

<b>American Tr. Ins. Co. v Surgicore of Jersey City, LLC</b>
2022 NY Slip Op 33625(U)
October 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 503153/2022
Judge: Carolyn E. Wade
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: HON. CAROLYN E. WADE

-----X  
AMERICAN TRANSIT INSURANCE COMPANY,

Petitioner, Index No. 503153/2022

- against -

SURGICORE OF JERSEY CITY, LLC A/A/O SHAMARI  
RESTAL - HARRISON,

Respondent.  
-----X

**DECISION AND ORDER**

MS # 1, 2

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of  
Petitioner's Application and Respondent's cross-application:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	NYSCEF #'s 1, 2
Cross-Motion and Affidavits/Affirmations.....	11, 12
Answering Affidavits/Affirmations.....	13
Reply Affidavits/Affirmations.....	
Defendant's Memorandum of Law.....	

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Upon the foregoing cited papers and after virtual oral argument, petitioner, AMERICAN  
TRANSIT INSURANCE COMPANY ("Petitioner" or "American Transit") pursuant to CPLR  
Article 75, seeks to vacate the arbitration award (AAA number 99-20-1187-2629) by Arbitrator  
John Kannengieser, Esq. ("Arbitrator") and master award by Master Arbitrator Victor J.  
Hershdorfer, Esq., ("Master Arbitrator"). Respondent, SURGICORE OF JERSEY CITY, LLC  
A/A/O SHAMARI RESTAL - HARRISON, ("Respondent" or "Surgicore") cross-petitions for  
attorney's fees.

The underlying arbitration involved Respondent's claim for \$4,735.38 in connection with  
medical services rendered to claimant, Shamari Restal-Harrison ("Restal-Harrison") on

“Claimant”) on 09/27/2018, for injuries that he sustained to his left knee as a result of a motor vehicle accident on 12/15/2017. Petitioner is an insurance carrier who had issued a policy to Ilyas Khan, which included a no-fault endorsement that covered Restal-Harrison. Claimant had assigned the right to collect no-fault benefits to the Respondent. The Petitioner denied the claim for lack of medical necessity.

Following the arbitration held on August 5, 2021, the Arbitrator found in favor of Respondent, who was awarded \$4,735.38. According to the award, Respondent had established its prima facie case through its submissions of proof of claim and the amount of the loss. The burden shifted to the Petitioner to show otherwise. Petitioner submitted Dr. Mathew Skolnick’s peer review report, which relied upon a radiology review by Dr. Daniel Cousin, and an intra-operative photo review by Dr. Howard Levin. Dr. Skolnick’s report reading of the MRI differed from that of the radiologist who first interpreted the films, as well as from the treating surgeon. Dr. Skolnick concluded that Claimant’s left knee surgery and all related services were not medically necessary or causally related to the accident.

The Arbitrator determined that Dr. Skolnick’s report was “completely conclusory, unsupported and lacking in a standard of care that was deviated from.” Moreover, the Arbitrator found that Dr. Cousin and Dr. Levin’s radiology review in the report conveniently found no causally related traumatic injury. As a result, the Arbitrator determined that Petitioner failed to meet its burden to establish a defense of lack of medical necessity and/or lack of causation.

The Master Arbitrator affirmed the Arbitrator’s award. The Master Arbitrator found that the Arbitrator rendered a determination of fact as to Dr. Skolnick’s report, which supported his award in Respondent’s favor.

In the instant application, Petitioner disagreed with the Arbitrator's findings with respect to Dr. Skolnick's report and found that the award was arbitrary and capricious. In opposition, Respondent argues that there is no basis to vacate the Arbitrator's award in its favor. Respondent contends that the Arbitrator reviewed the evidence submitted, and found that Petitioner did not satisfy its burden.

An award in a compulsory arbitration proceeding "must have evidentiary support and cannot be arbitrary and capricious" and "with respect to determinations of law, the applicable standard in mandatory no-fault arbitrations is whether 'any reasonable hypothesis can be found to support the questioned interpretation" (*Matter of Progressive Advanced Ins. Co. v NY City Tr. Auth.*, 166 AD3d 621, 622 [2d Dept 2018] [internal citations and quotations omitted]). Judicial review of arbitration awards is extremely limited (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479, 846 NE2d 1201, 813 NYS2d 691 [2006]). "Unless an arbitration award violates a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's powers, it may not be vacated" (*Matter of Verille v Jeanette*, 163 AD3d 830, 830 [2d Dept 2018]). Thus, "courts are bound by an arbitrator's factual finding." *Id.*

Here, the Arbitrator made a factual determination that Dr. Skolnick's peer review report was conclusory and did not articulate a standard of care that was deviated from. The Arbitrator's determination is supported by a reasonable hypothesis. Dr. Skolnick's report relied on Dr. Cousin's radiology review and Dr. Levin's intra-operative photo review which differed from a reading of the MRI of the radiologist that first interpreted the films, as well as from the treating surgeon.

Therefore, this Court finds that the Arbitrator rendered a factual determination which was neither arbitrary or capricious; and was supported by a reasonable hypothesis. Accordingly, Petitioner's application is **DENIED**.

Respondent's cross-petition for attorney's fees is **GRANTED**. As the prevailing party, Respondent is entitled to reasonable attorney's fees (*Acuhealth Acupuncture, P.C. v Country-Wide Ins. Co.*, 170 AD3d 1168 [2d Dept. 2019]). 11 NYCRR 65-4.10(j)(4), in pertinent part, states: "The attorney's fee for services rendered in connection with...a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter." Essentially, the regulation permits the award of attorney's fees, pursuant to 11 NYCRR 65-4.10(j)(4), if the respondent prevails in whole or in part in "a court appeal from a master arbitration award."

Based on the foregoing, it is hereby

**ORDERED** that Respondents' cross-petition for attorney fees, pursuant to 11 NYCRR 65-4.10(j)(4), is **GRANTED**.

**ORDERED** that Respondent submit a proposed judgment to the County Clerk's Office with Notice to the Petitioner.

This constitutes the Decision and Order of the Court.

DATED: 10/6, 2022

  
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HON. CAROLYN E. WADE, J.S.C.

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