

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: July 31, 2015]

OWEN EMERSON

V.

**USAA CASUALTY INSURANCE
COMPANY**

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P.M. No. 2015-1711

DECISION

LANPHEAR, J. Before the Court are Plaintiff Owen Emerson’s (Emerson or Plaintiff) Motion to Vacate, and Defendant USAA Casualty Insurance Company’s (USAA or Defendant) Motion to Confirm the Arbitration Award issued on February 25, 2015. Jurisdiction is pursuant to G. L. 1956 § 10-3-11.

I

Facts & Travel

This matter arises out of an underinsured motorist arbitration for injuries sustained during a motor vehicle accident. On August 15, 2010, Plaintiff, then aged twenty-five (25), was operating a pedicab at the intersection of Memorial Boulevard and Spring Street in Newport, Rhode Island. While stopped at the intersection, the pedicab was impacted from behind by a motor vehicle driven by Rachel Defaria. Emerson was thrown approximately fifteen (15) feet from the site of the impact and landed on his side and hands. When paramedics arrived at the scene, Emerson was standing next to his pedicab with “no [obvious] injuries.” (Pl.’s Ex. 2.) Emergency personnel conducted a preliminary examination and then transported Emerson to the Emergency Department at Newport Hospital.

Emerson underwent diagnostic x-ray imaging to investigate moderate pain in his head and right wrist. The treating physician, Dr. Vanhemelrijck, diagnosed Plaintiff with a wrist sprain, and consulting physician Dr. Knapik noted that x-rays revealed a “corticated density [] just distal to the dorsal aspect of the radius on the lateral view.” (Pl.’s Ex. 2; Diagnostic Imaging Consultation.) Dr. Knapik postulated that the “fragment [was] likely related to an old injury,” and no further action was taken to resolve the anomaly. Id. Emerson was given Motrin and discharged.

Three days later, on August 18, 2010, Plaintiff presented at the office of Dr. Foster of Danbury Orthopedics complaining of increasing pain, discomfort, and stiffness allegedly stemming from the accident. Records indicate that Dr. Foster read the x-rays taken at Newport Hospital and concluded that the area could require a “stabilizing procedure,” but no immediate action was taken. (Pl.’s Ex. 3.) Emerson made two subsequent visits to Dr. Foster on August 31, 2010 and December 27, 2010. During this period, Emerson was subjected to an MRI, which confirmed the presence of a bone fragment and a scapholunate ligament tear. (Pl.’s Ex. 4.) Even after reading the MRI, Dr. Foster declined to prescribe any treatment beyond a wrist splint, which was provided to Plaintiff.

From December 2010 to March 2012, the record demonstrates that Plaintiff was employed as a bartender, carpenter, garden laborer, and furniture designer and builder. He also engaged in regular conditioning exercises, and Plaintiff has admitted to performing push-ups and handstands as part of this routine. Despite the physical nature of Plaintiff’s work, he did not see another physician for the alleged injury until March 2012, when he accompanied his mother to her appointment at the office of Dr. Joseph DiGiovanni, a partner at Danbury Orthopedics. During that visit, Dr. DiGiovanni allegedly discussed a “clunk” in Plaintiff’s wrist, but did not

immediately pursue treatment. Instead, Plaintiff continued his carpentry and gardening employment until April 2014, when he returned to Dr. DiGiovanni with continuing wrist issues. Dr. DiGiovanni determined that the bones in Plaintiff's wrist had become misaligned and conducted an outpatient wrist fusion procedure in May 2014, four years after the alleged injury. (Pl.'s Ex. 9.)

As Plaintiff sought treatment for his injury, the insurer for the tortfeasor responsible for the pedicab collision tendered its policy limit of \$25,000 on May 18, 2012. Thereafter, the underlying action accrued to Plaintiff for underinsured motorist benefits, which he instituted against USAA in the Newport County Superior Court on or about March 6, 2013. The parties agreed to arbitrate the matter in a letter dated April 3, 2013, and a three-member arbitration panel—consisting of Plaintiff's designated arbitrator, Defendant's designated arbitrator, and a third, neutral arbitrator—was selected to hear the matter pursuant to the agreement.

Discovery was conducted following the selection of the panel. Defendant took Plaintiff's statement under oath, and the neutral arbitrator granted the Defendant's Request for Production of Documents seeking medical records. Plaintiff's counsel also discussed the possibility of taking the depositions of Dr. Foster and/or Dr. DiGiovanni with opposing counsel, but the defense resisted. Consequently, Plaintiff submitted a Motion to Compel the Deposition of Dr. Craig Foster to the neutral arbitrator on or about May 29, 2014. (Pl.'s Ex. 6.)

On or about September 8, 2014, the neutral arbitrator phoned Plaintiff's counsel and allegedly stated:

“[h]e had a conversation with counsel for USAA, Katherine Merolla, Esq., regarding the taking of the depositions of Dr. Foster and Dr. DiGiovanni, that the medical reports and records were being admitted at the Arbitration hearing without objection by the Defendant, that there was no dispute with regard to the medical records and the injuries sustained by Mr. Emerson and therefore,

there was no need for Plaintiff's counsel to take the deposition of either Dr. Craig Foster or Dr. Joseph DiGiovanni since the medical records and treatment were not in dispute and were all coming in without objection." (Post-Award Motion to Vacate Award and Reopen Arbitration at 4).

As a result of this conversation, Plaintiff's motion was deemed "unnecessary" and never submitted to the panel for consideration. Plaintiff's counsel took no further action to press the issue, and the parties advanced to the arbitration hearing without formally resolving the motion.

The parties submitted pre-arbitration briefs, and the panel heard the dispute on January 26, 2015 (the Hearing).¹ As agreed, the panel received all medical records into evidence. Defense counsel challenged causation and the nature and extent of Plaintiff's injuries in the prehearing brief, but did not cite expert medical testimony and did not call an expert to testify at the Hearing. As part of the defense, Plaintiff was cross-examined by defense counsel and shown chronologically recent pictures of Plaintiff doing handstands on a beach, which he confirmed. Defendant's counsel then challenged causation and the nature and extent of Plaintiff's injuries by citing, inter alia, Plaintiff's physically rigorous work, pediatric injuries, and the handstand pictures in her closing argument.

While Plaintiff's counsel did object to the argument, she neither pressed Plaintiff's Motion to Compel Depositions nor did she seek a continuance, adjournment, or press alternative motions during the Hearing. Instead, Plaintiff's counsel apparently relied on the uncontroverted affidavit of Dr. DiGiovanni, which states: "my diagnosis and prognosis as contained in the attached report is based upon a reasonable degree of medical certainty and that based upon a reasonable degree of medical certainty the proximate cause of the condition which I have

¹ Neither party has filed a copy of the transcript from the arbitration hearing with this Court. All references to events or testimony taking place at the hearing are derived from the post-hearing memoranda submitted to this Court, the transcript of the post-Award motions hearing, and the hearing before this Court.

diagnosed is directly related to the injuries sustained on August 14, 2010 as related to me by way of history given by the patient” and counsel’s damages evaluation. (Pl.’s Ex. 3, ¶ 5.)

The panel deliberated on two separate occasions, and issued an Arbitration Award (the Award) on February 25, 2015, in which it awarded the Plaintiff \$50,948.64 plus interest. See Pl.’s Ex. 1. The Award explicitly determined that USAA owed Plaintiff the principal amount of \$25,948.64 and interest in the amount of \$19,382.52, a total liability of \$45,331.16. Id.

Plaintiff filed a post-Award Motion to Vacate Arbitration Award and to Reopen Arbitration with the panel on March 16, 2015, which was substantially similar to the Motion to Vacate currently before this Court. Plaintiff’s counsel argued that she had been misled to believe that Defendant would not challenge causation or the nature and extent of Plaintiff’s injuries at the Hearing. Specifically, Plaintiff’s counsel claimed she had entered into an agreement with opposing counsel that the defense would not challenge the medical records with expert testimony, and that she relied on conversations with the neutral arbitrator when she declined to move to compel a deposition for Dr. Foster or Dr. DiGiovanni. The panel reconvened on April 2, 2015 to hear Plaintiff’s motion, and issued a detailed written decision denying the motion thereafter. (Def.’s Ex. B.)

Plaintiff filed his present Motion to Vacate Award and Reopen Arbitration with this Court on April 24, 2015, and Defendant responded with an objection to Plaintiff’s Motion and a Cross-Motion to Confirm the Arbitration Award on May 11, 2015. This Court heard the motions of the parties on June 11, 2015.

II

Standard of Review

In Rhode Island, strong public policy weighs in favor of the finality of arbitration awards. See N. Providence Sch. Comm. v. N. Providence Fed'n of Teachers, Local 920, 945 A.2d 339, 344 (R.I. 2008) (citing Pierce v. R.I. Hosp., 875 A.2d 424, 426 (R.I. 2005)). The “policy of finality is reflected in the limited grounds that the Legislature has delineated for vacating an arbitration award.” Berkshire Wilton Partners, LLC v. Bilray Demolition Co., 91 A.3d 830, 835 (R.I. 2014) (quoting Prudential Prop. and Cas. Ins. Co. v. Flynn, 687 A.2d 440, 441 (R.I. 1996)). Accordingly, this Court performs an extremely limited review of arbitration awards to preserve the integrity and efficacy of arbitration proceedings. Aponik v. Lauricella, 844 A.2d 698, 704 (R.I. 2004).

Section 10-3-12 expressly circumscribes the grounds upon which this Court must vacate an arbitration award. See § 10-3-12. That section provides, in pertinent part:

“In any of the following cases, the court must make an order vacating the award upon the application of any party to the arbitration:

“(1) [w]here the award was procured by corruption, fraud or undue means.

“(2) [w]here there was evident partiality or corruption on the part of the arbitrators, or either of them.

“(3) [w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in hearing legally immaterial evidence, or refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been substantially prejudiced.

“(4) [w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” Sec. 10-3-12.

“[E]very reasonable presumption in favor of the award will be made[.]” See Coventry Teachers’ Alliance v. Coventry Sch. Comm., 417 A.2d 886, 888 (R.I. 1980) (citations omitted). If the award is not vacated, modified, corrected or unenforceable, the Court must confirm the award upon application of any party to the arbitration. See § 10-3-12. It is the arbitrator’s judgment for which the parties have bargained and by which they agree to abide. Jacinto v. Egan, 120 R.I. 907, 911, 391 A.2d 1173, 1175 (1978).

III

Analysis

A

Motion to Vacate

Plaintiff requests this Court to find that the arbitrators committed misconduct under § 10-3-12(3)² when they failed to “allow Emerson to take the depositions of Drs. Foster and DiGiovanni, and to present that evidence to the Arbitration panel.” Plaintiff distills his motion’s allegations into roughly four arguments in the supporting memoranda. He contends:

“it is clearly misconduct on the part of the neutral Arbitrator (1) to fail to present Plaintiff’s Motion to Compel the deposition of Mr. Emerson’s physicians to the full panel of Arbitrators, and therefore, in essence, deny Plaintiff the right to depose the attending physicians and to present their testimony to the Arbitration panel through the depositions; (2) to unilaterally notify Plaintiff’s counsel that the medical records were coming in without objection and there was no dispute as to the medical evidence, and then to base an Award on Defendant’s argument, over objection, that the injury and surgery were not related to the wreck; (3) to base an Award on speculation and facts not in evidence, and not on any material evidence that was properly before the Arbitration

² As provided supra, § 10-3-12(3) states that a Court must vacate an award “[w]here the arbitrators were guilty of misconduct . . . refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been substantially prejudiced.”

panel; (4) to deny the Plaintiff's Motion to Vacate the Arbitration Award and to Reopen the Arbitration." (Pl.'s Mem. 13.)

Rhode Island Courts have never precisely addressed the application of § 10-3-12(3)'s evidentiary requirements.³ However, it is well-settled that an arbitrator "enjoys wide latitude in conducting an arbitration hearing," and "[a]rbitration proceedings are not constrained by formal rules of procedure or evidence." Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901, 763 F.2d 34, 38-39 (1st Cir. 1985) (citing generally F. Elkouri & E. Elkouri, How Arbitration Works, *39 at 254-56 (3d ed. 1973)). Arbitrators decide the admissibility and relevance of proposed evidence and "must be given discretion to determine whether additional evidence is necessary or would simply prolong the proceedings." Petroleum Transp., Ltd., Ionian Challenger v. Yacimientos Petroliferos Fiscales, 419 F. Supp. 1233, 1235 (S.D.N.Y. 1976) aff'd, 556 F.2d 558 (2d Cir. 1977) (quoting Catz Am. Co. v. Pearl Grange Fruit Exch., Inc., 292 F. Supp. 549, 553 (S.D.N.Y. 1968)). "While they may err in their determination, every failure to receive relevant evidence does not constitute misconduct [] so as to require the vacation of the award." Fairchild & Co. v. Richmond, Fredericksburg & Potomac R.R. Co., 516 F. Supp. 1305, 1314 (D.D.C. 1981); Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir. 1968).

In this case, the neutral arbitrator should have, perhaps, resolved the deposition issue by submitting Plaintiff's motion to the panel or requesting counsel to place her concerns on the record, but failure to do so does not automatically constitute misconduct. Fairchild & Co., 516 F. Supp. at 1314. An Arbitrator is "not required to hear all the evidence proffered by a party," she must only provide each party "an adequate opportunity to present its evidence and argument."

³ But see Taylor v. Delta Electro Power, Inc., 741 A.2d 265 (R.I. 1999) (holding in part that an arbitrator need only provide the opportunity for a party to present its case, but declining to provide further guidance.)

Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997). There is no indication that Plaintiff's counsel formally pressed its Motion to Compel or otherwise ensured that the motion was formally decided by the panel. Moreover, it is not clear that the information set forth in the depositions differs from or enhances the existing evidence. The medical records considered by the panel contain both the personal and professional opinions of Drs. Foster and DiGiovanni, and Dr. DiGiovanni provided an explanatory affidavit for the panel's consideration. It is undisputed that a motion to compel was never before the panel and a formal order was never issued resolving either motion. Accordingly, the neutral arbitrator's failure to submit Plaintiff's motion to the panel does not constitute misconduct such as to compel this Court to vacate the Award.

Plaintiff's counsel also contends that statements by the neutral arbitrator led her to believe that certain portions of the record would not be contested. This allegedly resulted in counsel being unprepared to defend her client's position when the Defendant challenged the causal nexus between the accident and the nature and extent of the injury. Plaintiff cites three federal cases for the proposition that "the arbitration panel may not inveigle a party not to present evidence on a point" and then permit an opposing party to address that point. However, these cases are highly distinguishable, because each addresses an instance in which the arbitrator formally declined to permit the admission of particular evidence. See Gulf Coast Indus. Workers Union v. Exxon Co., USA, 70 F.3d 847, 849 (5th Cir. 1995) (vacated where an arbitrator actively prevented the admission of evidence during a hearing); Hoteles Condado Beach, La Concha & Convention Ctr., 763 F.2d at 39 (vacated where an arbitrator explicitly refused to give any weight to a testimonial transcript admitted into evidence); Tempo Shain Corp., 120 F.3d at 18 (vacated where an arbitration panel refused to continue proceedings to accommodate a central witness). Here, neither the panel nor the neutral arbitrator made any such order, statement, or

representation. It is true that, at the April 2, 2015 post-Award motion hearing before the panel, the neutral arbitrator expressed concern on the record that his statements during the pre-arbitration process could have been misconstrued by Plaintiff's counsel. (Tr. 11:10-16, Apr. 2, 2015.) However, he also noted that the panel followed the letter of his representations: "[e]verything went in uncontradicted. [Plaintiff] brought [his] medical records in, [Plaintiff] submitted them, and then the panel weigh[ed] those medical records . . . []nobody denied any of [Plaintiff's] records." Id. As in any legal contest, counsel has an obligation to ensure that its concerns are properly effectuated and preserved. The panel is not burdened to try the case for the Plaintiff and, in fact, the panel should respect the strategic autonomy of the parties.⁴ Therefore, this Court finds that the pre-arbitration communications between the parties and the neutral arbitrator do not constitute misconduct under the governing statute.

Plaintiff's counsel contends that the neutral arbitrator's "refusal" to present Plaintiff's motion to the panel "substantially prejudiced the Plaintiff in that the majority of the arbitration panel (including the neutral Arbitrator) disregarded the uncontroverted and only medical evidence admitted into evidence before them, and in rendering their Award relied solely on [unsubstantiated] arguments made by Defense counsel" in violation of § 10-3-12(3) and the spirit of the statute. In effect, Plaintiff asks this Court to revisit the merits of the case to determine whether the panel properly weighed the evidence and argument before them.

However, "[a] court [] may not reconsider the merits of an award despite allegations that it rests upon errors of fact" R.I. Council 94, AFSCME, AFL-CIO v. State, 714 A.2d 584, 588 (R.I. 1998). This Court will draw every reasonable presumption in favor of the Award, and

⁴ It is well settled that issues not raised at an arbitration hearing are deemed to have been waived. Aponik, 844 A.2d at 698; Providence Teachers' Union Local 958 Am. Fed'n of Teachers v. Providence Sch. Comm., 433 A.2d 202 (R.I. 1981).

uphold the Award when supported by any legally competent evidence in the record. See Coventry Teachers' Alliance, 417 A.2d. at 888.

Assuming, arguendo, this Court may properly revisit the material considered by the panel, the Court finds sufficient evidence in the transcript of the post-Award motion hearing to conclude that the panel properly weighed the evidence before it and issued a defensible Award. When Plaintiff's counsel attempted to argue that there was no evidence supporting the panel's decision at the post-Award hearing, the neutral arbitrator explained that the statement of Dr. DiGiovanni submitted to the panel said two things: "[Plaintiff's] surgery, now, [four] years later, is a, full-blown tear . . . [a]nd he also said [Plaintiff] was non-compliant or basically he said he only wore his splint for the first . . . two weeks." The neutral arbitrator went on to state that even this testimony is "somewhat contradicted" by the records of Dr. Foster who suggested that Plaintiff was "not even complying wearing his splint the first two weeks." (Tr. 13:12-14; 14:1-10) Moreover, the neutral arbitrator explained that Plaintiff's deposition, taken in January 2014, made it "absolutely clear . . . that this man had done a lot of physical labor involving his right dominant extremity for [four] years." Id. at 14:7-11.

Similarly, Plaintiff claims that the panel violated § 10-3-12(3) when it denied Mr. Emerson's post-Award motion to vacate the Award and reopen arbitration. The panel issued a written order denying Plaintiff's post-hearing Motion to Vacate Award and Reopen Arbitration on April 2, 2015, which addressed many of the issues set forth in Plaintiff's present Motion. In it, the panel made three explicit findings:

"1. There is no evidence of any written stipulation between counsel regarding injuries nor evidence of claimant's counsel making contact with defense counsel orally or in writing with respect to any such alleged understanding.

“2. There was no denial of the opportunity to depose the treating physicians pre-Hearing. No Order of denial was issued by the panel or any member of it. A Motion to compel deposition of Dr. Foster was addressed in that defense counsel had objected to having the deposition conducted until such time as she had received all of the Plaintiff’s medical records. In response to this Motion, it was ordered that the records be produced. They were produced. Thereafter, there was no pressing of a Motion to Compel the deposition of Dr. Foster. There was no Motion to Compel deposition filed with respect to Dr. Giovanni.

