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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0928**

State Farm Insurance Companies, petitioner,
Respondent,

vs.

Areceley Padilla,
Appellant.

**Filed December 24, 2012
Reversed and remanded;
motion for sanctions denied and motion to clarify record denied
Peterson, Judge**

Hennepin County District Court
File No. 27-CV-11-23900

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Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and
Cleary, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a district court judgment vacating a no-fault arbitration award,
appellant argues that the district court erred by concluding that the arbitrator refused to
consider material evidence and exceeded his powers by finding that respondent insurer's

request for an examination under oath was not reasonable. Appellant also moved for sanctions against respondent for improperly summarizing arbitration testimony to this court and to the district court. We reverse the district court's order vacating the arbitration award, but decline to award appellant sanctions and deny respondent's motion to clarify the record.

FACTS

Appellant Arecely Padilla, age 17, suffered neck and back injuries while a passenger in her father's truck. Her father was insured by respondent State Farm Insurance Companies. Appellant was treated by Metro Injury between August 2010 and July 2011. Billing statements show that she was seen 35 times and received a variety of services, such as chiropractic adjustment, massage, and other therapies.

Metro Injury began providing respondent with billing statements and records in September 2010, but respondent did not pay the bills. Respondent believed that Metro Injury had a pattern of overbilling and overtreatment or of creating false or duplicative medical records. Appellant provided respondent with her current medical records and information about medical providers she had consulted during the seven years before the accident. Respondent repeatedly asked appellant to submit to an examination under oath (EUO), but she refused to do so and instead filed a petition for no-fault arbitration in November 2010. In January 2011, respondent denied appellant's claim for benefits because appellant failed to comply with the policy's requirement of cooperation.

Appellant later agreed to submit to an EUO, but rescinded that agreement after the Minnesota Supreme Court issued its opinion in *W. Nat'l Ins. Co. v. Thompson*, 797

N.W.2d 201 (2011). Instead, appellant's attorney asked the no-fault arbitrator to rule on whether it was reasonable for respondent to require appellant to submit to an EUO.

Before the arbitration hearing, respondent made an offer of proof to the arbitrator to produce copies of billing, diagnosis, and treatment records that showed Metro Injury's treatment of other patients and that looked similar to appellant's treatment plan. Respondent stipulated that it would produce these documents "if requested by the arbitrator and if an agreement is reached by the parties and the arbitrator that the materials will be submitted under seal and treated as confidential information. The information would need to be returned to [respondent's] counsel at the conclusion of the arbitration proceeding." The arbitrator requested additional information from respondent, but did not request copies of the documents described in the offer of proof. Respondent did not submit the proffered documents to the arbitrator.

At the arbitration hearing, appellant testified under oath and was cross-examined by respondent's counsel. Respondent's counsel acknowledged that appellant "provided her testimony in an honest and straightforward fashion regarding this is what was provided, this was not . . . provided, and . . . I don't remember whether or not that was provided, which are appropriate responses to the questions." The arbitrator determined that it was not reasonable to require appellant to submit to an EUO, concluding that the purpose of no-fault arbitration was to "encourage 'the voluntary exchange of information' and discourage formal discovery." The arbitrator acknowledged that appellant had a duty of cooperation, but stated that it was not reasonably necessary to require an EUO "from a minor claimant under the guise of conducting an ongoing

investigation into the treatment and billing practices of Metro Injury.” The arbitrator also noted that despite respondent’s concerns about the necessity of medical treatment provided to appellant, respondent “deliberately chose not to take advantage of its rights under Minn. Stat. § 65B.56, subd. 1 and schedule an independent medical examination for [appellant].” The arbitrator stated that “[b]ecause [respondent] deliberately chose not to schedule an independent medical examination of [appellant], I find that it has failed to prove a reasonable necessity for requiring [appellant] to submit to an [EUO].” Finally, the arbitrator noted that “concerns over the accuracy of [appellant’s]” medical records could be dealt with on cross-examination and that respondent’s concerns about other insureds were not relevant to the question of appellant’s claim for medical benefits. Appellant was awarded \$7,406, plus interest of \$752.90, out of her request for \$8,440.

On respondent’s motion to vacate the arbitration award, the district court concluded that the arbitrator refused to hear evidence material to the controversy and exceeded his powers by depriving respondent of its right to require an EUO. The district court vacated the arbitration award. This appeal followed.

D E C I S I O N

The district court shall vacate an arbitration award when:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
- (3) The arbitrators exceeded their powers;
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so

conducted the hearing, contrary to the provisions of section 572.12, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 572.09 and the party did not participate in the arbitration hearing without raising objection[.]

Minn. Stat. § 572.19, subd. 1 (2010). The district court concluded that the arbitrator refused to hear material evidence and exceeded his powers. We review the district court's decision on whether the arbitrator exceeded his powers de novo, as a question of law. *In re Progressive Ins. Co.*, 720 N.W.2d 865, 869-70 (Minn. App. 2006), *review denied* (Minn. Nov. 22, 2006). The party requesting vacation of an arbitration award must make a clear showing of a violation of these standards; if not, we will assume that the arbitrator did not exceed his authority. *Garlyn v. Auto-Owners Ins. Co.*, 814 N.W.2d 709, 712-13 (Minn. App. 2012)

A no-fault arbitrator is “limited to deciding questions of fact, leaving the interpretation of law to the courts.” *Weaver v. State Farm Ins. Cos.*, 609 N.W.2d 878, 882 (Minn. 2000). When an arbitrator must apply law to facts in order to grant relief, a court will review the arbitrator's necessary legal determinations de novo. *Id.* But an arbitrator's findings of fact are conclusive. *Garlyn*, 814 N.W.2d at 712; *State Farm v. Liberty Mut. Ins. Co.*, 678 N.W.2d 719, 721 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). A court may not review whether the record supports an arbitrator's findings. *Liberty Mut. Ins. Co. v. Sankey*, 605 N.W.2d 411, 413 (Minn. App. 2000), *review denied* (Minn. Apr. 18, 2000).

The question of whether an insured must submit to an EUO involves a determination of the reasonableness of the request. *Thompson*, 797 N.W.2d at 208. This is a question of fact for the arbitrator. *Id.* The arbitrator’s finding that a request for an EUO is reasonable or unreasonable is conclusive. *See Garlyn*, 814 N.W.2d at 712 (stating that arbitrator’s factual findings are conclusive). The courts, however, review the arbitrator’s legal conclusions of the consequences of this factual determination de novo. *Thompson*, 797 N.W.2d at 208.

II.

The district court concluded that the arbitrator refused to hear material evidence because he declined respondent’s offer of proof of medical records of other Metro Injury patients. *See* Minn. Stat. § 572.19, subd. 1(4) (stating that arbitration award shall be vacated if arbitrator refused to hear material evidence).

The parties to arbitration “are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.” Minn. Stat. § 572.12(b) (2010). Minn. R. No-Fault Arb. 24 states:

The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the issues. The arbitrator shall be the judge of the relevancy and materiality of any evidence offered, and conformity to the legal rules of evidence shall not be necessary.

See also State v. Hanks, 817 N.W.2d 663, 668 (Minn. 2012) (stating that rulings on relevancy of evidence are generally discretionary); *Wadena v. Bush*, 305 Minn. 134, 146-

47, 232 N.W.2d 753, 761 (1975) (determining that relevancy of medical records was fact question).

The arbitrator noted in his memorandum that “information obtained from other insureds [is] irrelevant to this matter and [appellant’s] claim for medical benefits.” Determination of relevancy is an inherent part of the arbitrator’s role as fact-finder, and courts must be wary about second-guessing the arbitrator’s factual findings.

Generally, evidence of fraud attributable to a person or entity not a party to the arbitration hearing is not material, and therefore not relevant, to the issue before the arbitrator. *See Progressive Ins. Co.*, 720 N.W.2d at 871-72 (rejecting insurer’s claim that arbitration award should be vacated based on alleged fraud by third-party medical-service providers). This court concluded that the district court’s role did not include

develop[ing] additional facts relating to the claim. Rather, its role is limited to determining whether any of the statutory grounds for vacating the awards exists. Because [the insurer] admitted that there was no evidence of fraud by the insureds or the arbitrators entitling it to vacation under Minn. Stat. § 572.19, subd. 1(1), any evidence of fraud by the service providers presented in an evidentiary hearing would address claims for relief under Minn. Stat. § 65B, subd. 4 [governing recovery of benefits paid due to intentional misrepresentation], which were not before the district court.

Id. at 873 (citations omitted). Similarly, respondent does not claim that appellant was a party to any alleged fraudulent activity by Metro Injury. Therefore, the arbitrator correctly found that respondent’s evidence of Metro Injury’s billing or treatment practices with regard to other patients was not relevant to the narrow issues of whether appellant’s claim should be paid or whether it was reasonable to require her to submit to

an EUO. The district court erred by determining that the arbitrator refused to accept material evidence; respondent's proposed evidence was not material to this claim.

III.

The district court concluded that the arbitrator exceeded his powers because he (1) denied respondent's request for an EUO despite respondent's demonstration that it acted in good faith and the EUO was a necessity; and (2) interpreted the statute to require attendance at an independent medical examination (IME) before an EUO could be required.

An arbitrator's decision can be vacated if the arbitrator exceeded his powers. Minn. Stat. § 572.19, subd. 1(3). A no-fault arbitrator has at least the following powers: (1) to award, suspend, or deny no-fault benefits, *Olson v. Auto-Owners Ins. Co.*, 659 N.W.2d 283, 285-86 (Minn. App. 2003), *review denied* (Minn. July 15, 2003); (2) to conclusively find facts, *Garlyn*, 814 N.W.2d at 712; (3) to determine the reasonableness of a request for an IME or EUO, *Thompson*, 797 N.W.2d at 207-08; and (4) to judge the relevancy or materiality of evidence submitted to the arbitration hearing, Minn. R. No-Fault Arb. 24.

The district court improperly weighed facts when it concluded that the arbitrator exceeded his powers because respondent "acted in good faith, demonstrated the necessity to obtain needed information, and [appellant] offered no reason for refusing to attend [an EUO]." The district court acknowledged that it made this decision "after review of the facts" and determined that respondent "sustained its burden of proof." *Thompson* makes clear that the arbitrator, as fact-finder, is charged with deciding whether a request to

attend an IME or an EUO is reasonable. 797 N.W.2d at 207-08. The district court's conclusion based on a review of the facts and a weighing of the evidence invaded the arbitrator's fact-finding duties.

The district court stated that the arbitrator engaged in statutory interpretation when he remarked that “[b]ecause [r]espondent deliberately chose not to schedule an [IME] of [appellant], I find that it has failed to prove a reasonable necessity for requiring [appellant] to submit to an [EUO].” Standing alone, this statement suggests that the arbitrator interpreted the statute to require an IME as a prerequisite for an EUO, which is not in accordance with Minn. Stat. § 65B.56, subd. 1 (2010). *See Thompson*, 797 N.W.2d at 206 (concluding that Minn. Stat. § 65B.56, subd. 1, permits insurer to require insured to submit to EUO upon showing of reasonable necessity).

But the arbitrator identified other circumstances that led him to conclude that respondent's request was unreasonable: (1) appellant was a minor; (2) appellant promptly submitted her claim and supporting medical records, and respondent failed to pay any part of her medical bills; (3) respondent claimed that it questioned the treatment provided to appellant, but did not request an IME, which could have confirmed respondent's concerns; (4) respondent requested the EUO “under the guise of conducting an ongoing investigation into the treatment and billing practices of Metro Injury”; (5) respondent could test the accuracy of appellant's medical records, which it had, on cross-examination; and (6) respondent's “concerns about information obtained from other insureds are irrelevant to this matter and this [appellant's] claim for medical benefits.”

These circumstances support the arbitrator's reasonableness finding and demonstrate that the arbitrator treated the reasonableness of respondent's request for an EUO as a question of fact. The arbitrator did not base his decision on the determination that the statute requires an IME before requesting an EUO; he determined that respondent's failure to request an IME, together with other circumstances, showed that requesting an EUO was not reasonable, which is a matter within the arbitrator's powers. The district court erred by concluding that the arbitrator exceeded his powers.

IV.

Appellant moved this court for sanctions under Minn. Stat. § 549.211 (2010) and Minn. R. Civ. P. 11, based on respondent's statements to the district court and in its appellate brief that appellant testified that no one had performed certain neurological tests despite Metro Injury's documentation of those tests. This is contrary to appellant's arbitration testimony; appellant testified that a neurologist had performed the tests. Within ten days of appellant's motion, respondent filed an affidavit admitting the error, which it described as inadvertent and unintentional.¹

“An attorney presenting pleadings or motion papers to the court certifies . . . that factual allegations or their denials have evidentiary support.” *Collins v. Waconia Dodge, Inc.*, 793 N.W.2d 142, 145 (Minn. App. 2011) (citing Minn. Stat. § 549.211, subd. 2;

¹Respondent seeks to correct the record under Minn. R. Civ. App. P. 110.05. But rule 110.05, which permits the parties to amend the record if it does not accurately reflect what occurred in the district court, does not apply here. The issue here is not the district court record, which is accurate, but the fact that respondent mischaracterized the arbitration record in the district court and this court. We, therefore, deny respondent's motion to clarify the record.

Minn. R. Civ. P. 11.02), *review denied* (Minn. Mar. 15, 2011). This places an affirmative duty on an attorney “to investigate the factual and legal underpinnings of a pleading.” *Uselman v. Uselman*, 464 N.W.2d 130, 142 (Minn. 1990). But both the rule and the statute require that the party seeking sanctions serve the nonmoving party with a motion setting forth its intent to seek sanctions, and both provide for a 21-day time period during which the nonmoving party may withdraw the challenged material. Minn. Stat. § 549.211, subd. 4(a); Minn. R. Civ. P. 11.03(a)(1). If after 21 days the offending material has not been withdrawn, the moving party may file the motion for sanctions with the court. *Johnson v. Johnson*, 726 N.W.2d 516, 518 (Minn. App. 2007). This “safe-harbor provision” is mandatory. *Id.* at 518-19. The purpose of the rule and statute is to deter improper conduct; by having a safe-harbor provision, the offending party is given an opportunity to correct the error. *Id.* at 519. Respondent responded within the safe-harbor period and withdrew the offending material.

We conclude that appellant may not be awarded sanctions for respondent’s misrepresentations to the district court. By not moving for sanctions in the district court, appellant did not give respondent an opportunity to correct the offending conduct. *See Progressive Ins. Co.*, 720 N.W.2d at 874 (reversing imposition of sanctions when moving party failed to comply with safe-harbor provision). And we will not award sanctions for respondent’s misrepresentations to this court, because respondent withdrew the offending statements during the safe-harbor period.

We reverse the district court's order vacating the arbitration award and remand for reinstatement of the arbitration award. We decline to award appellant sanctions.

Reversed and remanded; motion for sanctions and motion to clarify record denied.