

**Country-Wide Ins. Co. v Empire State Ambulatory
Surgery Ctr.**

2021 NY Slip Op 32194(U)

November 3, 2021

Supreme Court, New York County

Docket Number: Index No. 655066/2021

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD **PART** **35**

Justice

-----X

COUNTRY-WIDE INSURANCE COMPANY

Petitioner,

- v -

EMPIRE STATE AMBULATORY SURGERY CENTER,

Respondent.

-----X

INDEX NO. 655066/2021

MOTION DATE 09/28/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 11, 12, 13 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ORDERED that the application of Petitioner Country-Wide Insurance Company (Motion Seq. 001) is partially granted to the extent that this matter is remanded for a Framed Issue Hearing; and it is further

ORDERED that the issues of whether Respondent Empire State Ambulatory Surgery Center's claim was received and verified prior to exhaustion of Petitioner's policy such that the arbitration award should be confirmed, and the amount of attorney's fees, if any, to which Respondent is entitled, are hereby referred to a Special Referee to Hear and Determine. It is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov), for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on

the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within twenty (20) days.

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 Empire State Ambulatory Surgery Center, or in the alternative, an order remanding this matter for a Framed Issue Hearing on the matter of policy exhaustion (Motion Seq. 001).

Respondent opposes and cross-moves for the confirmation of the Award along with an award of attorney’s fees and costs incurred with the instant motion.

BACKGROUND FACTS

Ms. Rosyahn Spencer (“Ms. Spencer”), Respondent’s assignor, was injured in an automobile accident on June 25, 2018. She sought treatment from Respondent who performed arthroscopic surgery on Ms. Spencer’s right knee on August 23, 2019. Respondent thereafter sought reimbursement from Petitioner in the amount of \$3,026.24. The claim was denied by Petitioner based on an Independent Medical Examination (IME) Report by Dr. John Vitolo (“the Report”). Dr. Vitolo examined Ms. Spencer on December 13, 2018, before the surgery, and concluded that Ms. Spencer was not in need of further treatment.

The parties then proceeded to arbitration before arbitrator Bernadette Connor (the “Lower Arbitrator”) on March 10, 2021 (NYSCEF doc No. 3). At said proceeding, Petitioner raised the defense of lack of medical necessity for the right knee surgery based on the Report.

The Lower Arbitrator rejected Petitioner's defense, holding that the issue of medical necessity has already been decided in a prior arbitration involving Petitioner and a separate medical provider but the same surgery, AAA Case No. 17-19-1149-0245, (the "Prior Arbitration"). As with the present case, Petitioner submitted the Report as evidence demonstrating lack of medical necessity. The arbitrator, Lisa Capruso, found the Report was insufficient to establish Petitioner's burden of demonstrating that the surgery was not medically necessary:

"It is noted that Dr. Vitolo did not conclude that the Assignor's sprains/strains had resolved at the time of the IME. I find that Dr. Vitolo's IME is insufficient to establish a lack of medical necessity for the right knee surgery as the IME had positive findings and Dr. Vitolo had not stated that the Assignor's sprains/strains had actually resolved at that time."

(NYSCEF doc No. 3 at 3).

Therefore, according to the Lower Arbitrator, the doctrine of collateral estoppel applied as Petitioner had a full and fair opportunity to present its defense regarding lack of medical necessity for the surgery in the Prior Arbitration.

Accordingly, the Lower Arbitrator issued the Award in favor of Respondent herein and granted its claim in the amount of \$3,026.24, plus interest and attorney's fees (NYSCEF doc No. 3).

Petitioner sought review of the Award on the ground that the Lower Arbitrator's decision to find that the surgery was medically necessary notwithstanding the Report was arbitrary, capricious and incorrect as a matter of law (NYSCEF doc No. 5). Petitioner also argued that the Lower Arbitrator improperly applied the doctrine of collateral estoppel.

On May 21, 2021, Master Arbitrator Alfred J. Weiner affirmed the Award, finding no basis to disturb the Lower Arbitrator's findings regarding the Report (NYSCEF doc No. 6). The Master Arbitrator also upheld the application of the doctrine of collateral estoppel (*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 her 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, and the Master Arbitrator erred in affirming the Lower Arbitrator's application (NYSCEF doc No. 1).

In opposition, Respondent argues that Petitioner's first argument must be rejected as it was never raised during the arbitration (NYSCEF doc No. 12). Respondent does not specifically address Petitioner's argument that collateral estoppel was incorrectly applied, but generally states that "Petitioner does not provide the Court with any substantive argument as to the manner in which the arbitrator or master arbitrator abused their power or otherwise erred in their finding that the lack of medical necessity was not sustainable" (*id.*).

Simultaneous to opposing the Petition, Respondent cross-moves for confirmation of the Award and seeks an award of attorney's fees.

DISCUSSION

An arbitration award may be vacated pursuant to CPLR 7511(b)(1)(iii)¹ where an arbitrator exceeded his or her power, including where the award violates strong public policy, is

¹ 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 pursuant to CPLR 7511(b)(1)(iii).

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 [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 [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 vacate" (*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]).

The Issue of Policy Exhaustion

Petitioner argues that vacatur of the award is warranted under CPLR 7511 (b)(1)(iii) as the Lower Arbitrator exceeded her power by issuing an award in excess of the contractual limit for the Personal Injury Protection (No Fault) coverage here of \$50,000, and the Master Arbitrator erred in affirming the same.

"[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 AD2d 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 AD2d at 245 [1st Dept 2000]; 11 NYCRR 65-1.1).

Respondent argues that Petitioner is precluded from raising the issue of policy exhaustion as it was not before the arbitrators in the underlying proceeding. However, Petitioner is not precluded from raising the issue of policy exhaustion for the first time before this Court. In the case 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. Accordingly, this Court finds it has authority to review the policy exhaustion evidence submitted by Petitioner in support of its argument that the Award must be vacated.

Petitioner has introduced an affidavit from its No Fault Litigation/Arbitration supervisor, Jessica Mena-Sibrian (NYSCEF doc No. 7). Ms. Mena-Sibrian attests that the claims file of Respondent's assignor, Ms. Spencer, reflects that the policy has been exhausted beyond its \$50,000 limit (*id.*). The affidavit also contains a ledger reflecting the dates that claims by various medical providers were paid that exhausted Ms. Spencer's policy. However, critically, the ledger fails to show that the policy was properly exhausted before Respondent's claim at issue here was verified, triggering Petitioner's obligation to pay the same. 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, claims are payable in the order they are received and fully verified, meaning that the provider has complied with any additional information requested by the insurer:

"The no-fault regulations provide that "[n]o-[f]ault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim, which shall include verification of all of the relevant information requested pursuant to section 65-3.5" (11 NYCRR 65-3.8 [a] [1]). With exceptions not relevant to this appeal, an insurer may not deny a claim "prior to its receipt of verification of all of the relevant information requested pursuant to section 65-3.5" (11 NYCRR 65-3.8 [b] [3]). Section 65-3.5 (b), in turn, authorizes the

insurer to request “any additional verification required . . . to establish proof of claim . . . within 15 business days of receipt of the prescribed verification forms.” This language contemplates that an insurer must pay or deny only a verified claim--that is, a claim that has been verified to the extent compliance with section 65-3.5 dictates in the particular case--within 30 calendar days of receipt; and, conversely, is not obligated to pay any claim until it has been so verified.”

(*id.* at 299).

Here, Petitioner’s evidence does not reflect whether it sought additional information from Respondent for verification and does not indicate the dates Respondent’s claim was received and/or verified, or the date that the policy was exhausted. Petitioner thus has not established that it is not obligated to pay the amount awarded to Respondent in the underlying arbitration proceeding. However, Petitioner’s evidence does demonstrate that its policy has been exhausted. In *Ameriprise*, the Appellate Term, First Department held that evidence of the sort submitted here raises triable issues of fact requiring a Framed Issue Hearing²:

“Petitioner-insurer’s submissions in support of its petition to vacate the arbitration award--including an attorney’s affirmation, the policy declaration page showing the \$50,000 limit and a payment ledger listing in chronological order the dates the claims by various providers were received and paid – raised triable issues as to whether the \$50,000 policy limit had been exhausted by payments of no fault benefits to respondent and other providers before petitioner became obligated to pay the claims at issue here. Therefore, we remand this matter to Civil Court for a framed issue hearing on that issue”

(93 NYS3d 624 [NY App. Term. 2017] [citations omitted]).

Accordingly, the Court directs that this matter of whether Petitioner’s policy was exhausted at the time Respondent’s claim was verified, such that the instant arbitration award directed payment in excess and must be vacated, is referred a Special Referee to Hear and Determine.

² The Appellate Term’s holding was later affirmed by the First Department in its decision referenced *supra* (79 AD3d 563 [1st Dept 2020]).

The Doctrine of Collateral Estoppel

The Court also writes to address Petitioner's argument that the Award should additionally be vacated as the arbitrators improperly applied collateral estoppel.

The Court finds this argument to be misplaced, as a determination of the applicability of collateral estoppel by an arbitrator is outside the bounds of proper review under Article 75. 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 award from the Prior Arbitration 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]). A party seeking to avoid application of the doctrine thus has the ultimate burden of establishing the absence of a "full and fair opportunity" to have litigated or contested the issue in an earlier matter (*id.*)

Petitioner does not contest that it was given a full and fair opportunity to litigate issues in the Prior Arbitrations, but rather argues that there was no mutuality of parties. However, complete mutuality of parties is longer a requirement for collateral estoppel under New York Law. In *B.R. DeWitt, Inc v Hall*, the Court of Appeals held that the doctrine of mutuality is a “dead letter”, and thus collateral estoppel can be invoked by a nonparty to the prior litigation, providing that the requirements for collateral estoppel (i.e., identity of issues and full and fair opportunity to litigate) were met as to the party sought to be precluded (19 NY2d 141 [1967]).

Here, as discussed, the Lower Arbitrator referenced a determination made by Arbitrator Capruso in *Hostin Orthopedics/Rosalyn Spencer v. Country-Wide Insurance Company* (AAA Case No. 17-19-1149-0245), wherein Arbitrator Capruso determined that the Report was insufficient to determine Ms. Spencer’s right knee surgery medically necessary. Although Arbitrator Capruso was reviewing the claims of a separate medical provider, the findings in the Prior Arbitration were reliant on the exact same Report of Respondent’s Assignor and were related to the same medical treatment of right knee surgery. Therefore, the the findings arose out of the same set of facts giving rise to the matters in the present arbitration determinations. As Petitioner had the opportunity to contest the finding that the Report did not establish lack of medical necessity in the Prior Arbitration, collateral estoppel is fully applicable notwithstanding the fact that the Prior Arbitration involved a different medical provider.

Thus, this Court finds that the Lower Arbitrator rationally applied the doctrine of collateral estoppel against Petitioner, and thus directs that the Special Referee consider only the ground of of policy exhaustion in determining whether the Award must be vacated.

Attorney's Fees

Respondent seeks an award of attorney's fees pursuant to 11 NYCRR §65-4.10(j)(4), which provides for reimbursement of attorney's fees incurred in connection with an appeal of an arbitration award (*See Matter of Country-Wide Ins. Co. v. Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407 [1st Dept 2018] ["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)"]. Respondent seeks an award totaling \$300 for attorney's fees incurred with the instant petition (NYSCEF doc No. 12).

In view of the Court's holding herein, Respondent is not entitled to attorney's fees at this juncture. However, the Court directs that, should Respondent prevail at the Framed Issue Hearing, the Special Referee shall determine the amount of attorney's fees Respondent is entitled to pursuant to 11 NYCRR §65-4.10(j)(4).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the application of Petitioner Country-Wide Insurance Company (Motion Seq. 001) is partially granted to the extent that this matter is remanded for a Framed Issue Hearing; and it is further

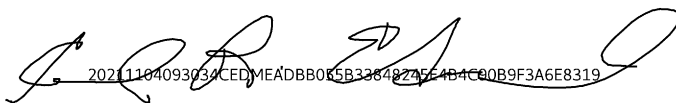
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ORDERED that counsel shall immediately consult one another and counsel for Petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the 'References' link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within twenty (20) days.


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11/3/2021
DATE

CAROL EDMED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input checked="" type="checkbox"/>	OTHER