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 -

NYEEQASC, LLC D/B/A NORTH QUEENS SURGICAL CENTER,

Defendant.

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INDEX NO. 650209/2021

MOTION DATE 01/11/2021

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, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

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 NYEEQASC LLC d/b/a North Queens Surgical Center (Motion Seq. 001) for the confirmation of the Award is granted; and it is further

ORDERED that Respondent's application for attorney's fees is denied; 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 July 12, 2020 (the "Award") issued in favor of Respondent NYEEQASC LLC d/b/a North Queens Surgical Center. 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

Ms. Sandra Bailey ("Ms. Bailey"), Respondent's assignor, was injured in an automobile accident on March 02, 2017. She subsequently underwent a right shoulder arthroscopic surgery which was performed by Respondent.

Respondent thereafter sought reimbursement from Petitioner in the amount of $3,026.24, but the claim was denied by Petitioner on the basis of a peer review report (the "Report") prepared by Dr. Andrew Bazos ("Dr. Bazos") concluding that the surgery performed was not medically necessary.

The parties then proceeded to arbitration before arbitrator Ioannis Gloumis (the "Lower Arbitrator") on July 7, 2020. The Lower Arbitrator found for Respondent, holding that "Dr. Bazos does not specifically state that the right shoulder surgery was not medically necessary or that [Respondent's surgeon] deviated from the generally accepted standard of care in the profession by performing the surgery." The Lower Arbitrator continued that while Dr. Bazos "relied upon the fact that [Ms. Bailey] was previously involved in a motor vehicle accident in 2013", Ms. Bailey "denied injury to her right shoulder" resulting from said accident. The Lower Arbitrator therefore found the Report unpersuasive, concluding that Respondent failed to establish its prima facie

burden of lack of causal relationship and lack of medical necessity. Accordingly, the Lower Arbitrator granted Respondent's claim in the amount of $3,026.24, plus interest and attorney's fees (NYSCEF doc No. 3).

On March 18, 2020, Petitioner sought review of the Award on the ground that the Award "was not rationally based upon the evidence presented…and was arbitrary and capricious." (NYSCEF doc No. 1, ¶9)

Master Arbitrator Victor Hershdorfer, however, affirmed the Award, holding that the Award was supported by factual findings determined by the Arbitrator after reviewing the evidence on the record and hearing the parties on oral arguments (NYSCEF doc No. 6).

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 Dr. Bazos' Report established lack of medical necessity (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. 27, ¶¶ 50-63). As to the sufficiency of Dr. Bazos' Report, Respondent maintains that the Lower Arbitrator made a detailed and thorough analysis of the evidence before him and concluded that the right shoulder surgery was medically necessary (*Id.*, ¶¶ 37-49). 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]).

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 defense should fail as it was never raised before and, in any event, Respondent had a priority of payment over subsequent claims.

"[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).

While Respondent is correct that Petitioner never raised the issue of policy exhaustion during the arbitration, Petitioner is not precluded from raising it 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."]).

Medical Necessity of the Surgery

Petitioner also argues that the Lower Arbitrator was arbitrary, capricious and incorrect as a matter of law for failing to sustain the Report by Dr. Bazos. According to Petitioner, the Report clearly establishes lack of medical necessity (NYSCEF doc No. 1, ¶ 36).

Respondent disputes Petitioner's claims. According to Respondent, the Lower Arbitrator considered the totality of medical proofs presented to him and found that the Report was insufficient to support the allegations of pre-existing conditions and that the injury and surgery were not causally related (NYSCEF doc No. 27, ¶ 37-49).

This Court finds that the Lower Arbitrator had a rational basis to support his findings. The Award should therefore be confirmed.

In holding that Petitioner bears the burden of proof to establish its defense of lack of medical necessity, the Lower Arbitrator cited to the case of *Mount Sinai Hospital v. Triboro Coach* (263 A.D.2d 11 [2d Dept, 1999]) which indeed holds that "the [insurer] has the burden to come

forward with proof in admissible form to establish "the fact" or the evidentiary "found[ation for its] belief" that the patient's treated condition was unrelated to his or her automobile accident."

Here, while Petitioner produced a Report from Dr. Bazos which alleges that Ms. Bailey's shoulder's condition was "unrelated to the trauma", the Lower Arbitrator found the Report insufficient to satisfy Petitioner's burden. Citing to the case of *CityWide Social Work & Psychological Servs. v Travelers Indem. Co.* (3 Misc 3d 608 [Civ Ct, Kings County 2004]), the Lower Arbitrator held that "[a] peer review of report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards" and here "Dr. Bazos did not specifically state that the surgery performed on Ms. Bailey deviated from the generally accepted standard of care." The Court has examined the case of *CityWide Social Work* and finds it to be relevant and applicable.[1]

The Court agrees with Respondent that the Lower Arbitrator, in arriving at his conclusions, made a detailed and thorough analysis of the evidence before him. Given that the scope of judicial review under CPLR 7511 is narrowly limited, this Court cannot revisit and weigh Petitioner's evidence all over again.

Attorney's Fees

In addition to seeking confirmation of the Award, Respondent seeks an award of attorney's fees pursuant to 11 N.Y.C.R.R. §65-4.10(j)(4).

In the *Matter of Country-Wide Ins. Co. v. Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407 [1st Dept 2018], the First Department 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

[1] In *CityWide Social Work,* the Court held that "[t]he evidence at trial was insufficient to establish that the billed-for services were inconsistent with generally accepted professional practice, and, therefore, the evidence was insufficient to carry defendant's burden of proving that the services were not medically necessary."

(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]).

While this Court is vested with authority to award attorney's fees pursuant to 11 N.Y.C.R.R. §65-4.10(j)(4), there is nothing on the record upon which such award can be based. Respondent merely alleges that its counsel spent time and costs defending this matter (NYSCEF doc No. 27, ¶¶ 65-66), but does not submit any supporting documents detailing the number of hours spent by its counsel and his billing rate. Therefore, this Court is not able to make a determination of a reasonable attorney's fee in this case.

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 NYEEQASC LLC d/b/a North Queens Surgical Center (Motion Seq. 001) for the confirmation of the Award is granted; and it is further

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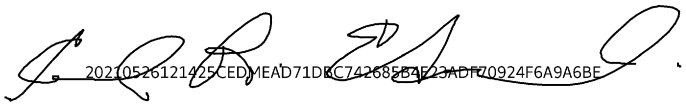

5/26/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE