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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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SAUL J. KLEIN,

Plaintiff,

-against-

GEICO GENERAL INSURANCE COMPANY,

Defendant.

----------x

TRIAL PART: 14
NASSAU COUNTY

INDEX NO: 001350-11

MOTION SEQ. NO:1

SUBMIT DATE:03/03/11

The following papers having been read on this motion:

Order to Show Cause.....1
Opposition.....2
Reply.....3

Petitioner's motion to vacate the arbitration award is hereby denied.

Petitioner, Saul Klein claims that he suffered permanent, lifelong, serious injuries to his neck and back on February 27, 2007 when his car was struck from behind. Petitioner claims that this accident resulted in cervical disc herniations with a migrated disc fragment and a lumbar disc herniation. It is claimed that the following treatments were necessitated from the accident: chiropractic care, massage therapy, trigger point injections, daily doses of Advil, and the recommendation to undergo Cervical Fusion and Decompression Surgery. Petitioner claims to have nearly $40,000 in unrecovered lost wages and continues to suffer physically from the accident.

Petitioner also testified that he was involved in a motor vehicle accident in 2004 resulting in injury to his lower back and neck. A copy of a lumbar MRI report, performed on June 23, 2004, was submitted and was said to be normal. X-rays, taken on June 23, 2004, were also submitted and did not show the presence of herniations.

Petitioner commenced this action against Andrea Oyarzun and Andres Orarzun as defendants in their capacity as owner and operator of the offending vehicle. Respondent GEICO was also named as a defendant in their capacity as the no-fault carrier relative to unpaid no-fault benefits. GEICO tendered its full policy limits of $25,000 to resolve petitioner Saul Klein's claims against

Andrea and Andres Oyarzun. Furthermore, the no-fault claims against GEICO were resolved in the amount of $16,500 in addition to the previously voluntarily paid amount of $16,000. Therefore, GEICO paid $32,500 of an available $48,000.

Both parties submitted to an arbitration, which was held on June 24, 2010. On November 1, 2010, the arbiter issued an arbitration decision awarding petitioner zero dollars. Accordingly, the petitioner moves to vacate the arbitration award.

An arbitration award rendered after a consensual arbitration may be vacated by a court only on the grounds set forth in CPLR § 7511(b). *Romaine v. New York City Transit Authority*, -A.D.3d-, WL 924249 (2d Dept. 2011). A court may vacate an arbitration award on the ground that the arbiter exceeded his powers within the meaning of CPLR § 7511(b)(1)(iii) only where the arbitrator's award violates weighty public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power. *Id.*

Petitioner argues that the arbitration award should be vacated due to the arbiter's bias. CPLR§ 7511(b)(1)(ii) provides for vacatur of an award based on the partiality or bias of an arbitrator who was appointed as a neutral. Where the arbiter was appointed as a neutral, any attack on the award on the ground of bias requires a showing of prejudice to the aggrieved party as a result of the arbiter's actual partiality or the appearance of such partiality. See *Artists & Craftsmen Builders, Ltd. v. Schapiro*, 232 AD2d 265, (1st Dept. 1996). A claim of arbiter bias must be established by clear and convincing proof, demonstrating more than a mere inference of partiality. *645 First Ave. Manhattan Co. v. Kalisch-Jarcho, Inc.*, 220 AD2d 517, (2d Dept. 1995); *Matter of Public Employees Federation on Behalf of Dasrath*, 191 AD2d 569, (2d Dept. 1993).

Petitioner argues that by performing an independent investigation that produced a tax appeals tribunal decision in which petitioner was a party, the arbiter was biased. Such an investigation does not provide the required clear and convincing evidence of bias. Arbiters may not base their award on ex parte discussions or independent investigations *Jelenevsky v. Leonakis*, 234 AD2d. 548 (2d Dept. 1996). However, the award was not based on such an investigation and the arbiter utilized several medical reports. The petitioner further argues that the arbiter ignored the previous negative MRI report and the IME report which confirmed the decrease range of motion due to a disc herniation. Such a claim does not best represent an argument of bias but supports other arguments put forth by petitioner below.

The arbiter's award is also claimed by petitioner to be irrational as well as arbitrary and capricious. The petitioner argues that the arbiter's award was irrational because he found that the prior negative MRI report was "not sufficient to prove causation." The award is claimed to be arbitrary and capricious because there is no rational basis for the arbiter to have concluded that the prior negative lumbar MRI was insufficient to prove that the lumbar disc herniation was not pre-existent. Furthermore, the petitioner states that there was no reason for the arbiter to have ignored GEICO's own IME finding of decreased range of motion related to a disc herniation.

An arbiter's award is irrational if there is no proof whatsoever to justify the award. *Chin v. State Farm Ins. Co.*, 73 A.D.3d 918, 919 (2d Dept. 2010). Additionally, even if an arbiter misapplies substantive rules of law or makes an error of fact, an award is not automatically vacated. *Id.* Therefore, an arbiter is not bound by principles of substantive law or rules of evidence and may do justice and apply his or her own sense of law and equity to the facts he finds them to be. *Id.* Such a claim of irrationality cannot be made in this case and the arbiter's failure to find causation was based on medical reports.

The arbiter made the following finding in the report:

> Dr. Pfeffer felt that the cervical MRI performed one month following the subject accident, showed pre-existing chronic degenerative disease, including disc herniations at all levels, as well as, minor disc bulging at C5/6. While she found minimal disc herniations at C3/4 and a slightly more prominent disc herniation at C4/5, she felt that they were more likely degenerative than traumatic given the presence of coexistent degenerative disc disease at C3/4 and C4/5 and the absence of evidence of the acute spinal trauma. Still further, Dr. Pfeffer felt the absence of hospital ER treatment or other urgent medical care was not consistent with acute herniations. As for the Lumbar MRI which was also taken one month post accident, Dr. Pfeffer reported that the study showed multilevel disc desiccation and multilevel Schmorl's node formation, as well as, a minimal L5/s1 herniation, more likely than not degenerative rather than traumatic.

The arbiter further based his award on the report of Dr. Noel Fleischer, which noted that petitioner's prior back injuries were completely healed but did not indicate that he reviewed petitioner's prior medical records or relied on anything other than the petitioner's word itself. In

addition this doctor reported finding cervical and lumbar tenderness and impaired range of motion but did not compare these finding to that of a normal range of motion. Therefore, the arbiter stated that he was unable to find if this deficit in range of motion was significant.

The arbiter also reviewed the records of orthopedist Alexandre B. deMoura. These records indicated that the petitioner was first seen on September 18, 2008. However, these records list a patients name other than the petitioner's. Accordingly, the records indicate that the first time that doctor deMoura examined petitioner was on February 12, 2009, nearly two years after the subject accident. Further, the arbiter noted that doctor deMoura's records were inconsistent. Doctor deMoura first reported that range of the cervical spine was normal and then subsequently reported that range of motion was decreased in the cervical spine. Additionally, this doctor made no statement connecting any cervical injury to the subject accident.

Such findings by medical doctors provides credible proof that the disc herniations were not caused by the accident in question and satisfies the low burden required of an arbiter. Therefore, the arbiter did not base his award from no proof whatsoever and the decision was not irrational, arbitrary or capricious. Contrary to petitioner's contention, the arbiter's award finds evidentiary support in the record and was rationally based. *Id.* Even if the arbiter failed to consider specific evidence, vacatur of the award would not be warranted. *Id.*

Accordingly, petitioner's motion to vacate the arbitration award is hereby denied.

This constitutes the decision and order of this Court.

ENTER

DATED: April 11, 2011

HON. ARTHUR M. DIAMOND

J. S.C.

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