Affirmed and Opinion filed May 20, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00151-CV

MESHARK OMORUYI, Appellant

V.

THE GROCERS SUPPLY CO., INC., Appellee

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 2006-31296

MEMORANDUM OPINION

Meshark Omoruyi appeals from the trial court's judgment entered in accordance with an arbitration award favoring The Grocers Supply Co., Inc. Omoruyi sued Grocers for negligence stemming from an on-the-job injury he suffered while employed by Grocers. After the trial court granted Grocers' motion to compel arbitration, the arbitrator ruled that Omoruyi take nothing on his claims against Grocers, and the trial court consequently dismissed Omoruyi's claims with prejudice. On appeal, Omoruyi contends

that (1) an arbitration agreement between Grocers and himself was rendered void by section 406.033 of the Texas Labor Code; (2) the agreement is void and unenforceable as against public policy; (3) all conditions precedent were not satisfied prior to commencement of arbitration proceedings; (4) Grocers' breach of its fiduciary duties precludes enforcement of the agreement; (5) the agreement is substantively unconscionable; and (6) the agreement is procedurally unconscionable. We affirm.

I. Background

In his petition, Omoruyi alleged that on January 27, 2006, he was unloading a truck while in Grocers' employ. When a ramp he was using malfunctioned, Omoruyi attempted to close it manually; a spring attached to the ramp's clamp then caused Omoruyi to be thrown backwards. Approximately one-half of Omoruyi's right pinky finger became caught in the ramp's chain and was severed. Grocers is a nonsubscriber to the Texas workers' compensation system. Omoruyi initially received treatment provided through Grocers' "Occupational Injury Benefits Plan," but at some point he sought care from a provider outside of the Plan and filed suit against Grocers. He specifically complains of ongoing pain for which he says the Benefits Plan did not provide treatment coverage.

In his petition, Omoruyi alleged that Grocers was negligent in failing to provide a safe work environment, including providing safe machinery, properly supervising employees, and implementing safety protocols. He further alleged that such failures proximately caused his injury. In regard to damages, Omoruyi contended that as a result of the injury, he was entitled to: (1) past, present, and future lost wages; (2) out-of-pocket expenses, including medical expenses; (3) compensatory damages for deformity, disability, and pain and suffering; (4) compensatory damages for emotional distress and mental anguish; and (5) exemplary damages.

Grocers filed a motion to dismiss in which it also requested that the trial court compel arbitration pursuant to an arbitration clause contained in an agreement between the parties. The trial court granted the motion in part and compelled the parties to arbitrate.

Omoruyi then filed a request for a writ of mandamus with this court, which we rejected because Omoruyi failed to establish an entitlement to such relief. *In re Omoruyi*, No. 14-07-00363-CV, 2007 WL 1558738, at *1 (Tex. App.—Houston [14th Dist.] May 31, 2007, orig. proceeding) (mem. op.). Our memorandum opinion did not otherwise state a substantive basis for the ruling. *Id.* At the conclusion of the arbitration proceeding, the arbitrator issued an award favoring Grocers on the merits and ordering that Omoruyi take nothing on his claims. On Grocers' motion, the trial court then entered a final judgment in accordance with the arbitration award and dismissed Omoruyi's claims with prejudice.

The arbitration clause Grocers relied upon was contained in a document, signed by Omoruyi and a Grocers representative, entitled "Voluntary Election of Mandatory Arbitration Agreement." This Arbitration Agreement contained mutual promises to resolve any claims covered by the Agreement through arbitration. In bold print, the agreement further informed Omoruyi that in signing, he was relinquishing his right to a jury trial on any covered claims. Claims covered by the agreement included tort claims such as negligence, negligence per se, and gross negligence, to the extent that such claims stemmed from work-related bodily injury.

The Arbitration Agreement explained that Grocers did not carry workers' compensation insurance for its employees but instead had adopted an "Occupational Injury Benefits Plan." It stated that the arbitration procedures contained in the Plan, as well as in the "Summary Plan Description," were incorporated into and made a part of the agreement as if set out therein, and that the Arbitration Agreement, along with the incorporated arbitration procedures, constituted the "complete agreement" between the parties. The Arbitration Agreement further provided that Omoruyi's agreement to waive his jury right was in exchange for eligibility for Plan benefits as well as the inherent benefits of arbitration procedures, specifically stating that "[i]f such claims cannot first be resolved through the Company's internal dispute resolution procedures, they must be submitted to final and binding arbitration in accordance with this Agreement." Although both parties

indicate that Omoruyi's employment with Grocers was contingent on his signing the Arbitration Agreement, the Arbitration Agreement itself actually states that signing was not a condition of employment. In signing the Arbitration Agreement, Omoruyi confirmed that he understood it, entered it voluntarily, and had ample time to read the agreement and seek the advice of anyone of his choosing.

Grocers' Benefits Plan provided specified benefits for injured employees, including medical expenses, "Wage Continuation," and payments in the event of death or dismemberment. Among the exclusions of coverage contained in the Plan are exclusions for "Mental and nervous conditions arising incident to the Bodily Injury or Disease, including for illustration and not limitation, (i) pain and suffering; [and] (ii) mental anguish, mental trauma, or depression . . . ."

Section 3.7 of the Plan, dealing with arbitration procedures, provided that any arbitration would be governed by the Federal Arbitration Act, as Grocers was "involved in . . . interstate commerce." It also provided that the arbitration fees and expenses would be "shared equally," except that the employee would not be required to pay more than $125 of the total amount of fees (an amount the Plan states would be "automatically increased from time to time in accordance with any adjustments made by the American Arbitration Association"). The Plan documents also contained claims review and appeals procedures to be undertaken in the event a claim for benefits was denied.

After determining the governing law, we will discuss Omoruyi's specific issues.

II. Which Law Governs: FAA, TAA, Common Law?

The parties initially dispute whether these proceedings are properly governed by the Federal Arbitration Act (FAA), the Texas Arbitration Act (TAA), or common law rules governing arbitration agreements. 9 U.S.C. §§ 1-307 (FAA); Tex. Civ. Prac. & Rem. Code §§ 171.001-.098 (TAA). Omoruyi specifically contends that because neither the TAA nor the FAA is applicable to the Agreement, he had the right, which he exercised, to

rescind the contract under common law principles governing arbitration agreements. In support, he cites *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 352 (Tex. 1977). We hold that the Agreement was governed by the FAA. Therefore, appellant's contention is without merit.

The FAA applies to all suits in state or federal court when the dispute concerns a "contract evidencing a transaction involving commerce." *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269-70 (Tex. 1992) (orig. proceeding). "Interstate commerce" in this context is not limited to the actual shipment of goods across state lines, but includes all contracts "relating to" interstate commerce. *In re FirstMerit Bank*, 52 S.W.3d 749, 754 (Tex. 2001) (orig. proceeding). To be applicable, the FAA does not require a substantial effect on interstate commerce; it requires only that commerce be involved or affected. *See In re L & L Kempwood Assocs.*, 9 S.W.3d 125, 127 (Tex. 1999) (orig. proceeding). Interstate commerce may be shown in a variety of ways, including: (1) location of headquarters in another state; (2) transportation of materials across state lines; (3) manufacture of parts in a different state; (4) billings prepared out of state; and (5) interstate mail and phone calls in support of a contract. *See Jack B. Anglin*, 842 S.W.2d at 270. Here, the Arbitration Agreement explicitly states, and Omoruyi and Grocers both acknowledge, that the contract relates to interstate commerce: Grocers is a wholesale grocery distributor that receives interstate shipments of goods and then redistributes them. *See In re Border Steel, Inc.*, 229 S.W.3d 825, 830-31 (Tex. App.—El Paso 2007, orig. proceeding) (holding that arbitration pursuant to clause in employee benefits plan was governed by FAA because employer engaged in interstate commerce and relying, at least in part, on statements to this effect in the agreement itself).

Omoruyi points out, however, that section 1 of the FAA contains an exemption clause, making the act inapplicable to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9

U.S.C. § 1. Omoruyi contends that his job as a warehouse worker, whose duties included loading and unloading trucks, falls within the section 1 exemption. We disagree.

The United States Supreme Court has held that the section 1 exemption should be read narrowly, confining application of the exemption to "transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 112-121 (2001).[1] As part of the rationale for this narrow reading, the court explained that Congress may have intended to reserve "for itself more specific legislation for those engaged in transportation," such as seamen and railroad employees, and, in fact, had enacted such legislation in the intervening years since passage of the FAA. *Id*. at 121. Foreshadowing this rationale, a federal court in Maryland held that a warehouse foreman, who unloaded interstate shipments of goods and then repackaged them and reloaded them on trucks for shipment to other facilities, was not a transportation worker, in part because Congress had passed no legislation specifically applying to such warehouse workers. *Kropfelder v. Snap-On Tools Corp.*, 859 F. Supp. 952, 958-59 (D. Md. 1994) (explaining further that while the warehouseman's work had a substantial relationship with interstate commerce, it was not in the same vein as work performed by seamen and railroad workers).

