

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM KUFES, M.D.,

Plaintiff-Appellant,

v

DANIEL J. DYMEK, M.D., P.C. and
DANIEL J. DYMEK, M.D.,
Jointly and Severally,

Defendants-Appellees.

UNPUBLISHED

June 11, 2002

No. 229293

Saginaw Circuit Court

LC No. 97-018986-CK

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order modifying the arbitration panel's opinion and award. We affirm.

The parties entered into an employment contract on June 1, 1995. The present case arose when defendants declined to pay plaintiff an employment bonus according to the terms of the employment agreement. The relevant provisions in the employment agreement provided:

Section 5. Compensation

* * *

(b) Employee shall be entitled to a bonus of fifty percent (50%) of the fees collected during the fifteen (15) month period ending August 31, 1996, with respect to Employee's professional services performed from June 1, 1995, to May 31, 1996

* * *

The determination of the bonus, including the determination of office overhead, shall be made by Corporation. *If there is a disagreement between Corporation and Employee over such determination, the accounting firm then serving Corporation shall make a final determination, which determination shall be final and binding on both parties. . . .*

* * *

Section 17. Arbitration. Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration in the County of Saginaw, State of Michigan, in accordance with the rules of the American Arbitration Association and judgment upon the award may be entered in any Court having jurisdiction thereof. [Emphasis supplied.]

After defendants refused to pay plaintiff the bonus, plaintiff filed suit for breach of contract in Saginaw Circuit Court. On July 8, 1997, defendants moved to compel arbitration of the issue whether plaintiff was entitled to the bonus. The arbitration panel determined that plaintiff was entitled to a bonus and further concluded that it was appropriate for the panel to determine the amount of the bonus. After plaintiff moved the lower court to confirm the arbitration panel's award, defendants moved to modify or vacate the award, arguing that the arbitration panel exceeded its authority in determining the amount of plaintiff's bonus. Specifically, in relevant part defendants contended that the panel exceeded its authority in disregarding defendants' accountant's bonus calculation. In a five-page written opinion and order, the lower court agreed, concluding that the specific terms of the employment contract provided that the amount of plaintiff's bonus be determined only by defendants' accountant. The court then modified the arbitration award to reflect that plaintiff was entitled to a bonus of \$35,590.00.

On appeal, plaintiff argues that the trial court exceeded its limited scope of judicial review regarding statutory arbitration awards. We disagree.

"The existence of an arbitration agreement and the enforceability of its terms are judicial questions for the court rather than for the arbitrators." *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000), citing *Huntington Woods v Ajax Paving Industries, Inc (After Remand)*, 196 Mich App 71, 74; 492 NW2d 463 (1992). In other words, whether a dispute is arbitrable is a question of law that we review de novo. *Madison Dist Public Schools v Myers*, 247 Mich App 583, 594; 637 NW2d 526 (2001). To determine whether an issue is subject to arbitration, a court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue falls within the confines of the arbitration clause, and whether the dispute is "expressly exempt from arbitration by the terms of the contract." *Id.* at 608. Any doubts about the arbitrability of an issue are resolved in favor of arbitration. *Id.* Likewise, "judicial review of an arbitrator's decision is very limited; a court may not review an arbitrator's factual findings or decision on the merits." *Port Huron Area School Dist v Port Huron Education Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986).

In *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982), our Supreme Court articulated the standard of judicial review of an arbitration award:

"[w]here it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion and that, but for such error, a substantially different award must have been made, the award and decision will be set aside." [Quoting *Howe v Patrons' Mutual Fire Ins Co of Michigan*, 216 Mich 560, 570; 185 NW 864 (1921).]

Thus, a court will vacate or modify an arbitration decision in limited circumstances, including where a clear error of law is evident on the face of the decision. *DAIIE, supra* at 443-444; *Rembert v Ryan's Steak Houses, Inc*, 235 Mich App 118, 163-164; 596 NW2d 208 (1999). MCR 3.602(J)(1)(c) and MCR 3.602(K)(1)(b) address the appropriate remedy when the court determines that the arbitration panel exceeded the scope of its authority. *Gordon Sel-Way, Inc v Spence Brothers, Inc*, 438 Mich 488, 495-496; 475 NW2d 704 (1991). In the instant case, because the trial court modified the arbitration award, the applicable court rule is MCR 3.602(K)(1)(b), which provides:

On application made within 21 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award if:

(b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted.

Arbitrators derive their authority from the arbitration agreement. *Krist v Krist*, 246 Mich App 59, 62; 631 NW2d 53 (2001). Arbitrators are bound to act within those terms and exceed their authority when they act beyond those terms. *Id.*, citing *Collins v Blue Cross Blue Shield of Michigan*, 228 Mich App 560, 567; 579 NW2d 435 (1998). An arbitrator exceeds his powers if he acts beyond the material terms of the contract from which he draws his authority, or if he acts in contravention of controlling principles of law. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). "If an arbitration clause is written in broad and comprehensive language, i.e., language including all claims and disputes, the computation of damages for breach of contract is presumed to be included. . . . Furthermore, an award will be presumed to be within the scope of the arbitrators' authority absent express language to the contrary." *Gordon Sel-Way, supra* at 497. Consequently, courts are reluctant to conclude that the arbitration panel exceeded its authority unless the arbitration agreement expressly limited the arbitrators' power in some manner. *Id.*

In rendering its decision, the trial court determined that section 5 of the employment contract unambiguously provided that defendants' accounting firm was empowered to make the final determination regarding the amount of the bonus. Although section 17 of the employment contract provided generally that any controversy or claim arising out of or relating to the contract or a breach of the contract was to be settled by arbitration, section 5(b) of the contract provided specifically that the amount of plaintiff's bonus was to be first determined by the corporation, and if there was a dispute, the final determination was to be made by the accounting firm. Thus, the contract expressly provided that the accounting firm's determination was to be final and binding, and not subject to arbitration. Under the circumstances, we agree with the trial court that the terms of the parties' contract excluded the computation of plaintiff's bonus during arbitration. Accordingly, the trial court did not err in concluding that the arbitration panel exceeded the scope of its authority when it determined the amount of plaintiff's bonus.

Plaintiff also argues this Court should apply the doctrine of judicial estoppel to preclude defendants from arguing that the amount of plaintiff's bonus was not within the arbitration panel's authority. We disagree.

“[T]he doctrine of judicial estoppel prohibits a party who has successfully and unequivocally asserted a position in a prior proceeding from asserting a wholly inconsistent position in a subsequent proceeding.” *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997), citing *Pashke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994). Although the record reflects that defendants requested that the issue whether plaintiff was entitled to a bonus under the contract be submitted to arbitration, a review of defendants’ motion to compel arbitration does not support plaintiff’s claim that defendants requested that the amount of plaintiff’s bonus be submitted to arbitration. Indeed, a careful review of the arbitrators’ decision belies plaintiff’s claim. Specifically, the arbitrators observed that defendants argued during the arbitration hearing that the arbitration panel was not “empowered to question . . . [the] final bonus determination.” Moreover, during the lower court proceedings defendants challenged the arbitrators’ decision to disregard their accountant’s determination of the bonus amount. Accordingly, we reject plaintiff’s claim that defendants should be judicially estopped from advancing this claim in this Court.

Affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Peter D. O’Connell