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| Country-Wide Ins. Co. v CPM Med. Supply |
| 2021 NY Slip Op 30373(U) |
| February 5, 2021 |
| Supreme Court, New York County |
| Docket Number: 652239/2020 |
| 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. 652239/2020

Petitioner,

MOTION DATE

- against-

MOTION SEQ. NO. 1

MOTION CAL. NO.

CPM MEDICAL SUPPLY a/a/o IVAN TUFINO-VICUNA,

Respondent.

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

PAPERS NUMBERED

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

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Answer — Affidavits — Exhibits _____

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Replying Affidavits

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Cross-Motion: Yes X No

Petitioner Country-Wide Insurance Company (“CWI”) commenced this proceeding by submitting a Notice of Petition and 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 October 30, 2019 (“the Award”) and a Master Arbitration award dated December 30, 2019, on the grounds that the lower [A]rbitrator exceeded his/her authority, or so imperfectly executed it, that a final and definite award upon the subject matter submitted was not made, and the Master Arbitrator erred in affirming the award.”¹

Factual Background and Procedural History

This matter arises from a motor vehicle accident that occurred on September 9, 2017, involving a vehicle registered in New York State and insured by CWI. Ivan Tufino-Vicuna (“Claimant”) was the driver of a vehicle insured by CWI that

¹ Over one month after the return date of the Petition, opposition was submitted on behalf of “Respondent MSJR of Queens, P.C. as assignee of non-party assignor Jose Vargas,” a respondent and assignor that are not parties to this case.

was struck by another vehicle. Claimant sustained injuries in the accident and received medical services from Respondent CPM Medical Supply (“CPM”). CPM thereafter sought reimbursement from CWI for the medical services it had provided to Claimant. CWI denied CPM’s claim for reimbursement based on Claimant’s failure to attend an examination under oath as requested by CWI.

This matter proceeded to arbitration on October 10, 2019, before Arbitrator Robin McAllister (hereinafter “the lower Arbitrator”). The lower Arbitrator held that CWI’s “denials premised on the EUO no-show were without merit” and determined that CPM was entitled to reimbursement for the medical services it had provided in the amount of \$3,589.50.”

Specifically, the lower Arbitrator made the following findings:

This decision is based on the oral arguments of counsel at the hearing and the documents submitted. I have reviewed the documents contained in the ADR Center as of the date of this award. At the hearing, Respondent [CWI] argued that it properly denied Applicant’s [CPM’s] claim since Assignor violated a condition precedent to coverage. I disagree. Respondent [CWI] failed to demonstrate that Assignor failed to appear at two properly scheduled EUOs. In support of its denials, Respondent [CWI] submitted the documents contained in the ADR Center including EUO scheduling letters with affidavits of service dated December 12, 2017 and January 17, 2018. Respondent [CWI] alleged that Assignor failed to appear for his EUO appointments on January 10, 2018 and February 9, 2018, thereby violating a condition precedent to coverage. See *Stephen Fogel Psychological, P.C. v. Progressive Casualty Ins. Co.*, 25 A.D.3d 720 (App. Term 2d & 11 Dists. 2004) However, Respondent [CWI] failed to submit proof that Assignor failed to appear at the EUOs. Respondent [CWI] submitted an affidavit from its EUO clerk. The affiant did not have personal knowledge of Assignor’s failure to appear at the EUOs and relied upon her review of the file. Moreover, the affiant noted that a statement was placed on the record on February 9, 2018, which was annexed to Respondent’s [CWI’s] submission but no

such transcript was submitted by Respondent [CWI]. Thus, I find that Respondent's [CWI's] denials premised on the EUO no-show were without merit.

CWI appealed the lower Arbitrator's decision to the Master Arbitrator. On December 30, 2019, the Master Arbitrator held:

Based on my review, I hereby affirm that this decision is consistent with the evidence. The decision below appears rational and based on case law to support the decision. The lack of a documented, transcript alleged to prove Respondent's [CWI's] case referenced but was not submitted. In addition, there is not sufficient evidence to support non-appearance for two properly scheduled EUO's only an Affidavit by Respondent's [CWI's] representative without actual knowledge and merely based on the Respondent's [CWI's] file.

Legal Standard

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*, 170 AD 3d 436, 436-437(1st Dept 2019). “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 NY3d 628 (Sup. Ct, Onondaga County 2017), *aff’d*, 67 NY3d 896 (4th Dept 2018), *leave to appeal denied*, 72 NY3d 917 (4th Dept 2018), *and leave to appeal denied*, 109 NE3d 1156 (2018).

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).

“The failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent vitiating coverage.” *Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468, 470 (1st Dept 2016). “To vitiate coverage, it must be shown that the notices for EUOs were timely and properly mailed to the claimants and that the claimants failed to appear.” *Id.*

Discussion

CWI fails to set forth a basis for disturbing the Award. Here, the lower Arbitrator demonstrated a rational basis for the Award. After oral argument and review of the documents submitted by CWI, the lower Arbitrator determined that CWI had failed to provide evidence to substantiate its denial of CPM’s claim for reimbursement based on a failure to appear at examinations under oath. Further, the Master Arbitrator properly concluded that lower Arbitrator did not exceed her powers and determined that the decision was rational and neither arbitrary, capricious nor incorrect as a matter of law. Moreover, CWI’s argument that the doctrines of collateral estoppel and res judicata apply based on an order issued in a separate action after the Award was rendered is unavailing.

Wherefore, it is hereby

ORDERED that the Petition of Country-Wide Insurance Company is denied in its entirety and this proceeding is dismissed and the Clerk shall enter judgment accordingly.

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

Dated: February 5, 2021

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION