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

PRESENT: Hon. EILEEN A. RAKOWER PART 6

Justice

COUNTRY-WIDE INSURANCE COMPANY,

Petitioner,

- against-

EPIONE MEDICAL P.C. a/a/o DANIEL BUENANO DORADO,

Respondent.

INDEX NO. 650469/2020

MOTION DATE

MOTION SEQ. NO. 1, 2

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits _____	
Replying Affidavits	

Cross-Motion: Yes X No

Under Motion Sequence 1, Petitioner Country-Wide Insurance Company ("CWI") commenced this proceeding by submitting a Petition seeking "an Order pursuant to CPLR 7511(b)(1)(i), CPLR 7511(b)(1)(iii), and CPLR 7511(b)(1)(iv) vacating a lower Arbitrator's Award dated July 31, 2019 ("the Award") and a Master Arbitration award dated October 18, 2019, on the grounds that the lower Arbitrator exceeded his/her authority, or so imperfectly executed it, that a final and definite award upon the subject matter submitted was not made, and the Master Arbitrator erred in affirming the award." Respondent Epione Medical P.C. a/a/o Daniel Buenano Dorado ("Respondent" or "Epione Medical") opposed the Petition. CWI submitted a reply. No decision was rendered on the Petition.

Under Motion Sequence 2, CWI seeks an Order restoring the case back to the calendar in order for the Court to determine whether the Petition to vacate the Award should be granted. CWI contends that after the submission of the Petition, "an email from E-track was received on February 26, 2020 stating that the Petition was withdrawn with a stipulation." CWI states that there was no such stipulation. Respondent opposes the motion to restore the action or in the alternative, requests that the action be restored for the purpose of denying the Petition.

CWI's Petition to vacate the Award is restored because it appears that the Petition was marked withdrawn inadvertently. However, for the reasons set forth below, the Court denies the Petition and confirms the Award.

Factual Background and Procedural History

This matter arises from a motor vehicle accident that occurred on February 17, 2018, involving a vehicle registered in New York State and insured by CWI. Daniel Buenano Dorado ("Claimant") was the driver of a vehicle insured by CWI that was struck by another vehicle. Claimant sustained injuries in the accident and received medical services from Epione Medical. Epione Medical thereafter sought reimbursement from CWI for the medical services it had provided to Claimant. CWI denied Epione Medical's claim for reimbursement. According to the lower Arbitrator Lucille S. DiGirolomo's Award, CWI denied Epione Medical's claim "based on the Assignor's failure to appear for examinations under oath scheduled for June 15 and July 11, 2018."

This matter proceeded to arbitration on July 29, 2019, before Arbitrator Lucille S. DiGirolomo (hereinafter "the lower Arbitrator"). The lower Arbitrator held that "the facts in the current matter … remain the same as in AAA case number 17-18-1107-4306" (hereinafter, the "Prior Arbitration Proceeding") wherein she held that CWI had failed to submit any proof of Claimant's non-appearance. The lower Arbitrator noted that CWI had appealed her determination in Prior Arbitration Proceeding and that Master Arbitrator Ancowitz upheld the Award.

The lower Arbitrator noted that unlike the Prior Arbitration Proceeding, CWI had uploaded the EUO transcripts in a timely manner and submitted an affidavit from Annie Persuad which elaborated on the affidavit she submitted in the Prior Arbitration Proceeding and describes a mailing procedure for the EUO notices. The lower Arbitrator held that collateral estoppel applied and barred CWI's then pending matter before her. The lower Arbitrator held:

> It is clear from the record that the Respondent had a full and fair opportunity to be heard in AAA case number 17-18-1107-4306 and, in fact, appealed my previous award … Respondent herein is attempting to relitigate, by new evidence, what has already been litigated, determined and upheld by a Master Arbitrator. This is not permissible. Accordingly, Applicant is awarded $3,890.86 in full satisfaction of this claim.

CWI appealed the lower Arbitrator's decision to the Master Arbitrator. On October 18, 2019, the Master Arbitrator held "that the award was not arbitrary and capricious and clearly had a plausible basis" and affirmed the Award.

In the proceeding before this Court, CWI states that "Ms. Persaud's affidavit has created a presumption of mailing" and CWI "failed to rebut that the presumption of mailing" in the July 29, 2019 proceeding before the Arbitrator. CWI also contends that "there is a pending Declaratory Judgment action against this claimant and provider in the Supreme Court of the State of New York, New York County." In its reply, CWI states that Claimant was granted a declaratory judgment in that separate action (Index No. 654656/2019) on November 7, 2019 declaring that CWI "owes no duty" to the defendant medical providers named therein, which

includes Claimant and Epione Medical, and ordering that all arbitrations, lawsuits and enforcement of awards or judgments arising from Claimant's accident be permanently stayed.

Legal Standard

Pursuant to CPLR § 7511(b), the grounds for vacating an arbitration award are "(i) corruption, fraud or misconduct in procuring the award; … (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; … (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; [and] (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection."

Generally, an arbitration award made after all parties have participated will not be overturned merely because the arbitrator committed an error of fact or of law. *Motor Vehicle Acc. Indemnification Corp. v. Aetna Casualty & Surety Co.*, 89 NY2d 214, 223 (1996). "[W]here the arbitration is pursuant to the voluntary agreement of the parties, in the absence of proof of fraud, corruption, or other misconduct, the arbitrator's determination on issues of law as well as fact is conclusive." *Id.*

To establish that an arbitrator has "exceeded his power" under CPLR §7511, a party must show that the award "violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power" under CPLR §7511(b)(1). *New York City Tr. Auth. v Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 (2005).

Where parties submit to "compulsory arbitration involving no-fault insurance, the standard of review is whether the award is supported by evidence or other basis in reason." *Matter of Miller v Elrac, LLC*, 170 AD 3d 436, 436-437(1st Dept 2019). "This standard has been interpreted to mean that the relevant test is whether the evidence is sufficient, as a matter of law, to support the determination of the arbitrator, is rational and is not arbitrary and capricious." *Id.* "Although compulsory arbitration awards are subject to a broader scope of review than awards resulting from consensual arbitration, the scope of judicial review of such an arbitration award is still limited to whether the award is supported by the evidence or other basis in reason as appears in the record." *Id.* "With regard to fact and credibility findings, the Court should accept the arbitrator's credibility determinations, even where there exists conflicting evidence and room for choice." *Vieira-Suarez v. Syracuse City Sch. Dist.*, 93 NYS3d 628 (Sup. Ct, Onondaga County 2017), *aff'd*, 67 NYS3d 896 (4th Dept 2018), *leave to appeal denied*, 72 NYS3d 917 (4th Dept 2018), *and leave to appeal denied*, 109 NE3d 1156 (2018).

Further, the power of the master arbitrator to review factual and procedural issues is limited to "whether the arbitrator acted in a manner that was arbitrary and capricious, irrational or without a plausible basis." *Petrofsky v. Allstate Ins. Co.,* 54 NY2d 207, 212 (1981). Courts are required to uphold the determinations of the master arbitrator on questions of substantive law if there is a rational basis for the finding. *Liberty Mutual Ins. Co. v Spine Americare Medical, P.C.,* 294 AD2d 574, 577 (2d Dept. 2002).

"The failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent vitiating coverage." *Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468, 470 (1st Dept 2016). "To vitiate coverage, it must be shown that the notices for EUOs were timely and properly mailed to the claimants and that the claimants failed to appear." *Id.*

The doctrine of collateral estoppel precludes a party "from relitigating in a subsequent action an issue clearly raised and decided against that party in a prior action." *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 23 (1st Dept 2014). To successfully invoke the doctrine, "the issue in the second action must be identical to an issue which was raised, necessarily decided and material in the first action," and "the party to be precluded must have had a full and fair opportunity to litigate the issue in the earlier action." *Id.* at 34. "The doctrine of collateral estoppel is applicable to arbitration awards, including those rendered in disputes over no-fault benefits, and will bar relitigation of the same claim or issue." *Country-Wide Ins. Co. v Axial Chiropractic, P.C.,* 2016 WL 6139812, No. 652969/2016 [N.Y. Sup Ct, New York County 2016] (citing *Matter of Ranni [Ross]*, 58 NY2d 714, 717 [1982]; *Monroe v. Providence Washington Ins. Co.*, 126 AD2d 929 [3d Dept 1987]).

Pursuant to CPLR §7511(e), "upon the denial of a motion to vacate or modify" an award, the Court "shall confirm the award."

Discussion

CWI fails to set forth a basis for disturbing the Award. Here, the lower Arbitrator demonstrated a rational basis for her Award, including the basis for her finding that CWI was collaterally estopped from raising new evidence in the matter before her. Further, the Master Arbitrator properly concluded that lower Arbitrator did not exceed her powers and determined that the decision was rational and neither arbitrary, capricious nor incorrect as a matter of law.

CWI also asks the Court to vacate the lower Arbitrator's Award in light of a declaratory judgment declaring that CWI owes no duty to Epione Medical. However, post-arbitration decisions involving liability are not a proper basis to vacate an arbitration 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).

Based upon the foregoing, the Petition for an order vacating the lower Arbitrator's Award dated July 31, 2019 and affirmed October 18, 2019 by a Master Arbitrator is denied. The Award in the matter of *Epione Medical, PC a/a/o Daniel Buenano Dorado v. Country-Wide Insurance Company* - AAA Case No.: 17-18-1110-1667 is hereby confirmed in all respects.

Wherefore, it is hereby

ORDERED that Petitioner Country-Wide Insurance Company's motion to restore its Petition is granted (Motion Sequence 2); and it is further

ORDERED that the Petition of Country-Wide Insurance Company is denied in its entirety and this proceeding is dismissed (Motion Sequence 1); and it is further

ORDERED that the arbitration award in the matter of *Epione Medical, PC a/a/o Daniel Buenano Dorado v. Country-Wide Insurance Company* - AAA Case No.: 17-18-1110-1667 is hereby confirmed in all respects; and it is further

ORDERED that the Clerk shall enter a judgment in favor of Respondent *Epione Medical, PC a/a/o Daniel Buenano Dorado* against Petitioner Country-Wide Insurance Company as follows: (a) $3890.86 plus interest from November 13, 2018 at the rate of two per cent (2%) per month, together with (b) Respondent's attorney's fees of 20% of the total amount of first party benefits and any additional first party benefits, plus interest thereon subject to a maximum fee of $1360.00; together with (c) forty dollars ($40) to reimburse respondent for the fees paid to AAA unless the fee was previously returned; 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.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: September 8, 2020

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION