

American Tr. Ins. Co. v Brooklyn Med. Practice, P.C.

2023 NY Slip Op 31523(U)

May 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 504136/2022

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____x

AMERICAN TRANSIT INSURANCE COMPANY,

Petitioner,

-against-

**BROOKLYN MEDICAL PRACTICE, P.C.
a/a/o SANTOS GARCIA,**

Respondent.

_____x

**DECISION / ORDER /
JUDGMENT**

Index No. 504136/2022

Motion Seq. No. 2 & 3

Date Submitted: 3/30/23

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion to vacating petitioner’s default, and upon restoring the petition to the calendar, granting the petition to vacate an arbitration award, and respondent’s cross-petition to confirm it and related relief

Papers	NYSCEF Doc.
Notice of Petition and Petition and Exhibits Annexed.....	<u>17-19</u>
Affirmation in Opposition, Cross-Petition and Exhibits Annexed..	<u>20-23</u>
Opposition to Cross-Petition and Reply	<u>26; 24-25</u>

**Upon the foregoing cited papers, the Decision/Order on this motion is
as follows:**

This is a special proceeding -- pursuant to CPLR Article 75 -- commenced by American Transit Insurance Company (ATIC) seeking an order and judgment vacating a No-Fault Insurance master arbitration award [Doc 3], which affirmed the hearing arbitrator’s award [id.]. The petition was calendared for January 11, 2023, and petitioner’s counsel failed to appear in Part 66, so it was “denied, no appearance movant” by another Justice of this Court. In Motion Seq. #2, petitioner moves to vacate the default and have the petition to vacate the award considered on the merits. Respondent opposes, and filed a cross-petition for counsel fees, denominated motion sequence #3. After oral argument, the petitioner’s motion to vacate the default in appearing in court on January 11, 2023 is granted. In his affirmation [Doc 18], he states that he came down with Covid-19 the evening

before the return date and was unable to reach the courtroom clerk before the default was entered. The order issued January 11, 2023 on petitioner's default is hereby vacated.

Turning to the merits of the petition, petitioner seeks to vacate an arbitration award dated 7/22/2021 [Doc 3], affirmed by a Master Arbitrator on 11/11/2021 [id.], which granted Respondent Brooklyn Medical Practice's claim for No-Fault insurance compensation for medical treatment. The Arbitrator awarded the sum \$2,835.62 of the Respondent's claim for \$4,360.22, plus interest from 5/2/2019, statutory attorneys' fees and the \$40 filing fee. Respondent provided services to its assignor, including but not limited to physical therapy, who was a bicyclist injured in a motor vehicle accident on July 8, 2016. A related similar application regarding another medical provider, a chiropractor, for the same assignor, is decided simultaneously herewith. It is under Ind. 504473/2022.

The court has issued a decision in the last few weeks in a similar case, American Transit v Brooklyn Medical Practice, Ind. 500651/2023, motion sequences 1 and 2, and will not repeat all the legal analysis again. Counsel is referred to that decision. The petition in this case, and in the other case for the same assignor, makes the same legal arguments, and the court reaches the same legal conclusions.

A hearing arbitrator's task of determining whether a service provided was medically necessary when the insurer says no and the provider says yes, entails the making of a finding of fact -- not a conclusion of law. A substantive legal issue is not involved.

The phrase "incorrect as a matter of law," as argued by petitioner, refers solely to issues of substantive law, not to the admissibility, probative value, or credibility, of the evidence which an arbitrator may consider when analyzing issues of fact. This court holds that, when determining an issue of medical necessity, a No-Fault hearing arbitrator is not required to apply the case law for summary judgment motions, which provides that a health

service provider must submit an expert's affidavit which "meaningfully refers to and either discusses or rebuts the conclusions of the insurer's expert witness" (see *Am. Tr. Ins. Co. v Right Choice Supply, Inc.*, ___ Misc 3d ___, 2023 NY Slip Op 23039, [Sup Ct Kings Co 2023]).

Accordingly, in this Article 75 proceeding, Arbitrator Rebecca Novak's award, which did not approve all of the items submitted, summarizes the IME reports and the medical provider's rebuttal, and concludes that "I find Dr. Russ' IME report set forth an adequate factual basis and medical rationale in support of its cutoff of the services noted above, and thus is sufficient to rebut the presumption of medical necessity attached to it." [Doc 3 Page 6]. She also considered an IME of Dr. Richard Weiss, and reached the same conclusion [id. page 7]. However, she also credited the rebuttal provided, and concludes "I find Applicant's evidence in this matter sufficient to refute the findings of both Dr. Weiss' and Dr. Russ' IMEs, and show that Assignor remained symptomatic beyond the date of the IME cutoffs. Thus, I find Applicant has sustained its burden of proof by a preponderance of credible evidence regarding the medical necessity of the services provided. The physical therapy services at issue are found to have been medically necessary [id.]. Where the arbitrator sets forth her reasons for finding the claimant's opposition submitted to be sufficient to refute the IMEs, this reasoning cannot be deemed incorrect "as a matter of law" within the purview of 11 NYCRR 65-4.10 (a) (4).

The court must next determine whether to sustain Master Arbitrator's Felenstein's award. The standard for Article 75 court scrutiny of a master arbitrator's review of a hearing arbitrator's award in terms of whether there was an error of law is whether the award is so irrational as to require vacatur (see *Matter of Smith v Firemen's Ins. Co.*, 55 NY2d 224, 232, 433 N.E.2d 509, 448 N.Y.S.2d 444 [1982]; *Matter of Acuhealth Acupuncture, PC v Country-Wide Ins. Co.*, 170 AD3d 1168 [2d Dept 2019]; *Matter of Acuhealth Acupuncture,*

P.C. v New York City Transit Authority, 167 AD3d 314 [2d Dept 2018]; *Matter of Acuhealth Acupuncture, P.C. v Country-Wide Ins. Co.*, 149 AD3d 828 [2d Dept 2017]). In the case at bar, the court finds that Master Arbitrator Felenstein's review of the legal issues presented by ATIC was not irrational.

With respect to the factual issues reviewed by Master Arbitrator Felenstein, the proper standard of her review was whether Arbitrator Novak reached her decision in a rational manner, i.e., whether it was arbitrary and capricious, irrational, or without a plausible basis. The master arbitrator may not engage in an extensive factual review, such as weighing the evidence, assessing the credibility of the medical reports, or making independent findings of fact (*Matter of Petrofsky v Allstate Ins. Co.*, 54 NY2d 207, 429 N.E.2d 755, 445 N.Y.S.2d 77 [1981]). Here, with respect to the provider's bills, Master Arbitrator Felenstein notes that the hearing arbitrator considered the IMEs, and the services were nonetheless found to be medically necessary, and the hearing arbitrator allowed the claims.

Judicial review of a master arbitrator's determination not to vacate a hearing arbitrator's award derives from the Insurance Law as set forth above, and involves the question of whether the master arbitrator exceeded his or her power (*Matter of Smith v Firemen's Ins. Co.*, 55 NY2d 224, 231, 433 N.E.2d 509, 448 N.Y.S.2d 444 [1982]). Here Master Arbitrator Felenstein did not exceed her power when she reviewed the factual findings of Arbitrator Novak. She applied the correct standard of review when she wrote, "I cannot negate this lower arbitrator's factual determination based on the evidence presented and which I find neither erroneous as a matter of law nor arbitrary and capricious nor so irrational as to warrant vacatur." (NYSCEF Doc No. 3, at Page 14).

There are four applicable grounds delineated in CPLR 7511 for vacating an arbitration award where a party has participated in an arbitration:

if the court finds that the rights of that party were prejudiced by:

- (i) corruption, fraud or misconduct in procuring the award; or
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
- (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
- (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

ATIC argues that the award here should be vacated because it was “arbitrary and capricious, irrational and without a plausible basis because an arbitration award must be vacated by the Master Arbitrator if the decision was incorrect as a matter of law” [Doc 1 ¶133].

Here, the court finds that ATIC has failed to establish that the decision was incorrect as a matter of law, or that there was corruption, fraud, or misconduct in procuring the award; or that there was partiality on the part of either arbitrator; or that either arbitrator exceeded his or her power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or that there was a failure to follow the procedures of Article 75.

The court finds that Master Arbitrator Felenstein's review was not arbitrary, capricious, irrational, or without a plausible basis (*see Matter of Petrofsky v Allstate Ins. Co.*, 54 NY2d 207, 211-212, 429 N.E.2d 755, 445 N.Y.S.2d 77 [1981]).

Cross-Petition

In addition to seeking to confirm Master Arbitrator Felenstein's award, respondent seeks additional attorney fees, costs and disbursements.

After calculating the total of the first-party benefits awarded in this arbitration plus interest thereon, ATIC was directed in the arbitrator's award to pay respondent an attorneys' fee equal to 20 percent of that total sum, subject to a maximum fee of \$1,360.00, as provided for in 11 NYCRR 65-4.6 [d].

Additionally, pursuant to 11 NYCRR 65-4.10 [j] [4], having successfully prevailed in this Article 75 proceeding, respondent is entitled to an additional attorneys' fee (see *Global Liberty Ins. Co. of New York v Brooklyn Medical Practice*, 178 AD3d 525 [1st Dept 2019]; *GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]).

Naomi Cohn, Esq., submitted an affirmation in support with regard to this Article 75 proceeding (NYSCEF Doc No. 21). In pertinent part, she states that she is of counsel to Ursulova Law Office P.C., attorneys for respondent. She avers that she has provided valuable and necessary services on behalf of respondent, for which she is requesting compensation pursuant to 11 NYCRR 65-4.10(j)(4). She states that her usual billing rate is \$400.00 per hour, which she states, "takes into account over a decade of experience specializing primarily in no-fault litigation and arbitration." Ms. Cohn states that the total time required to provide these legal services to the client was 2 hours "including case review, research, drafting, exhibit preparation, and e-filing, plus an appearance fee of January 11, 2023 of \$200. Based upon the above calculations, respondent seeks an attorneys' fee of \$1,000.00 (2x \$400 + \$200) for the services performed in this matter."

Considering the applicable factors, this court awards respondent \$1,000.00 for the work performed by respondent's counsel on this Article 75 proceeding.

As the prevailing party, respondent is entitled to its costs and disbursements, to be taxed by the County Clerk, should a judgment be entered.

Conclusions of Law

Accordingly, it is hereby **ORDERED, ADJUDGED, and DECREED** that:

- (1) ATIC's petition to vacate the master arbitration award of Marilyn Felenstein is dismissed.
- (2) Brooklyn Medical Practice's cross-petition to confirm the master arbitration award is granted, and the master arbitration award is confirmed in its entirety.

(3) Brooklyn Medical Practice is awarded the principal amount of \$2,835.62 as No-Fault insurance benefits, along with simple interest thereon (i.e., not compounded) at two per cent per month on a pro rata basis, using a 30-day month, computed from 5/2/19, calculated to the date of payment of the total principal amount.

(4) After calculating the total of the principal amount of \$2,835.62 plus the interest thereon from the applicable date to the date of entry of this order, ATIC shall pay Brooklyn Medical Practice an attorneys' fee equal to 20 percent of that sum total, subject to a maximum fee of \$1,360.00.

(5) ATIC shall pay Brooklyn Medical Practice an additional attorneys' fee of \$130.00 as awarded by the Master Arbitrator.

(6) ATIC shall pay Brooklyn Medical Practice an additional attorneys' fee of \$400.00 per hour for work performed by counsel on this Article 75 proceeding, plus \$200 for a court appearance, in the total sum of \$1,000.00.

(7) ATIC shall pay Brooklyn Medical Practice \$40 to reimburse respondent for the fees to AAA, as awarded by the arbitrator, and \$75 for the Master Arbitration filing fees, as awarded by the Master Arbitrator.

(8) Brooklyn Medical Practice shall recover from ATIC costs and disbursements as allowed by law, to be taxed by the County Clerk if a judgment is entered, pursuant to the Bill of Costs submitted by counsel.

This shall constitute the decision, order and judgment of the court.

Dated: May 5, 2023

ENTER:



Hon. Debra Silber, J.S.C.