New York Official Reports

Unreported Disposition
78 Misc.3d 1242(A), 188 N.Y.S.3d 916 (Table), 2023 WL 3669716 (N.Y.Sup.), 2023 N.Y. Slip Op. 50506(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

***1** American Transit Insurance Company, Petitioner,

v.

Nexray Medical Imaging PC D/B/A Soul Radiology, A/A/O Carlos Guzman, Respondent.

Supreme Court, Kings County
Index No. 533041/2022
Decided on May 25, 2023

CITE TITLE AS: American Tr. Ins. Co. v Nexray Med. Imaging PC

ABSTRACT

Arbitration
Compulsory Arbitration
No-Fault Insurance—No-fault arbitrator's role does not include perusing examination under oath transcript to find evidence supporting insurer's claim of lack of coverage, it being insurer's burden to provide such.

Insurance
No-Fault Automobile Insurance
Compulsory Arbitration—No-fault arbitrator's role does not include perusing examination under oath transcript to find evidence supporting insurer's claim of lack of coverage, it being insurer's burden to provide such.

American Tr. Ins. Co. v Nexray Med. Imaging PC, 2023 NY Slip Op 50506(U). Arbitration—Compulsory Arbitration—No-Fault Insurance—No-fault arbitrator's role does not include perusing examination under oath transcript to find evidence supporting insurer's claim of lack of coverage, it being insurer's burden to provide such. Insurance—No-Fault Automobile Insurance—Compulsory Arbitration—No-fault arbitrator's role does not include perusing examination under oath transcript to find evidence supporting insurer's claim of lack of coverage, it being insurer's burden to provide such. (Sup Ct, Kings County, May 25, 2023, Maslow, J.)

APPEARANCES OF COUNSEL

Larkin Farrell LLC, New York City (David Fair of counsel), for petitioner.
Roman Kravchenko, Melville, for Respondent.

OPINION OF THE COURT

Aaron D. Maslow, J.

The following numbered papers were read on this petition and cross-petition:

Petition (NYSCEF Doc No. 1)

Notice of Petition (NYSCEF Doc No. 2)

Exhibit A - Arbitration Award (NYSCEF Doc No. 3)

Exhibit B - Master Arbitration Award (NYSCEF Doc No. 4)

Exhibit C -- Respondent's Arbitration Request Form and Arbitration Submission (NYSCEF Doc No. 5)

Exhibit D -- Petitioner's Arbitration Submission and Master Arbitration Brief (NYSCEF Doc No. 6)

Statement of Authorization for Electronic Filing (NYSCEF Doc No. 7)

Request for Judicial Intervention (NYSCEF Doc No. 8)

Affidavit of Service (NYSCEF Doc No. 9)

Statement of Authorization for Electronic Filing (NYSCEF Doc No. 10)

Affidavit of Service (NYSCEF Doc No. 11)

Statement of Authorization for Electronic Filing (NYSCEF Doc No. 12)

Notice of Cross-Petition (NYSCEF Doc No. 13)

Cross-Petition (NYSCEF Doc No. 14) [1]

ISSUES PRESENTED

Should a No-Fault arbitration award be sustained where the insurer denied payment on the ground that there was a fact or founded belief that health services were unrelated to the motor vehicle accident but the insurer failed to submit an explanatory brief, witness statements, medical records, or an expert affidavit to support its defense?

Is it the role of a No-Fault hearing arbitrator to peruse a transcript of an examination under oath for the purpose of locating testimony to support such a defense, in the absence of the insurer's highlighting the specific substantiating testimony?

Background

Petitioner American Transit Insurance Company ("ATIC") commenced this CPLR Article 75 proceeding by notice of petition, seeking an order and judgment vacating a No-Fault Insurance master arbitration award of Victor J. D'Ammora, Esq. (dated September 8, 2022), which affirmed the arbitration award of Kihyun Kim, Esq. (dated June 4, 2022) granting Respondent Nexray Medical Imaging PC's ("Nexray") claim for No-Fault insurance ***2** compensation for health service expenses.[2, 3] Arbitrator Kim awarded $878.67 to Nexray as compensation for performing a left knee MRI on Carlos Guzman, its assignor[4] ("Assignor"), who claimed to have been injured in a motor vehicle accident on September 20, 2019. (NYSCEF Doc Nos. 2, Notice of Petition; 1, Petition.)

Respondent Nexray has opposed ATIC's petition to vacate the master arbitration award and it cross-petitioned for a judgment confirming the master arbitration award and awarding $878.67 as principal, statutory interest, the $40.00 arbitration filing fee, attorney's fees, and costs and disbursements (NYSCEF Doc No. 13, Notice of Cross-Petition; 14, Cross-Petition).

The petition and cross-petition were scheduled for oral argument on May 19, 2023, before this Court. Prior thereto, in accordance with IAS Part 2 Rules, the parties were notified that the matter would be determined on the submissions.

The underlying arbitration which is the subject of this proceeding was organized by the American Arbitration Association ("AAA"), which assigned Case No. 17-21-1191-8028[5] to it. The AAA has been designated by the New York State Department of Financial Services to coordinate the mandatory arbitration provisions of Insurance Law § 5106 [b], which provides:

> Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party ["No-Fault insurance"] benefits, or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent.

Insurance Law article 51 provides for the payment of basic economic loss incurred by persons injured in motor vehicle accidents. Included within basic economic loss are first-party benefits for medical and other professional health services.[6] First-party benefits are more commonly known as "No-Fault benefits."[7]

In furtherance of the statutory scheme, a comprehensive set of No-Fault Regulations were promulgated by the Superintendent of Insurance (presently Superintendent of Financial Services). They are contained at 11 NYCRR Part 65. Said part is subdivided into five subparts which encompass the following topics: prescribed insurance policy endorsements, rights and liabilities of self-insurers, claims for benefits, arbitration, and unauthorized providers of health services. Part 65 is a/k/a Insurance Regulation 68.

Generally, the claims process for health service bills[8] for No-Fault compensation begins with the submission by a health service provider of a claim form (usually, but not always, a Form NF-3 verification of treatment by attending physician or other provider of health service).[9] Besides providing information regarding the injured person, diagnoses, projected treatment, etc., ***3** the claim form includes a bill for services performed. The claim form can be submitted directly by the injured person to the No-Fault insurer but over many decades a practice developed by which the health service providers submit the claim forms. As noted in footnote 4, they possess standing to do so by virtue of having received signed assignments of benefits from the injured persons.[10, 11] The insurer must either pay or deny the bill within 30 days, or seek additional verification within 15 business days. If it denies payment, it must issue

a Form NF-10 denial of claim [12] identifying why the bill was not paid. (*See* Insurance Law § 5106 [a]; 11 NYCRR 65-3.5 [b]; *Viviane Etienne Medical Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 505 [2015]; *New York & Presbyterian Hospital v Progressive Casualty Ins. Co.*, 5 AD3d 568, 569-570 [2d Dept 2004]). The 30-day deadline does not apply to situations where the insurer claims that health services were not related to the subject motor vehicle accident (*see Central Gen. Hosp. v. Chubb Group*, 90 NY2d 195 [1997]).

The record evidence submitted in this Article 75 proceeding revealed that the underlying arbitration involved one Form NF-3 claim form (bill) submitted by Nexray to ATIC for payment. It was in the amount of $878.67 and it covered a left knee MRI of March 6, 2020. This was in accordance with the procedure outlined in the previous paragraph for the submission of claims for No-Fault compensation. After requesting additional verification, and receiving it on June 19, 2020, ATIC issued a Form NF-10 denial of claim on July 13, 2020.

The denial of claim asserted: "Based on American Transit's investigation and EUO [examination under oath] testimony conducted on 6/17/20, American Transit is asserting a lack of coverage, as it has established the 'fact or founded belief' that the claimant's treated condition was unrelated to the motor vehicle accident. The eligible injured person failed to establish that the alleged injuries were causally related to the motor vehicle accident." (NYSCEF Doc No. 6, ATIC's Arbitration Submission and Master Arbitration Brief, at 4 [13]). A fee defense was also asserted but not pursued in arbitration.

Arbitrator Kihyun Kim's Award

The record evidence reveals further that on May 5, 2002, Arbitrator Kihyun Kim conducted a hearing at which Alexander Mun, Esq., from Russell Friedman & Associates LLP, appeared for Nexray, and Helen Cohen, Esq., appeared for ATIC (NYSCEF Doc No. 3, Arbitration Award, at numbered p 1).

In his award, Arbitrator Kim stated that the hearing documents were contained in the ***4** AAA's ADR Center [14]. ATIC conceded that the fee charged by Nexray was consistent with the applicable fee schedule. (*Id*. at numbered p 2.) The only issue in the case was "whether [ATIC] established its lack of coverage defense" (*id*. at numbered p 1).

In support of its claim that it established the fact or founded belief that Assignor's treated condition was unrelated to the subject motor vehicle accident, ATIC's counsel maintained that Assignor's EUO "testimony revealed that the accident was a low impact condition, and that the scope and amount of treatment was disproportionate to the nature of the accident. She noted, among other things[,] that the Assignor did not go to the hospital and was not treated at the scene. Counsel further advised that Applicant's [Nexray] owner has been indicted for his participation in a no fault fraud scheme involving Applicant." (*Id*. at numbered p 4.) In terms of evidence, ATIC relied on "a Report of Motor Vehicle Accident - MV104; the Assignor's NF-2 [application for No-Fault benefits]; the EUO scheduling letters; and the transcript of the Examination Under Oath of the Assignor, dated June 17, 2020" (*id*.).

Nexray's counsel argued that ATIC "failed to upload sufficient proof to the record to establish its defense" (*id*.).

Arbitrator Kim reviewed case law pertaining to No-Fault insurers' defense that a purported accident was not a covered event because there was a fact or founded belief that a condition and/or treatment was not proximately related to it (*id*. at numbered pp 2-3):

- *Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195 [1997]: The initial burden is on the insurer to come forward with proof establishing by "fact or founded belief" that the claimed injuries have no nexus to the accident.

- *Mt. Sinai Hosp. v Triboro Coach Inc.*, 263 AD2d 11 [2d Dept. 1999]: Causation is presumed since it would not be reasonable to insist that an applicant must prove as a threshold matter that the patient's condition was caused by the automobile accident; when alleging a lack of coverage defense, the insurer bears the burden of coming forward with admissible evidence of the fact of lack of coverage or of the foundation for its belief that there is no coverage.

- *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13 [2d Dept. 2009]: This defense often involves a fact pattern which calls for the insurer to

present evidence by a medical expert who is qualified to render an opinion on causality.

- *A.B. Med. Servs. PLLC v State Farm Mut. Auto. Ins. Co.*, 7 Misc 3d 822 [Civ Ct, Kings County 2005]: When arguing fraud as a defense, the insurer bears the burden of presenting sufficient evidence of the fact of fraud or of the foundation for its belief that fraud occurred; besides medical evidence an affidavit by a special investigator can suffice; if the insurer carries its burden then the insured must rebut it or succumb.

- *A.B. Med. Servs. PLLC v Eagle Ins. Co.*, 3 Misc 3d 8 [App Term, 2d Dept, 9th & 10th ***5** Jud Dists 2002]: An insurer's founded belief cannot be based upon unsubstantiated hypotheses and suppositions.

Applying the law to the evidence presented to him, Arbitrator Kim made the following findings (NYSCEF Doc No. 3, Arbitration Award, at numbered p 4):

> I find that Respondent failed to establish its lack of coverage/causation defense. I find that there is insufficient credible evidence in the record to support a founded belief that, "the claimant's treated condition was unrelated to the motor vehicle accident." Respondent did not upload any explanatory brief, any witness statements, any medical records, any expert affidavit regarding causation, any SIU affidavit discussing Respondent's investigation or explaining how or why Respondent's determination was made, or any other actual proof to support and substantiate its defense, other than the EUO transcript of the Assignor, and the MV-104, Report of Motor Vehicle Accident. I have carefully review[ed] the EUO transcript of the Assignor, as well as the EUO transcript of the other claimant/passenger in the linked case, and I find it unclear as to what specific testimony Respondent believes adequately supports its assertions/defense and how Respondent made the leap that the Assignor's treated condition was unrelated to the motor vehicle accident. While counsel asserted that the accident was not significant and that the asserted injuries were disproportionate to the low impact nature of the accident, I do not [ ] believe that the testimonial evidence alone was sufficient to reach such conclusion, particularly without the presentation of some actual medical evidence and/or expert opinion. With respect to the asserted indictment of Applicant's owner, Respondent did not present any actual evidence of any indictment nor any evidence that any such indictment related to the subject accident, the claimants and/or claims at issue in this proceeding. If Respondent's investigation was broader than what was presented herein, then Respondent should have uploaded such supporting evidence to the record herein. In sum, only limited evidence was uploaded to the record and on this record, the evidence submitted to the record in this case does not, in my view, make out a prima facie case in support of Respondent's asserted defense. Based on the totality of the evidence in the record, Respondent has failed to meet its initial burden and its denial cannot be sustained. Accordingly, Applicant is entitled to reimbursement in the amount of $878.67. . . .

In essence, Arbitrator Kim held that there was a lack of evidence to support ATIC's position that it established the fact or founded belief that Assignor's condition and treatment were unrelated to the subject accident.

Arbitrator Kim awarded the $878.67 principal billed. He also awarded statutory interest of 2% per month, an attorney's fee, and return of the $40 filing fee (*id*. at numbered pp 5-6; see 11 NYCRR 65-4.5 [s]).

Master Arbitrator Victor J. D'Ammora's Award

ATIC filed for master arbitration to appeal Arbitrator Kim's award. It argued that the latter's award was irrational (NYSCEF Doc No. 6, ATIC's Arbitration Submission and Master ***6** Arbitration Brief, at pp 70-79).

Master Arbitrator D'Ammora held that while a hearing arbitrator's award can be reversed if it is incorrect as a matter of law, a master arbitrator exceeds his statutory power by making his own factual determination, reviewing factual and procedural errors committed during the course of the arbitration, weighing the evidence, or resolving credibility issues (NYSCEF Doc No. 4, Master Arbitration Award, at numbered p 2, citing 11 NYCRR 65-4.10 [a] [4]) and *Mott v State Farm Ins. Co.*, 55 NY2d 224 [1982]).

He noted that Arbitrator Kim reached his determination after reviewing the submitted evidence—that there was insufficient evidence to sustain a lack of coverage defense. "Arbitrator Kim's conclusions and findings were in his discretion and interpretation of the evidence. It cannot be regarded as reversible error within this Master Arbitrator's

purview. This Master Arbitrator cannot conduct a de novo review and substitute my interpretation and view of the evidence for that of Arbitrator Kim. In particular, as here, Arbitrator Kim's determination is rational and supported by the record." (NYSCEF Doc No. 4, Master Arbitration Award, at numbered p 2.) The award was affirmed along with a $195.00 attorney's fee (*id*. at numbered pp 3-4).

ATIC's Petition to Vacate

ATIC's CPLR Article 75 petition to vacate stated that the claim was denied based upon ATIC's investigation and the EUO testimony—that there was a fact or founded belief that Assignor's treated condition was unrelated to the motor vehicle accident and that Assignor failed to establish that the alleged injuries were causally related to the accident (NYSCEF Doc No. 1, Petition, ¶ 26). "The arbitration decision was arbitrary and capricious, irrational and without a plausible basis" (*id*. ¶ 35), in that "Arbitrator Kihyun Kim failed to follow well settled law" (*id*. ¶ 40). The petition proceeded to argue that ATIC needed only to show a founded belief to support its defense (*id*. ¶ 40), and that circumstantial evidence could support it (*id*. ¶ 47). "[ATIC] offered evidence to establish the 'founded belief' of fraud. [Nexray] did not offer any evidence to rebut that showing. The arbitrator ruled for [Nexray] despite the fact that [ATIC] offered evidence of a founded belief and [Nexray] failed to offer any evidence to rebut that showing. In doing so the arbitrator failed to follow well settled law."

The petition concluded by asserting that Arbitrator Kim's decision was "arbitrary and capricious, without rational basis and incorrect as a matter of law because zero evidence simply cannot outweigh evidence" (*id*. ¶ 49). ATIC was "entitled to a declaration that the arbitration decisions of Kihyun Kim, Esq. and Vic D'Ammora, Esq. in the matter designated AAA number 99-21-1191-8208 have no force or effect" (*id*. ¶ 50).