Other courts have focused more specifically on the nature of the work performed by the employee in question. For example, in *Lenz v. Yellow Transportation, Inc.*, the court determined that "[t]he real question is whether the employee is engaged in the interstate transport itself such that the employee has a direct effect on the channels of interstate commerce." 352 F. Supp. 2d 903, 908 (S.D. Iowa 2005). Surveying other cases considering application of the section 1 exemption, the *Lenz* court determined that it had to look closely at the employee's "specific job duties and responsibilities to determine if [he

[1] The *Circuit City* Court further explained that the phrase "engaged in . . . interstate commerce" contained in the section 1 exemption was considerably narrower than the phrase "involving commerce" used in section 2 to describe the type of agreements to which the FAA would apply. 532 U.S. at 112, 114-19. In other words, the FAA applies to employment contracts that evidence a transaction involving interstate commerce unless the employee is actually engaged in such commerce as a part of his job duties. *See* 9 U.S.C. §§ 1, 2; *Circuit City*, 532 U.S. at 114-19.

was] a transportation worker." *Id*. at 907. In determining that a "customer service representative" for a transportation (trucking) company was a transportation worker and thus exempt under section 1, the court highlighted facts demonstrating that the employee "had a direct effect on the schedule and movement of the goods themselves" by "coordinat[ing] freight flow by expediting movement of shipments" in response to customer concerns. *Id*. at 908. It further emphasized that the employee's duties occurred during shipment of the goods, thus distinguishing his work from that of an employee in a different case where work occurred before or after shipment and thus was held to not have a direct effect on interstate commerce. *Id*. at 907 (distinguishing *Lorntzen v. Swift Transp., Inc.*, 316 F. Supp. 2d 1093, 1097 (D. Kan. 2004)).

Applying the lessons of *Lenz* here, it is clear that Omoruyi's job responsibilities—loading and unloading trucks at the warehouse and scanning products within the warehouse—were not "so closely related [to interstate commerce] as to be in practical effect part of it." *Id*. at 908 (quoting *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Local 437*, 207 F.2d 450, 452 (3d Cir. 1953)). There has been no showing that Omoruyi's duties directly involved or impacted the actual shipment or transit of the goods. Accordingly, we find that because the section 1 exemption does not apply, the FAA governs the Arbitration Agreement between the parties. Therefore, Omoruyi was not entitled to rescind the Agreement under common law principles governing arbitration. Additionally, as will be developed more fully below, in determining the validity of arbitration agreements under the FAA, we generally apply state-law principles governing the formation of contracts. *See In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

III. Analysis of Omoruyi's Issues

A party moving to compel arbitration must establish that (1) a valid, enforceable arbitration agreement exists, and (2) the claims asserted fall within the scope of that

agreement. *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 581 (Tex. App.—Houston [14th Dist.] 1999, no pet.). If the movant establishes that an arbitration agreement governs the dispute, the burden then shifts to the party opposing arbitration to establish a defense to the arbitration agreement. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999) (orig. proceeding). "Once the trial court concludes that the arbitration agreement encompasses the claims, and that the party opposing arbitration has failed to prove its defenses, the trial court has no discretion but to compel arbitration and stay its own proceedings." *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753-54 (Tex. 2001). Consequently, we consider whether an agreement imposes a duty to arbitrate under a de novo standard of review. *In re Provine*, No. 01-09-00769-CV; 2009 WL 4967245, at *3 (Tex. App.—Houston [1st Dist.] Dec. 10, 2009, orig. proceeding).

In his six issues, Omoruyi raises both objections to the enforceability and validity of the Arbitration Agreement as well as defenses to its enforcement. Specifically, he contends that (1) the Arbitration Agreement was rendered void by section 406.033 of the Texas Labor Code; (2) the Agreement is void and unenforceable as against public policy; (3) all conditions precedent to arbitration were not satisfied; (4) Grocers' breach of its fiduciary duties precluded enforcement of the Agreement; (5) the Agreement is substantively unconscionable; and (6) the Agreement is procedurally unconscionable.

A. Labor Code Section 406.033

In his first issue, Omoruyi contends that because the Arbitration Agreement interferes with his right to a judicial resolution of his claims, it is voided by operation of section 406.033 of the Texas Labor Code. Tex. Lab. Code § 406.033. In support of his contention, Omoruyi specifically relies upon subsections (a) and (e) of that section, which provide as follows:

> (a) In an action against an employer who does not have workers' compensation insurance coverage to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment, it is not a defense that:

(1) the employee was guilty of contributory negligence;

(2) the employee assumed the risk of injury or death; or

(3) the injury or death was caused by the negligence of a fellow employee.

. . . .

(e) A cause of action described in Subsection (a) may not be waived by an employee before the employee's injury or death. Any agreement by an employee to waive a cause of action or any right described in Subsection (a) before the employee's injury or death is void and unenforceable.

Id. § 406.033(a) and (e).

According to Omoruyi, section 406.033(e) prohibits a pre-injury waiver of a right to judicial resolution of injury or death claims against a non-subscriber employer. The Texas Supreme Court has recently expressly held to the contrary in *In re Golden Peanut Co.*, 298 S.W.3d 629, 631 (Tex. 2009), a case also involving personal injury claims against a nonsubscriber to the workers' compensation system. As the court stated in that case: "[A]n agreement to arbitrate is a waiver of neither a cause of action nor the rights provided under section 406.033(a), but rather an agreement that those claims should be tried in a specific forum. Accordingly, section 406.033(e) does not render the arbitration agreement void." *Id.* For the reasons expressed in *In re Golden Peanut*, we find that section 406.033(e) does not render the Arbitration Agreement at issue in the present case void. We therefore overrule Omoruyi's first issue.

B. Public Policy[2]

In his second issue, Omoruyi contends that the Arbitration Agreement is void as violative of Texas public policy. Specifically under this issue, he complains that (1) the Arbitration Agreement's waiver of judicial rights was imposed as a condition of

[2] The types of arguments Omoruyi makes under the rubric of "public policy" are often, but not always, considered by courts under the principles governing substantive unconscionability. These general principles are set forth below in regards to Omoruyi's substantive unconscionability arguments, which to some degree, merely reprise his public policy arguments.

employment, and (2) other perceived "inadequacies" in Grocers' Benefits Plan "tipped the scales" against legislative intent as set forth in the Texas Workers Compensation Act. Tex. Labor Code §§ 401.001-419.007.

In support of his arguments, Omoruyi places great reliance on the Texas Supreme Court's analysis in *In re Poly-America, L.P.*, 262 S.W.3d 337 (Tex. 2008).[3] Such reliance is misplaced. In *Poly-America*, the court held that an arbitration provision in an employment contract was unconscionable because it limited the remedies available under the anti-retaliation provisions of the Workers' Compensation Act; specifically, the contract prohibited the arbitrator from ordering reinstatement or awarding punitive damages. *Id.* at 352-53. In arriving at this conclusion, the court reaffirmed that a provision in an agreement between an employer and an employee, that was imposed as a condition of employment and limited the employer's liability, would violate public policy as expressed in the Workers' Compensation Act. *Id.* at 353 (citing *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 550 (Tex. 2001)). The court further explained that such waivers of liability would allow employers to enjoy the Act's limited-liability benefits while exposing workers to exactly the sort of injury costs that the Act was designed to shift to employers. *Id.* In such cases, the balance established by the Act between ensuring compensation for injured workers on the one hand and limiting employers' exposure to uncertain and potentially high damage awards on the other would thus be "tipped so that the employee's benefits under the statute are substantially reduced, [and] the clear intent of the legislature is thwarted." *Id.* (quoting *Hazelwood v. Mandrell Indus. Co.*, 596 S.W.2d 204, 206 (Tex. Civ. App.—Houston [1st Dist.] 1990, writ ref'd n.r.e.)). Consequently, private agreements that allow employers to reap the system's benefits while burdening employees with the costs of injury are generally against public policy. *See id.* However, the evils warned against in *Poly-America* are not what occurred in the present case.

[3] The court explained in *Poly-America* that even though the arbitration proceedings were governed by the FAA, federal preemption did not apply to the assessment of whether the parties had entered into a valid and enforceable agreement to arbitrate under state contract law. 262 S.W.3d at 347.

Omoruyi first complains that the Arbitration Agreement between himself and Grocers imposed arbitration as a mandatory condition of employment. He does not, however, cite any authority or make any specific argument as to how this fact *alone* violated public policy. To the contrary, as recognized in *Poly-America*, Texas public policy *favors* resolution of conflicts through arbitration. *Id.* at 348 ("Agreements to arbitrate disputes between employers and employees are generally enforceable under Texas law; there is nothing *per se* unconscionable about an agreement to arbitrate employment disputes and, in fact, Texas law has historically favored agreements to resolve such disputes by arbitration."). Indeed, in *Poly-America*, after holding that the liability-limiting provisions were void, the court ultimately upheld the trial court's order compelling arbitration. *Id*. at 360-61. Similarly, in *In re Halliburton, Co.*, the Texas Supreme Court held that an arbitration provision imposed as a condition of employment was not unconscionable. 80 S.W.3d 566, 567 (Tex. 2002). Based on the analysis in *Poly-America* and *In re Halliburton*, we find that the imposition of an arbitration provision as a condition of employment in the present case did not in itself violate public policy.[4]

Omoruyi next argues that the following language in the arbitration procedure portion of the Arbitration Agreement impermissibly waived protections afforded by the Workers' Compensation Act:

> **(e) Remedies and Defenses.** All parties are entitled to allege any claim, obtain any remedy, and assert any legal or equitable defense that the party could allege, obtain or assert in a Texas state or federal court in that jurisdiction.

Omoruyi specifically contends that this language violates the prohibition of certain common law defenses contained in section 406.033(a) of the Workers' Compensation Act.

[4] It is important to note that this case does not present a situation where an employee was forced to agree to waive his right to sue his employer for negligence or to limit the employer's potential liability in exchange for occupational injury benefits. *See generally Lawrence*, 44 S.W.3d at 550 (suggesting such a liability-limiting provision would violate public policy). In signing the Agreement and continuing to work for Grocers, Omoruyi did not give up his right to seek common law remedies or to any limitation on those remedies. He merely agreed to arbitrate such disputes rather than try them in court.

Tex. Labor Code § 406.033(a). As discussed above, section 406.033(a) provides that in an action against a nonsubscriber employer, the employer may not utilize the defenses of contributory negligence or assumption of the risk or assert as a defense that the injury was caused by the negligence of another employee. *Id*. However, contrary to Omoruyi's contention, the Arbitration Agreement does not waive the section's prohibition against these defenses. The Agreement provides that Grocers could assert the same defenses in arbitration that it could in a state or federal court. Thus, the section 406.033(a) prohibition of certain defenses would operate in an arbitration proceeding under the Agreement just as it would in a court proceeding, *i.e.*, Grocers would not be entitled to raise the listed defenses in either forum.

Lastly, Omoruyi contends that other Benefit Plan inadequacies "tipped the scales" of the public policy balance struck in the Texas Workers Compensation Act. Specifically referencing the benefits provided under Grocers' Plan, Omoruyi contends that the Plan was "void as against public policy [because i]t allowed Grocers to enjoy the Act's immunity from judicial proceedings and a jury trial while exposing workers to exactly the sort of costs of necessary medical treatment and income benefits that the Act is specifically designed to shift onto the employer." Omoruyi complains in particular about the fact that the Benefit Plan did not cover "physical symptoms of an Occupational Bodily injury or disease," and specifically did not provide benefits for "[m]ental and nervous conditions," such as pain and suffering and mental anguish. We disagree with Omoruyi that the Plan's alleged benefit inadequacies rendered it void as against public policy as set forth in the Act.

As the Texas Supreme Court has explained, the Workers' Compensation Act strikes a balance: on the one hand, it relieves employees of the burden of having to prove negligence and provides them with timely compensation for on the-job injuries; on the other hand, the Act prohibits employees from pursuing common-law remedies against employers. *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 142 (Tex. 2003); *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 206-07 (Tex. 2000). Here, Grocers' Plan

provided certain benefits in exchange for a mutual agreement to arbitrate any disputes regarding on-the-job injuries. Unlike the Workers' Compensation Act, the Plan does not prevent an employee from seeking common law remedies against Grocers.[5] In other words, unlike an employee of a Workers' Compensation subscriber, Omoruyi could still, and in fact did, sue Grocers for negligence, seeking compensatory as well as exemplary damages.[6] Consequently, Omoruyi has failed to show that the Benefits Plan "tipped the scales" of the policy balance struck in the Act.[7] We find that all of Omoruyi's public policy arguments are without merit. We therefore overrule his second issue.

C. Condition Precedent

In issue three, Omoruyi contends that the trial court erred in compelling arbitration because exhaustion of internal dispute resolution procedures, a condition precedent to arbitration under the Arbitration Agreement, was not fulfilled.[8] We agree with Grocers that this issue was a matter for the arbitrator to determine. Because there is

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[5] Indeed, the Plan documents themselves appear to preserve common law remedies. Appendix D to the Benefits Plan is a document entitled: "Mutual Agreement to Arbitrate Occupational Injury and Disease Claims." Section 4 of this agreement states in part that "[w]hile both Claimant and Company retain all substantive legal rights and remedies under this Agreement, Claimant and Company are each waiving all rights which either may have with regard to trial . . . ." Subsection 5(a) states that the claims covered by the agreement include all claims for pain and suffering and mental anguish (the very types of claims Omoruyi contends were restricted). And, perhaps most importantly, subsection 6(e) states that in an arbitration proceeding, "[a]ll parties are entitled to . . . obtain any remedy . . . that the party could [obtain] in a Texas state or federal court in that jurisdiction."

[6] An employee of a subscriber can notify his or her employer of his or her intention to opt out of the system and retain their common law rights of action, provided the employee does so by the time limits established in the Act. *See* Tex. Labor Code § 406.034.

