SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART 52**

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Petitioner,

- v -

RUTLAND MEDICAL, PC,

Respondent.

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INDEX NO. 652068/2023

MOTION DATE 05/17/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 12, 13 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

Petitioner American Transit Insurance Company ("American Transit") moves, under Article 75 of the CPLR, for an order vacating a master arbitration award which affirmed an arbitration award in its entirety. The respondent's cross-petition opposes the petition and seeks: (1) to confirm the arbitration award and master arbitration award in the sum of $2,941.64, (2) Interest at a rate of 2% from 9/23/2021 until entry of a judgment; (3) No-fault statutory attorneys' fees in the sum of 20% of combined principle and interest up to a maximum of $1,360.00, in an amount to be calculated by the clerk; (4) No-fault master arbitration fees in the sum of $130.00; (5) Reasonable attorney's fees to be determined by the Court in accordance with 11 NYCRR § 65-4.10(j)(4); (6) Arbitration filing fee of $40.00; and (7) Costs and disbursements of this action as taxed by the Clerk.

For the reasons set forth hereinbelow, the petition is denied, and the cross-petition is granted.

Respondent Rutland Medical, PC ("Rutland") is a medical provider who, as an assignee of Carmen Saget ("Saget" or "assignor"), submitted no-fault insurance claims to the petitioner insurance company. These claims were denied due to the assignor's alleged failure to attend two duly scheduled Examinations Under Oath ("EUO"). Following denial of its claims, Rutland submitted the dispute to arbitration. The issue in the arbitration was whether American Transit properly denied Rutland's claim due to the failure of the assignor to appear and attend the EUOs. The arbitrator acknowledged that the assignor's appearance at an EUO is a condition precedent to coverage, and an insurer may properly deny claims on the basis that the assignor failed to appear at said EUOs. However, the arbitrator found American Transit "failed to establish its EUO no-show defense with sufficient credible evidence," noting that there were no statements on the record or other evidence that the assignor had failed to show on the scheduled dates. The master arbitrator confirmed the award in its entirety, noting that the burden is on the insurance carrier to establish all of the elements of the defense of failure to appear, and that one of the elements is establishing an actual failure to appear.

"Judicial review of a master arbitrator's award is restricted, by the terms of the statute, to 'the grounds for review set forth in article seventy-five' of the CPLR" (*Petrofsky* (*Allstate Ins. Co.*), *In re*, 54 NY2d 207, 210 [1981]). CPLR § 7511(b)(1)(iii) provides that an arbitration award shall be vacated where the court finds the "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." Where, as here, the arbitration was compulsory,[1] "due process of law requires that the awards of the arbitrator be judicially reviewable for errors of law, competency and substantially of evidence, as well as arbitrary and capricious conduct" (*Mount*

[1] Pursuant to Ins. Law § 5106(b) every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to arbitration.

St. Mary's Hosp. of Niagara Falls v Catherwood, 26 NY2d 493, 503 [1970]). "The standard applicable to judicial review of a compulsory arbitration proceeding is whether the award was 'supported by a reasonable hypothesis' and was not contrary to what could be fairly described as settled law (*Metro. Radiological Imaging, P.C. v Country-Wide Ins. Co.*, 19 Misc 3d 130(A) [App Term 2008]). A "master arbitrator is also expressly precluded from reviewing factual or procedural errors" (*Petrofsky*, *supra* at 212). On questions of substantive law, the determination of the master arbitrator must be upheld if there is a rational basis for the determination (*see Matter of Liberty Mut. Ins. Co. v Spine Americare Med., P.C.*, 294 AD2d 574, 577 [2d Dept 2002]). Pursuant to 11 NYCRR § 65-4.5(o)(1) "[t]he arbitrator shall be the judge of the relevance and materiality of the evidence offered."

The awards issued by the arbitrator in the underlying arbitration and the master arbitrator were not in excess of the arbitrators' power, arbitrary, capricious, or contrary to settled law. The arbitrator properly acknowledged that an insurer may deny claims based on the failure to appear for an EUO as it constitutes a breach of a condition precedent to coverage. However, the arbitrator, as the person entitled to "be the judge of the relevance and materiality of the evidence offered" (11 NYCRR § 65-4.5[o][1]), found that there was insufficient evidence that the assignor failed to appear for the EUOs and, therefore, American Transit failed to meet its burden to establish its EUO no-show defense. American Transit has not cited to any authority to support its contention that the denial of claim forms alone constitutes sufficient evidence to establish a prima facie case with respect to the nonappearance (Petition ¶ 74). To the contrary, in order to meet its burden to show nonappearance, an insurer needs to submit evidence from someone with personal knowledge of the nonappearances (*see Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721 [2d Dept 2006]; *see also Crossbridge Diagnostic Radiology,*

P.C. v Progressive Ins. Co., 20 Misc 3d 143(A) [App Term 2d Dept 2008] ["affidavit submitted by defendant was insufficient to establish Mr. Cherry's nonappearance at said EUOs, defendant failed to raise a triable issue of fact"]; *Parisien v Tri State Consumers Ins. Co.*, 76 Misc 3d 133(A) [App Term 2d Dept 2022] ["the affirmation from the doctor who was scheduled to perform the IMEs did not establish that he possessed personal knowledge of the nonappearance of plaintiff's assignor for the IMEs"]; *Matter of Boro Chiropractic, P.C. v State Farm Fire and Cas. Co.*, 39 Misc 3d 1228(A) [Civ Ct Kings County 2013] ["here the master arbitrator improperly shifted the burden of proof to petitioner to establish attendance at the EUOs by reasoning that petitioner offered no proof that the EUO was ever conducted and denying it was respondent's burden to produce evidence establishing the EUO no-show"]). Accordingly, the arbitrator had a rational basis for determining that the evidence set forth by American Transit did not support the EUO no-show defense. Therefore, their award was supported by a reasonable hypothesis and was not contrary to what could be fairly described as settled law. Accordingly, the master arbitrator did not exceed their power in upholding the award of the arbitrator.

For these reasons the awards for the arbitrator and master arbitrator are confirmed. Accordingly, it is hereby

ADJUDGED that the petition is denied; and it is further

ADJUDGED that the cross-petition is granted, and the award rendered in favor of respondent and against petitioner is confirmed; and it is further

ADJUDGED that respondent RUTLAND MEDICAL, PC, do recover from petitioner AMERICAN TRANSIT INSURANCE COMPANY, the amount of $ 2,941.64, plus interest at the rate of 2% per annum from the date of 9/23/2021, as computed by the Clerk, plus no-fault statutory attorneys' fees in the sum of 20% of combined principle and interest up to a maximum of

$1,360.00, in an amount to be calculated by the clerk, plus the no-fault Master Arbitration fees in the sum of $130.00, together with costs and disbursements as taxed by the Clerk, and that the petitioner have execution therefor; and it is further

ORDERED that an assessment of respondent's reasonable attorneys' fees pursuant to 11 NYCRR § 65-4.10(j)(4) against petitioner is directed, and it is further

ORDERED that a copy of this order with notice of entry be served by the respondent upon the Clerk of the General Clerk's Office, who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website].

This constitutes the decision and order of the court.

7/24/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE