

## Modifying an Arbitration Award Due to ‘Evident Miscalculation’

**Judge Abraham J. Gafni (Ret.)**

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### ADR

Miscalculation of an award by an arbitrator represents one of the few grounds warranting modification. But what evidence and what procedures are required by a court when reviewing a contention of arbitrator miscalculation?

These issues were considered recently by the Supreme Court of Mississippi in *D.W. Caldwell v. W.G. Yates & Construction*, No. 2017-CA -00116- SCT, \_\_\_ So. 3<sup>rd</sup> \_\_\_ (May 10, 2018).

The matter involved a dispute between a general contractor and roofing subcontractor. During the arbitration that was neither recorded nor transcribed, “the arbitrator considered arguments, reviewed evidence, and heard witness testimony over the course of three days. He then reopened the proceedings for additional documentation before issuing his 13-page award ...” in favor of the subcontractor. The contractor filed a motion for clarification or correction of the arbitration award. The arbitrator, in dismissing the motion, concluded that “he lacked the authority to re-evaluate the merits of any claim already decided” as the award contained no computational or other errors,

The subcontractor filed a motion with the circuit court to confirm the award. The contractor countered with a motion to alter, amend or vacate, contending that the award contained an

evident miscalculation. In response, the subcontractor, filed a request to limit the presentation of proof at the argument on the contractor's motion.

The circuit court first considered the subcontractor's motion to limit proof. After oral argument, it determined that there was an evident miscalculation as it related to retainage. (This retainage determination was later rejected by the Supreme Court because retainage amounts had been completely removed from the award as this issue was not ripe for review.) On this basis, the circuit court allowed a second phase of the hearing at which the parties were permitted to present a witness and 14 additional exhibits.

Based on this additional evidence and testimony, the circuit court found that a "facially evident miscalculation" (unrelated to retainage) would result in an improper double payment to the subcontractor and reduced the award.

On appeal to the Supreme Court of Mississippi, the subcontractor argued that the circuit court had erred when it allowed additional evidence and testimony.

The subcontract agreement between the parties provided that the laws of the state of Mississippi relating to the modification of an arbitration award would control. It recites:

"Upon application made by a party to the arbitration ... the court shall modify or correct the award where: There is an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award."

[It should be noted that this language relating to the modification or correction of an award due to an "evident miscalculation" is virtually identical in Pennsylvania's Uniform Arbitration Act, 42 PS. sec. 7315(a), and differs minimally from the Federal Arbitration Act, (FAA) 9 U.S.C. sec. 11(a) which requires that the evident miscalculation be "material").

The question for the appellate court, therefore, was: "What amounts to an evident miscalculation in an arbitration award?"

Although it had never ruled on this question under state law, the court noted that several federal courts had addressed the issue of "evident miscalculation" when interpreting Section 11(a) of the FAA. The U.S. Court of Appeals for the Fourth Circuit had suggested "that it must be facially evident from the text of the award." The Eighth Circuit had stated "that the miscalculation must reflect a mathematical or computational error in the award." The Fifth Circuit's formulation determined that "'an evident material miscalculation' occurs 'where the record that was before the arbitrator demonstrates an unambiguous and undisputed mistake of fact and the record reflects strong reliance on that mistake by the arbitrator in making his award.'"

Finally, a Mississippi Court of Appeals opinion had decided that neither a mistake of fact nor misinterpretation of the law constituted an evident miscalculation. Rather, it consolidated the federal formulations, holding that such a miscalculation must include 1) a mathematical error apparent on the face of the award or, an evident material miscalculation when the “record ... demonstrates an unambiguous and undisputed mistake of fact and the record demonstrates strong reliance on that mistake by the arbitrator in making his award.”

In its opinion, the Supreme Court of Mississippi noted initially that when parties have bargained for arbitration, and the arbitration has been completed, courts should not retry the matter. “Arbitration is a substitute for and not a prelude to litigation. Accordingly, arbitration awards are considered final with very few, narrow exceptions outlined by statute.”

Rather, it stated, “Concerning the narrow exception at issue, the court finds that the ‘evident’ (plain, obvious or clearly understood) miscalculation must be apparent from nothing more than the four corners of the award and the contents of the arbitration record.” It concluded that if a court started to look to evidence “beyond the ‘face’ of the award or the arbitration record” this would allow “the parties an opportunity to retry the matter in front of a trial judge.” It concluded that, “We fail to find any law supporting the notion that our courts should grant parties an opportunity to present new evidence or witness testimony—even in the absence of an arbitration record- and we decline to create such law now.” Rather, a court should seek only to answer, “whether the arbitrator made a computational or mathematical error, apparent on the face of the award.” Moreover, “even if the judge was warranted in his initial determination that a miscalculation existed, it was error for the court to permit the examination of witnesses to determine the character and extent of the mistake.”

Finally, in seeking to determine whether there was such an evident miscalculation where the ability to investigate is limited because there is no transcribed record, a court may consider the:

- The arbitrator’s award.
- Written arguments by the attorneys in their trial court motions and appellate briefs.
- Oral arguments presented to the judge on the motion to limit proof.
- All documents agreed by the parties to have been part of the record before the arbitrator.

The appellate court noted that the written arguments and oral presentations before the court “may not have been identical to the arguments before the arbitrator.” However, the review of the documentary and tangible evidence that is part of the record is limited to whether there was an evident miscalculation. The introduction of new evidence or witness

testimony for the purpose of analyzing the substance of the dispute or determining whether an award should be modified is not permitted. A decision to modify must be based only on “the evident nature- the clear and obvious presence—of the error in the award.” “Witness testimony outside the confines of the arbitration record amounts to fact- finding by the trial court exceeding the scope of the court’s review.”

This opinion reaffirms how difficult it is to upset an arbitration award based on “evident miscalculation” other than in cases where a simple arithmetic error appears on the face of the award itself. Any other “evident miscalculation” must appear and emerge from the admitted documentary evidence or a transcribed arbitration record.

Accordingly, particularly in arbitrations where there is a fear of miscalculation because the arbitrator will be called upon to make numerous mathematical calculations, parties might be well- advised to not only recite in their memoranda the specific numbers in evidence and how they should be calculated but also require that the arbitrator set forth such calculations in the award itself.

In addition, if the award will consist of several distinct items, parties should consider requiring that the arbitrator identify the award for each such item separately rather than as a single amount. Thus, should miscalculation as to one item be identified, modification will be more easily made of that item alone without requiring the more complex vacation and/or modification of the award in its entirety. •

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