

American Tr. Ins. Co. v Progressive Surgical Ctr.

2025 NY Slip Op 34668(U)

December 4, 2025

Supreme Court, New York County

Docket Number: Index No. 653135/2025

Judge: Kathleen Waterman-Marshall

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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. KATHLEEN WATERMAN-MARSHALL PART 31

Justice

-----X

INDEX NO. 653135/2025

AMERICAN TRANSIT INSURANCE COMPANY,

MOTION DATE 05/21/2025

Plaintiff,

MOTION SEQ. NO. 001

- v -

PROGRESSIVE SURGICAL CENTER,

**DECISION + ORDER ON
MOTION**

Defendant.

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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, the motion by American Transit Insurance Co. (“American Transit”) to vacate a master arbitration no-fault award dated March 5, 2025, and the underlying arbitration award, is denied. Upon the same record, the cross-motion by Progressive Surgical Center (“Progressive”) to confirm the master arbitration award, and for its costs and attorney’s fees, is granted.

Background

Non-party Natalia Klyuchindkiy (“Ms. Klyuchindkiy”) was involved in a motor-vehicle accident on September 9, 2022, in which she was allegedly injured. Ms. Klyuchindkiy sought medical treatment for her injuries from various medical providers, including Progressive, and assigned her right to collect no-fault benefits to her medical providers. Progressive submitted a no-fault benefits claim for \$83,728.00 to American Transit. American Transit denied the claim as untimely and without medical necessity, based upon an independent medical exam (IME) by its doctor, Dr. Manevitz, and peer review by Dr. Chiu.

Progressive demanded arbitration of its no-fault benefits claim. During the arbitration proceedings, Progressive reduced its demand from \$83,728.00 to \$4,979.34. The arbitrator rejected American Transit’s denial for lack of medical necessity, finding that Dr. Manevitz’ IME report noted “cervical sprain resolved with residuals” without explaining the impact of residuals on Ms. Klyuchindkiy’s condition, or what residuals means. The arbitrator further found that Dr. Manevitz’ IME report was refuted by contemporaneous exam reports submitted by Progressive which provided objective findings of reduced range of motion, motor strength, and sensation, as well as Ms. Klyuchindkiy’s reports of tenderness. As to the peer review by Dr. Chiu, the arbitrator found that Dr. Chiu improvidently declared the MRI report was missing pages without verifying or explaining why the medical record was incomplete, and that this impacted the weight afforded to Dr. Chiu’s rationale. The arbitrator also noted that Dr. Chiu’s citations provided little analysis of the facts of the case and that his conclusion regarding causality was

vague. Progressive's rebuttal report by Ms. Klyuchindkiy's treating physician, Dr. Etelzon explained causality and noted that Dr. Chiu – a rehabilitation doctor – is not qualified to perform a peer review of a surgeon and is “clearly not aware of the role of an interventional pain management physician.” The arbitrator found Dr. Etelzon's rational “more thorough and persuasive than Dr. Chiu's.” Accordingly, the arbitrator rejected American Transit's lack of medical necessity defense and noted that this finding was consistent with the arbitrator's prior findings in a related arbitration involving Ms. Klyuchindkiy's other medical providers.

The arbitrator also rejected American Transit's timeliness defense. It found that American Transit's denial failed to include the requisite language to a medical provider that an untimely notice of claim would be accepted upon a reasonable excuse, as required under 11 NYCRR § 65-3.3(e) to assert a timeliness defense.

American Transit sought review of the arbitrator's decision via master arbitration proceedings. It argued that the arbitrator's award was irrational because Drs. Manevitz and Chiu concluded that the services were not medical necessary, and these conclusions were supported by other evidence in the record, yet the arbitrator found Progressive's evidence more credible. Notably, American Transit did not raise arguments regarding timeliness under 11 NYCRR § 65-3.3(e). The master arbitrator affirmed the award in its entirety, finding that the award was rational, and that the arbitrator was empowered to weigh the evidence and make determinations of credibility and fact.

American Transit then filed the instant Article 75 special proceeding challenging the arbitration and master arbitration awards. As with the master arbitration proceedings, it contends that the arbitrator's award was incorrect because it did not agree with American Transit's doctors. It further argues that the arbitration award improperly applied the 45-day timeliness requirement under 11 NYCRR § 65-3.3(e). Thus, American Transit argues that the master arbitrator should have corrected these alleged errors in accordance with *Matter of Petrofsky* (54 NY2d 207 [1981]) and vacated the arbitrator's award. American Transit now seeks to have this Court correct the alleged mistakes in the arbitrator's and master arbitrator's awards under *Matter of Petrofsky*.

Progressive contends that American Transit is, effectively, seeking *de novo* review of the Arbitration and Master Arbitration Awards, which is not available because the award does not exceed \$5,000.00 (Insurance Law § 5106[c]; 11 NYCRR § 65-4.10[h][2]). It contends that this Court's review of the arbitration awards is limited to the grounds set forth in CPLR § 7511 (corruption/fraud; partiality; excess of power; failure to follow Article 75 procedures; or violative of public policy) or as arbitrary and capricious. Progressive further contend that the arbitration awards need only be based upon some evidence to be confirmed, that the arbitration awards are supported by the evidence, and the awards neither represent an error of law nor fact. It contends that the arbitrator properly found American Transit did not meet its burden, and that its evidence was, in essence, simply less convincing than Progressive's. Progressive seek its costs and attorney's fees, including statutory attorney's fees of 20% of the award amount (11 NYCRR § 65-4.6[b]) for work performed during the underlying arbitration and additional attorney's fees on an hourly basis for the work performed in this special proceeding (11 NYCRR § 65-4.10[j][4]).

Discussion

I. Vacate Arbitration Awards

CPLR § 7511 provides that a party may seek to vacate an arbitration award due to: (i) corruption or fraud, (ii) partiality of the arbitrator, (iii) an arbitrator acting in excess of their authority or imperfectly executing their authority such that the final award did not address the subject of the arbitration proceedings, or (iv) by the arbitrator's failure to follow the procedures of Article 75 of the CPLR. Likewise, where a strong public policy is violated by the award or the award is irrational, vacatur is proper (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530 [2010]). Where the parties have submitted to "compulsory arbitration involving no-fault insurance, the standard of review is whether the award is supported by evidence or other basis in reason" (*Matter of Miller v Elrac LLC*, 170 AD3d 436 [1st Dept 2019]). This standard is interpreted to mean whether the arbitrator's decision is rational and not arbitrary or capricious (*id.*). However, the petition to vacate the arbitration award must be filed within 90-days of delivery of the award.

"Consistent with the public policy in favor of arbitration, the grounds specified in CPLR 7511 for vacating or modifying a no-fault arbitration award are few in number and narrowly applied" (*Matter of Mercery Cas. Co. v Healthmakers Med. Group, P.C.*, 67 AD3d 1017 [2d Dept 2009]). "Courts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined" (*Goldfinger v Lisker*, 68 NY2d 225 [1986]; *see also Geneseo Police Benevolent Assn. v Village of Geneseo*, 91 AD2d 858 [4th Dept 1982] *aff'd* 59 NY2d 726 [1983]). Consequently, errors of law or fact do not form a basis to vacate an arbitrator's award (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471 [2006]; *Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332 [2005]). "An arbitration award must be upheld when the arbitrator offer[s] even a barely colorable justification for the outcome reached" (*Susan D. Settenbrino, P.C. v Barroga-Hayes*, 89 AD3d 1094 [2d Dept 2011] quoting *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 479 [internal quotation removed]). Simply put, it is well established that an arbitrator's award is largely unreviewable by this Court (*Matter of Falzone*, 15 NY3d at 534).

Vacatur of the arbitration and master arbitration awards is denied. Contrary to American Transit's contention, neither *Matter of Petrofsky* nor *Matter of Miller v Elrac, LLC* provide that the court may review the arbitration award for errors of law, but rather provide that the master arbitrator may correct errors of law during its review (54 NY2d 207 [1981]; 170 AD3d 436 [1st Dept 2019]). "Although compulsory arbitration awards are subject to a broader scope of review than awards resulting from consensual arbitration, the scope of judicial review of such an arbitration award is still limited to whether the award is supported by the evidence or other basis in reason as appears in the record" (*Matter of Miller*, 170 AD3d at 437; *see also Mount St. Mary's Hosp. of Niagara Falls v Catherwood*, 26 NY2d 493 [1970]). It is well established that errors of law or fact by an arbitrator do not form a basis for the Court to vacate an arbitration award (*Wien & Malkin LLP*, 6 NY3d at 479; *Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332; *Motor Vehicle Acc. Indemnification Corp. v Aetna Casualty & Surety Co.*, 89 NY2d 214, 223 [1996]; *Steyn v CRTV, LLC*, 175 AD3d 1 [1st Dept 2019]; *Merrill Lynch, Pierce, Fenner & Smith Inc. v Graef*, 34 AD3d 220 [1st Dept 2006]). Nor did the master arbitrator err in refusing to disturb the arbitrator's discretionary findings as to the facts, credibility, and weight of the evidence (*Smith v Firemen's Ins. Co.*, 55 NY2d 224, 231-232 [1982] [master arbitrator's

review limited to the grounds set forth in CPLR § 7511 or whether the award: exceeds policy limits, is incorrect as a matter of law, improperly awards attorneys' fees, or is irreconcilable with an award rendered in health services association arbitration]). American Transit seeks to have this Court perform, effectively, *de novo* review of the arbitration awards, which is not available as the arbitration award does not exceed \$5,000.00 (Insurance Law § 5106[c]; 11 NYCRR § 65-4.10[h][2]).

Additionally, vacatur of the arbitration awards based upon an alleged erroneous application of 11 NYCRR § 65-3.3(e) is likewise denied. American Transit is precluded from advancing arguments regarding 11 NYCRR §65-3.3(e), as it did not first raise the issue before the master arbitrator (*American Transit Insurance Company v NextStep Healing, Inc.*, 79 Misc.3d 1203[A] [Sup Ct, Kings County 2023] [Maslow, J.]; *see generally, Rochester City Sch. Dist. v Rochester Teachers Assn*, 41 NY2d 578 [1977]). Consequently, the Court denies vacatur of the arbitration award or master arbitration award on the basis that the awards were flawed by an error of law.

Assuming, *arguendo*, that it was proper for the Court to reach the issue of mistake of law or fact, as American Transit contends, it would find no mistakes occurred. At bottom, American Transit's petition simply takes issue with the arbitrator weighing the evidence against it. An arbitrator properly acts within their discretionary authority when they weigh the evidence before them (*Matter of Global Liberty Ins. Co. v Coastal Anesthesia Servs., LLC*, 145 AD3d 644 [1st Dept 2016]; *Matter of Mercury Cas. Co. v Healthmakers Med. Group, P.C.* 67 AD3d 1017 [2d Dept 2009]). Similarly, were American Transit's argument regarding compliance with 11 NYCRR § 65-3.3(e) properly preserved, it nevertheless misses the mark. It asserts, in conclusory fashion, that Progressive never offered a reasonable excuse for its late claim of no-fault benefits; however, notably, this is not the reason the arbitrator rejected American Transit's timeliness defense. The arbitrator rejected American Transit's timeliness defense because American Transit's denial of Progressive's claim *failed to contain the requisite late notice language* under 11 NYCRR § 65-3.3(e) that a late notice would nevertheless be accepted upon a showing of a reasonable excuse. Thus, whether Progressive provided a reasonable excuse is irrelevant given that American Transit failed to include the mandatory reasonable excuse notice language in its denial.

Finally, there are no well-defined or strong policy or constitutional considerations which would otherwise favor vacatur of the arbitration award (*New York State Correctional Officers & Police Benevolent Ass'n v State*, 94 NY2d 321 [1999]).

Accordingly, the Court denies American Transit's petition to vacate the arbitration awards.

II. Confirmation of Awards

Where a motion to vacate an arbitration award is denied, the Court must confirm the award (CPLR § 7511[e]; *see also Matter of Board of Educ. of Ardsley Union Free School Dist., Town of Greenburgh v Ardsley Congress of Teachers*, 78 AD2d 879 [2d Dept 1975]). As the Court has denied vacatur of the awards, it need not reach the issue raised in Progressive's cross-motion whether an arbitrator's application of res judicata or collateral estoppel is unreviewable

by the Court. Were the Court to reach the issue, it would find the application of res judicata and collateral estoppel to be, at most, an unreviewable legal error (*see e.g. Matter of Falzone*, 15 NY3d at 534). Accordingly, the Court grants Progressive's cross-motion to confirm the arbitration awards.

III. Attorney's Fees

"The general rule is that in proceedings involving arbitration, as in other litigation, an attorney's fee is not recoverable unless provided for by agreement or statute" (*Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]). 11 NYCRR § 65-4.6(b) provides for attorney's fees in the amount of 20% of the arbitration award, plus interest. 11 NYCRR § 65-4.10(j)(4) provides that "in a court appeal from a master arbitration award" the Court shall fix the attorney's fees for the work performed in the court appeal. CPLR Article 75 actions to confirm a master arbitration award constitute "a court appeal" under the regulation (*Matter of Geico Ins. Co.*, 148 AD3d at 705); thus, the Court may set attorney's fees incurred for the instant special proceeding.

Where attorney fees are authorized, either by statute or agreement, the fee sought must be reasonable (*American Motorists Ins. Co. v Napco Sec. Sys.*, 244 AD2d 197 [1st Dept 1997]). In determining the reasonableness of attorney's fees, the Court considers the attorney's affidavit and submissions to elicit the "difficulty of the issues and the skill required to resolve them; the lawyers' experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained and the responsibility involved" (*Bankers Fed. Sav. Bank v Off W. Broadway Devs.*, 224 AD2d 376 [1st Dept 1996]).

Progressive's attorney's fees for the underlying arbitration are fixed at 20% of the arbitration award plus interest pursuant to 11 NYCRR § 65-4.6(b), not to exceed \$1,360.00. As to the additional fees incurred in this special proceeding, Progressive's counsel seeks \$1,500.00 representing 3 hours of work at \$500 per hour. The amount of time for which counsel seeks compensation is supported by counsel's records. As to the hourly rate billed by counsel, considering counsel's 20 years of no-fault experience, ability, and reputation; the benefit to the Medical Providers; the amount of time necessary; and the uncertainty of compensation, the Court finds \$500 per hour reasonable compensation. Accordingly, the \$1,500 attorney's fee for work performed in this matter is reasonable (11 NYCRR § 65-4.10(j)(4); *Matter of Geico Ins. Co.*, 148 AD3d at 705).

Accordingly, it is

ORDERED that American Transit's petition to vacate the arbitration and master arbitration awards is denied; and it is further

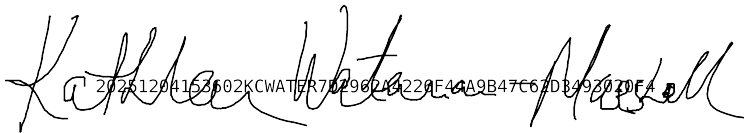
ORDERED that the cross-motion of Progressive Surgical Center, P.C. to confirm the arbitration and master arbitration awards is granted; and it is further

ORDERED, DECLARED, and ADJUDGED that Progressive Surgical Center P.C. shall have judgment and does recover the amount of the arbitration award in the sum of

\$4,979.34 as against American Transit Insurance Company with interest at 2%, pursuant to 11 NYCRR § 65-3.9, from the date of the arbitration award, November 18, 2024, together with costs and disbursements, as calculated by the Clerk of the Court; and it is further

ORDERED, DECLARED, and ADJUDGED that Progressive Surgical Center P.C. shall have judgment and does recover as and for reasonable attorney’s fees the sum of \$1,500.00 for this special proceeding, plus statutory attorney’s fees of 20% of the arbitration award together with interest as calculated by the Clerk of the Court in the aforementioned paragraph under 11 NYCRR § 65-4.6(b), plus \$65.00 for the master arbitration fee; and it is further

ORDERED that judgment shall be submitted to the Clerk of the Court and not to chambers or the part, unless directed otherwise by the Clerk of the Court.



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12/4/2025
DATE

KATHLEEN WATERMAN-MARSHALL,
J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: