SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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In the Matter of

LAM QUAN, M.D., P.C., as assignee of ELADIO AREVALO,

Petitioner,

- v -

GEICO CASUALTY COMPANY,

Respondent.

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INDEX NO. 650734/2023

MOTION DATE 05/05/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

In this proceeding pursuant to CPLR 7511, the petitioner, Lam Quan, M.D., P.C., as assignee of Eladio Arevalo, seeks to vacate the January 27, 2023 award of a master arbitrator, affirming a January 9, 2023 American Arbitration Association (AAA) arbitration award that had denied its claim for first-party (no-fault) benefits to reimburse it for medical diagnostic services that it had performed for Arevalo in connection with an automobile accident. The petitioner requests that, upon vacatur, the court remit the matter to a different arbitrator for reconsideration or, in the alternative, enter judgment in its favor and against the respondent in the sum of $914.94, along with interest at rate of 2% from the date that it submitted a demand to arbitrate until entry of judgment, along with attorneys' fees in the sum of 20% of the combined principal and interest, up to a maximum of $1,360.00. The respondent insurer, GEICO Casualty Company (GEICO), opposes the petition. The petition is denied, and the award is confirmed.

Eladio Arevalo was injured in a January 12, 2022 motor vehicle accident involving his own vehicle, which was covered by a GEICO automobile insurance policy. He complained that, as a consequence of the accident, he injured his lower leg. On March 9, 2022, the petitioner

undertook a lower extremity nerve study on Arevalo. Arevalo assigned the petitioner his claim to recover no-fault benefits, after which the petitioner, on March 23, 2022, made claim upon GEICO for reimbursement of $914.94 to pay for the nerve study. The respondent processed the claim and timely rejected it by notice dated April 12, 2022, asserting that the amount requested was not in accordance with applicable statutory and regulatory fee schedules, that, based on a peer report, the study was not medically necessary, and that the limits of coverage under the policy already had been exhausted in any event.

The petitioner sought arbitration of the claim before the AAA. At the arbitration hearing, the petitioner argued that the respondent was not entitled to rely on the exhaustion defense because the grounds asserted by GEICO for the denial of the claim were improper, as the study was medically necessary and the amount claimed was valid, and that the subject invoice thus should have been paid before any of Arevalo's other medical, hospital, pharmacy, and health-care claims that the respondent insurer received subsequent to the petitioner's claim.

Relying upon *Harmonic Physical Therapy, P.C. v Praetorian Ins. Co*. (47 Misc 3d 137[A], 2015 NY Slip Op 50525[U], *1, 2015 NY Misc LEXIS 1143, *2 [App Term, 1st Dept, Apr 14, 2015]), the lower arbitrator concluded that claims that are timely denied by an insurer do not hold a place in the priority-of-payment queue ahead of subsequently filed claims that were approved and paid by the insurer. The lower arbitrator consequently upheld the insurer's exhaustion-of-benefits defense. In a January 9, 2023 award, the lower arbitrator thus found in favor of the respondent insurer, and rejected the petitioner's claim for benefits. The petitioner sought review of the award before a master arbitrator. In a January 27, 2023 award, the master arbitrator affirmed the initial arbitration award. In his determination, the master arbitrator wrote:

> "A review of the Record demonstrates that the Arbitrator below examined and weighed the positions asserted by the respective parties and articulated a well-reasoned explanation for the determination reached.
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> "Relying, principally, on the holding in *Harmonic Physical Therapy, P.C. v*

> *Praetorian Ins. Co*. (47 Misc. 3d 137[A] [1st Dept App Term 2015]), the Lower Arbitrator rejected the Appellant's priority of payment argument under 11 NYCRR 65-3.15 and concluded that exhaustion of the limits of coverage was dispositive.
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> "Notably, an arbitration award which goes beyond the underlying policy limits exceeds the limited authority the parties have vested in the forum and would be subject to vacatur on that ground. (*See*, CPLR 7511 [b] [iii]; *Matter of Motor Veh. Acc. Indem. Corp. v American Country Ins. Co.,* 126 AD3d 657 [1st Dept 2015]; *Spears v New York City Transit Auth*., 262 AD2d 493, lv den 94 NY2d 761 [2000]; *see also, Countrywide Ins. Co. v Sawh*, 272 AD2d 245 [1st Dept 2000]).
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> "Recent appellate case law lends further support to the Lower Arbitrator's determination. 'Once a no-fault insurer "has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease" (*Countrywide Ins. Co. v Sawh*, 272 AD2d 245, 708 NYS2d 862 [1st Dept 2000]). An arbitrator's award directing payment beyond the monetary limit of a no-fault insurance policy exceeds the arbitrator's power and constitutes grounds for vacatur of the award (*see Matter of Brijmohan v State Farm Ins. Co*., 92 NY2d 821, 823, 699 NE 2d 414, 677 NYS 2d 55 [1998]; *see also Matter of Ameriprise Ins. Co. v Kensington Radiology Group, P.C*., 179 AD3d 563, 118 NYS 3d 82 [1st Dept 2020])' (*Matter of DTR Country-Wide Ins. Co. v Refill Rx Pharmacy, Inc*., 2023 NY Slip Op 00179 [1st Dept 2023]; *see also, Allstate Fire & Cas. Ins. Co. v Branch Med., P.C.,* 74 Misc 3d 134 [A], 1st Dept App Term 2022]).
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> "Based on the foregoing, the Award under review cannot reasonably be assailed as arbitrary, capricious or incorrect as a matter of law."

This proceeding ensued.

The grounds specified in CPLR 7511 for vacatur of an arbitration award are exclusive (*see Bernstein Family Ltd. Partnership v Sovereign Partners, L.P*., 66 AD3d 1, 8 [1st Dept 2009]), and it is a "well-established rule that an arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone v New York Cent. Mut. Fire Ins. Co*., 15 NY3d 530, 534 [2013]). 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 [1st Dept 2016]). Where, as here, arbitration is compulsory (*see* Insurance Law § 5105), closer judicial scrutiny of the arbitrator's determination is required under CPLR 7511(b) than that applicable to consensual arbitrations

(*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co*., 89 NY2d 214, 223 [1996]; *Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.]*, 49 NY2d 757, 758 [1980]; *Mount St. Mary's Hosp. v Catherwood*, 26 NY2d 493, 508-509 [1970]). To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co*., 89 NY2d at 223; *Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.]*, 49 NY2d at 758).

In a compulsory no-fault arbitration, a party aggrieved by a lower arbitrator's award may seek vacatur or modification of that award solely by appeal to a master arbitrator, and only upon the grounds articulated in 11 NYCRR 65-4.10(a), which, as relevant here, include a contention that the award "was incorrect as a matter of law" (11 NYCRR 65-4.10[a][4]; *see* Insurance Law § 5106[b]). Hence, the function of the master arbitrator in reviewing the decision below is to confirm that the decision was arrived at in a rational manner, and that the decision was not arbitrary and capricious (11 NYCRR 65.17[a][1]) or incorrect as a matter of law (11 NYCRR 65.17[a][4]).

The initial authority to determine whether a lower arbitrator's initial award was incorrect as a matter of law belongs to the master arbitrator, unless the petitioner can establish the award was totally irrational (*see Matter of Acuhealth Acupuncture, P.C. v Country-Wide Ins. Co.* 149 AD3d 828, 829 [2d Dept 2017]). Inasmuch as the master arbitrator did not make his own factual determinations, review alleged factual or procedural errors made in the course of the arbitration, weigh the evidence, or resolve credibility issues, he did not exceed his authority (*see Matter of Richardson v Prudential Prop. & Cas. Co*., 230 AD2d 861 [2d Dept 1996]).

Moreover, the court concludes that the master arbitrator's determination was not incorrect as a matter law in any event. As the master arbitrator noted, there is a split in appellate authority on the issue of priority of claims in the face of the potential exhaustion of the limits of a no-fault insurance policy. The Appellate Term, First Department, has held that claims that are timely denied by an insurer do not hold a place in the priority-of-payment queue ahead

of subsequently filed claims that were paid by the insurer, thus exhausting available coverage (*see Harmonic Physical Therapy, P.C. v Praetorian Ins. Co*., 47 Misc 3d 137[A]; 2015 NY Slip Op 50525[U]; 2015 NY Misc LEXIS 1143 [App Term 1st Dept, Apr. 14, 2015]). The Appellate Term, Second Department, has held that fully verified claims are payable in the order they were received, and that there was no merit to an insurer's contention that it need not pay an improperly denied claim because its payment of subsequent claims had the effect of exhausting the available coverage (*see Alleviation Med. Servs., P.C. v Allstate Ins. Co.*, 55 Misc 3d 44, 45 [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2017], *affd other grounds* 191 AD3d 934 [2d Dept 2021]).

In *Harmonic Physical Therapy*, the Appellate Term, First Department, explained that

> "[c]ontrary to plaintiff's contention, defendant was not precluded by 11 NYCRR 65-3.15 from paying other providers' legitimate claims subsequent to the denial of plaintiff's claims. Adopting plaintiff's position, which would require defendant to delay payment on uncontested claims, or, as here, on binding arbitration awards - pending resolution of plaintiff's disputed claim – 'runs counter to the no-fault regulatory scheme, which is designed to promote prompt payment of legitimate claims' (*Nyack Hosp. v General Motors Accept. Corp*., 8 NY3d at 300)"

(*Harmonic Physical Therapy, P.C. v Praetorian Ins. Co*., 2015 NY Slip Op 50525[U], *1). The rule articulated in *Harmonic Physical Therapy* expressly has been applied by courts on numerous occasions to permit insurers to invoke the exhaustion defense under circumstances identical to those presented in the instant matter (*see Matter of Fill RX NY, Inc. v LM Gen. Ins. Co.,* 2023 NY Slip Op 32950[U], *5, 2023 NY Misc LEXIS 4642, *7 [Sup Ct, N.Y. County, Aug. 24, 2023] [Kelley, J.] [denying petition to vacate master arbitrator's award in favor of insurer where insurer timely denied claim on the ground that the amount claimed was not in accordance with no-fault schedule, and benefits were thereafter exhausted]; *Matter of Galaxy RX, Inc. v GEICO Ins. Co*., 2023 NY Slip Op 31974[U], *1-2, 2023 NY Misc LEXIS 2912, *2-3 [Sup Ct, N.Y. County, Jun. 12, 2023] [denying petition to vacate master arbitrator's award affirming lower arbitrator's award]; *Advantage Radiology, P.C. v Motor Veh. Acc. Indem. Corp*., 78 Misc 3d 126[A], 2023 NY Slip Op 50139[U], 2023 NY Misc LEXIS 751 [App Term 1st Dept, Feb. 27,

2023] [insurer raised triable issue of fact as to whether it exhausted the coverage limits by payments to other providers and to the assignor for lost wages, and whether such payments were made in compliance with the priority of payment regulations]; *Allstate Fire & Cas. Ins. Co. v Branch Med., P.C.,* 74 Misc 3d 134[A], 2022 NY Slip Op 50277[U], 2022 NY Misc LEXIS 1365 [App Term 1st Dept, Apr. 19, 2022] [affirming vacatur of a master arbitrator's award to a medical provider that was made despite the fact that subsequent claims had exhausted the policy limits, and holding that, when an insurer has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease]; *see also Matter of New Millennium Pain & Spine Med., P.C. v Progressive Cas. Ins. Co*., 2023 NY Slip Op 32218[U], 2023 NY Misc LEXIS 3312 [Sup Ct, N.Y. County, Jun. 27, 2023] [Kelley, J.]). In the *Allstate* decision, the Appellate Term explicitly concluded that, "[c]ontrary to respondent's contention, petitioner was not precluded by 11 NYCRR 65-3.15 from paying other legitimate claims subsequent to the denial of respondent's claims" (*Allstate Fire & Cas. Ins. Co. v Branch Med., P.C.,* 2022 NY Slip Op 50277[U], *1, 2022 NY Misc LEXIS 1365, *2]).

The determination of the Appellate Division, First Department, in *Matter of Ameriprise Ins. Co. v Kensington Radiology Group, P.C.* (179 AD3d 563 [1st Dept 2020]), relied upon by the petitioner, is not to the contrary. There, the Appellate Division did not address the issue of whether claims that are timely denied by an insurer did or did not hold a place in the priority-of-payment queue ahead of subsequently filed claims that ultimately were paid by the insurer. Rather, it generally enforced the regulatory no-fault payment protocols as set forth in title 11 of the New York Code Rules and Regulations. In *Ameriprise*, the insurer rejected a claim submitted by an injured party's assignee for no-fault benefits, where the insurer had requested additional verification by means of an examination under oath, but neither the injured party nor the assignee appeared for the examination. The Court thus concluded that the claims, as initially submitted, had not been properly verified, and that claims submitted by other health-care providers that had been verified would be entitled to priority over any unverified claims. It thus

affirmed an Appellate Term decision remitting the matter to the Civil Court for a framed-issue hearing on the issue of whether the subject policy limits were in fact exhausted before the insurer ultimately became or would become obligated to pay the claims submitted by the injured party's assignee.

Inasmuch as the master arbitrator's award was not contrary to law or arbitrary and capricious, he properly affirmed the lower arbitrator's award. Hence, the petition to vacate the master arbitrator's award must be denied. Pursuant to CPLR 7511(e), "upon the denial of a motion to vacate or modify" an award, the court "shall confirm the award."

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied; and it is further,

ADJUDGED that, upon the denial of the petition, the January 27, 2023 award of Master Arbitrator A. Jeffrey Grob, made in *Matter of Lam Quan, M.D., P.C. v GEICO Casualty Company,* American Arbitration Association Case No. 17-22-1247-3567, American Arbitration Association Assessment No. 99-22-1247-3567, be, and hereby is, confirmed.

This constitutes the Decision, Order, and Judgment of the court.

8/31/2023
DATE

JOHN J. KELLEY, 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**