

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BRANSTEN
Justice

PART 6

JRWB DIAGNOSTIC IMAGING, PC.
ET AL

INDEX NO. 108679/04
MOTION DATE 8/31/04
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

- v -

AMER. TRANSIT INSURANCE CO.,
ET AL

The following papers, numbered 1 to 13 were read on this motion to/for vacate

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2
3 to 12
13

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided
in accordance with the
accompanying memorandum.

FILED
DEC 20 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12-17-04

Eileen Bransten
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

HON. EILEEN BRANSTEN

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

-----X
In the Matter of Arbitration between
JRWB DIAGNOSTIC IMAGING, P.C., a/a/o,
NADINA PETERSON, BLAISE ROBINSON,
LATISHA GARDNER, CHAKA BESS, SERGEY
LUZHENKOV, ELIAHU RAFAILOV, FRANTZ NOEL,
JEAN NOEL, RODERICK LLOYD, SOPHIA GRANT,
TATIANA PATEMKINA, NAUM STROK,
OMAR CARBADO, PERCY LYTCH, EDUARDO
RODRIGUEZ, HARRY ROSADO, SADYK ALIMAEV,
SIPAL TAHIR, CYNTHIA MACDONALD,
JAMES MOORE, JULIAN GAYLE, IGOR TOKAR,
DERICK WRIGHT, CATHERINE VOLEY, SAMV
FRANTS, VLADISLAV ZOLOTAREVSKIY, BETTY
DANTICA, CECILIA VILOTA, JUNIOR TEHLEY
and MARY PHILISTIN,

Petitioner,

– against –

AMERICAN TRANSIT INSURANCE COMPANY,
MVAIC, AIU INSURANCE COMPANY, INFINITY
INSURANCE COMPANY, COUNTRYWIDE
INSURANCE COMPANY, EAGLE INSURANCE
COMPANY, ALLSTATE INSURANCE COMPANY,
NATIONWIDE INSURANCE COMPANY,
PROGRESSIVE INSURANCE COMPANY, MUTUAL
SERVICES CASUALTY INSURANCE COMPANY,
TRAVELERS INSURANCE COMPANY, STATE
FARM INSURANCE COMPANY, GEICO,

Respondents.

-----X
PRESENT: EILEEN BRANSTEN, J.S.C.

FILED
DEC 20 2004
NEW YORK
COUNTY CLERK'S OFFICE

Index No.: 108679/04
Motion Date: 08/31/04
Motion Seq. No.: 001

Petitioner JRWB Diagnostic Imaging, P.C. ("JRWB"), a/a/o Nadina Peterson, Blaise Robinson, Latisha Gardner, Chaka Bess, Sergey Luzhenkov, Eliahu Rafailov, Frantz Noel, Jean Noel, Roderick Lloyd, Sophia Grant, Tatiana Patemkina, Naum Strok, Omar Carbado, Percy Lytch, Eduardo Rodriguez, Harry Rosado, Sadyk Alimaev, Sipal Tahir, Cynthia McDonald, James Moore, Julian Gayle, Igor Tokar, Derick Wright and Cecilia Vilota moves to vacate the arbitration awards between Petitioner and respondents American Transit Insurance Company ("American Transit"), MVAIC, AIU Insurance Company ("AIU"), Infinity Insurance Company ("Infinity"), Countrywide Insurance Company ("Countrywide"), Eagle Insurance Company ("Eagle"), Allstate Insurance Company ("Allstate"), Nationwide Insurance Company ("Nationwide"), Progressive Insurance Company ("Progressive") and Mutual Services Insurance Company ("Mutual") (collectively "Respondents").* Respondents oppose the petition.

Background

JRWB is a diagnostic imaging center located in Kings County, New York, and the assignee of persons who were involved in automobile accidents and allegedly received

* The petition has been discontinued with prejudice against respondents Travelers, State Farm and GEICO. Therefore, they are no longer parties to this proceeding.

treatment at the center. Each of the assignors, after various vehicle accidents, received an MRI at JRWB. Affirmation in Support of Petition (“Aff.”), at ¶ 2. In consideration for their MRI’s, each assigned JRWB the right to be reimbursed by their insurance companies – the Respondents, which are insurance companies required under the Comprehensive Motor Vehicle Insurance Reparations Act of New York State (“No-Fault Law”) to reimburse their insureds – JRWB’s assignors – for “basic economic loss” suffered as a result of their automobile accidents. Allstate, Progressive and American Transit’s Memorandum of Law in Opposition (“Opp. Memo.”), at 9.

After treating the assignors, JRWB submitted bills to Respondents for payment of no-fault benefits. Aff., at ¶¶ 6,7. Respondents each failed to pay JRWB, claiming, among other things, that the treatment was not medically necessary. Aff., at ¶ 8. As a result, JRWB filed a request to arbitrate and the parties each went to arbitration before a No-Fault Arbitrator. Aff., at ¶¶ 9,10. In each case, the arbitrator concluded that JRWB had no standing to demand payment because it did not prove the MRI’s were medically necessary, and the business was improperly licensed in violation of the Business Corporations Law (“BCL”). *See, e.g.*, Petition (“Pet.”), Ex. 5, at 2. The arbitrators made the following findings of fact:

- The MRI’s were performed by Open Ocean MRI, a business that listed JRWB on its letterhead and, in essence, controlled JRWB. Pet., Ex. 5, at 2.
- The names of two doctors, Jeffrey Lang, M.D. (“Dr. Lang”) and John T. Rigney, M.D. (“Dr. Rigney”), also appeared on the letterhead. *Id.*

- David Batsiyan (Mr. Batsiyan) owned and controlled Open Ocean MRI; he is not and never was a physician. *Id.*
- When each of the assignors had an MRI scan, no doctor was present. Instead, Dr. Rigney read the films from his home and dictated reports. *Id.*
- Open Ocean MRI created a stamp of Dr. Rigney's signature and would stamp the reports once a non-physician technician prepared them. *Id.*
- Dr. Rigney never saw the completed reports. *Id.*
- Open Ocean MRI also stamped Dr. Rigney's signature on treatment forms submitted to the insurance carriers; Dr. Rigney never signed or verified the claims to ensure that they were medically necessary. *Id.*
- Mr. Batsiyan controlled the business and dictated all medical practice for JRWB and Open Ocean MRI. On April 8, 2003, he pled guilty to the crime of scheming to defraud in the second degree and petit larceny. Open Ocean MRI pled guilty to scheming to defraud in the first degree. *Id.*

After reviewing the testimony of each of the parties and volumes of documentary evidence, the arbitrators found that JRWB did not prove that the MRI's were medically necessary. Pet., Ex. 5, at 2. The arbitrators also found that JRWB lacked standing to receive no-fault payments because it was not a properly-licensed medical provider. Specifically, the first arbitrator to hear the issue, Arbitrator Mellis, concluded that JRWB had no standing to collect payments because it was formed and operated in violation of Article 15 of the BCL. Based on this finding, each arbitrator subsequently denied JRWB's claims for payment. Aff.,

at 11. JRWB then requested review by a master arbitrator. Aff., at 13. The master arbitrator affirmed the arbitration awards, explaining that JRWB had no right to payment. Pet., Ex. 38.

In this Article 75 proceeding, JRWB moves to vacate the master arbitrator's decision, arguing that it was arbitrary, irrational and incorrect as a matter of law. Pet., at ¶ 421. Specifically, JRWB argues that it is not precluded from receiving payments because its contract with Ocean Open MRI is a proper business relationship between a professional medical corporation (JRWB) and a non-professional corporation (Open Ocean MRI). Aff., at ¶ 42. Alternatively, JRWB urges that even if it does have an improper corporate structure, it is not prevented from collecting benefits because of this violation and relies principally on *State Farm Mutual Ins. Co. v. Mallela*, 175 F. Supp. 2d 401 (E.D.N.Y. 2001) (holding that defendants had standing to collect no-fault payments even though they fraudulently obtained certificates of incorporation). Aff., at ¶ 55. It also points out that Respondents have not claimed that it improperly performed or failed to perform the MRI scans billed. Aff., at ¶ 109. Additionally, JRWB contends that the criminal charges brought against Open Ocean MRI and its principal have no bearing on JRWB's standing to receive benefit payments. Aff., at ¶ 143. Furthermore, it states that the arbitrator incorrectly considered standing at the arbitration because Respondents did not raise it as a defense. Finally, JRWB alleges that Respondents cannot disclaim payment because they did not timely deny JRWB's claims. Aff., at ¶ 157.

In opposition, Respondents argue that the issues before this Court were already decided by the arbitrators and that JRWB is impermissibly requesting this Court to make its own factual findings. Opp. Memo., at 3. Respondents also urge that the master arbitrator's decision was rational and based on the evidence. Opp. Memo., at 8. Finally, Respondents state that they are not precluded from denying JRWB's claims even though they failed to timely deny them because the claims are based on lack of coverage. *Id.*

Analysis

A master arbitrator is empowered to set aside an arbitrator's award only when it is "arbitrary and capricious, incorrect as a matter of law, in excess of the policy limits, or in conflict with other designated no-fault arbitration proceedings." *In re Smith v. Firemen's Ins. Co.*, 55 N.Y.2d, at 231; *In re Petrofsky v. Allstate Ins. Co.*, 54 N.Y.2d, at 212 (citations omitted). CPLR 7511 provides that a court can vacate the award of a master arbitrator only when it finds that the master arbitrator "exceeded his power." *In re Smith v. Firemen's Ins. Co.*, 55 N.Y.2d 224, 231 (1982); *In re Petrofsky v. Allstate Ins. Co.*, 54 N.Y.2d 207 (1981). Unless the court finds that the master arbitrator exceeded powers, it cannot vacate an award, even if it finds the arbitrator incorrectly applied a rule of law. *In re Smith v. Firemen's Ins. Co.*, 55 N.Y.2d, at 232 (emphasis added); *American Ins. Co. v. Messinger*, 43 N.Y.2d 184,

191 (1977) (“Errors in arbitration proceeding, whether of fact or law, are beyond scope of judicial review”).

When arbitration is compulsory, however, the standard of review is broader to protect the Due Process rights of the parties, and an award may be vacated only when the arbitrator’s determination is “without rational basis” or not “supported by evidence or other basis in reason.” *Matter of Shand v. Aetna Ins. Co.*, 74 A.D.2d 442, 443 (2d Dep’t 1980); *see also*, *Mount St. Mary’s Hosp. of Niagara Falls v. Catherwood*, 26 N.Y.2d 493, 507, *rearg. denied* 27 N.Y.2d 737 (1970); *Nationwide Ins. Co. v. Markuson*, 113 A.D.2d 1014, 1016 (4th Dep’t 1985), *app. dismissed* 67 N.Y.2d 647 (1986). “To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious.” *Matter of Motor Vehicle Accident Indemnification Corp. v. Aetna Casualty and Surety Co.*, 89 N.Y.2d 214, 223 (1996); *General Accident Fire and Life Assurance Corp. v. Avery*, 88 A.D.2d 739, 740 (3d Dep’t 1982). “The test thus applicable for review of no-fault arbitrations where error of law is in issue is essentially similar to that utilized for review of quasi-legislative determinations – whether *any* reasonable hypothesis can be found to support the questioned interpretation.” *Matter of Shand v. Aetna Ins. Co.*, 74 A.D.2d, at 454 (emphasis in original); David D. Siegel, *New York Practice*, § 603 (3d ed. 1999). Thus, in the no fault context, “the master arbitrator’s determination of the law need not be correct:

mere errors of law are insufficient to set aside the award.” *Matter of Liberty Mutual Ins. Co. v. Spine Americare Med., P.C.*, 294 A.D.2d 574, 577 (2d Dep’t 2002).