[7] In *Lawrence*, the Texas Supreme Court cautioned against a plan-by-plan comparison of occupational injury plans versus benefits under the Act. 44 S.W.3d at 551-52. As the court pointed out, there are substantial "difficulties inherent in quantifying and measuring such intangible benefits" such that "a comparative-equivalency analysis [would foster] unpredictability of outcome and [undermine] judicial economy." *Id*. at 551. In the present case, such an analysis is additionally unnecessary because the Agreement and the Plan did not require Omoruyi to waive any right of action or accept any limitation on liability in exchange for benefits.

[8] The language that Omoruyi contends creates a condition precedent reads as follows: "If such claims cannot first be resolved through the Company's internal dispute resolution procedures, they must be submitted to final and binding arbitration in accordance with this Agreement."

no indication in the record that Omoruyi brought the issue before the arbitrator, Omoruyi cannot raise it in this appeal. The United States Supreme Court has explained that questions of procedural arbitrability, such as the fulfillment of conditions precedent to arbitration, are matters for the arbitrator to determine. In contrast, questions of substantive arbitrability, such as whether an arbitration agreement is enforceable or whether the matter at hand falls within the scope of the agreement, are matters for a court to determine. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964); *see also W. Dow Hamm III Corp. v. Millennium Income Fund, L.L.C.*, 237 S.W.3d 745, 753 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding); *In re Global Const. Co.*, 166 S.W.3d 795, 798 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding).

A few courts have recognized an exception to this dichotomy, permitting courts to determine procedural arbitrability questions under certain circumstances, such as when the issues are factually undisputed. *See, e.g., Gen. Warehousemen & Helpers Union Local 767 v. Albertson's Distribution, Inc.*, 331 F.3d 485, 488 (5th Cir. 2003); *In re Pisces Foods, L.L.C.*, 228 S.W.3d 349, 352-53 (Tex. App.—Austin 2007, orig. proceeding); *see also In re Igloo Prods. Corp.*, 238 S.W.3d 574, 579, 581 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (holding that issue of condition precedent was for the court to decide where neither party suggested either that the agreement was ambiguous or that the condition had been met). Here, the parties strongly disagree concerning the facts pertaining to the alleged condition precedent. Omoruyi contends that Grocers was required to initiate and complete internal dispute resolution procedures before seeking to compel arbitration. Grocers contends that it fulfilled its contractual obligations respecting internal dispute procedures by making Omoruyi aware of the procedures after his claim was denied and by providing him the opportunity to pursue internal resolution. Grocers

argues that it was Omoruyi who failed to comply with the Benefit Plan's rules by essentially dropping out of the Plan and filing his lawsuit.[9]

Because Omoruyi's condition precedent argument implicates procedural matters and not substantive ones, as defined by the Supreme Court, and it does not fall into any recognized exception to the rule that procedural arbitrability matters are the province of the arbitrator, Omoruyi should have raised this issue before the Arbitrator. Omoruyi does not appeal any decisions of the arbitrator, and the record does not establish that he made this argument to the arbitrator. Consequently, Omoruyi did not preserve this issue for appeal. We overrule Omoruyi's third issue.

D. Breach of Fiduciary Duties

In his fourth issue, Omoruyi contends that Grocers' breach of its fiduciary obligations as plan administrator precluded enforcement of the Arbitration Agreement. In the argument section of his brief, however, the only mention Omoruyi makes of any supposed fiduciary duty is in support of his condition precedent argument discussed above. He specifically suggests, in this portion of his brief, that because Grocers was the plan administrator, the Grocers employee who operated as claims adjuster for Omoruyi's claim was obligated to inform him of the available appeals process and recommend that he undertake that process.[10] Omoruyi concludes by arguing that because Grocers failed to

[9] Cases recognizing an exception to the *Howsam* procedural-substantive dichotomy typically have involved mediation as a condition precedent to arbitration under the agreement at hand rather than exhaustion of internal dispute procedures. *See, e.g.*, *In re Igloo*, 238 S.W.3d at 579, 581; *In re Pisces Food*, 228 S.W.3d at 351. While mediation either occurs or does not occur in a given case, the question of when and under what circumstances internal dispute procedures have been sufficiently utilized to fulfill a condition precedent to arbitration can be a much more nuanced query. The cases recognizing an exception to the *Howsam* dichotomy are, therefore, additionally distinguishable from the present case on this basis.

[10] In support of his claim that Grocers owed fiduciary duties to him, Omoruyi cites *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210 (Tex. 1988), which he contends stands for the proposition that an "insurer owes fiduciary duties to its insured." He has misstated the holding in *Aranda.* It holds merely that an insurer, specifically a workers' compensation carrier, has a duty to "deal fairly and in good faith" with its insureds, or specifically, a covered, injured worker. 748 S.W.2d at 212-13. Omoruyi offers no authority or argument as to whether such a duty would also apply in the context of a benefit plan such as involved in the present case. Omoruyi also fails to offer authority or argument supporting the supposed

fulfill this obligation, it should be estopped from "contend[ing] otherwise," apparently indicating that Grocers should not be permitted to argue that it had fulfilled the conditions precedent involving internal dispute resolution. As discussed above, Omoruyi's condition precedent arguments were for the arbitrator to decide. Regardless, at no point in the brief does Omoruyi argue that the alleged breach of fiduciary duty, by itself, voided the Arbitration Agreement or otherwise rendered it unenforceable. *See* Tex. R. App. P. 38.1(h). We decline to make his argument for him. Consequently, we overrule Omoruyi's fourth issue.

E. Unconscionability

In his fifth and sixth issues, Omoruyi contends that the Arbitration Agreement was, respectively, substantively and procedurally unconscionable. "Substantive unconscionability" refers to the general fairness of the arbitration provision itself, whereas, "procedural unconscionability" refers to the fairness of the circumstances surrounding adoption of the arbitration provision. *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006). Unconscionable contracts are not enforceable under Texas law. *In re Poly-America*, 262 S.W.3d at 348. The burden of proving unconscionability is on the party asserting such ground for revocation. *Id*. Whether an arbitration agreement is unconscionable can be considered by a court in determining the validity of the agreement. *In re Palm Harbor*, 195 S.W.3d at 677 (citing *In re Halliburton*, 80 S.W.3d 566, 571 (Tex. 2002) (orig. proceeding)); *see also In re Weeks Marine, Inc.*, 242 S.W.3d 849, 860-61 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (holding that court could consider procedural unconscionability issue).

1. Substantive Unconscionability

The question of whether an arbitration clause is substantively unconscionable turns on whether "given the parties' general commercial background and the commercial needs

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fiduciary duty that he would impose upon Grocers. Because of our resolution of this issue, we need not analyze any of these unsupported points.

of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001) (orig. proceeding). Under issue five, Omoruyi specifically contends that the Arbitration Agreement was unconscionable because "it was so grossly one-sided." In a single sentence of argument, he complains that his continued employment was conditioned on waiver of his rights to sue, to a jury trial, and of the Workers' Compensation Act's proscription against a nonsubscriber employer's common law defenses in exchange for "grossly inadequate medical benefits."

Omoruyi has made each of these arguments under other issues in his brief, and he provides no additional reasoning under his substantive unconscionability issue. In response to Omoruyi's arguments based on section 406.033(e) of the Texas Labor Code, we explained that in signing the Agreement, he did not actually waive his right to sue, he merely agreed to a particular forum for resolution of his cause of action. *See In re Golden Peanut*, 298 S.W.3d at 631. In response to Omoruyi's public policy arguments, we explained that Texas favors resolution of conflicts, even in the employer-employee context, through arbitration and that the Agreement in fact did not conflict with the Act's proscription against common law defenses. *See* Tex. Labor Code § 406.033(a); *In re Poly-America*, 262 S.W.3d at 348. Additionally, we explained why Omoruyi's inadequate benefits complaint lacked merit. For the reasons discussed in these prior sections of the opinion, we reject Omoruyi's substantive unconscionability arguments and overrule his fifth issue.

2. Procedural Unconscionability

Procedural unconscionability relates to the making or inducement of the contract, focusing on the facts surrounding the bargaining process. *TMI, Inc. v. Brooks*, 225 S.W.3d 783, 792 (Tex. App.—Houston [14th Dist.] 2007, pet denied). Under his sixth issue, Omoruyi asserts procedural unconscionability based on the purported facts that (1) there was no negotiation between the parties concerning the Arbitration Agreement; (2) he

was required to sign the Agreement without having reviewed other documents incorporated therein; and (3) he did not receive "unequivocal notification" of the modifications to his at-will employment as required.

Omoruyi first points out that the Arbitration Agreement was prepared by Grocers and was not subject to negotiation. The Texas Supreme Court has held under similar facts that such a "take it or leave it" offer from an employer to an at-will employee is not, without more, procedurally unconscionable. *In re Halliburton*, 80 S.W.3d at 572. Thus, the fact of non-negotiability alone will not render the Arbitration Agreement here unconscionable.[11]

Omoruyi next asserts that he was required to sign the Arbitration Agreement without the benefit of reviewing other documents, which were incorporated by reference into the agreement. Omoruyi does not, however, cite any portion of the record demonstrating that he was not permitted to review the Benefit Plan documents. Furthermore, Omoruyi does not cite any authority or provide any specific argument as to how this alleged fact rendered the Arbitration Agreement unconscionable. *See generally* Tex. R. App. P. 38.1(h) ("[Appellant's] brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). Accordingly, we find no merit in this argument.

Lastly, Omoruyi complains that he did not receive "unequivocal notification" of the modifications to his at-will employment as required by the Texas Supreme Court in *In re Halliburton*, 80 S.W.3d at 568-70, and *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228-29 (Tex. 1986). Omoruyi's reliance upon these cases is misplaced for several

[11] Omoruyi asks this court to compare our sister court's opinion in *In re Brookshire Brothers, Ltd.*, 198 S.W.3d 381 (Tex. App.—Texarkana 2006, orig. proceeding), to the facts of this case. In *Brookshire Brothers*, the court pointed out that the employee had no bargaining ability in respect to an arbitration clause imposed by her employer; however, the court considered this fact as only one of several factors demonstrating that the agreement was procedurally unconscionable, including that she was already in the process of pursuing legal claims against her employer when it imposed the arbitration requirement. *Id*. at 388. No aspect of *Brookshire Brothers* suggests that the agreement in the present case was procedurally unconscionable.

reasons. To begin with, *Halliburton* and *Hathaway* considered whether an employer had given an employee unequivocal notification of changes to his at-will employment as a question of contract formation, not as a matter of procedural unconscionability. *Halliburton*, 80 S.W.3d at 568-70; *Hathaway*, 711 S.W.2d at 228-29. Both cases dealt with situations in which an employer attempted to modify the terms of an at-will employee's employment by providing notice to the employee of the change and essentially conditioning continued employment on acceptance of the change. *Halliburton*, 80 S.W.3d at 568; *Hathaway*, 711 S.W.2d at 228. In such situations, if the employee continues working after having received notice of the changes, he or she has accepted the changes as a matter of law. *Halliburton*, 80 S.W.3d at 568; *Hathaway*, 711 S.W.2d at 229. For modification to be effective, the notice must be "unequivocal," and "the employee must know the nature of the changes and the certainty of their imposition." *Hathaway*, 711 S.W.2d at 229. In *Hathaway*, the employee was found to have not accepted the modification where his supervisor twice told him not to "worry about" the changes because he (the supervisor) would "take care of the situation." *Id*. at 228-29. In *Halliburton*, the employee was found to have accepted the changes as a matter of law where he acknowledged that he received notice and continued working thereafter, even though he asserted that he did not fully understand the notice. 80 S.W.3d at 568.[12]

Even if Omoruyi had properly raised his arguments as matters of contract formation, neither *Halliburton* nor *Hathaway* support the conclusion that no contract was formed under the facts of this case. Omoruyi bases his contention that he did not receive unequivocal notice on discrepancy within the documents: while the last sentence of the Arbitration Agreement states that his signing of the Agreement was not a condition of his employment or continued employment with Grocers, other statements in the Plan documents suggest that his employment was conditioned on his agreeing to the Arbitration

[12] It is not entirely clear from the *Halliburton* opinion exactly what documents the employee received as notification, but it appears that, as here, the employee received a summary of the plan and not the plan itself. 80 S.W.3d at 568-69.

Agreement and Benefits Plan. Omoruyi offers no specific rationale as to how the apparent inconsistency in the documents rendered the Arbitration Agreement unenforceable, stating only that unequivocal notice was "a foregone conclusion." In support of his position, he cites *Hathaway*, in which the employee was given conflicting information as to whether or not he had to accept the modification as a condition of his continued employment. 711 S.W.2d at 228. The facts of *Hathaway* are distinguishable from those of the present case. In that case, the issue was whether the employee had agreed to the modification based on the employer's notification and his subsequent conduct. *Id*. at 228-29. In contrast, because Omoruyi signed the Arbitration Agreement, there is no issue of contract formation or subsequent modification.[13] Accordingly, we overrule Omoruyi's sixth issue.[14]

IV. Conclusion

Having overruled all of Omoruyi's appellate issues, we affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges, Justice Anderson, and Senior Justice Mirabal.[*]

[13] We need not and do not make any holdings respecting whether in fact Omoruyi's acceptance of the changes was a condition of his employment.

[14] In his reply brief, Omoruyi points out that the Texas Supreme Court has held that nonsubscriber workers' compensation benefits plans must fulfill the fair notice requirements of conspicuousness and the express negligence doctrine. *See Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 191, 193-94 (Tex. 2004). However, Omoruyi did not mention this holding in his original briefing and makes no argument that such holding rendered the plan at issue in the present case procedurally unconscionable.

[*] Senior Justice Margaret Garner Mirabal, sitting by assignment.