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 -

SEDATION VACATION PERIOPERATIVE MEDICINE PLLC,

Defendant.

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INDEX NO. 652675/2020

MOTION DATE 06/23/2020

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, 24, 25, 26, 27

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

Upon the foregoing documents, it is

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

ORDERED that the cross-petition of Respondent Sedation Vacation Perioperative Med PLLC (Motion Seq. 001) 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 $2,385 is granted; and it is further

ORDERED that the Clerk 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, Petitioner Country-Wide Insurance Company seeks, pursuant to CPLR 7511(b)(1)(i), (iii) and (iv), an order vacating a no-fault arbitration award dated February 6, 2020 (the "Award") issued in favor of Respondent Sedation Vacation Perioperative Med PLLC. 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 grants the cross-petition for its confirmation.

BACKGROUND FACTS

Mr. Suraj Mohammed ("Mr. Muhammed"), Respondent's assignor, was injured in an automobile accident on December 4, 2017. He sought treatment from Respondent who performed lumbar percutaneous discectomy (the "Procedure") on him on June 19, 2018. Respondent thereafter sought reimbursement from Petitioner in the amount of $870.00 for the anesthesia used in the Procedure. The claim was denied by Petitioner on the basis of a peer review report (the "Report") by Dr. Mitchell Ehrlich concluding that the surgery performed was not medically necessary.

The Award of the Lower Arbitrator

The parties then proceeded to arbitration before arbitrator Robyn McAllister (the "Lower Arbitrator") on February 6, 2020. At said proceeding, Petitioner raised the defense of lack of medical necessity based on the Report which stated, among others, that given "the paucity of clinical and imaging findings, it was questionable whether any sort of invasive management should have been undertaken on the lumbar spine, let alone an outlier procedure like a percutaneous discectomy. The IDET ablation annuloplasty and the discography also have low rate of success and a high rate of long-term complications."

The Lower Arbitrator rejected Petitioner's defense, holding that the issue of medical necessity has already been decided in two prior arbitrations, AAA Case No. 17-19-1122-7126 and AAA Case No. 17-18-1104-0312 (the "Prior Arbitrations"), where the same Report was submitted as evidence but was found to be "vague with respect to its factual findings". Therefore, according to the Lower Arbitrator, the doctrine of collateral estoppel applies as Petitioner had a full and fair opportunity to present its defense in the Prior Arbitrations.

Accordingly, the Lower Arbitrator issued the Award in favor of Respondent herein and granted its claim in the amount of $870, plus interest and attorney's fees (NYSCEF doc No. 3).

Review of the Master Arbitrator

On March 18, 2020, Petitioner sought review of the Award on the ground that the Award was arbitrary, capricious and incorrect as a matter of law (NYSCEF doc No. 5). Petitioner argued that the Lower Arbitrator "failed to personally and specifically address himself, either intentionally or not, [the Report] and why it was not deemed sufficient to shift the burden of proving medical necessity over to [Petitioner herein]." (*Id.*) Petitioner also argued that the Lower Arbitrator improperly applied the doctrine of collateral estoppel.

Master Arbitrator Richard Ancowitz, however, affirmed the Award, holding that Petitioner "presented no reason [to] not credit the arbitrator's findings concerning he evidence, and in particular [the Report]" (NYSCEF doc No. 6). The Master Arbitrator also upheld the application of the doctrine of collateral estoppel, finding that "[t]here[was] no indication that [Petitioner] did not have a full and fair opportunity to contest the prior award" and that "[Petitioner's] suggestion that the facts in each case were different is simply unavailing, and both awards indeed pertained to the very same [Report] and the very same defense of lack of medical necessity." (*Id.*)

This Article 75 Proceeding

Petitioner now seeks vacatur of the Award pursuant to CPLR 7511 (b)(1)(i), (iii) and (iv). In support, Petitioner advances two arguments. First, Petitioner for the first time argues that the Lower Arbitrator exceeded his power by awarding funds over the policy limit of $50,000. Second, Petitioner maintains that the Lower Arbitrator incorrectly applied the doctrine of collateral estoppel (NYSCEF doc No. 1).

In opposition, Respondent argues that Petitioner's first argument must be rejected as it was never raised during the arbitration and that, in any case, Petitioner failed to show that the policy was exhausted by payment of claims in priority order (NYSCEF doc No. 12). Simultaneous to opposing the Petition, Respondent cross-moves for confirmation of the Award and seeks an award of attorney's fees.

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. An examination of Petitioner's papers shows that Petitioner is seeking to vacate the Award solely 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]).

The Issue of Policy Exhaustion

Petitioner argues that vacatur of the award is warranted under CPLR 7511 (b)(1)(iii) as the arbitrator allegedly exceeded his power when he issued an award in excess of the contractual limit for the Personal Injury Protection (No Fault) coverage here of $50,000. Respondent contends that this Court "should not entertain Petitioner's attempt to add arguments previously overlooked". (NYSCEF doc No. 12, p. 4). In any event, according to Respondent, Petitioner's evidence fails to show that the policy was exhausted in claim priority-order under 11 NYCRR 65-3.15.

"[A]n arbitration award made in excess of the contractual limits of an insurance policy has been deemed an action in excess of authority" (*State Farm Ins. Co. v. Credle,* 228 A.D.2d 191 [1st Dept 1996]). Such excess of authority constitutes grounds for vacatur of the award (*See Matter of Brijmohan v. State Farm Ins. Co.,* 92 N.Y.2d 821, 822 [NY Ct App, 1998]; *Countrywide Ins. Co. v. Sawh,* 272 A.D.2d at 245 [1st Dept 2000]; 11 NYCRR 65-1.1).

Contrary to Respondent's position, Petitioner is not precluded from raising the issue of policy exhaustion for the first time before this Court. In the case of *Matter of Ameriprise Inc. Co. v Kensington Radiology Group, P.C.* (179 AD3d 563 [1st Dept 2020]), the First Department held that "[t]he defense that an award exceeds an arbitrator's power is so important that a party may introduce evidence for the first time when the other party tries to confirm the award." In so ruling, the First Department relied on the case of *Brijmohan v State Farm Ins. Co.* (92 NY2d 821 [Ct App 1998]) where respondent raised the issue of whether the award exceeded the policy limit only after the award was rendered and as an objection to its confirmation in court. On the basis of this

authority, this Court finds that Petitioner can seek to vacate the Award on the ground of policy exhaustion even if this was not previously raised during the arbitration.

Nevertheless, this Court finds that Petitioner failed to substantiate its claim. Petitioner's bare payout ledger fails to clearly show that the policy was properly exhausted before Petitioner was obligated to pay the claims at issue here.

11 NYCRR 65-3.15 states that:

> "When claims aggregate to more than $ 50,000, payments for basic economic loss shall be made to the applicant and/or an assignee in the order in which each service was rendered or each expense was incurred, provided claims therefor were made to the insurer prior to the exhaustion of the $ 50,000. If the insurer pays the $ 50,000 before receiving claims for services rendered prior in time to those which were paid, the insurer will not be liable to pay such late claims. If the insurer receives claims of a number of providers of services, at the same time, the payments shall be made in the order of rendition of services."

The Court of Appeals held in *Nyack Hospital v General Motors Acceptance Corp.* (8 NY3d 294 [2007]) that under the above provision, fully verified claims are payable in the order they are received. Petitioner's evidence, however, fails to show when the claims listed on the payout ledger were received and verified so as to show compliance with 11 NYCRR 65-3.15. Therefore, Petitioner's defense of policy exhaustion should be rejected (*see Mount Sinai Hosp. v. Dust Tr., Inc.*, 104 AD3d 823 [2d Dept 2013] [Similar to this case, the defendant therein "failed to establish the order in which the medical services were rendered, and the order in which the claims were received." Thus, the Court held that based on the record, "it cannot be determined whether the defendant's purported payments were made in compliance with 11 NYCRR 65-3.15."]).

The Doctrine of Collateral Estoppel

Petitioner next argues that the arbitrator "arbitrarily, capriciously and incorrectly applied collateral estoppel." (NYSCEF doc No. 1) Respondent maintains that the

application/misapplication of the doctrine of collateral estoppel is an error courts generally cannot review (NYSCEF doc No. 12, p. 3).

This Court agrees with Respondent. In the case of *Matter of Falzone v New York Cent. Mut. Fire Ins. Co.* (15 NY3d 530 [2010]), the Court of Appeals, "applying this State's well-established rule that an arbitrator's rulings, unlike a trial court's, are largely unreviewable", held that "petitioner's claim [therein] --that the arbitrator erred in failing to apply collateral estoppel to preclude litigation of the causation issue in the [] arbitration--falls squarely within the category of claims of legal error courts generally cannot review." Given that the scope of judicial review under CPLR 7511 is narrowly limited, this Court is precluded from revisiting and weighing the Report and the awards from the Prior Arbitrations to determine if the Lower Arbitrator properly applied collateral estoppel.

However, even if this Court considers Petitioner's argument, this Court finds that it is lacking in merit.

"The doctrine of collateral estoppel, or issue preclusion, bars relitigation of issues of ultimate fact where the issues have been conclusively determined against one party in a proceeding where that party had a full and fair opportunity to litigate the issue." (*Vera v Low Income Mktg. Corp.*, 145 AD3d 509 [1st Dept 2016], *citing Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]).

Petitioner does not contest that it was given a full and fair opportunity to litigate issues in the Prior Arbitrations. However, Petitioner avers that the issue in the Prior Arbitrations was different from the issue considered by the Lower Arbitrator. In particular, according to Petitioner, the Prior Arbitrations "discussed the issue of the medical necessity of the lumbar percutaneous discectomy [while] [t]he issue for this matter is for the medical necessity of the anesthesia provided for the procedure."

The Court rejects Petitioner's argument. The anesthesia services were but a necessary incident to the Procedure. In fact, as stated in the Award, Petitioner denied Respondent's claim for anesthesia "since the lumbar discectomy was not medically necessary" (NYSCEF doc No. 3). During the arbitration, Petitioner did not provide any evidence to show lack of necessity for the anesthesia services independent from its evidence showing that the Procedure itself for which the anesthesia was used was unnecessary. However, such evidence - in the form of a Report purportedly showing that that the Procedure was not medically necessary - had already been rejected in the Prior Arbitrations. Thus, this Court finds that the Lower Arbitrator rationally applied the doctrine of collateral estoppel against Petitioner.

Attorney's Fees

Respondent seeks an award of attorney's fees pursuant to 11 N.Y.C.R.R. §65-4.10(j)(4). In support, Respondent submitted an affirmation detailing the hours spent by its counsel preparing the opposition to Petitioner's petition and the cross-petition for confirmation (see NYSCEF doc No. 22). In the affirmation, Respondent's counsel avers that they spent a total of 9.45 hours of legal work. Respondent seeks attorney's fees in the amount of $2,385 pursuant to counsel's billing rate of $300 per hour.

The Court finds that Respondent is entitled to attorney's fees. In *Matter of Country-Wide Ins. Co. v. Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407 [1st Dept 2018], the court held that the "Supreme Court has authority to award attorney's fees as this is an appeal from a master arbitration award pursuant to 11 NYCRR 65-4.10 (j) (4), which, in pertinent part, provides: "The attorney's fee 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." (see also *Matter of GEICO Ins. Co. v. AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]). The Court has

reviewed Respondent's submission in support of its application for attorney's fees (NYSCEF doc No. 22) and finds the same to be reasonable and adequate. Thus, Respondent's application for attorney's fees for this proceeding in the amount of $2,385 is granted.

CONCLUSION

Based on the foregoing, it is hereby

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

ORDERED that the cross-petition of Respondent Sedation Vacation Perioperative Med PLLC (Motion Seq. 001) for the confirmation of the Award is granted; and it is further

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2/23/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	[x]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
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APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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