AFFIRMED and Opinion Filed June 10, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01036-CV

TEXAS HEALTH MANAGEMENT, LLC, Appellant
V.
HEALTHSPRING LIFE & HEALTH INSURANCE COMPANY, INC., Appellee

On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause No. 219-00125-2018

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Carlyle
Opinion by Justice Bridges

Appellant Texas Health Management, LLC seeks to overturn the trial court's final arbitration in favor of appellee Healthspring Life & Health Insurance Company, Inc. In two issues, THM challenges the trial court's order striking its motion to vacate and the final judgment confirming the arbitration award. We affirm the trial court's judgment. Because the issues are settled in law, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.4.

Background

THM and Healthspring entered into a business service agreement (BSA) on May 1, 2013 in which THM, as vendor, performed certain business services for Healthspring. Per the BSA, THM performed in-home health risk assessments (HRAs) for Medicare patients enrolled in Healthspring's health plans. Healthspring provided THM with a "360 Form," a physical and diagnostic testing form that nurse practitioners filled out during home well checks for Medicare patients based on questioning and observing the patient. In addition, nurse practitioners sometimes performed labs, which included a finger stick or blood draw. The 360 Form was then coded by medical coders and the HRA was generated. THM completed a separate form for each 360 performed. Under the 2013 BSA, Healthspring paid THM a separate fee for each 360 ($250), HRA ($50), and lab ($50). After Healthspring received the completed 360 Forms, it could then submit the forms to the Centers for Medicare & Medicaid Services (CMS) in exchange for payment.

The BSA was amended on April 1, 2015. Joseph Stroffolino, THM's managing director, negotiated the amendment to the contract.

The parties operated under the BSA without issue until September 2016 when Healthspring attempted to renegotiate contract terms for an all-inclusive rate of $295 for all services performed. Such terms were unacceptable to THM because the decreased rate would significantly impact its revenue. When THM refused Healthspring's proposed terms, Healthspring withheld further business.

On January 16, 2017, THM sent a letter to Healthspring terminating the BSA because of "overreaching and unlawful attempt[s] by Cigna to force THM to accept new contract terms without consideration that are oppressive and unfair to THM, terms which contravene the existing Contract and that, if accepted by THM, would drive THM into insolvency."[1] THM explained it was misled by Cigna into believing that THM would acquire bidding opportunities in new markets outside of Texas; however, the prospect of expansion into other markets was a ploy to coax THM into offering Cigna the same pricing while reducing its business volume in Texas. THM further accused Cigna of manipulating the volume of member information and the timing of providing member information thereby affecting THM's ability to seek reimbursement and creating significant overpayment liability.

In a January 27, 2017 letter, Healthspring responded it valued its relationship with THM and reminded THM it had advanced hundreds of thousands of dollars to assist with cash flow issues. Healthspring also questioned whether it owed $2,152,455 for underpayment of services from 2015 and 2016 because THM never sent invoices for the services. Healthspring agreed to investigate THM's claims "shortly, at which time we will advise you whether our position has changed," and to provide its 2016 reconciliation "in due course under the contract."

[1] Healthspring is a wholly-owned subsidiary of Cigna, and Cigna is THM's only customer and sole source of revenue. Cigna acquired Healthspring in 2012.

Despite Healthspring's letter, THM quickly requested arbitration on January 30, 2017, through the American Arbitration Association (AAA) in accordance with the Commercial Arbitration Rules. THM also applied for emergency measure protection under commercial arbitration rule 38 based on non-payment of three invoices from 2015 and 2016 for $2,073,595.00. THM alleged that without emergency relief, it lacked sufficient funds for payroll, as well as other expenses, which would result in staff layoffs and business terminations. Thus, THM sought equitable relief for payment of the invoices.

David Daniels served as the emergency arbitrator during an emergency hearing conducted on February 14, 2017. Healthspring claimed it was not obligated to pay the invoices because it previously paid for the services, and the invoices charged amounts not permitted under the BSA. It took issue with the invoices' separate fee for each service performed.

Daniels construed the amended contract to require Healthspring to separately compensate THM for HMRs, labs, and 360 exams; however, THM was not entitled to emergency relief because the contract did not require Healthspring to pay THM until April 27, 2017. The order stated it would "continue in effect unless and until amended by subsequent order of the Arbitral Panel."

On February 21, 2017, THM amended its arbitration demand to include additional claims against Healthspring for anti-competitive conduct violating section

2 of the Sherman Act. THM claimed Healthspring wrongly directed business away from it and toward Alegis Care to increase its market share of HRAs in Houston.

In its Answering Statement, Healthspring denied all liability and continued arguing a flat-rate pricing interpretation of the contract. It also counterclaimed for breach of contract and sought turn over of all the completed 360 forms in THM's possession. THM, among other defenses, argued Healthspring was not entitled to the 360 forms because Healthspring refused to pay for them. Furthermore, the 360 Forms were in dispute and if Healthspring was granted such relief, "it would be tantamount to an award in [its] favor . . . without having to prove its case."

THM requested arbitration before a single arbitrator because of its financial condition. Healthspring objected, and the parties eventually agreed to a three-person panel. The Tribunal consisted of Mr. Albert M. Appel, the Honorable Gerald Harris, and Andrew F. McBride, III. Appel was appointed as chair of the panel. The Tribunal issued several pre-hearing orders: Order No. 1, in part, allowed orders to be signed by the Tribunal chair on behalf of the entire Tribunal and allowed any order to be effective as if signed by all three Tribunal members; Order No. 2 determined Daniels' decision was not binding on the Tribunal; and Order No. 3 allowed Healthspring to redact all "commercially sensitive terms" in the contracts THM requested to support its Sherman Act claim.

After Healthspring produced redacted copies of the contracts, it moved for summary disposition of THM's Sherman Act claim. THM opposed the request and

asked the Tribunal to reconsider its ruling and allow review of the redacted documents. Appel denied the request in Order No. 5, but allowed THM to "offer at the hearing such evidence as it may produce in support of [its antitrust] claim." Without the redacted documents, THM determined it could not support its Sherman Act claim and withdrew it.

The parties subsequently participated in a multi-day arbitration. On March 14, 2018, the Tribunal delivered its final award denying all of THM's claims and awarding Healthspring $737,250 in damages. The Tribunal reasoned that THM repudiated the BSA by providing notice of termination and filing an application with the AAA seeking emergency protection. The Tribunal also ordered THM to pay Healthspring $69,779.56 in arbitration fees.

THM filed a motion to vacate the arbitration award in the United States District Court for the Southern District of New York on May 22, 2018. Prior to this motion, however, an action was already proceeding in the Eastern District of Texas involving the arbitration. Based on the first-filed rule, the Southern District of New York transferred the case back to Texas in an order dated June 18, 2018.

On July 24, 2018, THM filed a motion to vacate the arbitration award in Collin County district court because "there can be no question that the Arbitration was nothing more than a sham. THM was mistreated every step of the way and was never given a fair opportunity to be heard on its claims."

The trial court signed a final judgment on January 18, 2019, confirming the arbitration award. This appeal followed.

Standard of Review

We review the trial court's confirmation of an arbitration award de novo. *See In re Chestnut Partners, Inc.*, 300 S.W.3d 386, 397 (Tex. App.—Dallas 2009, pet. denied); *Statewide Remodeling, Inc. v. Williams*, 244 S.W.3d 564, 567 (Tex. App.––Dallas 2008, no pet.); *see also Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1021 (5th Cir. 1990). The entire record is considered in our review. *Statewide Remodeling, Inc.*, 244 S.W.3d at 567. An arbitration award has the same force as a judgment of a court of last resort and is presumed valid and entitled to great deference. *See Cambridge Legacy Grp., Inc. v. Jain*, 407 S.W.3d 443, 447 (Tex. App.—Dallas 2013, pet. denied). Thus, we indulge all reasonable presumptions to uphold the arbitration award. *See CVN Grp., Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002). A party seeking to vacate an arbitration award bears the burden of presenting a record that establishes its grounds for vacating the award. *Statewide Remodeling, Inc.*, 244 S.W.3d at 568.

Because Texas law strongly favors arbitration, judicial review of an award is extraordinarily narrow and exceedingly deferential. *See Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016); *Myer v. Americo Life, Inc.*, 232 S.W.3d 401, 407 (Tex. App.—Dallas 2007, no pet.). Under the FAA, an arbitration award is presumed to be valid. *Myer*, 232 S.W.3d at 407.

An arbitration award governed by the FAA must be confirmed unless it is vacated, modified, or corrected under certain limited grounds. *Amoco D.T. Co. v. Occidental Petroleum Corp.*, 343 S.W.3d 837, 841 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Under section 10(a), a court may vacate an arbitration decision upon the application of any party to the arbitration:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where 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.

9 U.S.C. § 10(a). Because the FAA does not include an additional ground to vacate an arbitration award based on mere errors in interpretation or application of the law or mistakes in fact-finding, courts must not "conduct a review of an arbitrator's decision on the merits." *Rosales v. Lone Star Corrugated Container Corp.*, No. 05-19-00183-CV, 2020 WL 415926, at *2 (Tex. App.—Dallas Jan. 27, 2020, no pet.). Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." *Id.*

Discussion

In its second issue, THM argues the trial court erred by confirming the arbitration award because the Tribunal committed numerous acts of misconduct satisfying three of the four section 10(a) statutory grounds.

We begin by considering whether the arbitrators were partial towards Healthspring. THM contends (1) the Tribunal received undisclosed financial incentives directly or indirectly from Healthspring; (2) the Tribunal awarded Healthspring the ultimate relief it was seeking without deciding the breach of contract claim; and (3) Appel denied THM access to legal counsel.

Evident impartiality is established if an arbitrator does not disclose facts that might, to an objective observer, create a reasonable impression of the arbitrator's partiality. *See Burlington N. Ry. Co. v. TUCO Inc.*, 960 S.W.2d 629, 636 (Tex. 1997). "[T]his evident partiality is established by the nondisclosure itself, regardless of whether the nondisclosed information necessarily establishes partiality or bias." *Id*. A neutral arbitrator need not disclose trivial relationships or connections. *See Karlseng v. Cooke*, 346 S.W.3d 85, 86 (Tex. App.—Dallas 2011, no pet.).

Healthspring argues THM failed to object to the Tribunal's alleged partiality based on Appel's undisclosed selection as an arbitrator in separate Cigna litigation and other financial incentives prior to confirmation of the arbitration award; therefore, THM waived its complaint. We agree. A party who knows or has reason to know of an arbitrator's alleged bias but remains silent pending the outcome of the

arbitration waives the right to complain. *Skidmore Energy, Inc. v. Maxus (U.S.) Expl. Co.*, 345 S.W.3d 672, 684 (Tex. App.—Dallas 2011, pet. denied); *see also Bossley v. Mariner Fin. Grp., Inc.*, 11 S.W.3d 349, 351–52 (Tex. App.—Houston [1st Dist.] 2000), *aff'd*, 79 S.W.3d 30 (Tex. 2002). "A party may not sit idly by during an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrator when the result turns out to be adverse." *Bossley*, 11 S.W.3d at 351–52. A party who learns of a conflict before the arbitrator issues his or her decision must promptly object to avoid waiving the complaint. *TUCO*, 960 S.W.2d at 637 n. 9.

The record indicates that on December 8, 2017, Appel sent a second supplemental disclosure statement explaining his recent selection "by both parties to an arbitration, one of which is Cigna Corp., to act as the sole arbitrator of the parties' dispute."

THM does not dispute it received this disclosure notice. Rather, it contends it timely objected to the partiality of the Tribunal at a hearing on December 26, 2017. The record contains no transcription of this hearing, which THM admitted in a footnote in its motion to vacate the arbitration award filed in Collin County district court. Thus, we cannot consider any alleged arguments or objections from a hearing absent from the record.

In its opening and reply briefs, THM directs the Court to two other record citations where it allegedly objected prior to the final arbitration award on March 14,

2018. First, it cites to an affidavit attached to its January 23, 2018 motion to vacate the arbitration award filed in Collin County. However, the portions of the affidavit THM cite do not accuse Appel (or other Tribunal members) of partiality because of his selection to serve as arbitrator in an unrelated Cigna case. Rather, THM's objections relate to the interim award in which "only one of the three arbitrators from the panel provided a ruling." THM's second citation to a December 26, 2017 email from Appel refers to the Tribunal's "morning conference call," but does not include any complaints about partiality or bias. Thus, the record reflects THM did not timely object to Appel's alleged partiality based on his selection as an arbitrator in an unrelated Cigna case.

THM next claims the Tribunal was partial because it received free beverages and meals from Healthspring every day of the hearing. THM claims it received this information from a December 5, 2017 letter from Healthspring to the Tribunal.[2] However, on the first day of arbitration, Appel acknowledged, "I understand, Mr. Leckerman, you ordered in lunch." Leckerman, Healthspring's attorney, confirmed lunch would arrive around noon. THM did not question or object to Healthspring providing lunch.

THM's repeated citation to documents within the record referring to the December hearing that was not transcribed does not preserve error. Moreover, the

[2] In the letter, Healthspring stated it had "participated in good faith, accommodating every request by the Panel, providing for the space for the hearing (and lunch and refreshments) without charging THM, and never seeking to interfere with the proceeding."

pleadings referring to the hearing were filed after the March 14, 2018 award. For example, THM refers to the hearing in its "memorandum of law in support of petitioner's motion to vacate arbitration award" filed in the Southern District of New York on May 22, 2018. THM refers to the hearing again in its motion to vacate filed in Collin County on July 24, 2018.

We are mindful of the Texas Supreme Court's admonishments to "reach the merits of an appeal whenever possible" and that "disposing of appeals for harmless procedural defects is disfavored." *See Horton v. Stovall*, 591 S.W.3d 567, 567, 570 (Tex. 2019) (citing *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008)). However, the court has recognized "preservation of error is required and flagrant violations will not be tolerated." *Id*. And, "[i]n some circumstances, it may be unclear whether a missing or wayward citation is a formal defect or something more substantive, like proof of a preservation problem." *Id*.

We are not required to comb through the record to find evidence to support a party's appellate issues, but nothing prevents us from undertaking reasonable efforts to locate evidence described in a party's brief. *Id*. (noting reasonable efforts are less burdensome with an electronically filed record). Recognizing the supreme court's admonishments and conducting a "simple search" of the electronic record, we have not found any objections based on bias or partiality despite THM admittedly learning

of such alleged bias or partiality prior to Tribunal's final decision.[3] To avoid waiver of its complaint, THM was required to promptly object to the Tribunal. *Bossley*, 11 S.W.3d at 351–52; *TUCO*, 960 S.W.2d at 637 n.9. It did not do so. Rather, its objections appear in the record after the trial court confirmed the final arbitration award. Because THM did not promptly object to the Tribunal's bias and partiality, it failed to preserve its complaint for review. *Bossley*, 11 S.W.3d at 351–52 ("A party may not sit idly by during an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrator when the result turns out to be adverse.").

In reaching this conclusion, we reject THM's reliance on *Alim v. KBR*, 331 S.W.3d 178, 183 (Tex. App.—Dallas 2011, no pet.). In that case, an arbitrator's "innocuous comment at the beginning of a hearing" did not waive the party's right to object to the arbitrator's partiality. *Id*. at 182. Besides the innocuous comment, nothing else in the record indicated the party knew of the prior relationship between the opposing party and the arbitrator. *Id*. Here, unlike the arbitrator in *KBR*, Appel amended his disclosure and informed the parties of his selection as an arbitrator for a case involving Cigna. While THM takes issue with the timing of the disclosure, the timing of the disclosure is not "indisputable evidence that [Healthspring] was

[3] The Clerk's and Reporter's record in this case consists of approximately 2,200 pages.

colluding with the Tribunal Chair." THM still had a responsibility to timely object to preserve its complaint, which it failed to do. *Bossley*, 11 S.W.3d at 351–52.

Next, we consider whether Appel was partial by denying THM access to legal counsel. THM argues Appel was biased because he ordered Stroffolino not to communicate with his counsel during a deposition. Again, THM did not object to the Tribunal or raise this issue prior to the final arbitration award.[4] A party who knows or has reason to know of an arbitrator's alleged bias but remains silent pending the outcome of the arbitration waives the right to complain. *Skidmore Energy, Inc.*, 345 S.W.3d at 684.

Next, THM asserts Appel was biased by permitting Healthspring to depose THM witnesses without counsel being physically present. Appel's ruling, according to THM, allowed "unfettered access" to THM's witnesses during depositions. THM's argument is without merit.

After Healthspring noticed the depositions and its intent to conduct them in New York, THM objected because Stroffolino and another THM witness could not afford the travel expenses. THM suggested that Healthspring absorb the travel costs if their physical attendance was important. Healthspring then noticed the depositions for Texas, the location of the two witnesses. THM objected again arguing it could not afford to send its attorney to Texas. Appel ultimately determined Healthspring's

[4] Unlike some of its other partiality arguments, THM has neither alleged, nor cited to anywhere in the record, an objection to the argument it now raises on appeal. Rather, our own review of the record indicates THM raised the issue for the first time in its motions to vacate filed in New York and Collin County.

"proposal that the depositions be conducted in Texas, the location of the witnesses, with [THM's attorney] being able to participate by videoconference, is a reasonable one." Appel further provided THM the "choice of attending in person or by videoconference." Appel required Healthspring to make arrangements for the "efficient identification and use of documents during the deposition to minimize interruption and delay." THM's attorney appeared via telephone.

In the absence of evidence showing partiality, we refuse to find that the arbitrator was a party to any improper conduct. A party seeking to vacate an award on the basis of evident partiality must prove the existence of facts that would establish a reasonable impression of the arbitrator's partiality to one party. *See Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 233 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *see also In re C.A.K.*, 155 S.W.3d 554, 564 (Tex. App.—San Antonio 2004, pet. denied). THM does nothing more than speculate that Appel "knew he was giving an unfair advantage" to Healthspring. THM assumes Appel "ignored" its request to have counsel present in person because he reached a different conclusion than THM wanted.

Appel allowed THM's counsel to appear in person or by videoconference. He did not prohibit counsel from attending at all. To the extent THM contends Appel was required to "address the impact" of his decision, we are unpersuaded by its argument. Appel determined it was reasonable for Texas residents to be deposed in Texas with THM's counsel either present in person or by teleconference. THM has

not cited any authority requiring an arbitration to further explain his decision. Regardless, if THM wanted an explanation for Appel's rationale, THM could have objected and requested it. THM did not.

Finally, THM asserts the Tribunal was partial because it awarded Healthspring the ultimate relief it was seeking without deciding the breach of contract claim. Healthspring responds THM seeks to set aside the arbitration award based on a mistake of law, which is not a proper ground for vacating an award. *See Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 429 (Tex. App.—Dallas 2004, pet. denied) ("A reviewing court (i.e. the trial court) will not set aside an arbitration award for a mere mistake of fact or law."). Such deference is intended to prevent disappointed litigants from seeking to overturn every unfavorable arbitration award in court. *Id*.

THM specifically challenges Order No. 6 in which the Tribunal ordered it to turnover and deliver all of the undelivered 360 Forms. THM asserts that the Tribunal "arbitrarily directed" the turnover of the 360 Forms, and the decision was made under an improper "guise" of their worth with "no basis" for reaching the conclusion. THM further alleges "there was no sound basis for the order" other than to ensure Healthspring received the documents and inflict harm on THM. Thus, THM concludes, "No unbiased arbitrator would have acted in this manner."

Although THM's argument is couched in terms of the Tribunal engaging in intentional misconduct showing its bias against THM, its actual complaint is the

Tribunal committed an error of law awarding the interim relief. Despite THM's accusations to the contrary, the parties argued their positions and responded to the Tribunal's questions regarding turnover of the documents during multiple days of hearings. The Tribunal ultimately determined the 360 Forms had "no economic or intrinsic value to THM," but had "significant value to Healthspring as they are the potential basis for substantial payments by CMS" that could be lost if the documents were not submitted to CMS by January 31, 2018. The Tribunal emphasized its decision and order was "not based on a determination of the merits [as alleged by THM]," but instead served as an "interim measure akin to protecting and conserving property and its attendant value, and to prevent that property and value from dissipating," a measure contemplated by R-37. *See* Am. Arbitration Ass'n, Comm. Arbitration R. R-37(a) ("The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection and conservation of property and disposition of perishable goods.").

The Tribunal issued Order No. 6 after contemplating both parties' arguments. Accordingly, THM's complaints about the order are challenges to alleged mistakes in law and fact, which are not proper grounds for vacating an award. *See Crossmark, Inc.*, 124 S.W.3d at 429.

Having rejected THM's partiality arguments, we now consider whether the award must be vacated because the Tribunal prevented THM from obtaining material evidence. *See* 9 U.S.C. § 10(a)(3).

THM contends the Tribunal denied it access to pricing terms material to its antitrust claim and improperly interfered with the examination of witnesses. Healthspring responds the Tribunal provided THM adequate opportunity to present its evidence, and a Tribunal's "active questioning" of witnesses is not a ground for vacating an award. Alternatively, Healthspring asserts THM did not object to the Tribunal's conduct or questioning during the hearing.

The preservation requirements of appellate rule 33.1 apply to arbitrations. *See Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 101 & n.80 (Tex. 2011) ("Although these rules are not written for appeals from arbitration, their principles should govern such appeals."); *see also Valentine*, 2017 WL 3597735, at *8 ("Complaints must have been preserved as if the award were a court judgment on appeal."). The record does not contain any objections by THM during the hearing regarding the Tribunal's alleged interference with the examination of witnesses. THM quotes several examples of the alleged misconduct, but glaringly missing from these examples is any objection. Although THM cites to portions of the record where it "complained to Mr. Appel about his conduct," none of the cites support its argument, and a cold reading of the record does not indicate THM "complained to Mr. Appel about his conduct throughout the hearing." Mr. Cutler certainly engaged in dialogue with the Tribunal and questioned their statements or understanding of witness testimony, but he did not clearly express any dissatisfaction on the record to preserve THM's

argument for review. Accordingly, we overrule THM's argument regarding witness interference.

In reaching this conclusion, we reject THM's argument that alternatively, it is challenging the legal sufficiency of the evidence, which it may raise for the first time on appeal. *See Quinn v. Nafta Traders, Inc.*, 360 S.W.3d 713, 721 (Tex. App.—Dallas 2012, pet. denied). Parties may raise a legal sufficiency challenge for the first time on appeal; however, we may not consider arguments raised for the first time in a reply brief. *See Dao v. Garcia*, 486 S.W.3d 618, 624 n.2 (Tex. App.—Dallas 2016, pet. denied). Because THM raised its sufficiency challenge for the first time in a footnote of its reply brief, we shall not consider it.

We now consider whether the Tribunal denied THM access to material evidence to prove its antitrust claim. To prove its Sherman Act claim, THM alleged it needed the pricing information contained in the Healthspring contracts with Alegis to show Healthspring's "monopolistic intent" against THM.

Like THM, Alegis employed nurse practitioners to complete in-home 360 exams and lab work. It similarly coded the reports to submit to CMS for reimbursement. Unlike THM, Alegis did not derive all of its business from Healthspring.

THM alleged that in 2015 and 2016, it was in direct competition with Alegis in the Texas market. Healthspring distributed names of plan members who resided in areas where Alegis had a substantial business presence or intended to expand.

Healthspring allegedly provided this information regardless of whether Alegis' pricing and service quality were superior to other third party providers. THM alleged such actions decreased its business volume and caused more than $2 million in debt.

THM further claimed Healthspring acted under the "guise of a multi-state request" for proposals that promised an award of 60,000 exams a year. As part of the request, bidders disclosed detailed business information including financial information, operational structure, and identities of its largest customers and vendors. Despite THM "winning," the "prize" was only business in markets it already operated. THM refused the arrangement.

THM also asserted Healthspring interfered with its discussions with UnitedHealthcare, a principal competitor of Cigna, by working quickly to prevent a deal between the companies. Subsequently, Healthspring withheld business in Arizona from THM.

After considering THM's arguments, the Tribunal issued Order No. 3. Order No. 3, in part, required all commercially sensitive terms in Alegis' contracts with Healthspring redacted prior to production to THM. The produced contracts with the redactions removed the relevant pricing terms. Thus, THM argued it could not substantiate its belief that Alegis could not compete with it on price. THM claimed, "These redactions have hindered our ability to prove the full extent of Alegis' inefficiencies."

Arbitrators have "broad discretion to make evidentiary decisions" and are not bound by the formal rules of procedure and evidence. *See Int'l Chem. Workers Union v. Columbian Chems. Co.*, 331 F.3d 491, 497 (5th Cir. 2003) (citing *Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Neuhoff Bros. Packers, Inc.*, 481 F.2d 817, 820 (5th Cir. 1973) ("arbitrator has great flexibility and the courts should not review the legal adequacy of his evidentiary ruling")). Further, to constitute misconduct requiring vacatur of an award, an error in the arbitrator's determination must be one that is not simply an error of law, but which so affects the rights of a party that it may be said the party was deprived of a fair hearing. *Rainier DSC 1, L.L.C. v. Rainier Capital Mgmt., L.P.*, 828 F.3d 362, 364 (5th Cir. 2016).

This Court cannot "look over the shoulder of the Arbitrator in order to alter his credibility decisions, rather we only consider whether the Arbitrator provided a fair and full hearing consistent with the FAA." *Int'l Chem. Workers Union,* 331 F.3d at 496. Courts refuse to meddle in the evidentiary rulings and credibility determinations of arbitrators.

The mere exclusion of evidence, without more, does not demonstrate partiality. *See Williams v. Flores*, No. 13-01-00545-CV, 2004 WL 1797574, at *4 (Tex. App.—Corpus Christi Aug. 12, 2004, pet. denied) (mem. op.); *see also Babcock*, 863 S.W.2d at 234. An arbitrator is not bound to hear all the evidence tendered by parties as long as each side is given an adequate opportunity to present

evidence and argument. *Babcock*, 863 S.W.2d at 234. When an arbitrator refuses to hear evidence because, after reasoned consideration, he deems it inadmissible, he does not act in a manner that is fundamentally unfair. *Pac. Breakwater W., Inc. v. Wellness Int'l Network, Ltd.*, No. Civ.A. 3:97-CV-1556, 2000 WL 276812, at * (N.D.Tex. 2000).

Given that THM received the contracts, albeit with redacted information, we conclude the Tribunal's decision did not rise to the level of the misconduct described in section 10(a) nor did it yield a fundamentally unfair hearing. Moreover, although THM has explained why it believed it needed the documents to establish its Sherman Act claim, it ultimately withdrew its antitrust claim. Thus, this claim was not before the Tribunal, and THM has not articulated why the particular documents were material to the Tribunal's ultimate decision. Regardless, the parties explored whether Healthspring considered redistributing volume that otherwise would go to THM to Alegis during the arbitration hearing.[5] Accordingly, the Tribunal did not violate section 10(a)(3) by preventing THM from obtaining or presenting material evidence. *See* 9. U.S.C. § 10(a)(3).

[5] For example, Cigna representative Lorynda Fish-Ianni testified when she learned in January 2017 that THM terminated the contract, Healthspring had not yet finished negotiating with other finalists, including Alegis. The negotiations ended with Alegis in April 2017.

Dr. Michael Fessenden (Cigna Healthspring's senior medical director of chronic care quality initiative) testified Healthspring did not favor Alegis. To the contrary, THM was Healthspring's primary-in-home vendor but then it started underperforming. He explained, "I didn't have a back up plan. This is one of the reasons we ultimately did the RFP is because we knew we had to have two viable options in every market. Otherwise, we get into a situation where if somebody underperforms or doesn't perform, we're - - we're not dead - - we'd be dead in the water."

THM also alleges the arbitration award must be vacated because the Tribunal exceeded its powers in six ways: (1) delegating Appel signing authority and decision-making on behalf of the entire Tribunal; (2) awarding specific performance; (3) awarding Healthspring arbitration fees THM owed the AAA; (4) re-deciding rulings by the emergency arbitrator; (5) misinterpreting contract pricing terms based on their plain meaning; and (6) failing to rule on the arbitrability of an alleged oral contract in Arizona. Healthspring responds the Tribunal had the authority to decide each issue based on the parties' arbitration agreement and the AAA commercial rules. 9 U.S.C. § 10(a)(4).

