SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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COUNTRY-WIDE INSURANCE COMPANY

Plaintiff,

- v -

FIFTH AVENUE SURGERY CENTER,

Defendant.

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INDEX NO. 651760/2020

MOTION DATE 11/10/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ORDERED that the petition of Petitioner Country-Wide Insurance (Motion Seq. 001) is denied in its entirety; and the Award of the Lower Arbitrator, as affirmed by Master Arbitrator, is confirmed; and it is further

ORDERED that the cross-petition of Respondent Fifth Avenue Surgery Center (Motion Seq. 001) for the confirmation of the Award is granted; and it is further

ORDERED that Respondent's application for attorney's fees in the amount of $1,600 is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that counsel for Respondent shall serve a copy of this order, along with notice of entry, on all parties within 20 days of entry.

MEMORANDUM DECISION

In this Article 75 action, Petitioner Country-Wide Insurance Company seeks, pursuant to CPLR 7511(b)(1)(i), (iii) and (iv), an order vacating a no-fault arbitration award dated September 10, 2019 (the "Award") issued in favor of Respondent Fifth Avenue Surgery Center. Respondent opposes and cross-moves for the confirmation of the Award.

For the reasons set forth below, the Court denies the petition to vacate the Award and grants the cross-petition for its confirmation.

BACKGROUND FACTS

Mr. Kqurshane Munlyn ("Mr. Munlyn"), Respondent's assignor, was injured in an automobile accident on April 19, 2017 and thereafter sought medical treatment from Respondent. On October 9, 2017, Mr. Munlyn underwent left shoulder arthroscopy for which Respondent sought reimbursement from Petitioner in the amount of $ 1,171.26 (NYSCEF doc No. 3, p. 2). The claim was denied by Petitioner based on Dr. Andrew Bazos's peer review report (the "Report") concluding that the medical services performed by Respondent were not medically necessary (NYSCEF doc No. 1, ¶ 9).

The Award of the Lower Arbitrator

The parties then proceeded to arbitration before arbitrator Pauline Molesso (the "Lower Arbitrator") on September 10, 2019. At said proceeding, Petitioner raised the defense of lack of medical necessity based on the Report which stated, among others, that "the causal relationship between the motor vehicle accident and the need for left shoulder arthroscopy has not been established for [Mr. Munlyn]." (NYSCEF doc No. 3, p. 3) In rebuttal, Respondent presented Dr. Bursztyn, Mr. Munlyn's treating surgeon. Dr. Bursztyn stated, among others, that "[t]he motor vehicle accident caused unexpected forces through [Mr. Munlyn's] shoulder"; that prior to the accident, Mr. Munlyn had no history of trauma to his left shoulder; and that "Mr. Munlyn underwent surgery as a direct causal relation to trauma." (*Id.*)

The Lower Arbitrator ruled in favor of Respondent, holding that Petitioner failed to discharge its burden of establishing that Mr. Munlyn's treatment was unrelated to his accident and that the accident did not exacerbate or aggravate any pre-existing condition or injury (NYSCEF

doc No. 3, p. 4). The Lower Arbitrator further held that Dr. Bazos did not cite to any medical authority to support his assertions and failed to rule out whether Mr. Munlyn exacerbated a pre-existing left shoulder injury (*Id.*) Accordingly, the Lower Arbitrator issued the Award in favor of Respondent herein and granted its claim in the amount of $1, 171.26, plus attorney's fees (*Id.*, pp. 5-6).

Review of the Master Arbitrator

On October 30, 2019, Petitioner sought review of the Award on the ground that the Award was arbitrary, capricious and incorrect as a matter of law (NYSCEF doc No. 4). Petitioner agued that the Lower Arbitrator is "responsible for determining the credibility of the [Report], not evaluating the quality of the [Report]." (*Id.*, p. 8) According to Petitioner, while the Lower Arbitrator "may have been justified in finding Dr. Bazos's [Report] to have been rebutted by Dr. Bursztyn's rebuttal", "the approach taken and the obvious bias shown render the decision arbitrary, capricious and incorrect as a matter of law." (*Id.*)

Master Arbitrator Robyn Weisman, however, affirmed the Award, holding that the Award was "cogently thought out and clearly articulated and certainly not irrational and capricious or incorrect as a matter of law." (NYSCEF doc No. 5, p. 3)

This Article 75 Proceeding

Petitioner now seeks vacatur of the Award pursuant to CPLR 7511 (b)(1)(i), (iii) and (iv). In support, Petitioner argues that the Lower Arbitrator was incorrect in placing the burden on Petitioner to prove lack of medical necessity (NYSCEF doc No. 1, ¶19-33). Petitioner maintains that under the correct standard, "the Applicant's doctor, as a medical expert, must raise only a triable issue of fact as to causation; the burden then shifts to the Respondent to come forward with sufficient evidence addressing or refuting the peer review doctor's conclusion as to the lack of

causation" (*Id.*, ¶ 22). Petitioner further avers that at the time the Award was issued, its requests for verification from Respondent were still outstanding (*Id.*, ¶¶ 34-43).

In opposition, Respondent argues that contrary to Petitioner's assertion, Petitioner had the burden not only to raise triable issue of fact as to causation, but also that "the accident did not cause the injuries as a matter of law." (NYSCEF doc No. 13, ¶ 9). As to the alleged outstanding verification requests, Respondent asserts that this argument was not made before the Lower Arbitrator. In any case, Respondent asserts that it responded to Petitioner's verification requests (*Id.*, ¶ 12). Simultaneous to opposing the Petition, Respondent cross-moves for confirmation of the Award and seeks an award of attorney's fees.

DISCUSSION

While Petitioner invokes CPLR 7511(b)(1)(i) and (iv) to vacate the Award, it does not make any allegations supporting a vacatur of the Award under these paragraphs, *i.e.*, facts constituting "corruption, fraud or misconduct in procuring the award" or "failure to follow the procedure of [Article 75]", respectively. While in its appeal to the Master Arbitrator, Petitioner alluded to the Lower Arbitrator being biased, Petitioner neither reiterates nor makes reference to such allegation in its Article 75 petition before this Court. An examination of Petitioner's papers shows that Petitioner is seeking to vacate the Award solely on the basis of CPLR 7511(b)(1)(iii).

An arbitration award may be vacated pursuant to CPLR 7511(b)(1)(iii) where an arbitrator exceeded his or her power, including where the award violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power (*See Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480, 480, 31 N.Y.S.3d 884 [1st Dept 2016]). Where arbitration is compulsory, "judicial review under CPLR Article 75 is broad, requiring that the award be in accord with due process and supported by adequate evidence in the record .... The

award must also be rational and satisfy the arbitrary and capricious standard of CPLR article 78" (*Motor Veh. Mfrs. Ass'n of U.S. v State of New York*, 75 NY2d 175, 550 N.E.2d 919, 551N.Y.S.2d 470 [1990]). While compulsory arbitration decisions require a stricter scrutiny than consensual ones, courts are still bound by the arbitrator's factual findings, interpretation of relevant documents, and judgment concerning remedies. A court cannot substitute its judgment for that of the arbitrator simply because it believes its interpretation is superior to that of an arbitrator who has made errors of judgment or fact (*Matter of New York State Correctional Officers & Police Benevolent Ass'n v. State of New York*, 94 NY2d 321, 726 N.E.2d 462, 704 N.Y.S.2d 910 [1999]).

Awards are also not vacated even where the error claimed is the incorrect application of a rule of substantive law, unless the error is so 'irrational as to require vacate" (*Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224, 232, 433 N.E.2d 509, 448 N.Y.S.2d 444 [1982]). To be upheld, an award in an arbitration proceeding need only have evidentiary support and not be arbitrary and capricious (*See Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223, 674 N.E.2d 1349, 652 N.Y.S.2d 584 [1996]). Even though the decision must have evidentiary support, "[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, 850 N.Y.S.2d 452 [1st Dept 2008], *quoting Peckerman v D & D Assocs.*, 165 AD2d 289, 296, 567 N.Y.S.2d 416 [1st Dep't 1991]). Under Article 75, arbitrators are not bound by substantive rules of law, including those of evidence. (*Silverman v Benmor Coats, Inc.*, 61 N.Y.2d 299, 308, 461 N.E.2d 1261, 473 N.Y.S.2d 774 [1984]). "An arbitral award cannot be attacked on the ground that an arbitrator refused to consider, or failed to appreciate, particular evidence or arguments" (*Genger v. Genger*, 87 AD3d 871, 874 n. 2, 929 N.Y.S.2d 232 [1st Dept 2011]). Under CPLR 7511(b)(1)(iii), as long as an arbitrator addresses the issues submitted for resolution, vacatur will

not be granted, unless the award is completely irrational -- that is, the resulting award goes beyond the issues before the arbitrator *(Rochester City Sch. Dist. v Rochester Teachers Ass'n*, 41 NY2d 578, 582, 362 N.E.2d 977, 394 N.Y.S.2d 179 [1977]).

Here, Petitioner claims that the Lower Arbitrator exceeded her power when she applied the wrong burden of proof and when she proceeded to render an award despite outstanding verification requests. For the following reasons, the Court finds that the Award has a rational basis and should be confirmed.

In holding that Petitioner bears the burden of proof to establish its defense of lack of medical necessity, the Lower Arbitrator cited to New York court cases which Petitioner does not say are no longer good law. This Court has examined thee cases and finds them to be relevant and applicable.

In *Mount Sinai Hospital v. Triboro Coach* (263 A.D.2d 11 [2d Dept, 1999]), the Court expressly addressed this question: "how does an insurer establish that a patient's medical treatment was for a condition unrelated to his or her accident?" The *Mount Sinai* court concluded that "the defendant has the burden to come forward with proof in admissible form to establish "the fact" or the evidentiary "found[ation for its] belief" that the patient's treated condition was unrelated to his or her automobile accident." Thus, the *Mount Sinai* court held that "[n]otwithstanding [the insurer's] repeated arguments to the contrary, it would not be reasonable to insist that a plaintiff hospital must prove as a threshold matter that its patient's condition was "caused" by the automobile accident and was unrelated to his/her entire previous medical history. The policy concerns underlying the no-fault legislation would thereby be undermined, and insurers would be motivated to refrain from issuing timely disclaimers in order to impose such an onerous threshold burden upon claimants." In arriving at this conclusion, the *Mount Sinai* court relied on, among

others, *Central General Hospital v. Chubb Group of Ins. Cos*. (90 N.Y.2d [Ct App, 1997], a case which was likewise cited to by the Lower Arbitrator in her Award.

Petitioner, however, insists that the Lower Arbitrator either erroneously relied on or misapplied *Nir v. Allstate* (2005 NY Slip Op 25090 [Civ. Ct. Kings County, 2005]) and *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13 [2nd Dept. 2009]). Petitioner argues that *Nir* "did not deal with medical necessity and lack of causation which was raised here by Dr. Bazos." (NYSCEF doc No. 1, ¶ 21). On the other hand, Petitioner alleges that under *Kingsbrook,* Dr. Bazos' "sole duty as a medical expert would be "to raise a triable issue as to 'the fact or founded belief that the alleged injury does not arise out of an insured incident'" (*Id.*, ¶ 29).

Petitioner's argument must fail. In the Award, the Lower Arbitrator cited to *Nir* not for the purpose of supporting her ruling on which party has the burden of proof. Rather, she cites to *Nir* to support the proposition that "[a] defendant's medical evidence must set forth more than just a basic recitation of the expert's opinion." (NYSCEF doc No. 3, p. 3). Indeed, the *Nir* court set forth standards to determine whether a peer review report provides insufficient factual basis or medical rationale. Thus, the Lower Arbitrator had a rational basis to rely on *Nir* in assessing the evidentiary value of Dr. Bazos's report and Dr. Burszytyn's rebuttal. As to whether her evaluation is correct is not within the scope of judicial review under CPLR Article 75 (*see Fitzgerald, Id.* at 48).

As to the case of *Kingsbrook,* this Court finds that the pronouncement regarding the insurer's burden to raise only "triable issues of fact" was made in the context of clarifying an insurer's burden in opposing a summary judgment ["Allstate has failed to come forward with proof in admissible form, as is its burden in opposing summary judgment [] to raise a triable issue as to "'the fact or founded belief that the alleged injury does not arise out of an insured incident'"]. Petitioner cannot rely on this pronouncement to impose a burden on Respondent to show that the

treatment received by Mr. Munlyn's treatment was related to his accident. In fact, the *Kingsbrook* court held that "[u]nlike negligence actions where plaintiffs must prove causation, plaintiffs seeking to recover first party no-fault payments bear no such initial burden, as causation is presumed." The Court rejects Petitioner's argument that the Lower Arbitrator erred in relying on *Kingsbrook* as "*Kingsbrook* does not require the insurer to demonstrate a lack of exacerbation." (NYSCEF doc No. 1, ¶ 30). Contrary to Petitioner's claim, the *Kingsbrook* court expressly held that "[e]xacerbations of preexisting conditions are covered by the No-Fault Law", but found that insurer therein failed to show "the causation or exacerbation, or lack of causation or exacerbation of conditions, in relation to the subject automobile accident."

The Court also finds that the cases cited to by Petitioner (*e.g.*, *Pan Chiropractic, P.C. v Mercury Ins. Co.* (24 Misc 3d [App Term 2009]); *Pommells v Perez* (797 NYS2d 380 [2005]); and *Latus v.Ishtarq* (159 AD3d 433 [1st Dept 2018])) are inapposite as they involve a party's burden of proof in opposing a motion for summary judgment which is different from a party's burden to establish its defense at arbitration.

As to the alleged outstanding verification requests, the Court finds that Petitioner never raised this issue at the time of hearing before the Lower Arbitrator, nor did Petitioner raise it on its appeal before the Master Arbitrator. The Court therefore considers this issue waived (*see Dickinson v State* (188 AD 2d 919 [3d Dept 1992]) ["Petitioner's primary contention [] was neither raised in the arbitration proceeding nor addressed by the arbitrator and, as such, was waived"], *citing* CPLR 7506 [f] ["Except as provided in subdivision (d) [right to representation by attorney], a requirement of this section may be waived by written consent of the parties and it is waived if the parties continue with the arbitration without objection."] and CPLR 7511 [b][iv] [an award may be vacated if the court finds that that the rights of that party were prejudiced by "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."]).

Attorney's Fees

Respondent seeks an award of attorney's fees pursuant to 11 N.Y.C.R.R. §65-4.10(j)(4). In support, Respondent submitted an affirmation detailing the hours spent by its counsel preparing the opposition to Petitioner's petition and the cross-petition for confirmation (see NYSCEF doc No. 14). In the affirmation, Respondent's counsel avers that they spent a total of 4 hours of legal work. Respondent seeks attorney's fees in the amount of $1,600 pursuant to counsel's billing rate of $400 per hour.

The Court finds that Respondent is entitled to attorney's fees. In *Matter of Country-Wide Ins. Co. v. Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407 [1st Dept 2018], the court held that the "Supreme Court has authority to award attorney's fees as this is an appeal from a master arbitration award pursuant to 11 NYCRR 65-4.10 (j) (4), which, in pertinent part, provides: "The attorney's fee for services rendered in connection with . . . a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter." (see also *Matter of GEICO Ins. Co. v. AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]). The Court has reviewed Respondent's submission in support of its application for attorney's fees (NYSCEF doc No. 20) and finds the same to be reasonable and adequate. Thus, Respondent's application for attorney's fees in the amount of $1,600 is granted.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the petition of Petitioner Country-Wide Insurance (Motion Seq. 001) is denied in its entirety; and the Award of the Lower Arbitrator, as affirmed by Master Arbitrator, is confirmed; and it is further

ORDERED that the cross-petition of Respondent Fifth Avenue Surgery Center (Motion Seq. 001) for the confirmation of the Award is granted; and it is further

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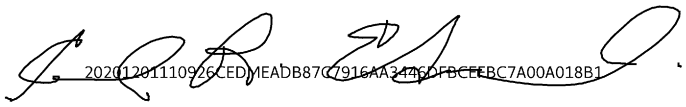

12/1/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	x	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	x	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE