# 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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COUNTRY-WIDE INSURANCE COMPANY

Plaintiff,

- v -

ORTHOPRO SERVICES, INC.,

Defendant.

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**INDEX NO.** 652312/2020

**MOTION DATE** 10/17/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

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 (motion seq. 001) 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 cross-petition (motion seq. 001) of Respondent OrthoPro Services, Inc. for the confirmation of the Award is granted; and it is further

ORDERED that Respondent's application for attorney's fees in the amount of $1,590 is granted; and it is further

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

ORDERED that counsel for Respondent shall serve a copy of this order, along with notice of entry, on all parties within 20 days of entry.

## MEMORANDUM DECISION

In this Article 75 action, Country-Wide Insurance Company (Petitioner) moves, pursuant to CPLR 7511(b)(1)(i), (iii) and (iv), to vacate a no-fault arbitration award (the Award) issued in favor of OrthoPro Services, Inc. (Respondent). Respondent opposes and cross-moves for the confirmation of the Award.

For the reasons set forth below, the Court denies the petition to vacate the Award and accordingly grants the cross-petition.

## BACKGROUND FACTS

Nashima Daniels ("Daniels"), Respondent's assignor, was injured in a motor vehicle accident on October 16, 2016 and sought medical treatment from Respondent. As part of the treatment, Respondent provided Daniels with durable medical equipment, pursuant to a prescription. Respondent thereafter submitted two medical bills to Petitioner for reimbursement.

The first bill, in the amount of $1,857.35, covers the durable medical equipment provided by Respondent to Daniels on October 19, 2016. The bill was received by Petitioner on November 30, 2016 (NYSCEF doc No. 3). Petitioner requested additional verification on December 30, 2016 and January 30, 2017, to which Respondent responded on January 17, 2017 and February 14, 2017, respectively (*Id.*). Petitioner never responded to this claim (*Id.*).[1]

The second bill, in the amount of $101.24, covers the durable equipment provided by Respondent to Daniels on January 4, 2017. The bill was received by Petitioner on January 19, 2017 (NYSCEF doc No.5, p. 19). Additional verification was requested by Petitioner on February 17,

[1] In the Award, the Lower Arbitrator stated that "[t]here was no evidence submitted to show that Respondent replied to [Respondent's] correspondence or paid or denied the [first bill]." However, she made mention of a "general denial" issued by Petitioner on January 19, 2017 (NYSCEF doc No. 3, p. 2). Based on the papers submitted by the parties, the Lower Arbitrator seems to refer to a "Denial of Claim Form" (NYSCEF doc No. 5, p. 24) which does not specify the medical bill to which it pertains.

2017 and March 20, 2017, to which Respondent responded on March 1, 2019 and March 29 .2017, respectively (*Id.*). On May 9, 2017, Petitioner denied the request for reimbursement on the ground that Daniels should have claimed Workers Compensation benefits instead of pursuing no-fault arbitration benefits (NYSCEF doc No.5, p. 21).

The parties then proceeded to arbitration before arbitrator Eileen Casey (the "Lower Arbitrator") on September 27, 2019. In the Award, the Lower Arbitrator found in favor of Respondent herein and granted the claim in the total amount of $1,958.59, plus interest and attorney's fees (NYSCEF doc No. 3). The Lower Arbitrator reasoned that Respondent is entitled to reimbursement of expense reflected on the first bill as Petitioner failed to make any determination on this claim (*Id.*). As to the second bill, the Lower Arbitrator found that Petitioner is precluded from raising the defense of Worker's Compensation as Petitioner's denial of the second bill was not made within thirty (30) days from receipt of Respondent's responses to verification as required by 11 NYYCRR § 65-3.8 (*Id.*).

On December 30, 2019, Petitioner sought review of the Award, insisting that Daniel's claim should have first been heard by the Worker's Compensation Board (the "Board"; NYSCEF doc No. 5). Petitioner argued that the Lower Arbitrator lacked jurisdiction to issue the Award (*Id.*). Master Arbitrator Robyn Weisman, however, affirmed the Award, finding that it is supported by "reasonable hypothesis" "and was neither contrary to what could be fairly described as settled law nor arbitrary, capricious or violative of strong public policy." (NYSCEF doc No. 6, p. 3). The Master Arbitrator also awarded Respondent with additional attorney's fees (*Id.*, p. 4).

Petitioner now seeks vacatur of the Award.[2] Petitioner argues that under the New York State Workers Compensation Law, Daniels should be "covered portal to portal." Thus, Respondent

[2] Petitioner notes that as the Master Arbitrator's award was received January 21, 2020 and the present petition was filed June 8, 2020, the petition is technically untimely pursuant to CPLR 7511(a) which mandates that petitions must

must first apply with the worker's compensation carrier, and it would only be upon a denial issued from this source of benefits that Respondent would be entitled to collect no-fault benefits (NYSCEF doc No. 1).

In its opposition, Respondent argues that the petition fails to allege any "corruption, fraud or misconduct in procuring the award" required for vacatur under CPLR 7511(b)(1)(i) (NYSCEF doc No. 12, ¶ 14). Moreover, the Master Arbitrator "acted within the scope of her allotted power…in light of the Award's sound and articulated legal analysis"; thus, vacatur under CPLR 7511(b)(1)(iii), which requires a showing that the arbitrator "exceeded his power," is not warranted (*Id.*, ¶ 15). Respondent seeks attorney's fees pursuant to 11 NYCRR § 65-4.10 (j)(4) for the work performed by counsel in this litigation. In reply, Petitioner argues that Respondent's application for attorney's fees has "no legal basis." (NYSCEF doc No. 20).

***Respondent's Cross-Petition***

Simultaneous to opposing the Petition, Respondent cross-moves for confirmation of the Award. In support, Respondent argues that the Lower Arbitrator reviewed the evidentiary record provided by both parties and relied upon numerous cases requiring the defense of Workers Compensation eligibility be preserved in a timely denial of claim form (NYSCEF doc No. 12, ¶ 8). According to Respondent, as the matter cannot be reviewed *de novo*, the Lower Arbitrator's rational findings must be upheld (*Id.*).

Petitioner opposes the cross-petition for being "procedurally defective." Petitioner does not offer specific reasoning for this claim, but asserts that "contrary to Respondent's assertion in its cross-petition, the Petition to Vacate does not constitute a *de novo* review of the matter originally

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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.

presented to the arbitrator. . . As such, Respondent's Cross-Motion is procedurally improper and should be denied as a matter of law" (NYSCFE doc No. 20). In response, Respondent states that Petitioner's papers "fail[] to state how any of the submitted papers are procedurally improper." (NYSCEF doc No. 21).

**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 on the basis of 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, 480, 31 N.Y.S.3d 884 [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 .... The award must also be rational and satisfy the arbitrary and capricious standard of CPLR article 78" (*Motor Veh. Mfrs. Ass'n of U.S. v State of New York*, 75 NY2d 175, 550 N.E.2d 919, 551N.Y.S.2d 470 [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, 726 N.E.2d 462, 704 N.Y.S.2d 910 [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 vacate" (*Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224, 232, 433 N.E.2d 509, 448 N.Y.S.2d 444 [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, 674 N.E.2d 1349, 652 N.Y.S.2d 584 [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, 850 N.Y.S.2d 452 [1st Dept 2008], *quoting Peckerman v D & D Assocs.*, 165 AD2d 289, 296, 567 N.Y.S.2d 416 [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, 461 N.E.2d 1261, 473 N.Y.S.2d 774 [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, 929 N.Y.S.2d 232 [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, 362 N.E.2d 977, 394 N.Y.S.2d 179 [1977]).

Here, Petitioner claims that the Lower Arbitrator exceeded her power when she granted a claim which should been heard by the Workers Compensation Board rather than an arbitrator. The Lower Arbitrator, however, found that Petitioner was precluded from raising this defense as it was

not timely raised. The Lower Arbitrator thus issued the Award after determining that there was no impediment to hearing the claim, and after finding that the evidence established Respondent's claims. The question before this Court is thus whether the findings in the Award have rational basis. For the following reasons, the Court finds that they do.

*First*, the Lower Arbitrator considered the evidence submitted by the parties and found that Respondent timely submitted medical bills to Petitioner and responded to all requests for additional verification from Petitioner. However, Petitioner never paid nor denied the first medical bill in the amount of $1,857.35, while it belatedly denied the second medical bill in the amount of $101.24. Petitioner does not dispute these factual findings upon which the Award is based.

*Second*, the Lower Arbitrator provided a rational basis for concluding that Petitioner is precluded from raising the defense that Daniels is eligible for Workers Compensation benefits and thus Respondent should have first filed a claim before the Board. In so ruling, the Lower Arbitrator relied on several cases, including *Westchester Med. Ctr. v. Lincoln Gen. Ins. Co.*, 60 A.D.3d 1045 [2d Dept 2009]). In *Westchester Med. Ctr.,* the Court held that "a Workers' Compensation claim does not constitute a defense of lack of coverage, which is not subject to the requirement that there be timely service of the disclaimer." The Lower Arbitrator also cited the case of *A.B. Med. Servs., PLLC v. Am. Tr. Ins. Co.* (24 Misc. 3d 127(A) [App Term 2009]). Following *Westchester Med. Ctr.,* the *A.B. Med.* Court held that "[s]ince the defense of the assignor's eligibility for workers' compensation benefits is subject to preclusion [] defendant was required to demonstrate that it timely denied plaintiffs' claims on said ground within 30 days of their receipt." The Lower Arbitrator cited other cases standing for the proposition that workers' compensation eligibility is not deemed to be a lack of coverage defense, but rather, a statutory offset subject to preclusion if not timely raised (*see e.g.*, *Corona Comprehensive Med. Care, P.C. v. Global Liberty Ins. Co. of*

*N.Y.* (24 Misc. 3d 1212(A) [Civ Ct 2009]). Petitioner here failed to provide any case law to the contrary. While Petitioner invokes the case of *Arvatz v Empire Mut. Ins. Co.*, 171 Ad2d 262 [1st Dept 1991]), the insurer in that case timely denied the claim on the ground of applicant's eligibility to Workers Compensation benefits.[3] Thus, the case of *Arvatz* is inapposite here.

Based on the foregoing, the Court denies Petitioner's application to vacate the Award and accordingly confirms the same. The Court rejects Petitioner's contention that the cross-petition is "procedurally defective" as Petitioner failed to provide any basis to argue so. The Court finds that the cross-petition was timely filed since an application for confirmation of award may be made within one year after delivery (*see* CPLR §7510). Moreover, even without the cross-petition, it is incumbent upon this Court to confirm the Award pursuant to CPLR §7511 (3)(e) which provides that "upon the denial of a motion to vacate or modify, it shall confirm the award."

***Attorney's Fees***

Respondent's cross-petition also seeks an award of attorney's fees pursuant to 11 N.Y.C.R.R. §65-4.10(j)(4) "for the work performed in securing a resolution of this matter." In support, Respondent submitted affirmations (NYSCEF doc Nos. 17 and 22) detailing the hours spent by its counsel preparing the opposition to Petitioner's petition, the cross-petition for confirmation and reply to Petitioner's opposition to the cross-petition. In the affirmations, Respondent' counsel avers that they spent a total of 5.3 hours of legal work. Respondent seeks attorney's fees in the amount of $1,590 pursuant to counsel's billing rate of $300 per hour.

The Court finds that Respondent is entitled to attorney's fees. The First Department has held that 11 N.Y.C.R.R. §65-4.10(j)(4) affords this Court authority to award attorney's fees in appeals of master arbitration awards, as the statute, in pertinent part, provides: "The attorney's fee

[3] Based on the facts, the application for no-fault benefits was filed on April 4, 1989. The insurer denied the claim on May 1, 1989 which was within the 30-day period required under 11 NYCRR § 65-3.8.

for services rendered in connection with . . . a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter." (*Matter of Country-Wide Ins. Co. v. Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407 [1st Dept 2018], see also *Matter of GEICO Ins. Co. v. AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]). In opposing Respondent's application for attorney's fees, Petitioner relies on *Country-Wide Ins. Co. v Gotham Med., P.C.*, 50 Misc 3d 712 [Sup. Ct. 2015]) where the Court denied an insured's application for attorney's fees in a litigation commenced by the insurer. The Court finds *Country-Wide Ins. Co.* inapposite here as it is a declaratory judgment action while this case is an appeal from a master arbitration award where parties, by express provision of 11 NYCRR 65-4.10 (j) (4), can seek attorney's fees.

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that the petition of Country-Wide Insurance (motion seq. 001) is denied in its entirety, and the award of the Lower Arbitrator, as affirmed by the Master Arbitrator, is confirmed; and it is further

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CAROL R. EDMEAD, J.S.C.

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