An arbitrator's authority is limited to disposition of matters expressly covered by the arbitration agreement or implied by necessity. *See Anchor Holdings, LLC v. Peterson, Goldman & Villani, Inc*., 294 S.W.3d 818, 829 (Tex. App.—Dallas 2009, no pet.). Arbitrators, therefore, exceed their powers when they decide matters not properly before them. *Id*. Our inquiry under section 10(a)(4) is whether the arbitrator had authority, based on the arbitration clause and the parties' submission, to reach a certain issue, not whether the arbitrator correctly decided the issue. *Id*. (citing *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1323 (5th Cir. 1994)). Further, the award must be derived in some way from the wording and purpose of the agreement, and we look to the result to determine whether the award is rationally inferable from the contract. *Id*. We may not vacate an award for errors in interpretation or application of law or facts. *Crossmark*, 124 S.W.3d at 429.

Because parties authorize the arbitrator to give meaning to the language of the agreement, we should not reject an award on the ground that an arbitrator misread the contract. Thus, "improvident, even silly" interpretations by arbitrators usually survive judicial challenges. *Ancor Holdings, LLC*, 294 S.W.3d at 829 (citing *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37–38 (1987)).

THM's first complaint arises from Order No. 1 in which the Tribunal, after discussions, due deliberations, and "as agreed to by the parties," ruled that "Upon agreement of the Tribunal, orders of the Tribunal may be signed by the Tribunal chair on behalf of the entire Tribunal and shall be effective as if signed by all three Tribunal members." THM claims the order was outside the scope of the arbitration clause and in violation of the AAA commercial rules. We need not resolve THM's arguments because once again, it failed to object to the Tribunal. *See Nafta Traders, Inc.*, 339 S.W.3d at 101 & n.80; *see also Valentine*, 2017 WL 3597735, at *8. In reaching this conclusion, we reject THM's assertion it had no reason to object until Appel's "illicit business relationship with Healthspring" in December 2017 came to light, at which time it objected. If THM believed the delegation of signing authority to Appel violated the AAA commercial rules, it should have objected when the order was first signed on May 11, 2017. Even after discovery of the alleged "illicit business relationship," THM did not timely object as previously discussed and its record cites belie any assertion it preserved its argument. As such, THM waived its

argument regarding whether delegating Appel signing authority and decision-making on behalf of the entire Tribunal violated section 10(a)(4).

THM next argues the Tribunal exceeded its powers by requiring THM to give Healthspring the 360 Forms because the order was a specific performance remedy not contemplated by the BSA. Healthspring responds the Tribunal acted within its power as authorized by American Arbitration Association, Commercial Arbitration Rule, R-47(a), which was incorporated into the BSA.

An arbitrator exceeds his powers by acting contrary to express provisions of the agreement. *See Anchor Holdings, LLC*, 294 S.W.3d at 829; *see also Prescott v. Northlake Christian Sch*., 141 Fed.Appx. 263, 272 (5th Cir. 2005).

The governing BSA contains no restrictions on the Tribunal's authority or ability to implement a choice of remedy. Instead, the BSA provides that disputes "shall be referred to and resolved in accordance with the Commercial Rules of the American Arbitration Association."

Commercial Rule 47(a) allows arbitrators to grant any remedy or relief they deem "just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." Am. Arbitration Ass'n, Comm. Arbitration R., R-47(a). Though the BSA does not provide for specific performance (or any other specific remedy or relief), it does not specifically preclude such relief either. Rather, the BSA's silence on limitations of damages, when squared with the Rule 47(a)'s express, broad provision for any manner of

damages the arbitrator deems acceptable, demonstrates that the Tribunal's award of specific damages was not expressly contrary to the parties' contract. *See, e.g., Prescott*, 144 Fed.Appx. at 273 (contract incorporating rules of the Institute for Christian Coalition (which tracks AAA commercial rule 47) did not limit arbitrator's ability to craft an award under the contract when contract was silent as to remedies); *see also Willoughby Roofing & Supp. Co. v. Kajima Int'l, Inc.*, 598 F.Supp. 353, 357 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985) ("When the extremely broad arbitration clause is read in light of the equally broad grant of remedial power in Rule 43,[6] it is clear that the parties by their contract have authorized the arbitrators to award punitive damages."). The parties certainly had the power to limit the Tribunal's ability to fashion appropriate remedies, but they chose not to do so. *See, e.g., 950 Corbindale, L.P. v. Kotts Capital Holdings Ltd. P'ship*, 316 S.W.3d 191, 197 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (provision allowing "award for compensatory damages only" would limit an arbitrators authority to award any other type of damages).

An arbitrator's award must be affirmed "so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *Misco*, 484 U.S. at 38. "This is particularly true with respect to the remedial authority of arbitrators, for it is essential that arbitrators have a great deal

[6] AAA R-43, which is part of the Construction Industry Arbitration Rules of the American Arbitration Association and currently Rule-48(a), tracks the same language of R-47(a) of the Commercial Arbitration Rules.

of flexibility in fashioning remedies if the national policy favoring the settlement of disputes by arbitration is to have any real substance." *See Willoughby Roofing & Supply Co*., 598 F.Supp. at 357.

We shall not interpret the BSA's silence (as encouraged by THM) as a basis for concluding the Tribunal exceeded its power.[7] Rather, such a restrictive presumption is contrary to the overriding principle under the FAA that we presume the arbitrator's actions were within his authority, and we resolve all doubts in favor of the award. *Framing v. BBL Builders, L.P*., No. 05-15-01430-CV, 2016 WL 3346041, at *4 (Tex. App.—Dallas June 15, 2016, pet. denied) (mem. op.) ("arbitration agreement in this case did not place restrictions on the arbitrator's authority to decide the amount of damages" and therefore was not outside scope of authority); *Barton v. Fashion Glass & Mirror, Ltd*., 321 S.W.3d 641, 646 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Accordingly, the Tribunal's specific performance award is rationally derived from the BSA and not contrary to any express contractual provisions. Consequently, THM is not entitled to vacatur on this ground.

In reaching this conclusion, we reject THM's argument that Tennessee law, which governs the contract, does not recognize specific performance as a remedy

[7] We are unpersuaded by THM's reliance on the "mutual indemnification" clause as a remedy/damage clause that limits the Tribunal's authority to award specific performance. The mutual indemnification clause applies in only specific circumstances and does not provide any limitation on the type of damages a party may recover.

that a party is entitled to under a contract. *See North v. Robinette*, 527 S.W.2d 95, 98 (Tenn. 1975); *Four Eights, LLC v. Salem*, 194 S.W.3d 484, 487–88 (Tenn. Ct. App. 2005). The cases cited by THM hold that specific performance of a contract under Tennessee law is "not available to a party as a matter of right, but rests in sound discretion of the chancellor under the facts appearing in the particular case." *North*, 527 S.W.2d at 98; *Four Eights, LLC*, 194 S.W.3d at 487–88. Thus, Tennessee law does not prohibit a contractual award of specific performance, but instead allows the remedy in certain circumstances within the court's discretion. Additionally, even if Tennessee law prohibited specific performance as a contractual remedy, the Fifth Circuit has recognized that when a contract is silent on the limitations of damages and incorporates an arbitration rule's broad, express provision like Rule 47(a), then an arbitrator's award, "even if not available under substantive [] state law," is not expressly contrary to the parties' contract. *Prescott*, 141 Fed.App. at 273–74 (rejecting argument that arbitrator was limited to awarding damages available under Louisiana law because contract included Louisiana choice of law provision); *see, e.g., Willoughby Roofing & Supply Co.*, 598 F.Supp. at 360 ("[I]f federal policy allows enforcement of an arbitration provision vesting the arbitrators with the authority to award punitive damages, then such a provision remains enforceable despite contrary state law or policy."). Although THM disagrees with the Tribunal's resolution of the dispute, this does not equate to an

arbitrator acing outside the scope of his authority. *Framing*, 2016 WL 3346041 at *4.

We now consider whether the Tribunal exceeded its power by awarding Healthspring arbitration fees THM alleges it owed the AAA because the award was arbitrary and outside the BSA's scope.

The parties agreed to abide by the AAA Commercial Rules, which included Rule 47(a) allowing arbitrators to grant any remedy or relief they deem "just and equitable and within the scope of the agreement of the parties . . . ." Am. Arbitration Ass'n, Comm. Arbitration R., R-47(a). The BSA states that "[e]ach party shall be responsible for its own costs and fees in connection with the arbitration proceedings." The Tribunal's award included, in relevant part, the following:

> Each party shall bear its own attorneys' fees and costs. The administrative fees of the American Arbitration Association totaling $40,505.55 shall be borne as incurred and the compensation of the Tribunal and Emergency Arbitrator totaling $217,502.39 shall be shared equally by the parties. Therefore, Texas Health shall pay to HealthSpring the sum of $69,779.56.

THM asserts, without citation to the record, that "Healthspring did not pay any arbitration fees on THM's behalf or otherwise incur any losses that would justify recouping amounts from the fees that THM owed to the AAA." Healthspring responds, likewise without any citation to the record, that the Tribunal "awarded HealthSpring these costs that THM had not borne, although it should have."

The record does not indicate the Tribunal's reasoning for awarding the fees to Healthspring. When the non-prevailing party seeks to vacate an arbitration award, it bears the burden of bringing forth a record that establishes its basis for vacating the award. *Statewide Remodeling, Inc.*, 244 S.W.3d at 569. Without such evidence in the record, we must presume the evidence was adequate to support the award. *Id*. Moreover, the language of the order indicates, by ordering THM to pay Healthspring $69,779.56, the Tribunal harmonized the mandatory language of the BSA requiring each party to "be responsible for its own costs and fees in connection with the arbitration proceedings" and Rule 47(a)'s discretion allowing a Tribunal to grant any remedy or relief it deemed "just and equitable and within the scope of the agreement of the parties."

THM cites to this Court's opinion in *Townes Telecommunication, Inc. v. Travis, Wolff & Co*., 291 S.W.3d 490 (Tex. App.—Dallas 2009, pet. denied) as an example of a Tribunal exceeding its authority in awarding costs in contradiction to the parties' agreement. In that case, the arbitration agreement stated, in relevant part, "All reasonable costs of both parties, as determined by the arbitrators, . . . , shall be borne entirely by the non-prevailing party (to be designated by the arbitration panel in the award) and may not be allocated between the parties by the arbitration panel." *Id*. at 492–93. The panel determined there was fault attributable to both parties and therefore, no prevailing party. *Id*. at 493. The panel further ordered each party pay its own costs. *Id*. On appeal, we concluded the arbitrators exceeded their authority

because the arbitration agreement specifically foreclosed the option of ordering parties to share the cost of the arbitration. *Id*. at 494. We noted the parties' arbitration agreement clearly placed the issue of awarding costs within the panel's power, but "with equal clarity, the agreement limit[ed] the panel's power to make such an award by stating that the cost 'may not be allocated between the parties.'" *Id*. By allocating the costs among the parties, "the panel acted in direct contravention of the agreement and exceeded the powers granted to it by the parties." *Id*. Here, the BSA did not limit or prohibit the Tribunal's authority to allocate costs. Accordingly, unlike the arbitrators in *Townes*, the Tribunal did not exceed its authority because the award did not directly contradict the BSA.

Alternatively, THM argues even if the Tribunal had authority to award fees, its calculation is incorrect. It cites the Court to an email exchange between counsel and the Director of ADR Services in which THM agreed to a panel of three arbitrators if Healthspring agreed to bear the costs of two of the three arbitrators. Healthspring agreed to the arrangement, and the Director of ADR Services agreed to "make a note on the file." Although this information was allegedly noted in the file, nothing in the record indicates the Tribunal knew about the agreement. Regardless, even if the Tribunal knew of the agreement and incorrectly calculated

fees, the alleged mistake of fact is insufficient grounds to vacate or modify the award.[8] *Crossmark Inc*, 124 S.W.3d at 429.

Accordingly, we pass no judgment on whether the Tribunal made a correct decision under the law and facts of this case. The issue of costs and fees was clearly submitted to the Tribunal, and it consulted the contractual provisions regarding fees when reaching its conclusion. Under these circumstances, we cannot conclude the Tribunal exceeded its authority in awarding Healthspring $69,779.56 in fees. *See, e.g., D.R. Horton-Tex., Ltd. v. Bernhard*, 423 S.W.3d 532, 535 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

Next, THM asserts the Tribunal exceeded its power by re-deciding rulings by Daniels, the emergency arbitrator. THM requested emergency arbitration pursuant to R-38 because Healthspring refused to pay invoices in accordance with the amended 2015 BSA. Although Daniels discussed contract ambiguity in his order, he ultimately determined THM was not entitled to emergency relief because Healthspring was not obligated to pay until on or about April 21, 2017, and such payments "are not due and payable at this time." Thus, Daniels denied emergency relief because THM's claims were not ripe.

Subsequently, the Tribunal allowed the parties to file briefs addressing whether Daniels' order had binding or preclusive effect in the arbitration and if so,

[8] THM has not alleged an evident material miscalculation of figures, which could be grounds to vacate an award. *See* 9 U.S.C.A. § 11.

the issues on which the order was binding and preclusive. In Order No. 2, the Tribunal determined Daniels' decision was not a final, binding order because his findings on contract ambiguity were not necessary to his decision denying THM's request for emergency relief. The Tribunal concluded, "As findings on that issue were unnecessary, we agree they are dicta and not binding on this Panel." It further noted that its decision did not imply Daniels' decision and order were incorrect on the issue of ambiguity or that the Tribunal might not reach the same conclusion, but only that the Tribunal would decide the amendment's ambiguity at an appropriate stage of the arbitration.

R-50 provides, in relevant part, that an arbitrator is "not empowered to redetermine the merits of any claim already decided." *See* Am. Arbitration Ass'n, Comm. Arbitration R., R-50. However, Daniels' findings on contract ambiguity were unnecessary in reaching the ultimate decision regarding whether THM was entitled to the relief sought. Rather, they were dicta. As such, the Tribunal did not violate R-50 by re-determining a claim already decided.

Daniels' order recognized the lack of finality by stating, "This Order shall continue in effect unless and until amended by subsequent order of the Arbitral Panel." THM has failed to cite any case law in which an emergency arbitrator's unnecessary findings are binding on an arbitration panel later in the proceedings. Instead, THM cites to cases discussing collateral estoppel. *See Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 91 (2d Cir. 2005) ("An arbitration decision

may effect collateral estoppel in a later litigation or arbitration if the proponent can show '*with clarity and certainty*' that the same issues were resolved."); *F. Hoffmann-La Roche Ltd. v. Qiagen Gaithersburg, Inc.*, 730 F.Supp.2d 318, 327 (S.D.N.Y. 2010) (discussing collateral estoppel effect of prior arbitration to present arbitration); *Barsness v. Scott*, 126 S.W.3d 232, 241 (Tex. App.—San Antonio 2003, pet. denied) (concluding arbitration panel exceeded its authority by subsequently modifying its original award because none of the requirements for modification under the TAA were present). THM has not argued collateral estoppel on appeal.

Moreover, the parties' obligations under the BSA were central issues to the arbitration vigorously argued by both sides throughout the proceeding. To the extent THM now attempts to challenge those findings, it is impermissibly seeking a merits review based on factual or legal error. *See Ancor Holdings, LLC*, 294 S.W.3d at 830 ("A complaint that the arbitrator decided the issue incorrectly or made mistakes of law, however, is not a complaint that the arbitrator exceeded her powers.").

Finally, THM argues the Tribunal failed to interpret the contract pricing terms based on their plain meaning and to rule on the arbitrability of an alleged oral contract in Arizona. THM has not preserved these issues for review. THM raised these two arguments in the trial court as "manifest disregard of the law." Despite THM's assertion to the contrary, "arbitration awards under the FAA may be vacated only for reasons provided in § 10," and § 10 does not include manifest disregard of the law. *See Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009)

("In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.") (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008)). Following the Supreme Court and Fifth Circuit, we likewise have held, "[t]here are limited grounds upon which a party may challenge an arbitration award, and those grounds do not include an error of law or even a manifest disregard of the law." *See Tantrum St., LLC v. Carson*, No. 05-16-01096-CV, 2017 WL 3275901, at *10 (Tex. App.—Dallas July 25, 2017, no pet.) (mem. op.) (citing *Hall St. Assocs., L.L.C.*, 552 U.S. at 587; *Citigroup Global Mkts., Inc.*, 562 F.3d at 350).

On appeal, THM switches course and argues the Tribunal exceeded its powers. THM's arguments raised to the trial court do not comport with its arguments on appeal. Thus, THM failed to preserve these arguments and we shall not consider them. *See* TEX. R. APP. P. 33.1; *see also Nafta Traders*, 339 S.W.3d 101 n.80 (recognizing preservation rules apply in arbitration proceedings).

After considering and rejecting THM's arguments for vacatur of the final arbitration award under section 10, we overrule its second issue. Because of our resolution of this issue, we need not consider whether the trial court erred by striking the motion to vacate as untimely. *See* TEX. R. APP. P. 47.1.

Conclusion

The judgment of the trial court is affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TEXAS HEALTH MANAGEMENT LLC, Appellant No. 05-18-01036-CV V. HEALTHSPRING LIFE & HEALTH INSURANCE COMPANY, INC., Appellee	On Appeal from the 219th Judicial District Court, Collin County, Texas Trial Court Cause No. 219-00125-2018. Opinion delivered by Justice Bridges. Justices Molberg and Carlyle participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee HEALTHSPRING LIFE & HEALTH INSURANCE COMPANY, INC. recover its costs of this appeal from appellant TEXAS HEALTH MANAGEMENT LLC.

Judgment entered June 10, 2020.