Nexray's Cross-Petition to Confirm

Nexray argued in its cross-petition most significantly that the arbitration awards had to be confirmed if they were supported by evidence or other basis in reason (citing *Matter of Petrofksy v Allstate Ins. Co.*, 54 NY2d 207 [1981]); rational (citing *Matter of Unigard Mut. Ins. Co. v Hartford Ins. Group*, 108 AD2d 917 [2d Dept 1985]); and not inapposite to settled law (citing *Matter of Global Liberty Ins. Co. v Therapeutic Physical Therapy, P.C.*, 148 AD3d 502 [1st Dept 2017]). ATIC did not meet its burden of establishing that the master arbitration award did ***7** not meet this criteria. (*See generally* NYSCEF Doc No. 14, Cross-Petition ¶¶ 21-29.)

Besides seeking confirmation of the hearing arbitration award which was affirmed by the master arbitrator, Nexray sought interest, attorney's fees, return of the arbitration filing fee, and costs and disbursements (NYSCEF Doc No. 13, Notice of Cross-Petition, at numbered p 1). Notably, Nexray did not submit any calculation of an attorney's fee for its opposition to the Article 75 petition and maintenance of the cross-petition.

No-Fault Insurance Arbitration

When the No-Fault Law was first enacted by the Legislature in Chapter 13 of the Laws of 1973 to take effect February 1, 1974, § 675 of the Insurance Law was added. In subdivision 2 thereof, insurers were required to provide claimants with an arbitration option for disputes involving liability for first-party benefits. This provision was amended in Chapter 892 of the Laws of 1977, when several changes were made to the 1973 version. [15] The provision regarding arbitration in § 675 was amended to add the following language:

> An award by an arbitrator may be vacated or modified by a master arbitrator in accordance with simplified procedures to be promulgated or approved by the superintendent [of insurance]. The grounds for vacating or modifying an arbitrator's decision by a master arbitrator shall not be limited to those grounds for review set forth in article seventy-five of the civil practice law and rules. The decision of a master arbitrator shall be binding except for the grounds for review set forth in article seventy-five of the civil practice law and rules, and provided further that where the amount of such master arbitrator's award is five thousand dollars or greater, exclusive of interest and attorney's fees, the insurer or the claimant may institute an action in a court of competent jurisdiction to adjudicate the dispute de novo. [16]

The provisions regarding No-Fault insurance arbitration remained in the recodification of the Insurance Law enacted in Chapters 367 and 805 of the Laws of 1984. The arbitration provisions were set forth in § 5106, and subdivisions (b) and (c) now read as follows:

> (b) Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party benefits, or additional

> first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent. Such simplified procedures shall include an expedited ***8** eligibility hearing option, when required, to designate the insurer for first party benefits pursuant to subsection (d) of this section. The expedited eligibility hearing option shall be a forum for eligibility disputes only, and shall not include the submission of any particular bill, payment or claim for any specific benefit for adjudication, nor shall it consider any other defense to payment.
>
> (c) An award by an arbitrator shall be binding except where vacated or modified by a master arbitrator in accordance with simplified procedures to be promulgated or approved by the superintendent. The grounds for vacating or modifying an arbitrator's award by a master arbitrator shall not be limited to those grounds for review set forth in article seventy-five of the civil practice law and rules. The award of a master arbitrator shall be binding except for the grounds for review set forth in article seventy-five of the civil practice law and rules, and provided further that where the amount of such master arbitrator's award is five thousand dollars or greater, exclusive of interest and attorney's fees, the insurer or the claimant may institute a court action to adjudicate the dispute de novo.

