

**American Tr. Ins. Co. v R.O. Med. Care, PC**

2023 NY Slip Op 31380(U)

April 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 537274/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25<sup>th</sup> day of April 2023

HONORABLE FRANCOIS A. RIVERA

-----X  
AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- against -

R.O. MEDICAL CARE, PC, A/A/O KAYSHAUN  
BROOMES,

Defendant.

-----X

**DECISION & ORDER**

Index No.: 537274/2022  
Oral argument: 4/6/2023

Cal. No.: 9, Ms. No.: 1

By notice of petition and petition filed on December 22, 2022, under motion sequence number one, petitioner American Transit Insurance Company (hereinafter ATIC) seeks an order and judgment pursuant to CPLR 7511, Insurance Law 5016(c), 11 NYCRR 65-4.10(h)(1)(i) and 11 NYCRR 65-4.10(h)(2) vacating a no-fault insurance master arbitration award of Toby Susan DeSimone (hereinafter DeSimone), dated October 18, 2022, which affirmed the arbitration award of Inez Beyrer (hereinafter Beyrer), dated July 14, 2022, granting respondent R.O. Medical Care, PC's (hereinafter the Applicant) claim for No-Fault insurance compensation in the amount of \$3,407.04 for a nerve conduction testing performed on its assignor, Kayshaun Broomes (hereinafter the Assignor).

NYSCEF documents numbered one through and including eleven were considered in determining the instant petition. The Applicant has neither appeared nor submitted opposition to the petition.

## BACKGROUND

The petition arises out of a motor vehicle collision which occurred on August 10, 2020. The Assignor is 22 years old and was an unrestrained passenger who allegedly sustained, among other things, a neck injury. The issue before the arbitrator was whether the Applicant was entitled to reimbursement for the nerve conduction study performed on the assignor on August 8, 2020. ATIC denied reimbursement based on a peer review by Peter Chiu, M.D., dated February 17, 2021. ATIC also argued that the claim was properly denied based upon the biomechanical evaluation of Dr. Dan Mazzucco, Ph.D., dated February 11, 2021.

Arbitrator Beyrer reviewed Dr. Chiu's peer review. Dr. Chiu opined that the Assignor's history and examination were indicative of a sprain or strain condition that did not support any realistic differential diagnoses which would require nerve testing. Dr Chiu stated that there no significant progressive neurological deficits, treatment response to conservative care or "red flags" to justify nerve conduction testing. Dr Chiu concluded that the nerve conduction testing was not medically necessary.

Beyrer then reviewed the Applicant's submission in response. The Applicant submitted a Letter of Medical Necessity, signed by Dr. Ruben Oganegov, M.D. The letter stated that the testing was a significant part of the evaluation of the continuous pain that the patient was experiencing following a neck injury to aid in determining the precise location of dysfunction and focus the treatment plan with the purpose of improving the patient's treatment outcome. The information obtained would be used to direct manipulative treatment to the spinal levels above and below the injured nerve to restore proper motion and coupling patterns to the spine.

After considering Dr. Chiu's peer review and the Applicant's response, Beyrer found that the testing was medically necessary, and that the applicant was entitled to full reimbursement.

Beyrer also addressed ATIC's claim that the denial was proper based on the biomechanical evaluation of Dr. Dan Mazzucco, Ph.D., dated February 11, 2021. Beyrer found that Dr. Dan Mazzucco report presumed that the Assignor was a restrained passenger in the subject motor vehicle accident. Dr. Dan Mazzucco opined that as a restrained passenger, the Assignor's movement in the vehicle would have been relatively small and would be consistent with merely transient neck strains. Beyrer found that the evidence in the instant proceeding supported the conclusion that the Assignor was an unrestrained passenger. As such, ATIC failed to establish its defense that the Assignor's injuries were not causally related to the subject accident.

Master Arbitrator DeSimone reviewed the award by Beyrer. Desimone stated that determinations of fact, the weight and credibility of the evidence, and the light in which the evidence is viewed, are purely discretionary matters and that the master arbitrator cannot conduct a de novo review of the above nor can the master arbitrator review errors of fact. Desimone further stated that the claims raised by ATIC in their appeal were addressed by the arbitrator below and that the arguments were outside the scope of a master review. Desimone further found that the award below was clearly articulated, had a rational and plausible basis in the evidence, and that there was no reason to disturb the arbitrator's decision and award.

#### **LAW AND APPLICATION**

A court reviewing the award of a master arbitrator is limited to the grounds set forth in CPLR Article 75, which include, in this compulsory arbitration, the question of whether the determination had evidentiary support, was rational, or had a plausible basis (*see Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 212 [1981]). Notably, the master arbitrator's review power is broader than that of the courts' because it includes the power to review for errors of law (*see id.* at 211-212; 11 NYCRR 65-4.10[a][4]). In contrast, the courts generally will not vacate

an arbitrator's award where the error claimed is the incorrect application of a rule of substantive law, unless it is so irrational as to require vacatur (*Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224, 232 [1982]; see also *Matter of Liberty Mut. Ins. Co. v Spine Americare Med.*, 294 AD2d 574, 576 [2nd Dept 2002]).

The master arbitrator reviewed the record and award of the no-fault arbitrator and did not find the no-fault arbitrator's interpretation of the evidence and applicable law pertaining to this dispute to be arbitrary, capricious, or contrary to law. Consequently, the master arbitrator upheld the award to the respondent in the amount of \$3,407.04.

The instant petition is a special proceeding. The procedure for special proceedings contemplates that the petition will be accompanied by affidavits demonstrating the evidentiary grounds for the relief requested (see CPLR 403[a]). It is settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised (CPLR 409 [b]; *Saadia Safdi Realty, LLC v Melvin Press*, 207 AD3d 633, 635 [2d Dept 2022], citing *Matter of Arben Corp. v Durastone, LLC*, 186 AD3d 599, 600 [2d Dept 2020]).

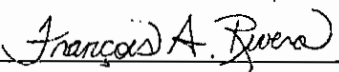
The evidentiary submissions and legal reasoning proffered by the petitioner did not make a prima facie showing that the no-fault arbitrator's award or the master arbitrator's award was either arbitrary or capricious. To the contrary, the petitioner's evidentiary submissions established that the no-fault arbitrator's award and the master arbitrator's affirmance of the award was based on sound and well-reasoned analysis of the evidence submitted and upon the proper application of the pertinent laws and regulations.

**CONCLUSION**

The petition by American Transit Insurance Company for an order and judgment pursuant to CPLR 7511, Insurance Law 5016(c), 11 NYCRR 65-4.10(h)(1)(i) and 11 NYCRR 65-4.10(h)(2) vacating a no-fault insurance master arbitration award of Toby Susan DeSimone which affirmed the arbitration award of Inez Beyrer granting respondent R.O. Medical Care PC's claim for no-fault insurance compensation is denied and the petition is dismissed.

The foregoing constitutes the decision and order of this Court.

ENTER:

  
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J.S.C.

**HON. FRANCOIS A. RIVERA**  
**J.S.C.**