“3. With regard to the understanding of the information conveyed in the September 2014 telephone conference between Plaintiff’s counsel and the Neutral Arbitrator as alleged in support of this post-Award Motion, it is noted that the defense filed its Pre-Hearing Memorandum setting forth within it a position which clearly disputed injury causation. Despite this, at no time prior to the commencement of the Hearing or at its outset was any statement made to the panel that the defense position was not in contradiction to the understanding that there was a stipulation “with regard to the injuries sustained by the Plaintiff.” During the cross examination of the Plaintiff and arguments, it was very clear that the defense was contesting causation, arguing mitigation and vigorously disputing the nature and extent of the claimed injuries. Despite this, there was no mention to the panel of any prior understanding of a stipulation as is set forth in this post-Award Motion. This issue concerning a prior understanding was not raised to the panel at any point prior to the Hearing, during the Hearing or at any time after the Hearing i.e.: during the four weeks before the Award/Decision was issued. No Motion was made to continue, delay or adjourn the Arbitration in order to allow depositions to be conducted in light of an understanding of the defense expected to be presented or any miscommunication with respect to it.” Def.’s Ex. B, Decision Denying Motion to Vacate Award and Reopen Arbitration.

Together with the transcript and supporting medical records, these statements demonstrate a rational consideration of the facts. “Except for complete irrationality, arbitrators are free to fashion applicable rules and determine the facts of a dispute before them without their award being subject to judicial revision.” Belanger v. Matteson, 115 R.I. 332, 356, 346 A.2d 124, 138 (1975); Lentine v. Fundaro, 29 N.Y.2d 382, 385, 278 N.E.2d 633, 635 (1972) (“An award

may be vacated . . . , it has been stated or held, where the construction of a document is ‘completely irrational’”). Accordingly, this Court finds that the panel considered sufficient material evidence and did not commit misconduct when issuing the underlying Award or denying Plaintiff’s post-Award Motion to Vacate and Reopen Arbitration.

After thorough review of the record, the Court finds that the actions of the neutral arbitrator and/or the panel do not amount to misconduct under § 10-3-12(3) and the Award is not irrational and has not otherwise prejudiced the Plaintiff’s rights. Accordingly, Plaintiff’s Motion to Vacate the Award and Reopen Arbitration is denied.

B

Motion to Confirm

Concurrent with its objection to Plaintiff’s Motion to Vacate, USAA moves this Court to confirm the arbitration award pursuant to § 10-3-11, which states “[a]t any time within one year after the award is made, any party to the arbitration may apply to the court for an order confirming the award, and thereupon the court *must* grant the order confirming the award unless the award is vacated, modified or corrected, as prescribed in §§ 10-3-12—10-3-14.” Sec. 10-3-11 (emphasis added). This Court has consistently held “‘when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.’” State v. Santos, 870 A.2d 1029, 1032 (R.I. 2005) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)).

Here, the General Assembly has provided a clear and unambiguous directive: if a motion to confirm is (1) filed within the one year statutory period, and (2) the arbitration award has not been “vacated, modified, or corrected,” a Court must confirm the award. See N. Providence Sch. Comm., 945 A.2d at 347 (public policy favors finality). USAA filed its Motion to Confirm on or

about May 11, 2015, just three months following the Award and well within the one year statutory period. The Award was not at that time, and has not been since, “vacated, modified or corrected, as prescribed in §§ 10-3-12—10-3-14.” Accordingly, this Court grants USAA’s Motion to Confirm the Arbitration Award pursuant to the plain language of § 10-3-11 and public policy favoring finality.

IV

Conclusion

For the reasons discussed herein, Plaintiff’s Motion to Vacate the Arbitration Award is denied, and Defendant’s Motion to Confirm Arbitration Award is granted. Counsel shall submit the appropriate Order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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CASE NO: P.M. 2015-1711

COURT: Providence County Superior Court

DATE DECISION FILED: July 31, 2015

JUSTICE/MAGISTRATE: Lanphear, J.

ATTORNEYS:

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For Defendant: Katherine A. Merolla, Esq.