

**Country-Wide Ins. Co. v Centro Metro Chiropractic
Care, P.C.**

2020 NY Slip Op 30766(U)

March 12, 2020

Supreme Court, New York County

Docket Number: 650407/2020

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

COUNTRY-WIDE INSURANCE COMPANY

Petitioner,

- v -

CENTRO METRO CHIROPRACTIC CARE, P.C.,

Respondent.

-----X

INDEX NO. 650407/2020

MOTION DATE 02/25/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ORDERED that the petition of Country-Wide Insurance is denied in its entirety, and the award of the Lower Arbitrator, as affirmed by the Master Arbitrator, is confirmed; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that Respondent shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

CASE DISPOSED

MEMORANDUM DECISION

In this Article 75 action, Country-Wide Insurance Company (Petitioner) moves to vacate a no-fault arbitration award issued in favor of Centro Metro Chiropractic Care, P.C. (Respondent). Respondent opposes the petition. For the reasons set forth below, the Court denies the petition and confirms the award.

BACKGROUND FACTS

Daniel Buenano Dorado, Respondent's assignor, was injured in a motor vehicle accident on February 17, 2018 and sought medical treatment from Respondent. Respondent thereafter submitted medical bills to Petitioner for reimbursement. Petitioner denied the claim based on Dorado's alleged failure to appear for an Examination Under Oath (EUO) scheduled on June 15, 2018, as well as a rescheduled examination on July 11 (NYSCEF doc No. 1, ¶¶ 3-8).

The parties then proceeded to arbitration before arbitrator Lucille S. DiGirolomo (the Lower Arbitrator) on July 29, 2019. In an award dated July 31, 2019, the Lower Arbitrator found in favor of Respondent herein and granted the claim (NYSCEF doc No. 3). The Lower Arbitrator found that Petitioner failed to establish the proper mailing of the EUO notices and Dorado's non-appearances for the scheduled EUOs. The Lower Arbitrator rejected as evidence the EUO transcripts supposedly showing Dorado's non-appearance as they were submitted late by Petitioner. Master Arbitrator Richard Ancowitz (the Master Arbitrator) confirmed the Award on appeal, finding that "the award was not arbitrary and capricious and clearly had a plausible basis" (NYSCEF doc No. 6).

Petitioner now seeks vacatur of the award. Petitioner argues that denial of the claim for no-fault benefits was properly denied in view of Dorado's failure to appear for EUO twice. Petitioner also contends that the affidavit of its employee Annie Persuad creates a presumption that the EUO

notices were properly mailed to Dorado pursuant to Petitioner's policy, and supports the claim that Dorado twice failed to appear for his EOU (NYSCEF doc No. 4, at ¶ 6, 139-141).

In opposition, Respondent argues that the award must be upheld as there is a rational basis for the Lower Arbitrator's findings. Specifically, Respondent points out that the Lower Arbitrator noted Persuad's affidavit merely states that she generated and signed the letters; but does not indicate she mailed the letters and therefore cannot be used to create a presumption of mailing. Moreover, Respondent maintains that the Lower Arbitrator did not exceed her power when she did not consider Petitioner's untimely evidentiary submissions as it was within her discretion to determine which evidence to consider.

Respondent also contends that this petition should be denied as Petitioner previously commenced a nearly identical petition in a linked matter, seeking the exact same relief sought herein, captioned *Country-Wide Insurance Company v NYC Sports Acupuncture, PC a/a/o Daniel Bueno Dorado* (Index No. 654594/2020). The Honorable Lynn R. Kotler dismissed that petition by decision and order dated January 14, 2020, in which she held that it was within the arbitrator's decision to refuse to entertain late submissions proffered by Petitioner. The decision further noted that the Master Arbitrator did not exceed her powers and confirmed the arbitration award issued in favor of the respondent, NYC Sports Acupuncture (NYSCEF doc No. 13).

In reply, Petitioner does not address the linked case, but draws the attention of the Court to the default judgment rendered on November 7, 2019 by New York State Supreme Court Judge Alan C. Marin (Marin Decision) declaring that Petitioner "owes no duty" to the defendant medical providers named therein, which includes Respondent, and ordering that all arbitrations, lawsuits and enforcement of awards or judgments arising from Dorado's accident be permanently stayed.

DISCUSSION

While Petitioner invokes CPLR 7511(b)(1)(i) and (iv) to vacate the Award, it does not make any allegations supporting a vacatur of the Award under these paragraphs, *i.e.*, facts constituting “corruption, fraud or misconduct in procuring the award” or “failure to follow the procedure of [Article 75]”, respectively. Rather, an examination of Petitioner’s papers show that Petitioner is seeking to vacate the Award essentially based on CPLR 7511(b)(1)(iii).

An arbitration award may be vacated pursuant to CPLR 7511(b)(1)(iii) where an arbitrator exceeded his or her power, including where the award violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power (*See Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480 [1st Dept 2016]). Where arbitration is compulsory, “judicial review under CPLR Article 75 is broad, requiring that the award be in accord with due process and supported by adequate evidence in the record” (*Motor Veh. Mfrs. Ass'n of U.S. v State of New York*, 75 NY2d 175 [1990]). While compulsory arbitration decisions require a stricter scrutiny than consensual ones, courts are still bound by the arbitrator's factual findings, interpretation of relevant documents, and judgment concerning remedies. A court cannot substitute its judgment for that of the arbitrator simply because it believes its interpretation is superior to that of an arbitrator who has made errors of judgment or fact (*Matter of New York State Correctional Officers & Police Benevolent Ass'n v. State of New York*, 94 NY2d 321 [1999]).

