American Arbitration Association

NO-FAULT ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Scott A Croce DC, PC	*Applicant*
−and−	
Preferred Mutual Insurance Company	*Respondent*

		17110401	
AAA ASSESSMENT NO.:	99-18-1100-8750	INSURER'S FILE NUMBER:	

AAA CASE NUMBER:

MASTER ARBITRATION AWARD

I, Marilyn Felenstein , the undersigned MASTER ARBITRATOR, appointed by the Superintendent of Insurance and designated by the American Arbitration Association pursuant to regulations promulgated by the Superintendent of Insurance at 11 NYCRR 65-4.10, having been duly sworn, and having heard the proofs and allegations of the parties on Not Applicable , make the following AWARD.

Part I. Summary of Issues in Dispute

Applicant submitted a claim for reimbursement for EDX testing provided to its Assignor following a motor vehicle accident on May 18, 2017. Respondent denied the claim based on a lack of medical necessity based on the peer report by Craig Horner D.C. Respondent subsequently issued a coverage denial asserting that the claimed injuries did not arise out of the use and operation of a motor vehicle. Respondent relied on the Biomechanical Injury Causation Analysis report of Jacqueline M. Lewis, Ph.D. who opined that there was no injury mechanism present in the accident to account for the claimed injuries.

Applicant submitted the matter for arbitration. The matter was heard by Arbitrator Fred Lutzen on March 6, 2019. In an award dated March 28, 2019, Arbitrator Lutzen found that Dr. Lewis had sufficient scientific and technical knowledge to provide the opinion that the assignor was not injured as the result of the use and operation of a motor vehicle. He also found that the evidence submitted by Applicant was insufficient to rebut the extremely detailed, comprehensive and convincing opinion by Dr. Smith. Respondent's defense was sustained.

Applicant seeks vacatur of the lower arbitration award arguing that the award was irrational, arbitrary and capricious.

Part II. Findings, Conclusions, and Basis Therefor

As required by 11 NYCRR Section 65-4.10©(3), I determine that the facts alleged in the submitted documents set forth a proper ground for review pursuant to Subdivision (a) of Section 65-4.10 and that the request for master arbitration was properly made in accordance with Subdivision (d)(1) and (2) of that Section.

The review of this award is limited to the standards set forth in CPLR Article 75 and which was defined by the Court of Appeals in Matter of Petrofsky v. Allstate Insurance Company, 54 N.Y.2d 207 as follows:

> "In cases of compulsory arbitration, this Court has held that Article 75 of the CPLR 'includes review . . . of whether the award is supported by evidence or other basis in reason' Mount St. Mary's v. Catherwood, 26 N.Y.2d 493. This standard has been interpreted to import into Article 75 review of compulsory arbitration the arbitrary and capricious standard of Article 78 review. (Caso v. Coffey, 41 N.Y.2d 153, 158, Siegel, New York Practice, Section 603, pp. 865-866.). In addition, Article 75 review questions whether the decision was rational or had plausible basis. (Caso **v**. Coffey, 41 N.Y.2d 153, supra)."

Since arbitration under the no-fault law is compulsory, the scope of review is whether the arbitration award was arbitrary and capricious, irrational or without a plausible basis. Matter of General Acc. Fire & Life Assur. Corp, 88 AD2d 739, 740; Matter of Adams v. Allstate Ins. Co., 210 AD2d 319, 321, lv. denied 86 N.Y.2d 707.

The grounds for review also include that the decision was incorrect as a matter of law (11 NYCRR 65-4.10(a)(4). However, "(The master arbitrator 'exceeds his statutory power by making his own factual determination, by reviewing factual and procedural errors committed during the course of the arbitration, by weighing the evidence, or by resolving the issues such as the credibility of the witnesses." Matter of Richardson v. Prudential Property & Casualty Co., 230 A.D.2d 861; Mott v. State Farm Insurance Company, 55 N.Y.2d 224.

A master arbitrator's powers of review are limited to whether or not the evidence is sufficient, as a matter of law, to support the determination of the arbitrator. The role of the master arbitrator is to review the determination of the arbitrator to assure that the arbitrator reached his or her decision in a rational manner, that the decision was not arbitrary and capricious (11 NYCRR 65.17 [a][1), incorrect as a matter of law (11 NYCRR 65.17 [a][4]), in excess of the policy limits (11 NYCRR 65.17 [a][2], [3]) or in conflict with other designated no-fault arbitration proceedings (11 NYCRR 65.17[a][5],[6]).

It is noted that an award may be found on review to be rational if any basis for such conclusion is present. Caso v. Coffey, 41 N.Y.2d 153, 391 NYS2d 88 (1976). Additionally, it is well settled that an arbitrator is not required to justify his or her award.

Applicant seeks vacatur of the award arguing that the claimed injuries were not caused by the reported motor vehicle accident. Applicant argues that Respondent's expert was not competent to testify and that it had never been given proper notice of the expert report thereby denying it of the opportunity to properly respond to the report. Respondent cited to *Clemente v. Blumberg,* 183 Misc.2d 923 (1999) for the position that a biomechanical engineer lacks the training and experience to testify regarding whether or not the injured party as sustained a serious injury. It is argued that Dr. Lewis gives a medical opinion which should only be rendered by a medial doctor. Respondent further argues that a lack of coverage defense must be made within 10 business days after the determination is made. Such was not the case herein.

In response, Respondent argues that its expert had properly concluded that there was no injury mechanism present in the subject accident to account for the claimed injuries. Respondent issued its denial on those grounds on December 13, 2018. The underlying arbitration was commenced on July 21, 2018 and its contentions were submitted on August 28, 2018. The report of its expert was submitted as a supplemental submission on December 13, 2018, almost three months before the hearing before Arbitrator Lutzen. Respondent, therefore, contends that Applicant had more than enough time to review and rebut the supplemental submission, but failed to do so. It is further argued that the award was neither arbitrary nor capricious as it was based on the factual determination of its expert, who was more than qualified to render a decision on the issue of causality. Respondent distinguished the *Clemente* case relied on by Applicant by noting that that case involved testimony at trial and the standard for a *Frye* hearing that would not apply to arbitration.

Respondent asserts that the lower arbitrator is empowered with the right to weigh the credibility of evidence and that he rendered a rational decision after doing so. arbitrator's interpretation of the no-fault statute. It is argued that respondent is merely attempting to relitigate the issue that was properly and completely resolved by the lower arbitrator. Applicant contends that the award is rational and not subject to vacatur.

Arbitrator Lutzen, in his award, explained why he reached his conclusion that the claimed injuries could not have been caused by the claimed incident. He refer to the police report and the photographs attached thereto and notes that the police report indicated "no injury reported and no visible injury seen". He notes the facts of the accident and discusses in detail the report by Dr. Lewis. The arbitrator found Respondent's expert to be qualified to make the analysis regarding causation and found that Applicant had failed to rebut the expert's conclusion.

It is clear that a lower arbitrator has the authority to assess the facts and apply the relevant case law. He had the right to determine what evidence would be considered, including the expert report submitted by Respondent. I have carefully reviewed the parties' briefs and the record on appeal. The arbitrator's findings were within the arbitrator's sound discretion and rational interpretation of the evidence and I find no reversible error within my purview as a Master Arbitrator. Per 11 NYCRR 65-4.5[o][1], the arbitrator shall be the judge of the relevance and materiality of the evidence offered. It would be improper for me, as a Master Arbitrator, to conduct a de novo review of the case and I cannot substitute my interpretation or my view as the weight or credibility of the evidence over that of the lower arbitrator.

Furthermore, considering that there is case law to support the position that New York courts have specifically held that a biomechanical engineer is qualified to give opinion testimony regarding whether the force of impact in an accident could case the alleged injuries, it cannot be said that the arbitrator's conclusion was not rational. *Plate v. Palisade Film Delivery Corp,* 39 AD3d 835 (2nd Dept. 20017). The request for vacatur of the award is denied.

Accordingly,

1. ☐ the request for review is hereby denied pursuant to 11 NYCRR 65-4.10 (c) (4)

2. X ☐ the award reviewed is affirmed in its entirety

3. ☐ the award or part thereof in favor of ☐ applicant
hereby reviewed is vacated and
☐ respondent

remanded for a new hearing ☐ before the lower arbitrator

☐ before a new arbitrator

4. the award in favor of the ☐ applicant
hereby reviewed is vacated in its entirety
respondent

—or—

5. ☐ the award reviewed is modified to read as follows:

A. The respondent shall pay the applicant no-fault benefits in the sum of

_____ Dollars ($_____), as follows:

Work/Wage Loss	$_____
Health Service Benefits	$_____
Other Reasonable and Necessary Expenses	$_____
Death Benefit	$_____
Total	$_____

B1. ☐ Since the claim(s) in question arose from an accident that occurred prior to April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from

_____ at the rate of 2% per month, compounded, and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

B2. ☐ Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from _____ at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

C1. ☐ The respondent shall also pay the applicant _____ dollars ($_____) for attorney's fees computed in accordance with 11 NYCRR 65-4.6(d). ***The computation is shown below*** (attach additional sheets if necessary).

–or–

C2. ☐ The respondent shall also pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e). However, for all arbitration requests filed on or after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

C3. ☐ Since the charges by the applicant for benefits are for billings on or after April 5, 2002, and exceed the limitations contained in the schedules established pursuant to section 5108 of the Insurance Law, no attorney's fee shall be payable by the insurer. See 11 NYCRR 65-4.6(i).

D. ☐ The respondent shall also pay the applicant forty dollars ($40) to reimburse the applicant for the fee paid to the Designated Organization for the arbitration below, unless the fee was previously returned pursuant to an earlier award

PART III. (Complete if applicable.) The applicant in the arbitration reviewed, having prevailed in this review,

A. the respondent shall pay the applicant ($) for attorney's fees computed in accordance with 11 NYCRR 65-4.10 (j). The computation is shown below (attach additional sheets if necessary)

B. If the applicant requested review, the respondent shall also pay the applicant SEVENTY-FIVE DOLLARS ($75) to reimburse the applicant for the Master Arbitration filing fee.

This award determines all of the no-fault policy issues submitted to this master arbitrator pursuant to 11 NYCRR 65- 4.10

State of North Carolina

County of Brunswick ☐ss:

I, Marilyn Felenstein , do hereby affirm upon my oath as master arbitrator that I am the individual described in and who executed this instrument, which is my award.

07/15/19
Date

Master Arbitrator's Signature

IMPORTANT NOTICE

This award is payable within 21 calendar days of the date of mailing. A copy of this award has been sent to the Superintendent of Insurance.

This master arbitration award is final and binding except for CPLR Article 75 review or where the award, exclusive of interest and attorney's fees, exceeds $5,000, in which case there may be court review de novo (11 NYCRR 65- 4.10(h)). A denial of review pursuant to 11 NYCRR 65- 4.10 (c) (4) (Part II (1) above) shall not form the basis of an action de novo within the meaning of section 5106(c) of the Insurance Law. A party who intends to commence an Article 75 proceeding or an action to adjudicate a dispute de novo shall follow the applicable procedures as set forth in CPLR Article 75. If the party initiating such action is an insurer, payment of all amounts set forth in the master arbitration award which will not be subject of judicial action or review shall be made prior of the commencement of such action.

Date of mailing:_____