Winning your No-Fault cases under the recent hobby vs CNA decision

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A previous article appeared on this website entited: "Can No-Fault Carriers Terminate Medical Benefits on the Grounds That An Insured Has Reached Maximum Medical Improvement". At that time, there was no Appellate level decisions on this issue, yet there existed a body of arbitration law which, for the most part, permitted termination of no-fault medical benefits based on "MMI".

The arbitrators justified MMI-based terminations by distinguishing between curative and maintenance treatment; only treatment which cures or improves the insured's overall medical condition is, according to these decisions, "necessary". See, e.g., Master Arbitration awards, NF 2720 and 2734. Since Insurance Law § 5102 requires that the carrier pay only for "necessary" expenses for medical treatment, the carriers were justified, according to the arbitrators, in terminating benefits once the insured had reached MMI.

Now along comes Hobby, a case brought by Michael Bersani of this law office. The Hobby plaintiff's chiropractic care was terminated based solely on MMI. Plaintiff, through her attorneys, avoided arbitration altogether by suing in Supreme Court, as was her right under Insurance Law § 5106. She then moved for summary judgment, arguing that neither Insurance Law § 5102 nor the regulations promulgated under it permitted the carrier to terminate medical benefits based on MMI.

On December 30, 1999, the Fourth Department ruled on Hobby, holding that "there is no authority for [terminating medical benefits based on MMI] under Insurance Law § 5102 (a)(1) or that section's applicable regulations". Hobby v CNA, __ AD2d __. __ NYS2d __, 1999 WL 1268197. Significantly, the Court also stated that "CNA's argument that 'maximum medical improvement' has been accepted for several years as a basis for denial of no-fault benefits by arbitrators is not dispositive; courts are not bound by the decisions of arbitrators through the principle of stare decisis". Hobby v CNA, supra.

Although the Fourth Department was clearly "not bound by the decisions of arbitrators", the issue that now arises is this: Are arbitrators bound by The Fourth Department's Hobby decision? What if stubborn arbitrators refuse to apply Hobby and abide instead by pre-Hobby arbitration law?

The unfortunate truth is that they can probably get away with it. This is because the grounds upon which an Appellate Court may vacate an arbitration award are limited. As noted by the Court of Appeals in Matter of Town of Callicoon, 70 N.Y.2d 907, 909, 524 N.Y.S.2d 389 (1987), an arbitration "award may not be vacated unless it is violative of a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power". Although the arbitrator's interpretation of the statute may be erroneous or inconsistent with seemingly relevant decisional authority (see, e.g., Matter of Maresco v. Rozzi, 162 A.D.2d 534, 556 N.Y.S.2d 731 (2nd Dept 1990); Fasanaro v. County of Rockland, 166 Misc.2d 152, 632 N.Y.S.2d 453 (Rockland Co. Sup. Ct. 1995),

affd., 237 A.D.2d 436, 656 N.Y.S.2d 876) the Courts will not reverse the arbitrator unless the decision is totally irrational. See, Matter of Town of Haverstraw, 65 N.Y.2d 677, 491 N.Y.S.2d 616 (1985). The Courts are even more reluctant to reverse an arbitrator on the law where, as with no-fault disputes, arbitration is voluntary rather than compulsory (see, Motor Vehicle Acc. Indemnification Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 214, 652 N.Y.S.2d 584 (1996).

Are no-fault insureds then doomed to suffer at the hands of stubborn arbitrators who refuse to apply the law as set forth in Hobby? No. Although arbitrators may not be bound by Hobby, lower courts in New York State are absolutely bound by it until or unless another appellate division rules contra. See, People v. Shakur, 215 A.D.2d 184, 627 N.Y.S.2d 341 (1ST Dept 1995); Mountain View Coach Lines v. Storms, 102 A.D.2d 663, 476 N.Y.S.2d 918 (2nd Dept 1984). Thus, no-fault insureds with Hobby-like cases should exercise their right under Insurance Law § 5106 to bring their cases to Supreme Court rather than to Arbitration.

In Supreme Court, summary judgment should be a simple matter. First, make sure that you get an admission, either in a bill of particulars or at deposition, that the only reason for termination of medical benefits is that the insured has reached "MMI". With this admission alone you can probably win on summary judgment since the reason for the denial of no-fault benefits was, as a matter of law, improper. See, Hobby v CNA, supra.
Nevertheless, to clinch victory you should also be armed with an affidavit from the treating physician stating that continued treatment is "medically necessary" because it helps alleviate the patient's pain and discomfort. Remember, the key is in the Statute itself, which states that the insurance company must pay "all necessary expenses" for medical treatment. Insurance Law § 5102(a)(1). You should therefor meet your burden of proving that the medical expense is "necessary".

