

**Matter of Haufe v Liberty Mut. Ins. Co.**

2019 NY Slip Op 33873(U)

December 23, 2019

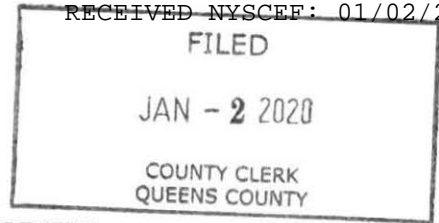
Supreme Court, Queens County

Docket Number: 708437/2019

Judge: Joseph Risi

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. JOSEPH RISI, A.J.S.C.  
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IAS PART 3

In the Matter of the Application of FRANCIS R. HAUFE,

Index No. 708437/2019

Petitioner,

**DECISION/ORDER**

-against-

LIBERTY MUTUAL INSURANCE COMPANY - SUM

Motion Seq. # 1

Respondent.  
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The following numbered papers read on this motion by plaintiff, Francis Haufe for a) an order pursuant to CPLR §7511(b)(1)(i), vacating the arbitration award of Anthony F. Altimari, Esq., dated February 18, 2019 based on alleged misconduct, or b) pursuant to CPLR §7511(b)(1)(iii), based on the arbitrator's allegedly acting in excess of his power, and c) pursuant to CPLR §7502(d), ordering a rehearing and determination on the issue of causation before a new arbitrator.

	Papers <u>Numbered</u>
Notice of Petition-Affirmation-Exhibits.....	EF 1- 32
Affirmation in Opposition & Cross-Motion.....	EF 36
Reply Affirmation & Opp to Cross Motion.....	EF 38-41

Upon the foregoing papers it is ordered that this motion is disposed of as follows:

Petitioner, a fifty-seven year old man, was involved in a motor vehicle accident on October 23, 2013, when a car hit him in the rear and pushed him into the vehicle in front of him. At the time of the accident, petitioner had an automobile insurance policy with Liberty Mutual Insurance Company ("LMIC") with coverage limits of \$250,000 per occurrence with a \$500,000 aggregate for bodily injury and \$250,000 per occurrence with a \$500,000 aggregate for Supplementary Uninsured Motorist benefits ("SUM"). Petitioner recovered \$50,000 for his injuries sustained as a result of the accident from the offending vehicle's insurance carrier. On or about February 7, 2017, petitioner served LMIC with a demand for Arbitration for SUM benefits, alleging he was injured on October 23, 2013, when his vehicle was allegedly struck by an "underinsured" vehicle. In view of the fact that petitioner has recovered a \$50,000 policy payment from the "underinsured" vehicle, his SUM coverage with LMIC is entitled to a set-off of that amount, resulting in an exposure of \$200,000, for his "underinsured" claim.

The arbitrator found no causal connection between the alleged brain injury/reduced mental capacity claim and the subject accident.

Petitioner claims that the arbitrator either acted arbitrarily, capriciously, and irrationally in issuing the award without any proof whatever, or he refused to hear pertinent and material evidence, thus demonstrating misconduct or he did both.

Petitioner is seeking to vacate the arbitration award based upon two subdivisions of CPLR §7511. CPLR §7511(b)(1)(i) allows for an arbitration award to be vacated if there is a finding of corruption, fraud or misconduct in procuring the award. CPLR §7511(b)(1)(iii) provides that an arbitration award can be vacated if the arbitrator, agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made.

Petitioner is also seeking a rehearing as set forth in CPLR §7511(d) which states “Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator...”

Respondent, on the other hand, claims that the arbitrator’s award was fairly and justly made, based upon the law, the evidence submitted and the arbitrator’s permitted discretion and that petitioner did not prove his case.

Respondent requests confirmation of the arbitrators award if this motion to vacate is denied. CPLR §7511(e) provides: “Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify; it shall confirm the award”.

The exhibits submitted by claimant at the arbitration hearing included the police accident reports, photos of the motor vehicles involved in the accident and the depositions of Francis and Joan Haufe. In addition there were medical records and treatment records from North Shore University Hospital emergency room, Jeffrey Krupen, M.D., Neurological Specialties of Long Island, Northway Physical Therapy, PC., NY Spine Care Interventional Pain Management, NSLIJ Glen Cove - Dept. of Orthopedics, Edward Craig, M.D., the Hospital for Special Surgery, Sarah G. Schaffer, Ph.D., Amen Clinic, Inc., Connecticut Spine & Health Center (includes MRI’s), IME from Dr. Marianna Golden, Howard Katz, M.D., and Marc J. Katzman, M.D.

It is clear that petitioner suffered an injury causally related to the subject accident. Injuries to petitioner’s neck, lower back and shoulders were shown to be causally connected to the motor vehicle accident of October 23, 2013. Petitioner received \$50,000 in damages for these injuries.

Petitioner is now seeking damages for his claim of slowly progressing memory difficulties, mood changes and cognitive function.

Petitioner argues that the arbitrator missed many salient points. Petitioner claims that because the EEG report found “post concussion syndrome” on January 14, 2014, the arbitrator is obligated to find a causal connection of brain injury/reduced mental capacity. This is not the case. The arbitrator specifically mentioned that there was no deficit in cognitive function according to the medical records and the complaints alleged were not proven to be causally related to the motor vehicle accident. The report of psychologist Susan Schaffer, Ph.D, found average general cognitive functioning. She went on to state that concussion symptoms tend to resolve within two weeks to two months. She found it unlikely that his reported concussion symptoms are secondary to his previous concussion.

Petitioner claims that the fact that the arbitrator used the phrase “significant causal connection” shows that he was applying a new standard of proof that was not called for and was inappropriate. Although the arbitrator added the word significant to causal connection, it is clear, after reading the arbitrator’s analysis of the evidence, that he has found no evidence of a causal relationship of a reduced mental capacity brain injury to the motor vehicle accident of October 23, 2013. He was therefore, not raising the standard of proof, rather, he found no proof of a causal connection to this particular alleged injury.

Petitioner claims that the examination under oath of Joan Haufe indicates that the petitioner’s alleged symptoms are causally related to the accident. Although petitioner’s wife describes symptoms of irritability and change in mood, these will not supply the causal link to the subject accident, nor is she equipped to make such a finding.

Petitioner also mentions that there was an alleged stipulation in colloquy between attorneys, agreeing to exclude from submission to the arbitrator, the report of Dr. Schaffer. No such stipulation or colloquy has been found in any of the submitted documents and respondent denies such a stipulation.

The arbitrator had a reasoned decision, stating which documents he reviewed and his basis for his decision. The arbitrator stated that “[A]fter reviewing the medical records, I was unable to determine any significant causal connection of the claimant’s complaints of a brain injury/reduced mental capacity to the motor vehicle accident at issue herein”.

The arbitrator analyzed the evidence, finding 2 days after the accident, plaintiff began treatment with Jeffrey Krupen, M.D., an internist. During office visits after the accident on 10/25/13, 11/1/13 and 11/15/13, plaintiff complained of headaches, joint pain, lower back pain, neck pain, ringing in ears, sleepiness and unsteadiness. The complaints and findings appeared mild to moderate. An MRI of the brain was normal whereas the MRI of the lumbar spine indicated bulges and the MRI of the cervical spine showed herniations. On the next visit, 3 months later, there were no complaints of head related symptoms and claimant’s mood and affect were described as normal. Dr. Krupen referred plaintiff for a neurological consultation at Neurological Specialties of Long Island who examined him on December 19, 2013. Plaintiff complained of headaches, ringing in ears, joint pain, back pain, sleepiness and unsteadiness. The arbitrator noted that he did not circle the potential

complaints of blurred vision, confusion, depression or memory loss on that questionnaire. An EEG and EMG of the lower extremities were normal and the EMG of upper extremities reported positive findings. The arbitrator noted that the office records did not establish causal connection of the positive findings to the accident at issue. Plaintiff had physical therapy beginning January 14, 2014 with complaints of neck, lower back, bilateral shoulder and left knee.

The arbitrator mentioned that he did not find any complaints of memory or brain related symptoms from December, 2013 until January 29, 2015 when the plaintiff was sent for a consultation with Sarah Schaffer, Ph.D. who saw plaintiff in consultation with Santo Terranova, M.D. at the Cushing Neuroscience Institute. The record from Dr. Schaffer indicates complaints of slowly progressive memory difficulties and mood changes. After tests, Dr. Schaffer found general cognitive function in the average range. It was Dr. Schaffer's opinion, "with regards to (the claimant's) concussion in 2013 without loss of consciousness...that it is highly unlikely that his reported symptoms are secondary to his previous concussion".

Records of examinations and testing at AMEN Clinic and Connecticut Spine & Health in 2016 contain complaints of memory loss, fatigue, decreased motor skills, and irritability. Neither of these records establish a causal connection of the claimant's complaints to the motor vehicle accident at issue.

The claimant offered the neurological IME performed by Marianna Golden, M.D. on behalf of the respondent as no-fault insurance carrier. The report found mild to moderate neurological symptoms concerning the neck, radiating into the upper extremities and lower back, radiating into the lower extremities. The report did not establish any brain injury/reduced mental capacity. The report does establish that the claimant was well oriented to time, place and person; it was noted that there was no confusion and that the claimant had normal memory, performed normal calculations and found no deficits in cognitive function.

The arbitrator also noted that three and a half years after the accident, petitioner qualified for Social Security disability. The records submitted did not specify the grounds upon which the petitioner was awarded disability benefits. There is no indication that the motor vehicle accident at issue played any part in the granting of the disability benefits. It was also noted that petitioner worked continuously as a union electrician until June, 2017, according to the application for disability benefits.

The arbitrator's decision was well reasoned based upon the evidence submitted. Accordingly, petitioner's motion is denied and the arbitrator's award is confirmed.

This is the decision and order of the Court.

Date: December 23<sup>rd</sup>, 2019

*[Signature]*  
Hon. Joseph Risi, A.J.S.C

FILED  
JAN - 2 2020  
COUNTY CLERK  
QUEENS COUNTY