

**Matter of American Tr. Ins. Co. v North Shore Surgi  
Ctr.**

2023 NY Slip Op 32452(U)

July 12, 2023

Supreme Court, New York County

Docket Number: Index No. 654516/2022

Judge: John J. Kelley

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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. JOHN J. KELLEY **PART** **56M**

*Justice*

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In the Matter of  
  
AMERICAN TRANSIT INSURANCE COMPANY,  
  
Petitioner,

**INDEX NO.** 654516/2022

**MOTION DATE** 03/02/2023

**MOTION SEQ. NO.** 001

- v -

NORTH SHORE SURGI CENTER, as assignee of  
ALASSANE THERA,

**DECISION, ORDER, and  
JUDGMENT**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

American Transit Insurance Company (ATIC) petitions pursuant to CPLR 7501(b)(1)(iii) to vacate an award of a master arbitrator dated September 22, 2022, that affirmed the award of a lower arbitrator dated June 26, 2022, awarding no-fault motorist benefits to North Shore Surgi Center (North Shore), as assignee of Alassane Thera. North Shore opposes the petition and counterclaims to confirm the award. The petition is denied, and the award is confirmed

Thera allegedly was injured in a motor vehicle accident on May 10, 2019, and underwent right knee surgery on March 11, 2021 at North Shore’s facility. Thera assigned North Shore his right to recover no-fault benefits from ATIC. North Shore made claim upon ATIC in the sum of \$4,498.67. ATIC received the claim on March 22, 2021 and thereafter requested North Shore to verify the facts underlying the claim on April 6, 2021, May 11, 2021, and May 22, 2021. On June 8, 2021, ATIC notified North Shore that the processing of the claim was being held in abeyance pending an examination under oath (EUO) of either Thera or a representative of North Shore, but the record of proceedings here does not contain any EUO scheduling letters.

There was a dispute between the parties as to whether ATIC sent a request for a final

verification on July 13, 2021, although, on July 19, 2021 and August 11, 2021, ATIC did send Thera requests to conduct an independent medical examination (IME). On October 14, 2021, ATIC denied the claim in an NF-10 form, incorporating by reference an explanation of benefits form that informed North Shore that its claim was denied for the following reasons:

“Surgery and surgically related services to the right knee are denied as not causally related to the accident of record base on attached peer review by DR. VITO LOGUIDICE, MD. In addition, denied based on no medical necessity based and no causal relationship between the accident and the knee surgery of 3/11/2021.

“FEES NOT IN ACCORDANCE WITH FEE SCHEDULES.”

North Shore demanded arbitration of the claim before the American Arbitration Association (AAA). In response, ATIC asserted that it had denied coverage on the ground not only that there was no medical necessity for the procedure, as set forth in its denial-of-claim form, but that Thera had failed to appear for his IME. On May 31, 2022, an arbitration hearing was conducted in Nassau County before an arbitrator acting under the auspices of AAA.

In a decision and award dated June 26, 2022, the arbitrator (hereinafter the lower arbitrator) found that there were no EUO scheduling letters in the case file, and that, although ATIC submitted IME scheduling letters, it could not point to any submissions showing why the denial was sent on October 14, 2021, particularly in the absence of any proof that Thera did not, in fact, appear for an IME on the date set forth in the second IME scheduling letter. The lower arbitrator, citing Insurance Law § 5106(a) and 11 NYCRR 65-3.8(c), which require an insurer to pay or deny a claim within 30 days of receipt of the final verification of facts underlying the claim, concluded that ATIC’s denial was untimely, and that its defense of lack of medical necessity thus was rendered academic. Specifically, she wrote “[t]herefore, *Respondent’s denial was late*, and in violation of the statutory provisions discussed above” (emphasis added).

With respect to ATIC’s defense that coverage was vitiated because Thera failed to appear for an IME (the failure-to-appear defense), the lower arbitrator, citing a decision by the Appellate Division, Second Department, further concluded that ATIC’s failure to assert that

defense in their denial-of-claim letter, or to assert it in any timely fashion in accordance with the Insurance Law and applicable regulations, precluded it from raising the defense at the arbitration hearing (see *Westchester Med. Ctr. v Lincoln Gen. Ins. Co.*, 60 AD3d 1045 [2d Dept 2009]). She compared that decision to the First Department's decision in *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC* (82 AD3d 559 [1st Dept. 2011]), which she interpreted as holding that an insurer's failure to raise the failure-to-appear defense in a timely denial does not, in and of itself, preclude an insurer from later raising the defense, either in an action or in an arbitration. The lower arbitrator indicated that she was going to follow the Second Department's approach, rather than the First Department's approach. She wrote that, "[b]ased on the fact that there is no evidence Respondent has submitted a timely specific denial premised on the IME no show defense, this defense is precluded."

The lower arbitrator thus awarded North Shore the sum of \$4,498.67 in full reimbursement of the claim, plus interest at the rate of two percent per month, calculated on a pro rata basis using a 30-day month from November 4, 2021, the date that payment of the claim became overdue (see 11 NYCRR 65-3.9[a]), along with an award of attorney's fees, as authorized by 11 NYCRR 65-4.6(d) and 11 NYCRR 65-4.10(j)(4).

ATIC appealed the lower arbitrator's award to a master arbitrator, arguing that the lower arbitrator erroneously applied the *Westchester Med. Ctr.* decision, and should instead have relied on the *Unitrin* decision. It argued that not only did *Unitrin* stand for the proposition that its failure to include the failure-to-appear defense in the denial-of-claim letter was not fatal to asserting the defense in the course of arbitration, but that the issuance a global denial letter relieved it of the obligation to comply with the timing requirements of 11 NYCRR 65-3.5. In a September 22, 2022 determination, the master arbitrator, who sits in Suffolk County, rejected ATIC's contentions, and affirmed the lower arbitrator's award, explaining that

"[t]he arbitrator had the discretion to choose to apply *Westchester* as the law is split on the issue. In this case a no-show must be timely preserved in a specific denial offered timely. The arbitrator found this claim not properly tolled.

After explaining the standard of review that a master arbitrator must apply under the no-fault regulations (see 11 NYCRR 65-4.10[a]), and that a master arbitrator may review a lower arbitrator's award to ascertain whether there was an error of law (see 11 NYCRR 65-4.10[a][4]), the master arbitrator concluded that the lower arbitrator's award "was cogently thought out and clearly articulated and certainly not irrational, arbitrary and capricious or incorrect as a matter of law." The master arbitrator awarded North Shore attorneys' fees in the sum of \$130.00, based on two hours of work at the regulatory rate of \$75.00 per hour.

This proceeding ensued.

An arbitration award may be vacated pursuant to CPLR 7511(b)(1)(iii) where an arbitrator exceeded his or her power, including where the award violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power (see *Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480 [1st Dept 2016]). Where, as here, arbitration is compulsory (see Insurance Law § 5105), closer judicial scrutiny of the arbitrator's determination is required under CPLR 7511(b) than that applicable to consensual arbitrations (see *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.]*, 49 NY2d 757 [1980]; *Mount St. Mary's Hosp. v Catherwood*, 26 NY2d 493 [1970]). To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious (see *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.]*, 49 NY2d 757 [1980]).

Insurance Law § 5106(a) provides that

"[p]ayments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained."

The demand for an IME or EUO constitutes a request for an additional verification of "proof of the fact[s]" underlying a claim for no-fault benefits that goes beyond a claimant's initial

verification (see 11 NYCRR 65-3.5[d]) and, as such, is subject to the requirement that any such request be mailed by an insurer or its agent within 15 days of receipt of the patient's or provider's response to the initial verification request, unless the insurer demonstrates that the IME or EUO was sought prior to the filing of claims by any medical provider (see *PV Holding Corp. v Hank Ross Med., P.C.*, 188 AD3d 429, 429 [1st Dept 2020]; *Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017]; *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]; *National Liability & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851, 851 [1st Dept 2015]; *American Tr. Ins. Co. v Vance*, 131 A.D.3d 849, 850 [1st Dept 2015]; *American Tr. Ins. Co. v Jaga Med. Servs. P.C.*, 128 AD3d 441, 441 [1st Dept 2015]). Where an insurer requests a claimant to appear for an IME, and the claimant fails to appear on the initially scheduled date, the insurer must schedule and request a second date for the IME (see 11 NYCRR 65-3.6). Consequently, under those circumstances, the statutory 30-day period for payment or denial of the claim begins to run after the claimant fails to appear on the later-scheduled date, and any denial issued after that 30-day period is untimely (see *Ezra Supply, Inc. v Nationwide Affinity Ins. Co. of Am.*, 77 Misc 3d 15, 17 [App Term, 2d Dept, 2d, 11th & 13 Jud Dists 2022]; 11 NYCRR 65-3.8[a][1]).

"[A]n insurer must affirmatively establish that it complied with claim procedures in order to obtain a judgment declaring that no coverage exists based on the failure of a claimant to appear for a medical examination" (*American Tr. Ins. Co. v Garcia*, 2016 NY Slip Op 31602[U], \*5, 2016 NY Misc LEXIS 3072, \*8 [Sup Ct, N.Y. County, Aug. 11, 2016]; see *American Tr. Ins. Co. v Camille*, 2019 NY Slip Op 33560[U], 2019 NY Misc LEXIS 6429 [Sup Ct, N.Y. County Dec. 3, 2019]; *Unitrin Advantage Ins. Co. v Better Health Care Chiropractic, P.C.*, 2016 NY Slip Op 30837[U], \*4, 2016 NY Misc LEXIS 1698, \*5 [Sup Ct, N.Y. County, May 4, 2016]); *Mapfre Ins. Co. of N.Y. v Aubry*, 2016 NY Slip Op 31017[U], \*4-5, 2016 NY Misc LEXIS 2030, \*4-5 [Sup Ct, N.Y. County, Mar. 30, 2016, Singh, J.]). Thus, assuming that ATIC demonstrated that it mailed its initial request for verification to the claimant or his or her health care providers within

10 days of receipt of the NF-2 claim form submitted by the claimant (see 11 NYCRR 65-3.5[a]), and mailed any additional request for verification within 15 days of receipt of the patient's response to the initial request for verification (see 11 NYCRR 65-3.5[b]; *Hertz Vehs. LLC v Significant Care, PT, P.C.*, 157 AD3d 600 [1st Dept 2018] see also 11 NYCRR 65-3.6[b] [requiring insurer to reschedule IME by mailing follow up notice within 10 days of defendant's nonappearance]), it was still required to establish that it dispatched its denial-of-claim letter within 30 days after Thera allegedly failed to appear for his second-scheduled IME, regardless of whether it was or was not legally precluded from raising the failure-to-appear defense in this arbitration or any action referable to the claim.

The lower arbitrator's determination to reject ATIC's failure-to-appear defense was not arbitrary and capricious, and did not constitute an error of law. In addition to holding that ATIC was legally precluded from raising the failure-to-appear defense at the arbitration hearing, the lower arbitrator nonetheless also expressly made a factual finding that ATIC's denial of the claim here was untimely. Thus, regardless of whether the lower arbitrator had authority to apply the Second Department's *Westchester Med. Ctr.* decision so as to preclude ATIC as a matter of law from raising the failure-to-appear defense, or was constrained for some reason to apply the First Department's *Unitrin* decision, North Shore correctly argued that ATIC's interpretation of *Unitrin* decision is too broad. Even if this court were to apply the *Unitrin* decision and hold that ATIC was not automatically precluded from raising the failure-to-appear defense despite its failure to assert it as a basis for denying the claim in its NF-10 denial letter, ATIC was still required to establish the defense with proof that it timely made its requests for an IME and that it dispatched the NF-10 form in accordance with the time constraints articulated in 11 NYCRR 65-3.5 and 65-3.6, specifically, that its October 14, 2021 denial was within 30 days of whatever date it had scheduled for Thera's IME in its August 11, 2021 follow-up demand letter. Since ATIC did not provide such proof to the lower arbitrator, it cannot now be heard to argue that the lower arbitrator's finding of untimeliness was arbitrary and capricious.

### A master arbitrator

“has the authority to vacate or modify an arbitration award based upon a ground set forth in CPLR article 75 (see 11 NYCRR 65.19[a][1]). The power of the master arbitrator to review factual and procedural issues is limited to whether the arbitrator acted in a manner that was arbitrary and capricious, irrational or without a plausible basis. If the determination of the arbitrator is challenged based upon an alleged factual error, the master arbitrator must uphold the determination if it has a rational basis”

(*Liberty Mut. Ins. Co. v Spine Americare Med., P.C.*, 294 AD2d 574, 576 [2d Dept 2002] [some citations and internal quotation marks omitted]).

Inasmuch as the master arbitrator did not make her own factual determinations, review alleged factual or procedural errors made in the course of the arbitration, weigh the evidence, or resolve credibility issues, she did not exceed her authority (see *Matter of Richardson v Prudential Prop. & Cas. Co.*, 230 AD2d 861 [2d Dept 1996]), and properly affirmed the lower arbitrator’s award. Moreover, “[w]here as here, both the arbitrator and the master arbitrator cited and considered the split between the First and Second Departments” on the issue of whether the failure-to-appear defense must be deemed waived where it was not raised in the denial-of-claim letter, “ultimately following the rationale” of the Second Department, “the master arbitrator’s award cannot be found to be irrational” (*Matter of Spartan Med. Supply v Liberty Mut. Ins.*, 2019 NYLJ LEXIS 2110, \*4-5 [Dist Ct, Nassau County, Jun. 3, 2019]; see *Matter of New Millennium Pain & Spine Med., P.C. v Progressive Cas. Ins. Co.*, 2023 NY Slip Op 32218[U], \*4, 2023 NY Misc LEXIS 3312, \*5-6 [Sup Ct, N.Y. County, Jun. 27, 2023] [Kelley, J.]). In any event,

“[t]he 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”

(*Matter of Pomona Pain Mgt., P.C. v Praetorian Ins. Co.* 2012 NY Slip Op 30525[U], \*6, 2012 NY Misc LEXIS 945 [Sup Ct, Nassau County, Jan. 31, 2012] [emphasis added]).

The grounds specified in CPLR 7511 are exclusive (*see Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 201 [1st Dept. 2009]) and it is a “well-established rule that an arbitrator’s rulings, unlike a trial court’s, are largely unreviewable” (*Matter of Falzone v New York Cent. Mut. Fire Ins. Co.*, 15 NY3d 530, 534 [2013]). Hence, the petition to vacate the master arbitrator’s award must be denied. Pursuant to CPLR 7511(e), “upon the denial of a motion to vacate or modify” an award, the court “shall confirm the award.”

Accordingly, it is

ORDERED that the petition is denied, and it is,

ADJUDGED that, upon the denial of the petition to vacate the master arbitration award, that master arbitration award, which was issued by the American Arbitration Association under Case No. 17-21-1225-8042, and dated September 22, 2022, is confirmed; and it is further,

ORDERED that the Clerk of the court shall enter a money judgment in favor of the respondent, North Shore Surgi Center, as assignee of Alassane Thera, and against the petitioner, American Transit Insurance Company, (a) in the principal sum of \$4,498.67, plus interest at the rate of 2% per month, calculated on a pro rata basis using a 30-day month, from November 4, 2021, as set forth in the award, (b) statutory prejudgment interest on that entire amount at 9% per annum from September 22, 2022, the date of the award, and (c) an award of attorneys’ fees in the sum of \$130.00.

This constitutes the Decision, Order, and Judgment of the court.



<u>7/12/2023</u> <b>DATE</b>					<u>JOHN J. KELLEY, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
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