Now let's look at how the insurance industry will react to Hobby and what we can do about that. We can expect that the no-fault carriers and their IME doctors will stop using the term "maximum medical improvement". Rather, the IME reports and Insurance denials may begin to closely track the language of Insurance Law § 5102, stating, for example, that the medical expenses are no longer "necessary" because the minimal benefit in pain relief is outweighed by the cost of the treatment.

Your response should be to move for summary judgment, arguing that the insurer's new language is semantic subterfuge for "MMI", which was held impermissible in Hobby. You need not worry about a cross-motion for summary judgment; the client's treating physician's affidavit stating that the pain treatment is medically necessary will create, at the very least, a question of fact for the jury as to whether the treatment was "necessary".

If you are denied summary judgment, and this is affirmed on appeal (which is unlikely) go to trial and you will probably win. Even though juries now seem reluctant to give big money awards to personal injury plaintiffs, the jury will likely be sympathetic to a plaintiff who is seeking only pain relief, and whose own insurance company claims that pain relief is not necessary.

Respondent's brief to Appellate Division

QUESTION PRESENTED

WHETHER THE MOTION COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO PLAINTIFF SINCE DEFENDANT HAD TERMINATED PLAINTIFF'S NO-FAULT BENEFITS BASED SOLELY ON ITS IME DOCTOR'S OPINION THAT SHE HAD REACHED "MAXIMUM MEDICAL IMPROVEMENT" AND SECTION 5102 OF THE INSURANCE LAW AND THE NO-FAULT REGULATIONS DO NOT PERMIT AN INSURANCE CARRIER TO TERMINATE MEDICAL BENEFITS ON THIS BASIS?

PRELIMINARY STATEMENT

Plaintiff suffered cervical soft tissue injuries when her vehicle was struck by another vehicle on April 19, 1996. Plaintiff's no-fault carrier terminated further medical benefits as of August 29, 1997. Plaintiff brought an action against defendant for wrongful termination of medical no-fault benefits (16-17). After depositions, plaintiff brought a summary judgment motion before the Hon. Charles Major (11). Judge Charles Major of the Onondaga County Supreme Court granted said motion by Decision dated December 7, 1998 (8-10) and Order dated November 23, 1998 (6-7). Defendant filed a timely appeal (3).

FACTS

In her complaint, plaintiff Bonnie Hobby sought to compel defendant to pay outstanding medical bills pursuant to the no-fault provisions contained in her motor vehicle insurance policy. After depositions, plaintiff moved for summary judgment.

Attached to plaintiff's motion papers was the deposition testimony of defendant's adjuster, Betsy King, in which Ms. King admitted that she terminated plaintiff's no-fault medical payments based solely on defendant's IME doctor's (Dr. Nastasi) opinion that plaintiff had reached "maximum medical improvement" ("MMI"). There was no other basis for denial (43-44).

Ms. King testified that her definition of MMI was that an insured is "not going to get any better with the treatment [she is receiving] . . .". King testified that there are no-fault "regulations" which permit the no-fault carrier to terminate benefits once a claimant has reached MMI (35). King further testified that treatment which maintains a person at the same level of comfort, without actually improving the symptoms, is not covered by no-fault under the regulations. She testified that no-fault does not cover "maintenance" (35). King terminated plaintiff's no-fault medical benefits despite plaintiff's treating physician's opinion that plaintiff had not yet reached MMI, and his recommendation that plaintiff continue chiropractic treatment (49-51).

Plaintiff also submitted in support of her motion an affirmation by Dieter Eppel, M.D., plaintiff's treating physician. Dr. Eppel stated that continued medical treatment, including physical therapy and medication, was necessary to improve plaintiff's medical condition, and that she had not yet reached MMI. He further stated that, even assuming plaintiff had reached MMI, said treatment was necessary to minimize the pain and discomfort plaintiff was suffering, even though said treatment might not actually "improve" her condition (58-59).

Plaintiff's attorney's submitted an affidavit in which he agreed that, for the purpose of the summary judgment motion, it should be assumed that plaintiff had reached MMI. It was plaintiff's attorney's position that MMI is not a proper grounds for denying no-fault medical benefits (13-15).

Defendant's answering papers included an attorney's affidavit which set forth that MMI is a proper grounds for denial of no-fault benefits (65-67), two Master No-Fault Awards agreeing with that opinion (78-83), plaintiff's deposition testimony and a affidavit by Anthony J. Natasi, M.D., defendant's IME doctor, in which he states that "there has been minimal if any improvement in her condition despite almost continuous medical, chiropractic and physical therapy treatment" and that plaintiff had reached MMI (84-85).

At plaintiff's deposition, she testified regarding the effects of the pain medication, chiropractic treatment and physical therapy she has been receiving. Specifically, plaintiff testified that the pain medication "relieve[s] her pain somewhat" (40), that the physical therapy helped "loosen" her stiff neck, and gave her relief for several days after each session (47) and that the chiropractic treatment "took some of the pain [away]" and loosened her neck so that she could move it more freely (54).

FACTS

POINT: THE MOTION COURT CORRECTY GRANTED SUMMARY JUDGMENT TO PLAINTIFF SINCE THERE WAS NO QUESTION OF FACT AS TO WHETHER CONTINUED MEDICAL TREATMENT WAS NECESSARY AND SECTION 5102 OF THE INSURANCE LAW AND THE NO-FAULT REGULATIONS DO NOT PERMIT AN INSURANCE CARRIER TO TERMINATE MEDICAL BENEFITS BASED ON "MMI".

It is uncontroverted that the medical treatment plaintiff was receiving alleviated her symptoms of pain and discomfort. It is also assumed, for the purpose of the summary judgment motion, that said treatment was not improving plaintiff's overall medical condition. The only issue is therefore a legal one, to wit; whether medical treatment which relieves pain symptoms and helps make a motor vehicle accident victim's day-to-day life more bearable is medically "necessary" within the meaning of the no-fault law.

No-fault carriers have justified terminating medical benefits based on MMI by distinguishing between curative and maintenance treatment. See, Master Arbitration Awards, NF 2720 and 2734 (78-81). According to the carriers, only treatment which cures or improves the insured's overall medical condition is "necessary". Since Insurance Law § 5102 requires only that the carrier pay for "necessary" treatment, the carriers claim they are justified in terminating benefits once the insured has reached MMI.

The argument is specious and Judge Major correctly rejected it. In his Decision, Judge Major stated:

The Court finds nothing in the no fault statute, in the regulations, for example, 11 NYCRR 65.15, or the case law, which limits the no fault medical benefits to the time of maximum medical improvement.

Here, the plaintiff is receiving relief from pain and discomfort for injuries received by the treatment rendered. 11 NYCRR 65.15(o)(1)(vi) refers to services "necessary for the treatment of the injuries sustained."

The Court finds that the continuing relief of pain of an injured person is treatment covered by the No Fault Law and the regulations.

Indeed, neither the Statute nor the legislative history permit the carrier to terminate medical benefits based on MMI. The Statute provides that the insurer must pay for "all necessary expenses incurred for: medical, hospital . . . service . . . any other professional health services" up to $50,000 (Insurance Law §5102; See also, 11 NYCRR §65.12). The insurance regulations promulgated by the Superintendent of Insurance provide that the term "any other professional health services" is "limited to those services that are required, or would be required, to be licensed by the State of New York if performed within the State of New York [e.g., chiropractic and physical therapy treatment] (11 NYCRR §65.15[o][1][vi]). The regulations further provide that "professional health services should be necessary for the treatment of the injuries sustained . . ." 11 NYCRR §65.15[o][1][vi]).

Since neither the Statute nor the regulations mention the term "MMI", but rather refer to "all necessary expenses" and "health services necessary for the treatment . . .", the real issue is whether medical treatment which relieves pain symptoms and helps make a motor vehicle accident victim's day-to-day life more bearable, but does not improve her overall medical condition, is medically "necessary" within the meaning of the no-fault law.

The intent of the drafters of a statute or regulation can be ascertained from the words and language used (McKinney's Cons Laws, Statutes, Book 1, § 94, p. 188). The drafters of Insurance Law § 5102 used the adjective "all" in conjunction with the term "necessary [medical] expenses". Thus, it can be discerned that the drafters intended to give the term "necessary" a broad, all inclusive meaning.

Further, 11 NYCRR §65.15(o)(1)(vi), which requires that the insured pay for any professional health services (i.e., chiropractic treatment and physical therapy) which are "necessary for the treatment of the injuries sustained", nowhere distinguishes between curative treatment and pain treatment. It simply says "treatment", which is again all-encompassing.

Thus, the term "necessary" and the term "treatment" include pain treatment. This plain meaning can be derived not only from a common-sense reading of the Statute and Regulations, but also from the way medicine is practiced. Medical professionals have a duty to eliminate discomfort and pain whenever possible, even though such treatment does not "cure" the patient. This duty, recognized since antiquity, is embodied in the Hypocratic Oath (England, Elizabeth, The Debate on Physician-Assisted Suicide", 16 Pace Law Rev 359, 421, FN 34; Bouvia v Superior Court of the State of California for the County of Los Angeles, 179 Cal.App.3d 1127, 1147, 225 Cal.Rptr. 297, 308 [1986]).

A large portion of modern medicine is aimed at reducing pain or discomfort or stabilizing a medical condition rather than at curing. For example, terminal cancer patients receive morphine, diabetics receive insulin, and pain medication is diagnosed to treat migraine headaches, all as part of necessary medical treatment, even though these prescriptions do not aim at improving the overall medical condition of the patient.

The carriers often contend that MMI acts as a necessary stop-gate to life-time medical treatment of great cost but insignificant medical value (See, Master Arbitration awards, supra, at pages 78-83 of Record). Again, this argument is not anchored in a fair reading of the Statute and regulations. The legislature did provide a stop-gate to unlimited no-fault medical expenses. That stop-gate is not,

however, MMI, but rather the $50,000 no-fault limit. If the legislature had intended to enact a separate MMI stop-gate, it would have done so. For example, it did provide a 3-year stop-gate for lost wages, yet provided no time limit for medical treatment (Insurance Law § 5102[a][2]).

Finally, the carrier's position finds no support in the legislative history. Before the No-Fault law was enacted, a victim of a motor vehicle accident could bring an action in Supreme Court against the negligent party for even the most minor injuries. If plaintiff suffered pain symptoms as a result of the accident, she could plead, prove and be compensated for medical treatment aimed at alleviating that pain, even if such treatment would not bring her any overall medical improvement. No law existed which would deny a plaintiff the right to plead, prove and be compensated for her pain treatment after she reached "MMI".

The no-fault law did not change this. Instead, it simply re-allocated the responsibilities so that the no-fault carrier would be responsible for paying for the first $50,000 of medical treatment and lost wages. If the injury was not "serious", the insured's rights to recovery ended here. In sum, the no-fault carrier was to be the exclusive provider of compensation for non-serious injuries. In terminating treatment of injuries based on MMI, the no-fault carrier breaches its duty to provide necessary medical treatment up to the $50,000 limit for such injuries (see, Insurance Law § 5102).

Defendant contends that several Master No-Fault Awards constitute Stare Decisis, and are therefore controlling on this Court (Defendant's Brief, 4). First, this argument turns the law on its head. This Court is not bound by interpretations of law found in arbitrators' Awards, but rather the arbitrators will be bound by this Court's interpretation of the law (McKinney's Cons Laws, Statutes, Book 1, § 72, p. 143). Second, the arbitration Awards themselves show that the Arbitrators have split on whether "MMI" can serve as grounds for terminating no-fault medical benefits (see, Master Arbitration Award 2720, which refers to a split among the Arbitration Awards, at page 80 of Record]). Finally, the American Arbitration Association is not a government "agency" to which this Court owes any deference, and in any event, this appeal is not from an AAA Arbitration Award, but rather from a Supreme Court Order. For all these reasons, this Court must, and should, now interpret Insurance Law § 5102 and the regulations de novo.

CONCLUSION

Plaintiff met her burden on her summary judgment motion by submitting proof that the medical treatment she was receiving alleviated her pain and discomfort and was medically necessary. Defendant failed to submit any evidence showing that the treatment failed to relieve plaintiff's pain symptoms, but instead maintained that it was justified in terminating medical benefits because plaintiff had reached MMI. Defendant failed to meet its burden in opposition to the motion because neither Insurance Law § 5102 nor the no-fault regulations provide "MMI" as a basis for termination of no-fault benefits.

This Court should affirm Judge Major's Order which granted summary judgment to plaintiff based on a proper interpretation of Insurance Law § 5102 and the no-fault regulations.

DATED: June 9, 1999
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