Insofar as is here relevant, the No-Fault Insurance Regulations promulgated by the Superintendent of Insurance provided that a master arbitrator may vacate or modify a hearing arbitrator's award where it "was incorrect as a matter of law (procedural or factual errors committed in the arbitration below are not encompassed within this ground)" (11 NYCRR 65.18 [a] [4]). This regulatory language was carried over into the revised Regulations promulgated in 2002, in 11 NYCRR 65-4.10 (a) (4). [17] A master arbitrator may also vacate or modify a hearing arbitrator's award under certain other grounds also (*see* 11 NYCRR 65-4.10 [a]). [18]

Discussion

The burden of proof on the issue of whether a motor vehicle accident caused a medical condition for which a person was treated and the No-Fault insurer was billed falls upon the insurer if the latter asserts a lack of nexus between the accident and the condition; the underlying purpose of the No-Fault Law would be undermined if a claimant health care provider were required to prove as a threshold matter that a patient's condition was caused by the accident and unrelated to his or her entire medical history (*see* *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 18-19 [2d Dept 2009]). An expert's affirmation is needed to provide a factual foundation for an insurance carrier's good faith belief that an alleged injury did not arise out of an insured accident; speculation or wishful thinking does not suffice (*see* *Mount Sinai Hosp. v Triboro Coach Inc.*, 263 AD2d 11 [2d Dept. 1999]).

The courts have also recognized that a prima facie case of lack of coverage may be established by other than a medical expert. This can include a biomechanical engineer's report (*e.g.*, *American Tr. Ins. Co. v AAAMG Leasing Corp.*, 2020 NY Slip Op 31811[U] [Sup Ct, NY County 2020]); *Liberty Mut. Ins. Co. v Hayes*, 2018 NY Slip Op 31283[U] [Sup Ct, NY County 2018]; a special investigator's affidavit (*e.g.*, *A.B. Med. Servs. PLLC v State Farm Mut. Auto. Ins. Co.*, 4 Misc 3d 143[A], 2004 NY Slip Op 51104[U] [App Term, 2d Dept, 2nd & 11th Dists 2004]); or a low-impact study (*e.g.*, *A.B. Med. Servs. PLLC v New York Cent. Mut. Fire Ins. Co.*, 12 Misc 3d 140[A], 2006 NY Slip Op 51347 [U] [App Term, 2d Dept, 2d & 11th Dists 2006]).

A claimant's [health service provider] prima facie showing establishes a presumption of coverage, and the burden of going forward on the issue of coverage falls upon the insurer; once the insurer comes forward with proof for its belief that the claimed loss was a staged accident, the burden shifts to the claimant to prove coverage by a preponderance of the evidence (*see New York Massage Therapy P.C. v State Farm Mut. Ins. Co.*, 14 Misc 3d 1231[A], 2006 NY Slip Op 52573[U] [Civ Ct, Kings County 2006]). The insurer bears the burden of coming forward with evidence of the fact of fraud or of the foundation for its belief that fraud occurred, but the burden of persuasion is on the applicant to prove that the loss was a covered event under the policy (*see A.B. Med. Servs. PLLC v State Farm Mut. Auto. Ins. Co.*, 7 Misc 3d 822 [Civ Ct, Kings County 2005]). At trial, the ultimate burden of proof on issues of causal relationship of injuries to the ***9** accident in question lies with the plaintiff (*see Dayan v Allstate Ins. Co.*, 49 Misc 3d 151[A], 2015 NY Slip Op 51751[U] [App Term, 2d Dept, 2d, 11th & 13th Dists 2015]).

The insurer must demonstrate that it has a founded basis for believing that the collision was intentionally caused but the burden of persuasion remains on the claimant, who must prove its case by a fair preponderance of the credible evidence; if the evidence weighs against the claimant or it is so evenly balanced that it is impossible to determine the matter, then judgment must be given for the insurer (*see* *V.S. Med. Servs., P.C. v Allstate Ins. Co.*, 11 Misc 3d 334, 342-343 [Civ Ct, Kings County 2006], *affd* 25 Misc 3d 39 (App Term, 2d Dept, 2d, 11th & 13th Dists 2009]).

V.S. Med. Servs. provided an example of the evidence which demonstrated that the insurer established a founded belief that injuries did not arise from a covered accident. In that case, the insurer presented credible evidence that the subject vehicle was an older model, that the collision took place shortly after insurance was procured, that insurance on the vehicle was cancelled after the subject collision and once before after a collision, that there were several passengers in the vehicle, that no occupant underwent emergency room treatment, that there were material discrepancies in EUO testimony among the occupants as to the number and genders of people in the vehicle, where they were going, and whether the driver knew the vehicle owner, and that the vehicle sustained only a small scratch—that the collision was staged because at least one driver intended to make contact. The burden then shifted to the claimant health service provider; the latter having failed to produce the alleged injured persons or any witnesses to the collision, it failed to carry its burden of proving that the collision was a covered accident. (*V.S. Med. Servs., P.C.*, 11 Misc 3d at 343-344 ["defendant's proof, which plaintiff failed to rebut, established by a preponderance of the evidence its defense of lack of coverage"].)

