

**Country-Wide Ins. Co. v CPM Med. Supply Inc.**

2020 NY Slip Op 31655(U)

May 28, 2020

Supreme Court, New York County

Docket Number: 650592/2020

Judge: Eileen A. Rakower

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: Hon. EILEEN A. RAKOWER**

**PART 6**

*Justice*

**COUNTRY-WIDE INSURANCE COMPANY,**

**INDEX NO. 650592/2020**

**Petitioner,**

**MOTION DATE**

**- against-**

**MOTION SEQ. NO. 1, 2**

**MOTION CAL. NO.**

**CPM MEDICAL SUPPLY INC. A/A/O DEVON SCHULER,**

**Respondent(s).**

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to

**PAPERS NUMBERED**

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

■

Answer — Affidavits — Exhibits \_\_\_\_\_

■

Replying Affidavits

■

**Cross-Motion: Yes X No**

Under Motion Sequence 1, Petitioner Country-Wide Insurance Company (“CWI”) submits a Petition seeking an Order pursuant to CPLR §7511(b)(1)(i), CPLR §7511(b)(1)(iii) and CPLR §7511(b)(1)(iv) vacating a lower Arbitrator’s Award dated July 22, 2019 and a Master Arbitration award dated October 22, 2019, “on the grounds that the lower Arbitrator exceeded his authority, or so imperfectly executed it, that a final and definite award upon the subject matter submitted was not made, the Master Arbitrator failed to follow the procedure of Article 75, and the Master Arbitrator erred in affirming the award.” The lower Arbitrator had awarded Respondent CPM Medical Supply Inc. a/a/o Devon Schuler (“CPM”) \$3,079.86 plus interest, and the Master Arbitrator affirmed the lower Arbitrator’s Award.

Under Motion Sequence 2, CPM cross-moves to dismiss the proceeding pursuant to CPLR §3211(a)(2). CPM contends that “this matter has already been adjudicated in arbitration by an Arbitrator and a Master Arbitrator, and the award granted is less than five thousand dollars; the court lacks de novo subject matter jurisdiction pursuant to N.Y. Ins. Law §5106(c).” CPM also contends that that the

Master Arbitrator properly affirmed the lower Arbitrator's Award. CWI opposes the cross motion.

### Background

This matter arises from an underlying accident that occurred on September 28, 2017 involving a vehicle registered in New York State and insured by CWI. Devon Schuler ("Claimant") was a passenger in a vehicle insured by CWI that was struck by another vehicle. Following the accident, Claimant allegedly received medical supplies from CPM to assist in his recovery from right shoulder surgery. CPM submitted medical bills for reimbursement for those medical supplies from CWI. According to the lower Arbitrator's Award, CWI denied CPM's claim for reimbursement pursuant to a peer report prepared by Dr. Andrew Bazos that determined "the right shoulder surgery was not medically necessary."

This matter proceeded to arbitration on June 25, 2019, before Arbitrator John Talay, Esq. (hereinafter "the lower Arbitrator"). The lower Arbitrator stated the issue was "[w]hether applicant is entitled to No-Fault reimbursement for very (sic) no-fault benefits in the face of peer review of contrary opinion." The lower Arbitrator reviewed both Mr. Bazos' report and the "rebuttal report" prepared by Dr. Kenneth McCulloch and submitted by CPM. The lower Arbitrator held that CWI had failed to satisfy its "burden of coming forward with proof in an admissible form to establish the fact or evidentiary foundation for its belief that the patient's condition for which he was treated was unrelated to the motor vehicle accident." The lower Arbitrator therefore rendered an award in favor of CPM and stated that his "award here is based upon a failure of the peer opinion to persuade."

CWI appealed the lower Arbitrator's decision to the Master Arbitrator. The Master Arbitrator held that "[t]he arbitrator's determination was supported by the rebuttal and the submitted medical records, and was not arbitrary, capricious and/or incorrect as a matter of law."

### Parties' Arguments

CWI argues that the claim at issue had been denied based on lack of medical necessity. CWI argues that it "has demonstrated timely denials based on lack of medical necessity, which the respondent has failed to rebut." CWI argues, "Respondent has issued a rebuttal by the same doctor that performed the

procedures on the claimant in the instant matter” which “is not impartial as it was prepared by the physician who has a financial gain in the instant matter” and can be “likened to a physician acting as its own medical witness in a malpractice trial.”

CPM argues in its cross motion that since that Master Arbitrator’s award was less than \$5,000, neither party is entitled to maintain a court action to adjudicate the dispute *de novo*. CPM further argues that the Master Arbitrator’s Award affirming the lower Arbitrator’s decision should not be disturbed. CWI opposes CPM’s cross motion. CWI argues that the Petition does not constitute a *de novo* review of the matter originally presented to the arbitrator.

### Legal Standard

Pursuant to N.Y. Ins. Law §5106(c), “The award of the master arbitrator shall be binding except for the grounds of review set forth in article seventy-five of the civil practice law and rules, and provided further that where the amount of such master arbitrator’s award is five thousand dollars or greater, exclusive of interest and attorneys’ fees ... the insurer or claimant may institute a court action to adjudicate the dispute *de novo*.” Where “[t]he master arbitrator’s award was less than \$5,000, neither party is entitled to maintain a court action to adjudicate the dispute *de novo*.” *Ave. C Med., P.C. v Encompass Ins. of MA*, 130 AD3d 764, 765 [2d Dept 2015].

Pursuant to CPLR § 7511(b), the grounds for vacating an arbitration award are “(i) corruption, fraud or misconduct in procuring the award; ... (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; ... (iii) an arbitrator, or 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; [and] (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.”

Generally, an arbitration award made after all parties have participated will not be overturned merely because the arbitrator committed an error of fact or of law. *Motor Vehicle Acc. Indemnification Corp. v. Aetna Casualty & Surety Co.*, 89 NY2d 214, 223 (1996). “[W]here the arbitration is pursuant to the voluntary agreement of the parties, in the absence of proof of fraud, corruption, or other

misconduct, the arbitrator's determination on issues of law as well as fact is conclusive." *Id.*

To establish that an arbitrator has "exceeded his power" under CPLR §7511, a party must show that the award "violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power" under CPLR §7511(b)(1). *New York City Tr. Auth. v Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005].

Where parties submit to "compulsory arbitration involving no-fault insurance, the standard of review is whether the award is supported by evidence or other basis in reason." *Matter of Miller v Elrac, LLC*, 2019 NY Slip Op 01544 [1st Dept 2019]. "This standard has been interpreted to mean that the relevant test is whether the evidence is sufficient, as a matter of law, to support the determination of the arbitrator, is rational and is not arbitrary and capricious." *Id.* "Although compulsory arbitration awards are subject to a broader scope of review than awards resulting from consensual arbitration, the scope of judicial review of such an arbitration award is still limited to whether the award is supported by the evidence or other basis in reason as appears in the record." *Id.* "With regard to fact and credibility findings, the Court should accept the arbitrator's credibility determinations, even where there exists conflicting evidence and room for choice." *Vieira-Suarez v. Syracuse City Sch. Dist.*, 93 NYS3d 628 [Sup. Ct, Onondaga County 2017], *aff'd*, 67 NYS3d 896 [4th Dept 2018], *leave to appeal denied*, 72 NYS3d 917 [4th<sup>1</sup> Dept 2018], *and leave to appeal denied*, 109 NE3d 1156 [2018] (citation omitted).

Further, 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." *Petrofsky v. Allstate Ins. Co.*, 54 NY2d 207, 212 [1981]. Courts are required to uphold the determinations of the master arbitrator on questions of substantive law if there is a rational basis for the finding. *Liberty Mutual Ins. Co. v. Spine Americare Medical, P.C.*, 294 AD2d 574, 577 [2d Dept. 2002].

Pursuant to CPLR §7511(e), "upon the denial of a motion to vacate or modify" an award, the court "shall confirm the award."

## Discussion

CPM's cross motion seeking to dismiss the proceeding is denied. The Petition is not seeking "*de novo* review of the matter originally presented to the arbitrator." Rather, the Petition seeks to vacate the lower Arbitrator's Award and Master Arbitrator's Award pursuant to CPLR §7511 on the grounds that the awards were rendered in excess of the arbitrators' respective powers.

Turning now to the Petition, CWI fails to set forth a basis for disturbing the lower Arbitrator's Award. The lower Arbitrator reviewed the competing affidavits submitted by the parties and held CWI failed to satisfy its burden of showing that the medical services provided were not medically necessary. The Court finds no basis to disturb this finding. "[A]ssessment of the evidence presented at an arbitration proceeding is the arbitrator's function rather than that of the court." *Fitzgerald v Fahnestock & Co., Inc.*, 48 AD3d 246, 247 [1st Dept 2008], quoting *Peckerman v D & D Assocs.*, 165 AD2d 289, 296 [1st Dept 1991]).

Further, the Master Arbitrator correctly determined that the lower Arbitrator did not exceed his powers and determined that the decision was rational and neither arbitrary, capricious nor incorrect as a matter of law. *Petrofsky*, 54 NY2d at 209.

Based upon the foregoing, the Petition for an order vacating the lower Arbitrator's Award dated July 22, 2019 and affirmed October 22, 2019 by a Master Arbitrator is denied.

The Award in the matter of *CPM Medical Supply Inc. a/a/o Devon Schuler - AAA Case 17-18-1098-6337*, is hereby confirmed in all respects. The cross motion to dismiss is denied.

Wherefore, it is hereby

ORDERED that the Petition is denied and this proceeding is dismissed; and it is further

ORDERED that the arbitration award in the matter of *CPM Medical Supply Inc. a/a/o Devon Schuler - AAA Case 17-18-1098-6337*, is hereby confirmed in all respects; and it is further

ORDERED that the Clerk shall enter a judgment in favor of Respondent *CPM Medical Supply Inc. a/a/o Devon Schuler* against Petitioner Country-Wide Insurance Company as follows: a) \$3,079.86, plus interest from June 21, 2018 at the rate of two per cent (2%) per month; together with b) Attorney fee is payable on a per claimant basis in which benefits are paid pursuant to the case of *LMK Psychological Services, PC vs. State Farm Mutual Automobile Ins. Co.* (2009 NY Slip Op 02481), decided April 2, 2009, together with c) forty dollars (\$40) to reimburse Respondent for the fees paid to AAA; and it is further

ORDERED the Respondent *CPM Medical Supply Inc. a/a/o Devon Schuler*'s cross motion (Motion Sequence 2) is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

ENTER:   
\_\_\_\_\_ J.S.C.

**HON. EILEEN A. RAKOWER**

**Dated: MAY 28, 2020**

**Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION**