

[*1]

Decided on May 9, 2008

Supreme Court, Queens County

**Venecia Nieves, Angelica Nieves and Pedro Nieves, Jr.,
II, For an Order pursuant to CPLR 7511 modifying an
arbitration award rendered by Arbitrator Emily
Diamond under the offices of the American Arbitration
Association**

against

**Pertaining to a claim Clarendon National Insurance
Company,**

25155/07

Jaime A. Rios, J.

On August 24, 2003, Venecia, Angelica and Pedro were passengers in a motor vehicle operated by Pedro Nieves, Jr. (Nieves) which was involved in an accident with an uninsured motor vehicle.

As a result of the occurrence, Venecia, Angelica, Pedro and Nieves sought arbitration of their claim for uninsured motorist (UM) benefits with Clarendon National Insurance Company (Clarendon).

The arbitration was held on May 8, 2007. Liability was conceded and thus, the sole issue before the arbitrator was whether the petitioners had sustained a serious injury as defined in Insurance Law 5102(d). At the conclusion of the arbitration, by decision dated August 2, 2007, the arbitrator awarded \$20,000.00 to Nieves, but found that Venecia, Angelica and Pedro failed to establish that they sustained a serious injury as set forth in Insurance Law 5102(d).

Venecia, Angelica and Pedro seek to have the arbitration award vacated and/or modified pursuant to CPLR 7511 upon the grounds of partiality and misconduct, contending that the arbitrator acted arbitrary and capricious.

In opposition, Clarendon contends that the petitioners have failed to establish that the arbitration award was arbitrary and capricious in nature. [*2]

CPLR 7511(b) provides that an application to vacate an arbitration award by a party who has participated in the arbitration may only be granted upon the grounds that the rights of that party were prejudiced by corruption, fraud, or misconduct in procuring the award, partiality of the arbitrator, the arbitrator exceeded his powers or failed to make a final and definite award, or a procedural failure that was not waived (*see Silverman v Cooper*, 61 NY2d 299 [1984]; *GEICO Gen. Ins. Co. v Sherman*, 307 AD2d 967 [2003]; *State Farm Mut. Auto. Ins. Co. v Arabov*, 767 NYS2d 905 {2 AD3d 531} [2003]).

CPLR 7511(c) provides that the court shall modify an award if there was a miscalculation of figures or a mistake in the description of a person, thing or property referred to in the award; the arbitrator has awarded on a matter not submitted for determination, or the award was imperfect in form.

Consistent with public policy in favor of arbitration, the grounds specified in CPLR 7511 for vacating or modifying an arbitration award are few in number and narrowly applied, with the list of potential objections being exclusive (*see Domotor v State Farm Mut. Ins. Co.*, 9 AD3d 367 [2004]).

At the outset, petitioners' contention that the award should be vacated on the ground of partiality and/or misconduct lacks merit. There has been no showing of an actual bias, conflict of interest or wrongdoing (*see Aviles v Allstate Ins. Co.*, 47 AD3d 710 [2008]; *Mays-Carr v State Farm Ins. Co.*, 43 AD3d 1439 [2007]; *County of Niagara v Bania*, 6 AD3d 1223 [2004]; *Conroy v Country Wide Ins. Co.*, 75 AD2d 852 [1980]).

Since petitioners' claim against Clarendon is made pursuant to the UM endorsement, it is subject to compulsory arbitration, and thus, the scope of judicial review of an arbitrator's award includes whether the award is supported by evidence or has other basis in reason (*see Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *Furstenberg v Aetna Cas. & Sur. Co.*, 49 NY2d 757 [1980]; *Mount St. Mary's Hosp. v Catherwood*, 26 NY2d 493 [1970]; *Kemper Ins. Co. v Westport Ins. Co.*, 9 AD3d 431 [2004]; *State Farm Mut. Auto. Ins. Co. v Arabov*, 2 AD3d 531 [2003]; *Scher v State Farm Ins. Co.*, 240 AD2d 415 [1997]; *American Motors Sales Corp. v Brown*, 152 AD2d 343 [1989]; *Rose v Travelers Ins. Co.*, 96 AD2d 551 [1983]).

An arbitrator is not required to justify his award, it must merely be evident that there exists a rational basis for it upon a reading of the record (*see Singletary v Govt. Empl. Ins. Co.*, 139 AD2d 723 [1988]; *Block v St. Paul Fire & Marine Ins. Co.*, 137 AD2d 475 [1988]; *Dahn v Luchs*, 92 AD2d 537 [1983]).

Here, the arbitrator's twelve page decision was based upon the testimony of Venecia, Angelica, Pedro and Nieves, transcripts of their deposition testimony, police accident report, health insurance claim forms, hospital and medical records submitted by claimants and Clarendon as well as film reviews performed at the request of the arbitrator. [*3]

Upon considering all the evidence, the arbitrator found that Venecia, Angelica and Pedro failed to establish that they sustained a permanent injury, a significant limitation of use, or a temporary disability for ninety days within the first 180 days immediately following the subject occurrence, meeting the threshold requirements of Insurance Law §5102(d). With regard to Nieves, the arbitrator determined that he sustained a serious injury pursuant to Insurance Law §5102(d) and awarded him \$20,000.00 in full disposition of his SUM claim.

The documentary evidence submitted to the arbitrator by Venecia, Angelica and Pedro failed to demonstrate the existence of a specific, quantifiable and objectively verifiable injury of disability (*see American Home Assur. Co. v Montilus*, 234 AD2d 543 [1996]). Petitioners allegedly claim injury to their neck and back; however, fail to produce objective or qualitative medical evidence regarding alleged range-of-motion limitations causally related to the accident (*see Jones v Cesar*, 2007 NY Slip Op 50543U). The medical records and reports do not include range of motion studies conducted contemporaneously with the subject accident (*see Earle v Chapple*, 37 AD3d 520 [2007]; *Knijnikov v Mushtag*, 35 AD3d 545 [2006]; *Cohen v A One Products, Inc.*, 34 AD3d 517 [2006]; *Ramirez v Parache*, 31 AD3d 415 [2006]) and supported by objective testing (*see Jackson v Colvert*, 24 AD3d 420 [2005]; *Mohammed v Gonzalez*, 1 AD3d 328 [2003]; *Williams v Precil*, 11 Misc 3d 136A [2004]). Any limitation of motion noted by Freddie Marton, M.D. or Marc J. Rosenblatt, D.O. in their reports was unquantified. The reports of Dr. Leist, dated April 13, 2004, set forth range of motion findings made over seven months after the accident. Additionally, the manner in which the findings were made and the measurements taken is unclear (*see Garner v Tong*, 27 AD3d 401 [2006]) and the dates various testing was performed is unknown.

Additionally, the film reviews conducted at the request of the arbitrator of the MRIs of Venecia's and Pedro's spine failed to confirm their claimed herniations.

The record does not demonstrate that the claimants were incapacitated from substantially performing their usual and customary duties for a period of 90 out of 180 days immediately following the accident (*see Insurance Law §5102(d)*). Venecia testified that she missed less than one week from her work as a hairdresser following the accident, thereupon returning to her regular schedule of ten to twelve hours a day, six days a week. Angelica and Pedro both testified that they only missed a few days from school as a result of the accident.

Regarding Nieves, the film review conducted at the request of the arbitrator revealed a protruding disc at C5-C6 which was consistent with EMG findings of cervical radiculopathy at C5-C6. Additionally, the doctor who examined him on behalf of Clarendon made a finding of some limitation of motion of his lumbar spine, unlike the petitioners. Moreover, he received treatment longer than Venecia, Angelica and Pedro.

Judicial review of an arbitrator's award is very limited (*see Pearlman v Pearlman*, 169 AD2d 825 [1990]) and the fact findings of the arbitrator may not be second guessed by a reviewing court (*see Liberty Mut. Ins. Co. v Sedgewick of New York*, 2007 NY Slip Op 6882). [*4]Based upon the present record, there was a rational basis to support the arbitrator's determination that Venecia, Angelica and Pedro did not sustain a serious injury within the meaning of Insurance Law §5102(d).

Accordingly, petitioners motion to vacate or modify the arbitration award is denied. The arbitration award of August 2, 2007 is confirmed and Clarendon is granted leave to enter judgment accordingly.

Dated: May 9, 2008

J.S.C.