SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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In the Matter of the Application of

COUNTRY-WIDE INSURANCE COMPANY

Petitioner,

For a Judgment Pursuant to Article 75

- v –

BELL BLVD. DENTAL P.C., a/a/o STEVE CHO,

Respondent.

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INDEX NO. 651016/2023

MOTION DATE 05/19/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

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

I. INTRODUCTION

Country-Wide Insurance Company ("Country-Wide") petitions the court pursuant to CPLR 7511(b)(1)(iii) and 7511(b)(iv) to vacate a master arbitrator's award dated November 28, 2022, which vacated a lower arbitrator's decision to dismiss the underlying claim, and awarded $3,070.00 in no-fault benefits to respondent Bell Blvd Dental P.C. ("Bell Blvd Dental"), as assignee of Steve Cho, for services rendered to him. The respondent opposes the petition and cross-petitions pursuant to CPLR 7510 to confirm the master arbitrator's award. The court denies the petition and grants the cross-petition.

II. BACKGROUND

On February 19, 2019, Steve Cho was struck by a motor vehicle insured by Country-Wide. According to a police report of the incident, Cho reported that he was emerging or had just emerged from his own vehicle when he was struck in the back by the insured vehicle's passenger-side side-mirror as that vehicle was backing out of a parking space. The driver of

the insured vehicle. Yue Feng Huang, told the police that he was backing out of a parking space but did not see a pedestrian emerge from a vehicle and did not hit anyone. Eight months later, on October 28, 2019, Cho presented to respondent Bell Blvd. Dental for dental treatment. According to the examination report from this visit, Cho cited his chief complaint as follows: "I had a car accident last Thursday. My car was rear-ended while I stopped in [sic] traffic light. My face hit the steering wheel." The respondent alleges that it performed dental work on Cho thereafter, including a CT scan, implant surgery, and a bone graft on February 4, 2020, and March 25, 2020.

After Cho assigned his rights to no-fault benefits to the respondent, the respondent filed several claims with Country-Wide seeking reimbursement. Country-Wide denied the respondent's claims on the bases that according to the police report, claimant was 'emerging' from his parked vehicle at the time of loss. Claimant was operating the vehicle not insured with this company. Benefits must be sought from the insurer of the vehicle." Some denials also cited and additional reason – "the fees charged were not in accordance with the fee schedule." That is, the claimant was not a pedestrian when injured but was operating his own vehicle, insured by another insurer and/or the fees charged for services rendered were excessive.

The parties entered into compulsory arbitration on September 28, 2022, for determination of whether Cho is an eligible injured person entitled to collect no-fault benefits from Country-Wide. The petitioner submitted to the arbitrator Cho's application for no-fault benefits, the denial of claim forms issued to the respondent and the police accident report. A hearing was held on September 28, 2022, no witness testimony was taken, and the lower arbitrator, Alison Bernick, relied upon parties' submissions and counsel's arguments.

By an Arbitration Award dated October 3, 2022, the lower arbitrator determined that Respondent Bell Blvd Dental "has failed to establish its entitlement to no-fault benefits from respondent" Country-Wide. The lower arbitrator found, based on the police report, that Country-Wide failed to establish that Cho was an occupant of his own vehicle at the time of the accident, and therefore any injury he sustained from the February 19, 2019, accident was "clearly caused by the use and operation of the vehicle insured by [Country-Wide]." See Insurance Law § 5102(b). The lower arbitrator then determined that Cho was not an eligible injured person under Country-Wide's policy because the injury for which the respondent treated Cho was not caused by the accident on February 19, 2019. In reaching this determination, the lower arbitrator relied upon the discrepancy between Cho's description of the accident that caused him to seek the

respondent's treatment and the description of the accident in the police report, as well as the discrepancy between the date that Cho said the accident occurred and the date of loss as the respondent reported in its records. Based on the discrepancies, the lower arbitrator concluded that the respondent's treatment was not a result of the February 19, 2019 occurrence, but that of an accident that occurred sometime in October 2019. Accordingly, the arbitrator dismissed the respondent's claims.

The respondent then sought a review of the award by a master arbitrator as provided for in 11 NYCRR 65-4.10. In support, the respondent submitted an affirmation of counsel in which it argued that the lower arbitrator erred in considering and then determining causation since causation is presumed in this context. The respondent argued that it is the burden of the insurer to come forward with proof establishing "by fact of founded belief" its defense that the claimed injuries have no nexus to the accident, and Country-Wide wholly failed to meet this burden. Its denials were not based on causation and it submitted no expert medical evidence.

On November 29, 2022, the master arbitrator, Vic D'Ammora, determined that the lower arbitrator properly analyzed the issue regarding whether Cho suffered an injury during the use or operation of a vehicle insured by Country-Wide but remarked that "[t]here should have been no consideration given to the issue of causation," as "[i]t was not the basis of the denial" and Country-Wide "did not contest causation and failed to submit any medical evidence to that effect." The master arbitrator concluded that, therefore, the arbitrator's award was "arbitrary and capricious," and vacated that award, instead awarding the respondent $3,070.00

III. LEGAL STANDARD

A court may vacate an arbitration award 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 (1st Dept. 2016). Where, as here, arbitration is compulsory (see Insurance Law § 5105), closer judicial scrutiny of the arbitrator's determination under CPLR 7511(b) is required than that applicable to consensual arbitrations. See Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co., 89 NY2d 214 (1996); Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.], 49 NY2d 757 (1980); Mount St. Mary's Hosp. v Catherwood, 26 NY2d 493 (1970). To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious.

See Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co., supra; Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.], supra.

With respect to the award of the master arbitrator, "[a] master arbitrator has the authority to vacate or modify an arbitration award based upon a ground set forth in CPLR article 75 [see 11 NYCRR 65.19(a)(1)]. The power of the master arbitrator to review factual and procedural issues is limited to whether the arbitrator acted in a manner that was arbitrary and capricious, irrational or without a plausible basis. If the determination of the arbitrator is challenged based upon an alleged factual error, the master arbitrator must uphold the determination if it has a rational basis." Liberty Mut. Ins. Co. v Spine Americare Med., P.C., 294 AD2d 574, 576 (2nd Dept. 2002) (some citations and internal quotations marks omitted).

IV. DISCUSSION

Country-Wide does not present an adequate basis to support vacatur pursuant to CPLR 7511(b)(1)(iii) or (iv). The master arbitrator did not exceed his power in finding that the lower arbitrator acted arbitrarily and capriciously when she summarily concluded without any basis in medical evidence that the injury the respondent treated was not proximately caused by the February 19, 2019, accident.

Under Insurance Law § 5102(b), no-fault first party benefits are reimbursable to an injured party or his or her assignee for all medically necessary expenses on account of "personal injury *arising out of* the use or operation of a motor vehicle." (emphasis added). Thus, "the vehicle must be a proximate cause of the injury before the absolute liability imposed by the statute arises." Cividanes v City of New York, 20 NY3d 925, 926 (2012). Unlike in a typical negligence action, the plaintiff in an action to recover first-party no-fault benefits does not bear the burden of establishing causation. See Mary Immaculate Hosp. v Allstate Ins. Co., 5 AD3d 742 (2nd Dept. 2004). Causation is presumed since "it would not be reasonable to insist that a [medical provider] must prove as a threshold matter that its patient's condition was 'caused' by the automobile accident." Mount Sinai Hosp. v Triboro Coach, 263 AD2d 11, 20 (2nd Dept. 1999). Thus, the burden is on the defendant insurer to come forward with proof establishing by "fact or founded belief" its defense that the claimed injury does not arise out of the accident. See Central Gen. Hosp. v Chubb Group of Ins. Cos., 90 NY2d 195, 199 (1997). The courts have been clear that it takes more than conjecture to prove lack of causal relationship. See Prince v Lovelace, 115 AD3d 424 (1st Dept. 2014); Glynn v Hopkins, 55 AD3d 498 (1st Dept.

2008); Angeles v Am. United Transp., Inc., 110 AD3d 639 (1st Dept. 2013). Furthermore, the question of whether an injury is "wholly unrelated to [an] automobile accident or not exacerbated by the accident 'cannot be resolved without recourse to medical facts.'" Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co., 61 AD3d 13, 22 (2nd Dept. 2009), citing Mount Sinai Hosp. v Triboro Coach Inc., supra.

According to the lower arbitrator's award, Country-Wide submitted its NF-10 Denial of Claim Form and the respondent's NF-2 Application for Motor Vehicle No-Fault Benefits but offered no medical evidence whatsoever to demonstrate a lack of causation, as the master arbitrator pointed out. Country-Wide failed to meet its burden of producing proof that the injury did not arise out of the accident. See Central Gen. Hosp. v Chubb Group of Ins. Cos., supra. In addition, while the lower arbitrator had before her the records from Cho's visit with the respondent, including an examination report, a "Get Acquainted Questionnaire," and the respondent's Letter of Medical Necessity, as well as the police report from the February 19, 2019 accident, glaringly absent from the record are any medical records showing that the February 19, 2019 accident did not cause Cho's injury. No physician or other medical expert affidavit was included in Country-Wide's submissions to explain the issue of causation or lack of causation in relation to the subject automobile accident. See, e.g., Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co., supra. The lower arbitrator did not hold Country-Wide to its burden of proving a lack of causation, and her determination was therefore based solely on conjecture based on the differences between the police report and the examination report. See Central Gen. Hosp. v Chubb Group of Ins. Cos., supra. As stated above, the question of whether an injury is wholly unrelated to an automobile accident or not exacerbated by the accident "cannot be resolved without recourse to medical facts." Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co., supra, citing Mount Sinai Hosp. v Triboro Coach Inc., supra. As such, the lower arbitrator's determination lacked adequate evidentiary support, and therefore the master arbitrator did not act arbitrarily or capriciously or exceed his power in vacating her award.

CPLR 7511(e) provides that "upon the denial of a motion to vacate or modify [an award], [the court] shall confirm the award." Thus, the court confirms the award challenged here, granting the cross-petition.

Contrary to the petitioner's contention, the respondent is entitled to reasonable attorneys' fees incurred in connection with this proceeding. See 11 NYCRR 65-4.10(j)(4); GEICO Ins. Co. v AAAMG Leasing Corp., 148 AD3d 703 (2nd Dept. 2017); Unitrin Advantage

Ins. Co. Kemper A. Unitrin Bus. v Pro. Health Radiology, 143 AD3d 536, 537 (1st Dept. 2016). Counsel for respondent Bell Blvd. Dental shall file with the court a supplemental affirmation and proposed accounting of attorneys' fees and expenses incurred in this proceeding within 30 days from the date of this order, or that relief is waived.

V. CONCLUSION

Accordingly, upon the foregoing papers, it is

ORDERED and ADJUDGED that the petition is denied, the cross-petition is granted and the master arbitration award made by the American Arbitration Association, dated November 29, 2022, in the arbitration proceeding entitled In the *Matter of the Arbitration Between Bell Blvd Dental P.C./Cho and Country-Wide Insurance Company*, AAA Assessment No. 99-21-1206-0248, is confirmed, and it is further

ORDERED that counsel for respondent Bell Blvd. Dental P.C a/a/o Steve Cho shall file with the court a proposed accounting of reasonable attorneys' fees and expenses incurred in this proceeding within 30 days from the date of this order, and shall notify the Part 42 Clerk of such filing, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision, Order and Judgment of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

12/21/2023
DATE

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