Here, the master arbitrator’s decision was rationally-based and supported by the evidence. He concluded that JRWB did not have standing to collect no-fault payments because it was improperly incorporated in violation of Article 15 of the BCL. He based this determination on, among other things, the testimony of Dr. Rigney, who stated that he read the films from his home, received \$50.00 per scan, and never saw the patients in person. *Pet.*, Ex. 5, at 2. The master arbitrator also examined the no-fault claim forms, which were stamped with Dr. Rigney’s signature, but not signed. *Id.* Finally, the master arbitrator considered testimony that Mr. Batsiyan controlled and owned JRWB, and that he was not a physician. *Id.* It is clear that the master arbitrator’s decision was supported by the facts and was rational.

Additionally, it is not the province of this Court to question whether the master arbitrator properly interpreted the law in reaching the conclusion that JRWB was precluded from receiving no-fault benefits because of its illegal incorporation. Even if this Court were to conclude that JRWB’s arbitration was compulsory, it cannot re-examine the master arbitrator’s interpretation of the law as long as his decision had *any* rational basis. *Matter of Shand v. Aetna Ins. Co.*, 74 A.D.2d, at 454; David D. Siegel, *New York Practice*, § 603 (3d ed. 1999). Case law, moreover, supports the master arbitrator’s conclusion that in an

action to recover no-fault benefits, proper licensing of the medical provider is a condition precedent to payment. *Valley Physical Med. and Rehab. P.C. v. New York Central Mutual Ins. Co.*, 193 Misc. 2d 675 (Sup. Ct. N.Y. County, Oct. 10, 2002) (citing *GEICO v. Southern Med. Devices*, Index No. 118101/93 [Sup. Ct. N.Y. County, Nov. 5, 1993]; *Northern Bronx Med. v. State Farm*, Index No. 105274/01 [Sup. Ct. N.Y. County, May 8, 2001]; *Advanced Care of New York v. Friscia*, Index No. 32528/99 [Sup. Ct. Kings County, February 22, 2000]). Therefore, the master arbitrator's decision has a rational basis and must be upheld.

Petitioner's reliance on *State Farm Mutual Ins. Co. v. Mallela*, 175 F. Supp. 2d 401 (E.D.N.Y. 2001), is misplaced. *Mallela*, a case holding that defendants have standing to collect no-fault payments even if they fraudulently obtain certificates of incorporation, is a federal District Court case that is not binding on this Court. Indeed, several New York cases have declined to follow *Mallela*. See, e.g., *Northern Bronx Med. v. State Farm*, Index No. 105274/01. Furthermore, in a subsequent case, *Universal Acupuncture Pain Services v. State Farm Mutual Auto. Ins. Co.*, 196 F. Supp. 2d 378, 385-86 (S.D.N.Y. 2002), a federal District Court acknowledged that *Mallela* is in conflict with established New York law and several arbitral decisions.

With regard to Petitioner's claim that the arbitrator improperly considered standing because the Respondents did not raise it as a defense, 11 N.Y.C.R.R. § 65-4.4(e) provides that

the “arbitrator may raise any issue that the arbitrator deems relevant to make an award.” Thus, the master arbitrator acted well within his power in considering Petitioner’s standing.

In the end, Petitioner has not met its burden of demonstrating that the master arbitrator either exceeded his power or failed to make an award upon any rational basis. As such, the petition must be denied and the arbitration awards must be confirmed. CPLR 7511(e) (“Upon denial of a motion to vacate or modify, [the reviewing court] shall confirm the award”).

Accordingly, it is

ORDERED that Petitioner’s petition to vacate the award is denied; and it is further

ORDERED that Respondents’ awards are confirmed.

This Constitutes the Decision and Judgment of the Court.

Dated: New York, New York
December 17, 2004

FILED

DEC 20 2004

NEW YORK
COUNTY CLERK'S OFFICE

ENTER



Hon. Eileen Bransten