

**American Tr. Ins. Co. v Dr. Offenbacher Med.  
Imaging PLLC**

2023 NY Slip Op 30335(U)

January 25, 2023

Supreme Court, New York County

Docket Number: Index No. 654968/2022

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART 14**

*Justice*

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AMERICAN TRANSIT INSURANCE COMPANY,

Petitioner,

- v -

DR OFFENBACHER MEDICAL IMAGING PLLC, a/a/o  
JEVAUGHN JEMINSON

Respondent.

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INDEX NO. 654968/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 15, 16, 17, 18 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The petition to vacate arbitral awards issued in favor of respondent is denied.

**Background**

Petitioner seeks to vacate arbitral awards issued in favor of respondent totaling \$4,508.68. It claims that it issued an insurance policy to non-party Shalaho Inc. Jevaughn Jeminson was a passenger in an automobile involved in an accident that was insured by petitioner under the subject policy. Mr. Jeminson sought medical treatment and respondent (as assignee) sought recovery in arbitration for its unpaid medical bills.

Petitioner claims that the awards should be vacated because petitioner properly demonstrated that it sent scheduling letters for IMEs and that Mr. Jeminson did not appear for these IMEs.

The arbitrator found that:

“[Petitioner’s] IME no [show] defense cannot be sustained. I adopt my prior rationale to the extent applicable. The bills at issue in the present case were received on March 30, 2020, April 9, 2020 and May 20, 2020 respectively. Though

[petitioner] did timely requests [sic] some documentary additional verification (i.e., the Assignor's NF-2, MRI films) for each bill, the first IME scheduling letter was sent to the Assignor on August 17, 2020, scheduling an IME for October 6, 2020. Both of these dates are more than 30 days after receipt of Applicant's bills herein. These facts are not disputed. As such, the first IME scheduling letter was sent in violation the requirements of 11 NYCRR §65-3.5 (b), which required additional verification be sought within 15 business days from the date the bill was received, Additionally, and significantly, the first scheduled IME was not scheduled to be held within 30 calendar days from the date of receipt of the bills in violation of the requirements of 11 NYCRR § 65-3.5(d)” (NYSCEF Doc. No. 3 at 7).

The arbitrator also noted that “nothing in the record that shows that [petitioner] ever delayed or properly tolled Applicant's claims in any way based on the IMEs. Similar to the prior proceeding, there are no delay letters, timely or even untimely, informing Applicant that its claim was being delayed pending the IME of the Assignor, and nothing in the record that shows that Applicant was ever informed of the IME of the Assignor in any way during the processing of its claim until the denials were issued on December 9, 2020” (*id.*). The arbitrator further noted that petitioner failed to upload an affidavit from the doctor assigned to do the IME or anyone else with personal knowledge to verify that the injured applicant did not appear for the IME (*id.* at 8).

Petitioner disagrees with the arbitrator’s conclusion and the affirmance by the Master Arbitrator. It insists that because Mr. Jeminson failed to appear for an IME, it properly rejected respondent’s request for reimbursement.

In opposition, respondent claims that petitioner failed to identify a sufficient ground upon which this Court should vacate the subject awards. It observes that the arbitrator correctly found that petitioner’s eventual denials of respondent’s reimbursement claims were late and so petitioner was precluded from raising the IME no show defense. Respondent claims it is entitled to legal fees pursuant to 11 NYCRR 65-4.1(j)(4) and an additional award of \$1,200 in fees for the instant proceeding.

In reply, petitioner insists the awards must be vacated because the policy is void *ab initio* due to Mr. Jeminson's failure to appear for the IMEs.

The Court observes that although respondent titled its papers, in part, as a cross-petition, it did not actually file a notice of cross-petition or pay the required fee for such an application.

### Discussion

The four grounds for vacating an arbitral award pursuant to CPLR 7511(b)(1) are

“(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.”

“Mere errors of fact or law are insufficient to vacate an arbitral award. Courts are obligated to give deference to the decision of the arbitrator even if the arbitrator misapplied the substantive law in the area of the contract” (*NRT New York LLC v Spell*, 166 AD3d 438, 439 [1st Dept 2018] [internal quotations and citations omitted]).

Here, the Court denies the petition as petitioner failed to identify a sufficient ground to vacate the awards. Petitioner's central argument is, essentially, that it disagrees with the factual findings by the lower arbitrator. But a mere disagreement with a decision is not a basis upon which this Court can vacate an award. The Court finds that the lower arbitrator made a rational decision based upon the record before him and the Master Arbitrator was correct to affirm the award in favor of respondent. Simply put, the lower arbitrator rationally found that the denials of respondent's reimbursement requests were far too late and in violation of the applicable no-fault

regulations. Petitioner’s continual reiteration that Mr. Jeminson failed to appeal for an IME is not a reason to disturb the award.

Although respondent did not follow the proper procedure to file a cross-petition, that issue is of no moment. CPLR 7511(e) provides that “upon the denial of a motion to vacate or modify, [the Court] shall confirm the award.”

Accordingly, it is hereby

ORDERED that the petition is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of respondent and against petitioner in the amount of \$4,508.68 plus reasonable legal fees in the amount of \$1,200 along with \$60 in legal fees, the \$40 reimbursement for fees and the \$75 filing fee all of which were awarded by the Master Arbitrator.

1/25/2023

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE