SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice
TRIAL/IAS, PART 3
NASSAU COUNTY

In the matter of the Application of Pomona Pain Management, P.C., Assignee of Kevin Branch,

Respondent,

- against -

PRAETORIAN INSURANCE COMPANY,

Petitioner.

RETURN DATE: 10/21/11
SEQUENCE NO.: 001

INDEX NO.: 012976/11

The following papers read on this petition (numbered 1)
Notice of Petition..... 1

PRAETORIAN INSURANCE COMPANY ("PRAETORIAN") brings this proceeding pursuant to **CPLR §7511** to vacate the award of the master arbitrator and the lower arbitrator in connection with a No Fault arbitration conducted by the American Arbitration Association. The Court notes, at the outset, that the above caption, taken from the Petition itself, incorrectly represents this proceeding. The instant **Article 75** proceeding is not an application by Pomona Pain Management, P.C. ("POMONA PAIN MANAGEMENT") but rather an application by PRAETORIAN. (The above caption was apparently drafted to reflect the position of the parties in the underlying arbitration.) The caption should read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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In the matter of the application of PRAETORIAN INSURANCE COMPANY,
Petitioner,
-against-
Index No. 012976/11

POMONA PAIN MANAGEMENT, P.C., Assignee of Kevin Branch,
Respondent.
----------x

The Court also notes that no opposition to this motion was received by the Court. Pursuant to this Part's Rules, namely Rule I(B), the Court automatically adjourns all motions that are submitted without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

The essential facts are not in dispute. The matter arises out of an automobile accident that occurred on March 30, 2010, in which POMONA PAIN MANAGEMENT'S assignor, Kevin Branch ("Branch"), was injured. On or about May 12, 2010, POMONA PAIN MANAGEMENT submitted a No Fault claim to PRAETORIAN in the amount of $3,273.74 for medical services provided to Branch. PRAETORIAN requested verification of the claim pursuant to the applicable automobile insurance policy and Insurance Department Regulations [*see* **11 NYCRR §65-3.5**; **11 NYCRR §65-3.6; 11 NYCRR §65-1.1**], as reflected in the following time-line:

May 18, 2010	Letter to Branch requesting that Branch submit to a Medical Examination ("ME") on June 7, 2010.
May 19, 2010	Letter to Branch requesting that Branch appear for an Examination Under Oath ("EUO") on June 1, 2010.
May 26, 2010	Additional Verification Request to POMONA PAIN MANAGEMENT stating that the claim was pending an ME and EUO of Branch.

Branch did not appear for the June 7, 2010 ME or the June 1, 2010 EUO.

June 8, 2010	Letter to Branch rescheduling the ME for June 21, 2010.
June 8, 2010	Letter to Branch rescheduling the EUO for June 21, 2010.

Branch did not appear for the June 21, 2010 ME or the June 21, 2010 EUO.

June 21, 2010	Letters to Branch and Branch's counsel rescheduling the EUO for June 30, 2010.
June 24, 2010	Letter to Branch rescheduling the ME for July 7, 2010.
July 2, 2010	Additional Verification Request to POMONA PAIN MANAGEMENT stating that the claim was pending an ME and EUO of Branch.

On July 21, 2010, PRAETORIAN denied POMONA PAIN MANAGEMENT's claim on the ground that Branch had failed to appear for an EUO or ME, as required by the applicable insurance policy and regulations.

The claim was submitted to arbitration before the American Arbitration Association (AAA Case # 412010050972). After two hearings, at which both sides were represented by counsel, the matter was closed on February 7, 2011. On or about February 11, 2012, Arbitrator Joseph Bianchino (the "Lower Arbitrator") rendered an award in favor of Respondent POMONA PAIN MANAGEMENT in the amount of $3,273.74 (the "Award"). The Lower Arbitrator held that the claim was improperly denied. With respect to the denial based upon failure to attend an EUO, the Lower Arbitrator found that PRAETORIAN had failed to properly notify POMONA PAIN MANAGEMENT on June 8, 2010 that the claim was pending the EUO, as required by **Section 65-3.6(b)** of the Insurance Department Regulations [11 NYCRR].

With respect to the denial based upon failure to appear for an ME, the Lower Arbitrator held that PRAETORIAN improperly delayed payment of the claim pending the ME. The Lower Arbitrator cited **Section 65-3.8(b)(1)**, which provides:

> "An insurer may not interrupt the payment of benefits for any element of basic or extended economic loss pending the administering of a medical examination, unless the applicant or the applicants attorney is responsible for the delay or inability to schedule the examination..." **11 NYCRR §65-3.8(b)(1)**

Based upon this provision, the Lower Arbitrator found that PRAETORIAN was not entitled to delay payment of the claim from the time of its receipt (5/12/10) until the time Branch first failed to appear for the ME (6/7/10). Accordingly, the Lower Arbitrator deducted that amount of time (26 days) from the 30 day period within which an insurer must pay or deny a No Fault claim, and found that PRAETORIAN had only four days from July 7, 2010 within which to pay or deny the claim. *See* **11 NYCRR §65-3.8(a)(1)**. The Lower Arbitrator held that PRAETORIAN's denial on July 21, 2010 was untimely, and therefore, its defense based upon Branch's failure to appear for an ME was precluded.

The matter was appealed before Master Arbitrator Peter J. Merani (the "Master Arbitrator"). In his decision dated June 17, 2011 (the "Master Award"), the Master Arbitrator affirmed the Award in its entirety.

PRAETORIAN now seeks to vacate the Master Award and the Award pursuant to **CPLR §7511** on the ground that the Award was "arbitrary and capricious, irrational and incorrect as a matter of law, and against public policy." [Petition ¶12.] PRAETORIAN does not challenge the Award as it pertains to the EUO requests. Rather, PRAETORIAN argues: that the timeliness of PRAETORIAN's denial is immaterial; that PRAETORIAN is not precluded from asserting a defense based upon the failure to appear for the ME, because the failure to appear for an ME is a breach of a condition precedent to coverage; and that the preclusion rule may not be applied to create coverage where it does not exist. *See* **Fair Price Medical Supply Corp. v. Travelers Indemnity Co.,** 42 AD3d 277.

PRAETORIAN relies on the recent decision (March 17, 2011) of the Appellate Division, First Department in **Unitrin Advantage Ins. Co v. Bayshore Physical Therapy, PLLC,** [82 AD3d 559, *lv denied* 17 NY3d 705], which held:

> The failure to appear for IMEs requested by the insurer 'when, and as often as, [it] may reasonably require' (Insurance Department Regulations [11 NYCRR] §65-1.1) is a breach of a condition precedent to coverage under the no-fault policy, and therefore fits squarely within the exception to the preclusion doctrine, as set forth in *Central Gen. Hosp. v Chubb Group of Ins. Cos.* (90 NY2d 195 [1997]). Accordingly, when defendants' assignors failed to appear for the requested IMEs, plaintiff had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued (*see* Insurance Department Regulations [11 NYCRR] §65-3.8[c]; *Stephen Fogel Psychological,* 35 AD3d at 721-722).

Although the Award and the Master Award were contrary to the holding in **Unitrin**, the Court finds that this is insufficient to vacate the Awards pursuant to **CPLR §7511**.

Judicial review of arbitration pursuant to **CPLR §7511** is limited in scope. Consistent with the public policy in favor of arbitration, the grounds for vacating an arbitration award are "few in number and narrowly applied." **Chin v. State Farm Ins. Co.,** 73 AD3d 918; **Mercury Cas. Co. v. Healthmakers Medical Group, P.C.,** 67 AD3d 1017. PRAETORIAN relies upon the ground that the arbitrator exceeded his powers in making the Award. *See* **CPLR §7511(b)(1)(iii).**

An arbitrator exceeds his power within the meaning of the statute only if the resulting award: (i) is clearly violative of a strong public policy, (ii) is totally or completely irrational; or (iii) manifestly exceeds a specific, enumerated limitation on the arbitrator's power. **Kowaleski v. New York State Dept. Of Correctional Services,** 16

NY3d 85; **Falzone v. New York Central Mut. Fire Ins. Co.,** 15 NY3d 530; **Chin,** 73 AD3d at 918. An arbitrator's error of law is not a basis for judicial vacatur. **Id.** Even if the arbitrator misapplies substantive law, the resulting award will not be disturbed unless it is "patently irrational" or "so egregious as to violate public policy." **Falzone,** 15 NY3d at 535. That being said, an error of law may rise to the level of irrationality when the resulting award is contrary to "settled law" or "clear precedent." *See* **Matter of State Farm Mut. Auto. Ins. Co. v. Lumbermens Mut. Cas. Co.,** 18 AD3d 762 (dicta); **Matter of State Ins. Fund (County-Wide Ins. Co.),** 276 AD2d 432 (vacating award).

In the proceeding at bar, the Court's determination turns on whether or not the Award, and the Master Award which affirmed it, were contrary to "settled law" or "clear precedent" so as to render them irrational or arbitrary. Does the holding in **Unitrin** reflect well-established, settled precedent governing the question of whether a non-appearance at an ME is defense that may be precluded?

The Court believes that the answer is "no." **Unitrin** held that the failure to appear for an ME is a breach of a condition precedent to coverage, and that a disclaimer based on such breach, even if untimely, could be sustained under the exception to the preclusion rule articulated in **Central Gen. Hosp. v Chubb Group of Ins. Cos.,** 90 NY2d 195. The Court notes, however, that **Chubb** does not fully support the holding in **Unitrin**. In **Chubb**, the Court of Appeals held only that an insurer was not precluded from asserting a defense on the ground that the injuries for which the patient was treated did not arise from the subject accident. **Chubb** reiterated the distinction, first articulated in **Zappone v. Home Ins. Co.** [55 NY2d 131], between disclaimers based upon a policy exclusion *or breach of a policy condition*, which are precluded if not timely made, and disclaimers premised upon a lack of coverage in the first instance (e.g., where there is no contractual relationship or where the injuries did not arise out of an insured incident), which may be asserted at any time.

The Second Department, citing **Chubb** and **Zappone**, applied this distinction in **Westchester Medical Center v. Lincoln General Ins. Co.,** 60 AD3d 1045 (2d Dept. 2009):

> Where, as here, the defendant's denial of liability also was based upon an alleged breach of a policy condition, to wit, the failure of the plaintiff's assignor to appear at an examination under oath, such an alleged breach does not serve to vitiate the medical provider's right to recover no fault benefits or to toll the 30-day statutory period . . . Rather, such denial was subject to the preclusion remedy. **Westchester Medical Center,** 60 AD3d at 1046-1047 (internal citation omitted).

The Court need not decide whether the Arbitrator or Master Arbitrator erred, as a matter of law, in precluding the failure-of-condition defense, or whether the apparently disparate holdings in **Unitrin** and the earlier **Westchester Medical Center** reflect a trend in the law, a split in the Departments, or a distinction based upon whether the requested verification was an EUO or an ME. The Court must only decide whether or not the Arbitrator or the Master Arbitrator could have rationally rendered the Award or the Master Award – i.e., whether or not **Unitrin** so settled the matter that any decision to the contrary would be irrational or arbitrary. This Court finds that, even if there was an error of law (which the Court does not decide here), there is sufficient conflicting authority to preclude a finding that the error rose to the level of irrationality.

The Court notes that PRAETORIAN's counsel did not make the **Unitrin** argument before the Master Arbitrator, notwithstanding the fact that **Unitrin** was decided (March 17, 2011) prior to the submission of counsel's brief (April 5, 2011). [*See* Appellant's Brief for Master Arbitration, Petition, Exh. 1]. Unlike the Court, the Master Arbitrator had the power to vacate the Award on the ground that it was incorrect as a matter of law. *See* **11 NYCRR §65-4.10(a)(4)**. It can hardly be argued that the Master Arbitrator was irrational in disregarding legal authority, when such authority was not brought to his attention. PRAETORIAN's brief to the Master Arbitrator argued, in sum and substance, that the Lower Arbitrator's decision was not rationally based on the evidence presented. [Appellant's Brief, ¶10.] The Master Arbitrator held that "[t]he findings by the arbitrator below were based on a careful review of the evidence presented by the parties." [See Master Award, Petition Exh. 2.] The Court cannot find that the Master Arbitrator failed to consider or address the issues before him.

Based upon the foregoing, the Court finds insufficient grounds to disturb the Award or the Master Award. Accordingly, it is

ORDERED, that the petition pursuant to **CPLR §7511** is **denied;** and it is further

ORDERED, that the Master Award is confirmed pursuant to **CPLR §§ 7510** and **7511(e)**.

Dated: January 31, 2012

J.S.C.