLR article 75 to apply only to the review of the awards of master arbitrators (*see,* Insurance Law § 5106[c])” (*Matter of Custen v General Acc. Fire and Life Ins. Co.*, 126 AD2d 256 [2d Dept. 1987]). It follows that if the hearing arbitrator's award is imperfect, this can affect judicial review of a master arbitration award affirming it.

2 Rather than denote the parties here as “Petitioner” and “Respondent” in discussion, the parties’ names are used. This is to facilitate the reader's understanding of the facts, arguments, analysis, and determination. This also minimizes confusion because the respondent in the underlying arbitration (ATIC) is not the respondent herein but rather is the petitioner herein. The respondent herein, Rutland, was not the respondent in the arbitration, but was the applicant.

3 Arbitrator Bishop wrote that the claimed amount in the arbitration request form was $2,713.58, which conflicts with the Form AR Arbitration Request Form (*compare* NYSCEF Doc No. 3 (Arbitration Award at numbered p 1) *with* NYSCEF Doc No. 5 (Rutland's Arbitration Request Form & Submission at 15).

4 Health service providers obtain standing to pursue No-Fault insurance compensation in arbitration by virtue of having received an assignment of benefits from the respective person claiming to have been injured in a covered motor vehicle accident; such person is often denoted as an “assignor.”

5 References to page numbers in NYSCEF filings lacking specified page numbers are to the PDF page numbers.

6 Paragraph 28 of the petition describes the AAA Case No. as 99-20-1175-4211, which was assigned to the master arbitration appeal. The original arbitration was assigned AAA Case No. 17-20-1175-4211 (*see* NYSCEF Doc No. 3, Arbitration Award at numbered p 1).

7 This statutory scheme was developed by New York's legislature in 1973, as part of a tradeoff whereby lawsuits for pain and suffering resulting from personal injuries in motor vehicle accidents were limited to instances of serious injury (*see generally* Insurance Law art 51; L 1973, ch 13, *as amended* L 1977, ch 892; John R. Dunne, *New York's No-Fault Automobile Insurance Law A Glimpse of the Past and a Glance at the Future*, 50 NY St BJ 284 [June 1978]; J. Benedict, *New York Adopts No-Fault: A Summary and Analysis*, 37 Albany L Rev 662 [1973]).

8 Although Insurance Law Article 51 does not mention the term “No-Fault,” shortly after the post-motor vehicle accident economic loss compensation system was enacted in 1973, the appellation “No-Fault” was adopted in common parlance to describe it.

9 This Court uses the term “health service bills” instead of “medical bills” because the No-Fault Law provides for reimbursement of “(i) medical, hospital ..., surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services; (ii) psychiatric, physical therapy ... and occupational therapy and rehabilitation ... and (iv) any other professional heath services” (Insurance Law § 5102 [b] [1]). Hence, the No-Fault insurance system encompasses not just “medical” services. In the instant case, the services at issue encompassed diagnostic testing, therapeutic injections, and chiropractic.

10 The prescribed claim forms are included within 11 NYCRR Part 65 (Regulation 68) Appendix 13. Besides Form NF-3 (verification of treatment by attending physician or other provider of health service), Appendix 13 contains Form NF-4 (verification of hospital treatment) and Form NF-5 (hospital facility form). Not every No-Fault insurance provider uses the prescribed forms; some utilize a HICF (Health Insurance Claim Form) or a UB-04 form more commonly used for inpatient outpatient claims billed by hospitals, healthcare facilities, and surgical facilities.

11 There is a prescribed assignment of benefits form (Form NF-AOB) in 11 NYCRR Part 65 (Regulation 68) Appendix 13.

12 The process of submitting a No-Fault claim to the insurer is governed by 11 NYCRR Subpart 65-3, which contains §§ 65-3.1 *et seq.*

13 Form NF-10 is also included within 11 NYCRR Part 65 (Regulation 68) Appendix 13.

14 This is the AAA's electronic case management and filing platform maintained on the Internet; it is known as “Modria,” which was the name of the company which developed it for the AAA (*see Liveblogging #ODR2014: The Developing Field of Online Dispute Resolution*, https://civic.mit.edu/index.html% 3Fp=1452.html [last accessed Mar. 19, 2023]; *Welcome to the Modria Resolution Center for the American Arbitration Association*, https://aaa-nynf.modria.com/ [last accessed Mar. 19, 2023]).

15 Among the more substantial changes in the 1977 legislation were the adoption of fee schedules to limit health service expenses and modifying the threshold categories for suing for noneconomic loss, i.e., pain and suffering.

16 Nothing in the Governor's Bill Jacket for Chapter 13 of the Laws of 1977 or other contemporary records comments on the provision adopting master arbitration review of hearing arbitrators' decisions, so it is not known why the master arbitration process was created (*see Matter of Bamond v Nationwide Mut. Ins. Co.*, 75 AD2d 812, 813 [2d Dept 1980], *affd* 52 NY2d 957 [1981]). This Court speculates that at least one reason was that No-Fault arbitration was compulsory and the Legislature desired to permit a party to an arbitration to seek review of the hearing arbitrator's award on the basis of an assertion of an error of law, which traditionally was not a basis for review in an Article 75 proceeding (*see Mott v State Farm Ins. Co.*, 77 AD2d 488 [3d Dept 1980], *revd sub nom. on other grounds Matter of Smith v Firemen's Ins. Co.*, 55 NY2d 224 [1982]).

17 Most non-No-Fault insurance arbitration awards cannot be vacated due to an error of law (*see Matter of Sprinzen v Nomberg*, 46 NY2d 623, 629-630 [1979]). No-Fault insurance arbitrations are different; an error of law can be the basis for reversal — by a master arbitrator. In that sense, the master arbitrator's review is broader than that of a court, since a court will not vacate an arbitration award due to an error of law (*see Matter of Petrofsky v Allstate Ins. Co.*, 54 NY2d 207, 211-212 [1981]; *Acuhealth Acupuncture, P.C. v Country-Wide Ins. Co.*, 176 AD3d 800, 802 [2d Dept 2019]).

18 11 NYCRR 65-4.10 (a) provides as follows:

> Grounds for review. An award by an arbitrator rendered pursuant to section 5106(b) of the Insurance Law and section 65-4.4 or 65-4.5 of this Subpart may be vacated or modified solely by appeal to a master arbitrator, and only upon one or more of the following grounds:
>
> (1) any ground for vacating or modifying an award enumerated in article 75 of the Civil Practice Law and Rules (an article 75 proceeding), except the ground enumerated in CPLR subparagraph 7511(b)(1)(iv) (failure to follow article 75 procedure);
>
> (2) that the award required the insurer to pay amounts in excess of the policy limitations for any element of first-party benefits; provided that, as a condition precedent to review by a master arbitrator, the insurer shall pay all other amounts set forth in the award which will not be the subject of an appeal, as provided for in section 65-4.4 or 65-4.5 of this Subpart;
>
> (3) that the award required the insurer to pay amounts in excess of the policy limitations for any element of additional first-party benefits (when the parties had agreed to arbitrate the dispute under the additional personal injury protection endorsement for an accident which occurred prior to January 1, 1982); provided that, as a condition precedent to review by a master arbitrator, the insurer shall pay all other amounts set forth in the award which will not be the subject of the appeal, as provided for in section 65-4.4 or 65-4.5 of this Subpart;
>
> (4) that an award rendered in an arbitration under section 65-4.4 or 65-4.5 of this Subpart, was incorrect as a matter of law (procedural or factual errors committed in the arbitration below are not encompassed within this ground);
>
> (5) that the attorney's fee awarded by an arbitrator below was not rendered in accordance with the limitations prescribed in section 65-4.6 of this Subpart; provided that, as a condition precedent to review by a master arbitrator, the insurer shall pay all other amounts set forth in the award which will not be the subject of the appeal, as provided for in section 65-4.4 or 65-4.5 of this Subpart.

19 One bill dealt with by Arbitrator Bishop had no corresponding denial of claim. Her determination with respect to this bill was not referred to in ATIC's master arbitration appeal or in this Article 75 petition.

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