Awards are also not vacated even where the error claimed is the incorrect application of a rule of substantive law, unless the error is so ‘irrational as to require vacatur’ (*Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224, 232 [1982]). To be upheld, an award in an arbitration proceeding need only have evidentiary support and not be arbitrary and capricious (*See Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). Even though the decision

must have evidentiary support, "[a]ssessment of the evidence presented at an arbitration proceeding is the arbitrator's function rather than that of the court" (*Fitzgerald v Fahnestock & Co., Inc.*, 48 AD3d 246, 247 [1st Dept 2008], quoting *Peckerman v D & D Assocs.*, 165 AD2d 289, 296 [1st Dep't 1991]). Under Article 75, arbitrators are not bound by substantive rules of law, including those of evidence. (*Silverman v Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 [1984]). "An arbitral award cannot be attacked on the ground that an arbitrator refused to consider, or failed to appreciate, particular evidence or arguments" (*Genger v. Genger*, 87 AD3d 871, 874 n. 2 [1st Dept 2011]). Under CPLR 7511(b)(1)(iii), as long as an arbitrator addresses the issues submitted for resolution, vacatur will not be granted, unless the award is completely irrational -- that is, the resulting award goes beyond the issues before the arbitrator (*Rochester City Sch. Dist. v Rochester Teachers Ass'n*, 41 NY2d 578, 582, 1977]).

Here, Petitioner claims that the Lower Arbitrator exceeded her power when she granted Respondent's claim despite its failure to comply with Petitioner's request for Dorado to appear for an EUO as a condition precedent to reimbursement.

In granting Respondent's claim, however, Petitioner does not deny that the Lower Arbitrator evaluated the evidence before her and found it was insufficient to support a finding that Petitioner properly denied coverage. The Lower Arbitrator's decision was supported by a rational basis as the Lower Arbitrator found that Petitioner failed to establish both the proper mailing of the EUO notices and Dorado's failure to appear for the EUOs. The Court finds no basis to disturb this finding as it is supported by the record and precedent. Particularly, the Lower Arbitrator relied on *Points of Health Acupuncture P.C. v. Lancer Ins. Co.* (2010 NY Slip Op. 51455 [Sup. Ct., App. Term, 2d Dept 2010]) to support the position that it was Petitioner's burden to establish mailing and Dorado's failure to appear. While Petitioner insists that "Persuad's affidavit has created a

presumption of mailing” (NYSCEF doc No. 1, ¶ 32), the Court cannot replace the Lower Arbitrator’s finding that it does not. Assessment of evidence is the function of the arbitrator and not of the Court (*Fitzgerald*, 48 AD3d at 247).

Further, the Master Arbitrator correctly determined that the Arbitrator’s decision did not exceed her powers. The Master Arbitrator’s role was to review the determination of the Arbitrator to assure that the Arbitrator’s decision was rational, not arbitrary nor capricious, and not incorrect as a matter of law. (*Petrofsky v. Allstate Ins. Co.*, 54 NY2d 207, 209 [1981]). The Master Arbitrator found that it was within the Lower Arbitrator’s discretion to disregard late submissions, stating that: “the arbitrator is to be the judge of the relevance and materiality of all evidence offered” (NYSCEF doc No. 6 at 2). This determination is supported by legal precedent, as “the decision to entertain or refuse late submissions of evidence is within an arbitrator’s discretion. (*Global Liberty Ins. Co. v Coastal Anesthesia Servs., LLC*, 145 AD3d 644, 645 [1st Dept 2016

Petitioner also asks the Court to vacate the Award in view of the Marin Decision declaring that Petitioner owes no duty to Respondent. However, this argument is of no moment as post-arbitration decisions involving liability are not a proper ground for vacatur of an award. “While the preclusive effect of a pre-arbitration judicial decision may be sufficient to vacate an arbitral award... a post-arbitration judicial determination concerning the insurer's liability is not one of the limited grounds for vacating an arbitration award...” (*Hereford Ins. Co. v Iconic Wellness Surgical Servs., LLC*, 2019 NY Slip Op 50801(U) [Sup. Ct., App. Term, 1st Dept 2019] [internal citation and quotation marks omitted]).

As the Master Arbitrator’s decision to affirm the Lower Arbitrator’s award was rational and within the Master Arbitrator’s authority, and Petitioner has demonstrated no basis for vacatur pursuant to Article 75, the petition is denied, and the award is confirmed in its entirety.

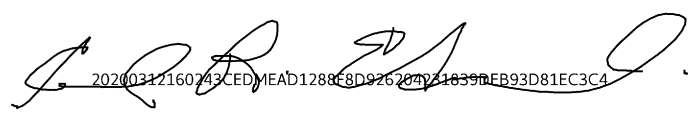
CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the petition of Country-Wide Insurance is denied in its entirety, and the award of the Lower Arbitrator, as affirmed by the Master Arbitrator, is confirmed; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that Respondent shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.


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3/12/2020
DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE