

**Matter of American Tr. Ins. Co. v McCulloch
Orthopaedic Surgical Servs. PLLC**

2025 NY Slip Op 31917(U)

May 22, 2025

Supreme Court, New York County

Docket Number: Index No. 650277/2025

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 650277/2025

In the Matter of the Application of
AMERICAN TRANSIT INSURANCE COMPANY,

MOTION DATE 01/16/2025

Petitioner,

MOTION SEQ. NO. 001

To vacate an arbitration award pursuant to Article 75 of the
Civil Practice Law and Rules,

- v -

**DECISION + ORDER ON
MOTION**

MCCULLOCH ORTHOPAEDIC SURGICAL SERVICES
PLLC,

Respondent

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13,
14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

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

Upon the foregoing documents, and after a final submission date of March 25, 2025,
Petitioner American Transit Insurance Company’s (“Petitioner”) petition to vacate the arbitration
award affirmed by Master Arbitrator Francisco Cruz, Esq. and in favor of Respondent McCulloch
Orthopaedic Surgical Services PLLC (“Respondent”) is denied. Respondent’s cross-petition for
attorneys’ fees is granted in part and denied in part.

Petitioner argues Master Arbitrator Cruz erred in awarding Respondent \$4,605.11 for a
right ankle surgery Respondent provided Petitioner’s insured, Tiffany Rivera (“Ms. Rivera”) on
February 4, 2022. Ms. Rivera was allegedly involved in a motor vehicle accident on July 8, 2021.

Petitioner argues it presented evidence that it maintained a “founded belief” that the
insured’s loss was not related to the alleged accident. Petitioner argues it presented evidence,
among other things, that (a) Ms. Rivera has a history of chronic back and knee pain prior to the

accident; (b) she underwent right knee surgery 5-6 years ago, (c) an ex-ray taken at the time of the accident shows she did not sustain any broken bones, (d) she continued to work as a security guard after the accident, and (e) Ms. Rivera was allegedly treating at “known medical mills.” Petitioner also argues that Ms. Rivera was examined by Dr. Eric Roth on April 26, 2022, and Dr. Roth opined that Ms. Rivera’s injuries had resolved. Petitioner argues that Respondent did not rebut the evidence in support of Petitioner’s founded belief, and therefore the arbitration award was irrational.

In the context of no-fault arbitrations, an arbitrator’s decision will not be vacated where it is rationally based (*Petrofsky v Allstate Ins. Co.*, 54 NY2d 207 [1981]). Here, the Court finds the master arbitrator’s affirmance of the lower arbitrator’s award was not irrational and was based in the applicable no-fault regulations (*see, e.g. Global Liberty Ins. Co. v Cambridge Medical, P.C.*, 193 AD3d 573 [1st Dept 2021]). Specifically, the fact that an insured has a history of prior injury or pain is insufficient as the no-fault regulations cover aggravation of preexisting conditions (*see* 11 NYCRR § 65-3.14[a]). Denial of coverage for treatment to an allegedly aggravated pre-existing insurer based on a “founded belief” defense requires the insurer show, through competent and admissible evidence, that the alleged injury was not related to the accident at all (*see, e.g. Mount Sinai Hosp. v Triboro Coach Inc.*, 263 AD2d 11, 18 [2d Dept 1999]). The burden may be met through the affidavit of an investigator and testimony from examinations under oath (*Nationwide General Ins. Co. v South*, 223 AD3d 411, 411-12 [1st Dept 2024]).

Ms. Rivera testified she was walking in a crosswalk when a vehicle hit her right knee and ankle, and as a result of the accident she tore a ligament in her right ankle. The police report from the date of the accident corroborated Ms. Rivera’s testimony, and the driver who hit Ms. Rivera was issued a summons for failing to yield to a pedestrian. There was no other evidence submitted,

and the evidence that was submitted was insufficient to establish a “founded belief” defense. Therefore, the arbitration award was not irrational, and the petition to vacate it is denied.

Because Respondent successfully defended this petition to vacate an arbitration award, it is entitled to attorneys’ fees pursuant to 11 NYCRR § 65-4.10(j)(4) (*see also American Transit Ins. Co. v Rutland Med. PC*, 224 AD3d 531, 531 [1st Dept 2024]). Moreover, the fee award is in an amount fixed by the Court adjudicating the matter (*see Matter of Country-Wide Ins. Co. v TC Acupuncture P.C.*, 172 AD3d 598 [1st Dept 2019]; *see also Matter of Country-Wide Ins. Co. v Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407, 408 [1st Dept 2018]). Therefore, the Petitioner’s argument about a statutory cap on fees is incorrect and misplaced. In reviewing the Respondent’s fee application, the Court finds 6 hours opposing the application to be reasonable. However the motion was decided on submission, therefore the 2.0 hours “anticipated for appearance at the oral argument” are not awarded. Moreover, the petition was not particularly complicated nor did it present novel issues, therefore the Court sets Respondent’s rate at \$ 300 an hour for a fee award of \$1,800.00.

Accordingly, it is hereby,

ORDERED that Petitioner American Transit Insurance Company’s petition to vacate the arbitration award affirmed by Master Arbitrator Francisco Cruz, Esq. and in favor of Respondent McCulloch Orthopaedic Surgical Services PLLC is denied; and it is further

ORDERED that Respondent McCulloch Orthopaedic Surgical Services PLLC’s cross-petition for attorneys’ fees is granted solely to the extent that Respondent is awarded \$2,400 in fees against Petitioner; and it is further

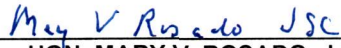
ORDERED that upon the submission of proper papers by Respondent to the County Clerk, the Clerk of the Court is directed to enter judgment in favor of Respondent McCulloch Orthopaedic

Surgical Services PLLC and against Petitioner American Transit Insurance Company in the amount of \$4,605.11 pursuant to the arbitration award in Respondent McCulloch Orthopaedic Surgical Services PLLC favor dated, June 17, 2024, plus statutory interest from June 17, 2024 until entry of judgment plus costs and disbursements as calculated and taxed by the Clerk of the Court; and it is further

ORDERED that upon the submission of proper papers by Respondent to the County Clerk, the Clerk of the Court is directed to enter judgment in favor of Respondent McCulloch Orthopaedic Surgical Services PLLC and against Petitioner American Transit Insurance Company in the amount of \$1,800.00 in attorneys' fees, plus statutory interest on the attorneys' fees from the date of this Decision and Order until entry of judgment, as calculated by the Clerk of the Court; and it is further

ORDERED that within ten days of entry, counsel for Respondent shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

<u>5/22/2025</u> DATE				 <u>HON. MARY V. ROSADO, J.S.C.</u>		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE