

**Country-Wide Ins. Co. v Surgicore of Jersey City,
LLC**

2020 NY Slip Op 33495(U)

October 20, 2020

Supreme Court, New York County

Docket Number: 652228/2020

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

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

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

Justice

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INDEX NO. 652228/2020

COUNTRY-WIDE INSURANCE COMPANY

MOTION DATE 10/17/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

SURGICORE OF JERSEY CITY, LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12 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 twenty (20) days of entry.

MEMORANDUM DECISION

In this Article 75 action, Country-Wide Insurance Company (Petitioner) moves, pursuant CPLR 7511(b)(1)(i), (iii) and (iv), to vacate a no-fault arbitration award (the Award) issued in favor of Surgicore of Jersey City, LLC (Respondent). Respondent opposes the petition. For the reasons set forth below, the Court denies the petition and confirms the Award.

BACKGROUND FACTS

Pelagia Moreno, Respondent's assignor, was injured in a motor vehicle accident on February 19, 2017 and sought medical treatment from Respondent. Respondent thereafter submitted medical bills to Petitioner for reimbursement for the facility fee for perioperative blocks administered during right shoulder arthroscopic surgery provided to Ms. Moreno (NYSCEF doc No. 1, ¶ 6).

Petitioner denied Respondent's claim and the matter proceeded to arbitration before arbitrator Steven Celauro (the Lower Arbitrator) on September 16, 2019. At the arbitration, Petitioner submitted a peer review by Dr. Charles Granatir, who stated that the services Respondent provided to Ms. Moreno, including the right shoulder arthroscopic surgery, were related to injuries not caused by the subject accident and thus lacked medical necessity (*id.*, ¶ 7). Respondent submitted rebuttal testimony from Dr. Dov Berkowitz, Ms. Moreno's treating physician, who opined that the surgery was medically necessary as Petitioner continued to experience pain for months after the accident and had previously been asymptomatic (NYSCEF doc No. 3 at 3).

In the Award dated September 16, 2019, the Lower Arbitrator found in favor of Respondent herein and granted the claim (NYSCEF doc No. 3). The Lower Arbitrator held that Respondent established its prima facie case and that the peer review submitted by Petitioner failed to establish

that the surgery lacked medical necessity (*id.* at 3). The Lower Arbitrator further held that, even assuming arguendo that Petitioner's peer review sufficiently shifted the burden of proof regarding medical necessity, Respondent successfully refuted the argument by establishing the "medical necessity for the surgery by a fair preponderance of the evidence" (*id.*). The Lower Arbitrator concluded that he deferred to the opinion of Ms. Moreno's treating physician rather than to the opinion of Petitioner's peer consultant, who was not responsible for the treatment (*id.*). On January 8, 2020, Master Arbitrator Victor J. Hershordfer (the Master Arbitrator) confirmed the Award on appeal, finding that "the Lower Arbitrator laid out his specific findings and reasoning as to how he rendered his decision," and concluded that the determination "was not arbitrary and capricious and/or incorrect as a matter of law" (NYSCEF doc No. 6 at 2).

Petitioner now seeks vacatur of the Award¹. Petitioner argues that the Lower Arbitrator's determination was irrational, not supported by the evidence, and arbitrary and capricious, and should not have been affirmed by the Master Arbitrator. Petitioner further contends the Master Arbitrator exceeded his power by disregarding Dr. Granatir's peer review and confirming the Award (NYSCEF doc No. 1, ¶ 22).

In opposition, Respondent argues that the Award must be upheld as the Award has evidentiary support, given that it was rendered after the Lower Arbitrator reviewed the entirety of the medical documentation, alongside the peer review report of Dr. Granatir, and the medical reports of others. Respondent also argues that Petitioner has not demonstrated that the Master Arbitrator exceeded his power in affirming the award, given that the Master Arbitrator's decision

¹ Petitioner notes that as the Master Arbitrator's award was received January 13, 2020 and the present petition was filed June 3, 2020, the petition is technically untimely pursuant to CPLR 7511(a) which mandates that petitions must be filed 90 days after receipt of a master award. The Court, however, accepts the petition for filing and consideration as the reason for the delay was the moratorium placed on all non-essential Court filings by the Administrative Order 78/20 of the Chief Administrative Judge dated March 22, 2020, in response to COVID-19 concerns (NYSCEF doc No. 7). Respondent also does not contest the Court's consideration of this petition.

reflects a thorough review of the Lower Arbitrator's decision and the evidentiary record of this proceeding.

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 the Lower Arbitrator's decision was irrational, but Petitioner does not deny that the Lower Arbitrator evaluated the evidence before him in finding that Petitioner did not properly establish a lack of causation and medical necessity for the treatment at issue. A thorough review of medical records conforms to the Lower Arbitrator's evidentiary duty under the no-fault regulations when adjudicating an insurer's defense based on a lack of medical necessity. (*Unitrin Advantage Ins. Co. v Lake Chiropractic. PLLC*, 2019 NY Slip Op 50953(U) (Civ. Ct. NY Co., 2019) ["a determination of medical necessity must be based on evidence in existence prior to the rendering of the service."]). The Lower Arbitrator's Award thus has a plausible basis and is predicated on the sufficiency of the evidence as it comes after a review of the entirety of the medical documentation. While Petitioner insists that Dr. Granatir's report definitively established

that the procedures undertaken by Ms. Moreno all lacked medical necessity, (NYSCEF doc No. 12, ¶ 9), the Court cannot replace the Lower Arbitrator's finding that Dr. Granatir's report was sufficiently rebutted by that of Ms. Moreno's treating physician. (See *Matter of Stolthaver Perth Amboy, Inc. v. JLM Mktg., Inc.*, 2017 NY Slip Op 31531(U) (Sup. Ct. NY Co., 2007) ["...a court may not review the weight the arbitrator gave conflicting evidence nor question the credibility findings of the arbitrator.]).

Further, the Court finds that Petitioner has demonstrated no basis to challenge the Master Arbitrator's decision to uphold the award rendered by the Lower Arbitrator. The Master Arbitrator found that the Lower Arbitrator properly considered both sides' arguments regarding the issues of causation and medical necessity, and concluded,

"The arbitrator found after studying the documents submitted by both sides that the applicant had established its prima facie case and the respondent failed to rebut the presumption of causation and also failed to establish lack of medical necessity. He then took it a further step by holding that even if he had found that the peer review had shifted the burden, the applicant's rebuttal had sufficiently refuted the peer review."

(NYSCEF doc No. 6 at 1-2).

The Master Arbitrator thus properly performed his role of reviewing the decision of the Lower Arbitrator and assuring that it was rational, not arbitrary nor capricious, and not incorrect as a matter of law. (*Petrofsky v. Allstate Ins. Co.*, 54 NY2d 207, 209 [1981]).

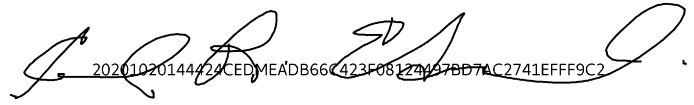
As the Master Arbitrator's decision to affirm the Lower Arbitrator's award was rational and within the Master Arbitrator's authority, and Petitioner has demonstrated no basis for vacatur pursuant to Article 75, the petition is denied, and the award is confirmed in its entirety.

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 twenty (20) days of entry.



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10/20/2020
 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