Verification of Questionable Lost Wage Claims Under the No Fault Law

During the first part of 2006 the New York Court of Appeals tackled the issue of reimbursed wages for undocumented aliens injured in construction accidents and the conflict between New York's Labor Law and the Federal Immigration statutes.

Our office has now successfully applied that decision in a No Fault lost wage claim and has saved our client, the insurer, from paying on the claim. We see this as a method for verifying future wage loss claims and thus making sure that only legitimate claims are reimbursed.

An analysis of the issue must start with a review of the Court of Appeals and United States Supreme Court cases. The tenet in both Balbuena v. IDR Realty LLC, etal., 6 N.Y.3d 338, 845 N.E.2d 1246 (2006), and Hoffman Plastic Compounds Inc. v. NLRB, 535 US2d 137, 2002, involved the knowledge of the parties involved in the employment relationship, and its interplay with the Federal Immigration Reform and Control act of 1986 (IRCA).

As the Court of Appeals stated in Balbuena, supra.:

> **[t]he most important component of the IRCA scheme was the creation of a new "[e]mployment verification system" designed to deter the employment of aliens who are not lawfully present in the United States and those who are lawfully present, but not authorized to work (see 8 USC § 1324a [b]).**
>
> **Under this system, aliens legally present and approved to work in the United States are issued formal documentation of their eligibility status by federal immigration authorities (see 8 USC § 1324 a [b][1][B], [C]), usually in the form of a "green card," a registration number or some other document issued by the Bureau of Citizenship and Immigration Services (see INS v National Center for Immigrants' Rights, Inc., 502 US 183, 195-196**

> [1991]; 8 CFR 274a.12 [a]). Before hiring an alien, an employer is required to verify the prospective worker's identity and work eligibility by examining the government-issued documentation. If the required documentation is not presented, the alien cannot be hired (see 8 USC § 1324a [a] [1]). An employer who knowingly violates the employment verification requirements, or who unknowingly hires an illegal alien but subsequently learns that an alien is not authorized to work and does not immediately terminate the employment relationship, is subject to civil or criminal prosecution and penalties (see USC § 1324a [a][1], [2]; [f][1]).
>
> Balbuena at page 8.

Thus, as the Court of Appeals held in Balbuena, since the employer knew that it was hiring employees who were not authorized to work, the employer could not shield itself from liability under the Labor Law by raising its own violations of IRCA.

The Court of Appeals continued their interpretation of IRCA by stating:

> In addition to the provisions relating to the responsibilities of employers, IRCA also declares that it is a crime for an alien to provide a potential employer with documents falsely acknowledging receipt of governmental approval of the alien's eligibility for employment (see USC § 1324c [a]). Similar to the INA, however, IRCA does not penalize an alien for attaining employment without having proper work authorization, unless the alien engages in fraud, such as presenting false documentation to secure the employment.

In the Hoffman case, supra., the alien employee presented false documents to the employer that appeared to verify his authorization to work in the United States, in violation of the IRCA. The employer violated the National Labor Relations Act the purpose of which is to protect the employee from unfair treatment by the generally large powerful employer. The employee in this case was laid off for

supporting a union organizing campaign. During a compliance hearing, the employee testified that he had never been legally admitted to or authorized to work in the United States. The Court determined that the NLRB was precluded from awarding the employee back pay. The back pay award to an illegal alien ran counter to the policies underlying the IRCA.

Thus, despite the public policy of promoting fairness in dealings between employer and worker, the worker was denied the protections and benefits of the NLRB due to his illegal immigration status and his obtainment of employment under false pretense.

In our case our client had performed an investigation that uncovered a social security number that was not unique and allegedly had been assigned to several individuals. Through questioning at an EUO it was learned that the individual did not have a valid Social Security number. An NF-6 was submitted by the employer and a W2 was submitted to prove his wages. However, the manner in which the injured party obtained his job was through submitting fraudulent documents. Thus we successfully argued the injured party was not entitled to wages as he fell within the exception carved out by the Court of Appeals.

When the regulations were amended a section was added regarding verifying lost wages. Section 65-3.5 (m) states:

> The failure of an employer, or other third party, to provide information necessary to establish proof of claim for lost wages on behalf of an applicant shall not be utilized as a basis for denial of claim based upon late submission of proof of claim.

It behooves an insurer to take a proactive approach to investigate lost wage claims. An insurer should have as much information as possible at their disposal to make a decision that will be upheld if challenged.

The following Master Arbitration decision was successfully argued by Craig B. Marshall, managing partner of Marshall & Marshall.

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Dispute Resolution Services Worldwide

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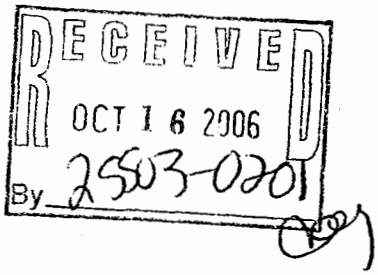
October 12, 2006



Marshall & Marshall, Esqs.
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Re: 17 991 R 10688 06
Mauricio Correa
and
Encompass Insurance Company

Claim File Number: Z6000162N7
412005047909
Accident Date: October 19, 2004
Pol#: US283791237 Pol Hld: Jerry Giardina

Dear Parties:

By direction of the Master Arbitrator, we herewith transmit to you the duly executed master award in this matter.

Very truly yours,

Anne Canini
Case Manager
917 438 1762
Caninia@adr.org

Enclosure(s)
cc:

Lawrence Fuchsberg, Esq. - New York State Insurance Department
Joseph Smeragliuolo - New York State Insurance Department
Robyn D. Weisman
Anthony Joseph Bianchino

AMERICAN ARBITRATION ASSOCIATION

No-Fault Arbitration Tribunal

In the Matter of the Review of the Arbitration between

MAURICIO CORREA *Applicant*

-and-

ENCOMPASS INSURANCE COMPANY *Respondent*

Heard by the ( ) AAA Expedited; ( ) HSA; ( ) IDA; or (X) AAA Forum.

Review Requested by: Respondent

AAA Case Number: 17 R 10688 06 Insurer's File Number: Z6000162N7

Insurance Department Case Number: 412005047909

MASTER ARBITRATION AWARD

I, 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 as 11 NYCRR 65.18, having been duly sworn, and having reviewed and considered the proofs and allegations of the parties, make the following AWARD.

PART I. Summary of Issues in Dispute

Whether the Lower Arbitrator exceeded his power or acted in an arbitrary or capricious manner in holding that the applicant failed to establish medical necessity in light of the fact that the Arbitrator found various issues regarding the credibility of the applicant's claim?

PART II. Findings, Conclusions, and Basis Therefor

Applicant/Appellant seeks reimbursement for lost wages in the amount of $30,000 from the date of the accident October 19, 2004. The arbitrator in a lengthy decision held that the Applicant was entitled to reimbursement for 19.86 weeks at $221.00 for a total of 44,389.06 and denied the rest of the claim.

The Arbitrator relied a great deal upon Regulation 68D allowing only documents submitted at the time of filing and conciliation to be considered. Numerous documents were submitted including a transcript of an Examination Under Oath, a "Faces of the Nation" search and medical records and reports.

The Assignor, following the pedestrian accident, apparently underwent arthroscopic surgery and then an anterior cruciate ligament reconstruction surgery on the right knee due to the accident. Applicant, up to the point of the arbitration hearing, claimed he was unable to work. Respondent claims the Applicant wasn't even involved in the accident and pointed out that the date of birth in the police report, ambulance report and initial emergency room report was different than the date of birth on the second ER report and that given by the Applicant during the EUO.
The arbitrator, however, opined that there was enough evidence to connect this Applicant to the accident. The Applicant testified under oath about the accident which was consistent with the police report and with the descriptions in the emergency room reports.

Respondent also argued that the Applicant was an undocumented alien with no valid social security number and therefore he should be precluded from being compensated for lost wages. Respondent submitted a search from "Faces of the Nation" which is based upon the social security number he listed on the Applicant's W-2. The Applicant's name, however, did not come up. The Arbitrator questioned the accuracy of the search as no information was provided by the Respondent regarding the data base or who did the search and therefore gave only limited weight to this evidence. The Arbitrator then relied on the case Balbuena v. IDR Realty et al. 2006 WL 396944 (N.Y.) to hold that an invalid social security number should not preclude compensation for lost earnings. The Arbitrator opined that the Court in that case distinguished the difference between the Immigration Reform and Control Act, and New York State's own labor law. The Court held New York's labor policies are applicable in dealing with those employed in New York State. Therefore, to determine if Applicant is entitled to compensation it is the No-Fault laws that would be controlling rather than the Immigration Reform and Control Act. Based upon the No-Fault regulations the arbitrator found the Applicant entitled to benefits regardless of being a properly documented worker.

Based upon the wage verification the Applicant was earning $276.25 per week and through No-Fault he would be entitled to 80%. The arbitrator awarded same up to $2000 per month. The arbitrator reviewed the Examination Under Oath and operative reports and letter and found the Applicant disabled from October 19, 2004 through March 3, 2005. There was no evidence submitted by the Applicant with respect to any disability to work after the March 3rd date. The Respondent apparently failed to submit any evidence that Applicant could return to work at any

time. Therefore, reimbursement was allowed for 19.86 weeks instead of the full amount of time Applicant was seeking. The total award was $4,389.06.

Respondent now seeks to overturn the arbitrator's decision declaring that the security number used by the Applicant was fraudulent as he obtained same through false means. Respondent cites the Balbuena v. IDR Realty case and indicates that the arbitrator erroneously interpreted the decision. The Court of Appeals in Balbuena stated in dicta, that the IRCA was designed to deter employment of aliens who are not lawfully present in the US and those who are but who are not authorized to work. Before hiring an alien the employer is required to verify the identity and work eligibility of the prospective employee. If not presented, the alien can not be hired. The Court of Appeals case goes further to state that it is a crime for an alien to provide an employer with false documents regarding eligibility. The alien would not be penalized for attempting or obtaining work unless the authorization is fraudulent.

The Respondent makes a valid argument as to the public policy involved and the purpose of IRCA. There was evidence submitted to the lower arbitrator which included Wage Verification Forms for McDonald's and a W-2 from the corporate name of McDonalds. In the Examination Under Oath, as well as other documents, it is apparent the social security number listed on the W2 was not the claimant's. The Respondent then deducts that the claimant presented to his employer false documentation. The Arbitrator agreed that the Applicant did not have a valid social security number. The appearance of fraud in this case is certainly forefront. I have to disagree with the Arbitrator ignoring the Federal Immigration policy and moving this case straight to the No-Fault regulations. I feel the public policy to prevent fraudulent claims and behaviors is of utmost importance. To allow such claim to exist in this case, when the Applicant was using an invalid social security number would be unjust and we would be supporting inappropriate acts.

I therefore, after reviewing all of the documents, briefs and prior decision, overturn the arbitrator's decision and find for the Respondent/Appellant. The award is vacated.

Accordingly,

1. ( ) the request for review is hereby denied pursuant to 11 NYCRR 65.18(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. (X) the award in favor of the (x) applicant / ( ) respondent. hereby reviewed is vacated in its entirety.

and/or

5. ( ) the award reviewed is hereby 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 Services Rendered in NYS	$_____
Heath Services Rendered outside NYS	$_____
Other Reasonable and Necessary Expenses	$_____
Death Benefit	_____
Total	$_____

B. The insurer shall compute and pay the applicant the amount of interest due from _____, at the rate of 2% per month, compounded, commencing 30 calendar days after proof of the claim therefor was received by the insurer and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65.15 (g) (3) (stay of interest).

C. The respondent shall also pay the applicant an attorney's fee for the arbitration below of _____ dollars ($_____) computed in accordance with the appropriate attorney's fee schedule. The computation is shown below (attach additional sheets if necessary).

D. The respondent shall also reimburse the applicant for the filing fee originally paid to the Insurance Department 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_____ _____dollars ($_____) for attorney's fees computed in accordance with 11 NYCRR 65.18(k). The computation is shown below

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 issued submitted to this master arbitrator pursuant to 11 NYCRR 65.18.

STATE OF NEW YORK)

SS:

COUNTY OF SUFFOLK)

I, ROBYN D. WEISMAN, ESQ., 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.

Date: September 28, 2006

Master Arbitrator's Signature

ROBYN D. WEISMAN

Master Arbitrator's Name

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 65.18(I)(1)). A denial of review pursuant to 11 NYCRR 65.18(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 the subject of judicial action or review shall be made prior to the commencement of such action.

Date of Mailing: OCT 12 2006