At an IAS Term, Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of January, 2014

P R E S E N T:

HON. KAREN ROTHENBERG,
Justice.

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GLAUCO TAMASO,
Petitioner,

- against - Index No. 502063/13

AMICA MUTUAL INSURANCE CO.,
Respondent.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, petitioner Glauco Tamaso (Tamaso) moves for a judgment, pursuant to CPLR 7511, setting aside that part of an arbitration award which denied petitioner compensation for his lost earnings, as arbitrary and capricious.

The instant proceeding arises out of personal injuries sustained by petitioner on July 27, 2010, when the vehicle he was operating was struck in the rear by another vehicle on the Manhattan side of the Williamsburg Bridge. Arbitration was held on January 15, 2013. At stake was $275,000, equal to petitioner's $300,000 Supplementary Uninsured Motorist

(SUM) policy limit less the $25,000 received in settlement from the tortfeasor's liability insurance carrier.

Pursuant to the arbitrator's award, petitioner was awarded $100,000 for past and future pain and suffering, plus an additional $13,657.19 for unpaid medical bills, less the $25,000 previously received from the tortfeasor, for a net award of $88,657.19. In issuing said award, the arbitrator specifically rejected petitioner's lost wage claim, stating in his award that claimant had failed to meet his burden of proof.

Petitioner contends that the evidence of his cognitive disability and inability to return to work was undisputed, and that as a result, the arbitrator's decision was arbitrary and capricious. Specifically, it is argued that the arbitrator overlooked or failed to consider the neuropsychological aspects of reports prepared by Dr. Richard DiBenedetto, respondent's examining neuropsychologist. According to petitioner, Dr. DiBenedetto essentially confirmed the findings of petitioner's treating neuropsychologist, Dr. Daniel Kuhn, who found that he remained permanently partially cognitively disabled, as far as his ability to work was concerned, as recently as October of 2012, based upon the results of tests he conducted at that time. A copy of Dr. Kuhn's report was annexed to petitioner's submissions to the arbitrator.

In opposition, respondent contends that the award was amply supported by the testimonial and documentary evidence, and that such evidence was expressly reviewed, considered and analyzed in both the award.

An SUM Arbitration award issued by Bernard Kuttner, Esq. (Kuttner, or the arbitrator) dated January 22, 2013, found petioner was not entitled to compensation for any lost wages beyond those already received by from no-fault

It is well settled that "this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties" (*Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co.*, 37 NY2d 91, 95 [1975]; *accord 166 Mamaroneck Ave. v 151 East Post Rd.*, 78 NY2d 88, 93 [1991] [arbitration is a favored method of dispute resolution in New York]). Hence, a reviewing court may not second-guess the fact-findings of the arbitrator (*see Matter of Liberty Mut. Ins. Co. v Sedgewick*, 43 AD3d 1062, 1063 [2007])

As stated by the Appellate Division in *Aftor v Geico Ins. Co.* 110 AD3d 262 [2013]), "[J]udicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley–Spear, Inc.*, 6 NY3d 471, 479 [2006]). "An arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached'" (*Matter of Allstate Ins. Co. v GEICO [Govt. Empls. Ins. Co.]*, 100 AD3d 878, 878 [2012], quoting *Wien & Malkin LLP v Helmsley–Spear, Inc.*, 6 NY3d at 479, quoting *Matter of Andros Compania Maritima, S.A. [Marc Rich & Co., A.G.]*, 579 F2d 691, 704 [2d Cir 1978]). In addition, an "arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice" (*Wien & Malkin LLP*, 6 NY3d at 479-480). [P]ursuant to

CPLR 7511(b)(1)(iii), a court may only vacate an arbitration award if the rights of the party moving to vacate the award were prejudiced by the arbitrator "exceed[ing] his [or her] power or so imperfectly execut[ing] it that a final and definite award upon the subject matter submitted was not made. Such an excess of power occurs only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL–CIO*, 6 NY3d 332, 336 [2005]).

The record before the court fails to demonstrate that the arbitrator's award was irrational, prejudicial, or in any way defective.

The arbitrator's decision of March 6, 2013, which is provided by respondent, but not petitioner, shows that the arbitrator specifically considered the reports of Dr. Kuhn and Dr. DeBenedetto, and rejected petitioner's arguments. In that decision, the arbitrator expressly considered and analyzed (1) the petitioner's testimony, which was found to be deficient ("numerous inconsistencies including claimant's testimony regarding lost time from work," "work history sporadic," "testimony of claimant 'unclear' as to his claimed wages, which varied greatly"); (2) the medical reports of all the doctors ("reports on behalf of respondent were more persuasive"); (3) specifically, the reports of Dr. DiBenedetto and Dr. Kuhn, the latter reporting "normal record" on some of the neuropsychological examinations he ordered, and "no evidence of neurological deficit". The arbitrator's March 6, 2013

decision, further, makes clear that the arbitrator did not believe that petitioner had established a causally related disability of any kind even prior to August of 2011.

Included in evidence found "persuasive" by the arbitrator was the affirmation of Dr. Adam N. Bender, a board-certified neurologist. Dr. Bender examined petitioner in November of 2010, four months after the accident, and in his affirmation, stated that he reviewed petitioner's medical records. After detailing the negative findings in the hospital records, Dr. Bender summarized the findings, which included no evidence of head injury, loss of consciousness or amnesia, as insufficient to diagnose, within a reasonable degree of medical certainty, post-concussion syndrome or a cognitive loss or disability.

In contrast, neither Dr. Kuhn nor Dr. DeBenedetto referred to any records or reports contemporaneous with the accident, nor did they dispute that those records referred to in Dr. Bender's report demonstrated a complete lack of objective medical evidence of any cerebral trauma in the accident. Since the arbitrator's rejection of the claim for SUM benefits for lost earnings "finds ample evidentiary support in the record and is rationally based," vacatur of the award is not warranted (*see State Farm Mut. Auto. Ins. Co. v Arabov,* 2 AD3d 531, 532 [2003]; *see also American Express Prop. Cas. Co. v Vinci,* 63 AD3d 1055, 1056). Accordingly, the court denies the motion and dismisses the petition.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.