American Arbitration Association

NO-FAULT ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

COMMUNITY MEDICAL CARE OF NY, PC a/a/o Injured Party	*Applicant*
−and−	
INTEGON NATIONAL INSURANCE COMPANY	*Respondent*

AAA ASSESSMENT 99-21-1219-0245 INSURER'S FILE NUMBER:

AAA CASE NUMBER:

MASTER ARBITRATION AWARD

I, Alana Barran, the undersigned MASTER ARBITRATOR, appointed by the Superintendent of Insurance and designated by the American Arbitration Association pursuant to regulations promulgated by the Superintendent of Insurance at 11 NYCRR 65-4.10, having been duly sworn, and having heard the proofs and allegations of the parties, make the following AWARD.

Part I. Summary of Issues in Dispute

Respondent/Appellant denied the claim for dates of service 5/18/2021 through 5/25/2021. Respondent/Appellant's position is that the Applicant/Appellee failed meet its obligation under 11 N.Y.C.R.R. § 65-1.1. The issue related to the dates of service here is whether lower no-fault arbitrator ("NFA") erred in finding that the Respondent/Appellant received notice of claim or injury as required by 11 N.Y.C.R.R. § 65-1.1. The NFA rejected Respondent/Appellant's lack of notice of claim defense and awarded the Applicant/Appellee's claim.

Part II. Findings, Conclusions, and Basis Therefor

Pursuant to 11 N.Y.C.R.R. § 65-4.10, a Master Arbitrator's review powers are limited to whether an arbitration award is incorrect as a matter of law, id. § 65-4.10(a)(4); in excess of the policy's limit, id. § 65-4.10(a)(2) & (3); incorrect with respect to an award of attorneys' fees, id. § 65-4.10(a)(5); or any ground enumerated in C.P.L.R. Art. 75 except for failure to follow Art. 75 procedures, id. § 65-4.10(a)(1). A Master Arbitrator is prohibited from

reviewing factual or procedural errors that may have occurred in the lower arbitration. Id. § 65-4.10(a)(4).

The role of the Master Arbitrator is not to conduct a de novo review of the issues decided by the no-fault arbitrator ("NFA"). Pursuant to C.P.L.R. Art. 75 and its interpretation by the Court of Appeals in Matter of Petrofsky v. Allstate Ins. Co., 54 N.Y.2d 207 (1981), an award resulting from compulsory arbitration may only be reviewed for whether it is "supported by evidence or other basis in reason," Mount St. Mary's Hosp. v. Catherwood, 26 N.Y.2d 493, 509 (1970); "arbitrary and capricious," Caso v. Coffey, 41 N.Y.2d 153, 158 (1976); or incorrect as a matter of law.

Factual and procedural errors committed during the course of the underlying arbitration are excluded from review. In the Matter of Richardson v. Prudential Prop. & Cas. Co., 230 A.D.2d 861 (App. Div., 2d Dep't. 1996), the Court stated that ("[The] master arbitrator exceeds his statutory power by making his own factual determination, by reviewing factual and procedural errors committed during the course of the arbitration, by weighing the evidence, or by resolving the issues such as the credibility of the witnesses.").

An arbitrator's award should be upheld if there is "any reasonable hypothesis" to support it, such as where the issue is "unsettled and subject to conflicting court decisions." *See* Motor Veh. Accident Indemn. Corp. v. Aetna Cas. & Surety Co., 89 N.Y.2d 214, 224 (1996). Also, an award cannot be "contrary to what could be fairly described as settled law." *See* State Farm Mut. Auto. Ins. Co. v. Lumbermens Mut. Casualty Co., 18 A.D.3d 762, 763 (App. Div., 2d Dep't 2005). An award is arbitrary and capricious if it does not follow "clear precedent." *See* State Ins. Fund v. Country-Wide Ins. Co., 276 A.D.2d 432, 432 (App Div., 1st Dep't 2000). An award may be found rational if any basis for such conclusion is present. See Caso v. Coffey, 41 N.Y.2d 153, 391 N.Y.S.2d 88, 359 N.E.2d 683 (1976).

A party seeking vacatur bears a "heavy burden" [Scollar v Cece, 28 AD3d 317 (1st Dept. 2006]), and, generally, the award under review must be upheld where the arbitrator " 'offer[s] even a barely colorable justification for the outcome reached' (Matter of Andros Cia Maritima, S.A. [Marc Rich & Co., A.G.], 579 F.2d 691, 704 [2d Cir 1978])." (Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d 471, 479 [2006], cert dsmd 548 US 940 [2006]).

It is within the province of the lower arbitrator to determine what evidence to accept or reject and what inferences should be drawn based on the evidence. See Mott v State Farm, 55 NY2d 224. In Petrofsky v Allstate, 54 NY2d 207, the Court of Appeals held that a master's powers of review do not encompass a *de novo* review of the matter presented to the lower arbitrator nor do they authorize the master arbitrator to determine the weight or credibility of the evidence.

The NFA considered the submissions of the parties, conducted a hearing and declared the case closed on September13, 2022. Ultimately, the NFA rejected Respondent/Appellant's defense and granted Applicant/Appellee's claim in its entirety. The issue related to the dates of service here is whether NFA erred in finding that the Respondent/Appellant received notice of claim or injury as required by 11 N.Y.C.R.R. § 65-1.1.

Respondent/Appellant's brief states that "[The claim was] denied as notice of [JC's] injury was not received by Integon National within 30 days of the date of the accident…

Respondents first notice of the injury which was a bill from Inspired Chiropractic, PC [was] received on May 13, 2021. The EIP, who was also the insured, never provided any notice of his injuries to Integon National." (Resp./Appellant brief pg.2).

Respondent/Appellant's brief also states that "the basis of [the NFA's] decision was that the Appellant Respondents received notice of the accident within the 30-day time period. However, the documents provided by responding clearly set forth that Integon National was not advised of any injuries until 36 days after the accident. To date, Respondent has not received any justification for the delay. [The NFA] it was arbitrary and capricious, and incorrect, in his decision." (Resp./Appellant brief pg.2).

Applicant/Appellee did not file a brief in opposition or at least there was none uploaded to this case file, despite being given an extension of time to file a brief. However, the lack of opposition does not preclude the master arbitrator tribunal from exercising its discretion to award in favor of the non-submitting party. See Rivera v Laport, 120 Misc. 2d 733 [Sup. Ct. NY Co. 1983]. Moreover, the regulations specifically hold that "a master arbitration award shall not be made in favor of an appearing party solely on the default of another party". See 11 NYCRR 65-4.10 [d] [8].

11 N.Y.C.R.R. § 65-1.1

> Action Against Company. No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.
>
> Notice. In the event of an accident, written notice setting forth details sufficient to identify the eligible injured person, along with reasonably obtainable information regarding the time, place and circumstances of the accident, shall be given by, or on behalf of, each eligible injured person, to the Company, or any of the Company's authorized agents, as soon as reasonably practicable, but in no event more than 30 days after the date of the accident, unless the eligible injured person submits written proof providing clear and reasonable justification for the failure to comply with such time limitation…

In Compas Med., P.C. v. Fiduciary Ins. Co. of Am., 51 Misc. 3d 66, 69, 31 N.Y.S.3d 734, 736 (N.Y. App. Term. 2016): the Court held: "We note that 11 NYCRR 65–1.1does not define what it means for a written notice to be "given," and the Court of Appeals did not elaborate when it stated that a claimant must "submit" a notice of claim (Hospital for Joint Diseases, *9 N.Y.3d at 317, 849 N.Y.S.2d 473, 879 NE2d 1291.* 1) However, 11 NYCRR 65–3.4 requires no-fault insurers to "forward to the applicant the prescribed application for motor vehicle no-fault benefits (N.Y.S. Form [NF–2]) accompanied by the prescribed cover letter (N.Y.S. Form [NF–1])," and the prescribed cover letter included in Appendix 13 to Regulation 68 states that the NF–2 application for No–Fault Benefits (which satisfies the written notice requirement [*see* 11 NYCRR 65–3.3(d)]) "must be sent to [the insurer] within 30 days of the accident date if your original notice to [the insurer] was not in writing." We hold that mailing the written notice of claim to the insurer within 30 days of the accident satisfies the requirement that written notice be "sent" to the insurer, as instructed by the prescribed cover letter, and that written notice be "given" to the insurer, as required by 11 NYCRR 65–1.1."

In Compas Med., P.C. v. ELRAC, Inc., 53 Misc. 3d 138(A), 48 N.Y.S.3d 265 (N.Y. App. Term. 2016) the Court held that "Contrary to plaintiff's argument, defendant conclusively established that the documents providing notice of the subject accident had not been mailed until July 7, 2010, by submitting a photocopy of the envelope in which defendant first received the documents, on which both the postage and the postmark are dated July 7, 2010, and that they therefore had not been submitted to defendant within the time frame required by 11 NYCRR 65-2.4 (b) (*cf.* CPLR 2103 [b] [2]; [f] [1]; *Kresch v Saul*, 29 AD3d 863 [2006]). Consequently, neither plaintiff nor plaintiff's assignor complied with a condition precedent to coverage (*see* 11 NYCRR 65-2.4 [a], [b])…Furthermore, the denial of claim forms advised plaintiff that the late notice of claim would "be excused should the applicant or the assignee provide reasonable justification for the failure to give timely notice" (*see* 11 NYCRR 65-3.3 [e]; *Radiology Today, P.C. v Citiwide Auto Leasing Inc.*, 15 Misc 3d 92 [App Term, 2d Dept, 2d & 11th Jud Dists 2007]). Defendant established that no such justification was provided. Thus, defendant's motion for summary judgment dismissing the complaint was properly granted (*see Great Health Care Chiropractic, P.C. v Elrac, Inc.*, 48 Misc 3d 139[A], 2015 NY Slip Op 51223[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015])."

11 N.Y.C.R.R. § 65-4.5 (o) (1) provides, in part, as follows:

> "(o) Evidence. (1) The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and department regulations".

In Charles Deng Acupuncture, P.C. v. Citiwide Auto Leasing, 59 Misc.3d 129(A), 100 N.Y.S.3d 609 (Table), 2018 WL 1528607 (N.Y.Sup.App.Term), 2018 N.Y. Slip Op. 50411(U) (N.Y. App. Term. 2018) the Court held that "Plaintiff's contention that the police accident report received by defendant was sufficient to constitute notice of the accident lacks merit as, even if the police report had been received by defendant within 30 days of the accident, it indicated that there were no injuries and, as a result, it did not identify an eligible injured person (*see* 11 NYCRR 65–2.4 [b]; *cf.* 11 NYCRR 65–3.3[c])."

I have carefully reviewed the brief, the record on appeal and the pertinent case law. Here, the NFA did not opine on the sufficiency of the "notice" provided to Respondent/Appellant on 4/23/2021 when the NFA found that "In support of its defense, respondent presented an affidavit dated 10/22/21 by Danuta Fudali, No-Fault Supervisor. Within her affidavit, Ms. Fudali asserted that notice of claim was not received within 30 days of the date of accident. However, within paragraph 6 of her affidavit, Ms. Fudali acknowledged that respondent received notice of the subject motor vehicle accident on 4/23/21 when it received a letter from the New York State Department of Transportation regarding some property damage as a result of said accident. Shortly thereafter, respondent sent to the EIP a Reservation of Rights Agreement on or about 4/28/21 wherein it stated the following: *We are in receipt of a loss report which alleges that you were involved in the above referenced accident.* Subsequently, respondent received a police report 20 days later on 5/17/21. The evidence demonstrates that respondent was aware of the within accident well within the requisite 30

days. I find that respondent has taken an unreasonably adversarial position here, especially since it sent the above-mentioned Reservation of Rights Agreement and received the police report within 30 days thereafter. Accordingly, I find that respondent did not sustain its "30-day rule" defense."

As the judge of the relevance and materiality of the evidence offered, that portion of the NFA's decision related to the specific sufficiency of the 4/23/2021 communication with the Respondent/Appellant is to be considered. A reading of the NFA's decision does not provide a clear analysis for the determination that the "notice" provided to the Respondent/Appellant on 4/23/2021 met the requirements of the Regulation under 11 N.Y.C.R.R. § 65-1.1. The NFA's finding that "The evidence demonstrates that respondent was aware of the within accident well within the requisite 30 days. I find that respondent has taken an unreasonably adversarial position here, especially since it sent the above-mentioned Reservation of Rights Agreement and received the police report within 30 days thereafter" is unclear as to whether the police report was received within 30 days of the accident, and, again, whether the evidence submitted is sufficient to render "notice" as required by 11 N.Y.C.R.R. § 65-1.1.

Under the circumstances, the proper course of action here is to vacate the award and remand for consideration as to whether the evidence submitted is sufficient to render "notice" as required by 11 N.Y.C.R.R. § 65-1.1.

The award is vacated and remanded for re-consideration as stated herein.

Accordingly,

1. ☐ the request for review is hereby denied pursuant to 11 NYCRR 65-4.10 (c) (4)

2. ☐ the award reviewed is affirmed in its entirety

3. ☒ the award or part thereof in favor of ☒ applicant
☐ respondent
hereby reviewed is vacated and
remanded for a new hearing ☒ before the lower arbitrator
☐ before a new arbitrator

4. ☐ the award in favor of the ☐ applicant
☐ respondent
hereby reviewed is vacated in its entirety

—or—

5. ☐ the award reviewed is modified to read as follows:

A. The respondent shall pay the applicant no-fault benefits in the sum of

_____ Dollars ($_____), as follows:

Work/Wage Loss $

Health Service Benefits	$
Other Reasonable and Necessary Expenses	$
Death Benefit	$
Total	$

B1. ☐ Since the claim(s) in question arose from an accident that occurred prior to April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from _____ at the rate of 2% per month, compounded, and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

B2. ☐ Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from _____ at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

C1. ☐ The respondent shall also pay the applicant _____ dollars ($_____) for attorney's fees computed in accordance with 11 NYCRR 65-4.6(d). ***The computation is shown below*** (attach additional sheets if necessary).

–or–

C2. ☐ The respondent shall also pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e). However, for all arbitration requests filed on or after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

C3. ☐ Since the charges by the applicant for benefits are for billings on or after April 5, 2002, and exceed the limitations contained in the schedules established pursuant to

section 5108 of the Insurance Law, no attorney's fee shall be payable by the insurer. See 11 NYCRR 65-4.6(i).

D. ☐ The respondent shall also pay the applicant forty dollars ($40) to reimburse the applicant for the fee paid to the Designated Organization for the arbitration below, unless the fee was previously returned pursuant to an earlier award

PART III. (Complete if applicable.) The applicant in the arbitration reviewed, having prevailed in this review,

A. the respondent shall pay the applicant

_____ for attorney's fees computed in accordance with 11 NYCRR 65-4.10 (j). The computation is shown below (attach additional sheets if necessary)

B. If the applicant requested review, the respondent shall also pay the applicant SEVENTY-FIVE DOLLARS ($75) to reimburse the applicant for the Master Arbitration filing fee.

This award determines all of the no-fault policy issues submitted to this master arbitrator pursuant to 11 NYCRR 65- 4.10

State of New York

County of New York. ☐ ss:

I, Alana Barran, do hereby affirm upon my oath as master arbitrator that I am the individual described in and who executed this instrument, which is my award.

12/28/22

Date

Master Arbitrator's Signature

IMPORTANT NOTICE

This award is payable within 21 calendar days of the date of mailing. A copy of this award has been sent to the Superintendent of Insurance.

This master arbitration award is final and binding except for CPLR Article 75 review or where the award, exclusive of interest and attorney's fees, exceeds $5,000, in which case there may be court review de novo (11 NYCRR 65- 4.10(h)). A denial of review pursuant to 11 NYCRR 65- 4.10 (c) (4) (Part II (1) above) shall not form the basis of an action de novo within the meaning of section 5106(c) of the Insurance Law. A party who intends to commence an Article 75 proceeding or an action to adjudicate a dispute de novo shall follow the applicable procedures as set forth in CPLR Article 75. If the party initiating such action is an insurer, payment of all amounts set forth in the master arbitration award which will not be subject of judicial action or review shall be made prior of the commencement of such action.

Date of mailing:_____