Very rarely will a case contain a Perry Mason-like moment where there is a confession that an assignor injured person's injuries were not the result of the claimed accident. Of necessity an insurer's founded belief that a collision was staged will be established by circumstantial evidence. "Circumstances insignificant in themselves may acquire probative force as links in the chain of circumstantial proof." (*A.B. Med. Servs. PLLC v State Farm Mut. Auto. Ins. Co.*, 7 Misc 3d at 827-828 [Civ Ct, Kings County 2005], quoting *Van Iderstine Co. v Barnet Leather Co.*, 242 NY 425, 435 [1926]). For example, where a vehicle was involved in several collisions within a short period of time after the insurer issued an insurance policy, this may satisfy the need for a founded belief necessary to support a denial grounded in asserted fraud (*e.g.*, *State Farm Mut. Auto. Ins. Co. v Laguerre*, 305 AD2d 490 [2d Dept 2003]). Where a driver rear ends another vehicle two days after taking out insurance, and again less than sixty days after the first collision, and his written and recorded statements contain discrepancies, this constitutes compelling circumstantial evidence that there was an intentional collision staged for the purpose of insurance fraud (*e.g.*, *National Grange Mut. Ins. Co. v Vitebskaya*, 1 Misc 3d 774 [Sup Ct, Kings County 2003]).

Notwithstanding the foregoing, unsupported conclusions and suspicions, as well as unsubstantiated hypotheses and suppositions are insufficient to raise a triable issue of alleged fraud (*see* *A.B. Medical Services PLLC v Eagle Ins. Co.*, 3 Misc 3d 8 [App Term, 2d Dept, 9th & 10th Dists 2002]). To create a trial issue of fraud or lack of coverage, the specific facts must be alleged with particularity (*see Vital Points Acupuncture, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 6 Misc 3d 1031[A], 2005 NY Slip Op 50267[U] [Civ Ct, Kings County 2005]).

Clearly, Arbitrator Kim did not misapply well-settled law in the arbitration at bar. As ***10** indicated above (*supra* at 5), he noted case law governing the adjudication of insurer defenses that there was a fact or founded belief that a condition and/or treatment was not proximately related to an alleged accident. What ATIC is challenging as a misapplication of settled law is Arbitrator Kim's finding that its evidence did not meet the evidentiary minimum to make out its initial burden of proof. That is an issue of fact—not an issue of law.

The provision in 11 NYCRR 65-4.10 [a] [4] that a No-Fault insurance arbitration award may be vacated where it was incorrect as a matter of law refers to substantive fact—not issues of fact (*see American Transit Ins. Co. v Right Choice Supply, Inc.*, —Misc 3d—, 2023 NY Slip Op 23039, *11 [Sup Ct, Kings County 2023]).

ATIC did not submit witness statements, supporting medical records, or a medical or other expert affidavit or report. It did not submit evidence of an indictment of the owner of Nexray, which it mentioned, the argument inferentially being that the alleged accident was fraudulent and the MRI unnecessary. ATIC merely relied on conclusory assertions of counsel which focused in large part on Assignor's EUO testimony. ATIC did not even submit a brief to Arbitrator Kim summarizing what EUO testimony supported its position. In essence, it appears that ATIC expected the arbitrator himself to peruse

the transcript to locate questionable responses by Assignor which might be indicative that something was awry. This is not the role of the arbitrator.

This Court notes that most No-Fault insurance arbitrations organized by the AAA are scheduled at 15-minute intervals. [19] Usually the only evidence iare the documentary submissions of the parties. In some instances where medical necessity is an issue a treating health provider or a peer review doctor may be called as a witness by the applicant or respondent respectively. In rare instances, an injured person may testify, especially if lost wages is an issue. The testimony of an SIU investigator might be offered where the respondent insurer asserts a contrived accident.

Here, it is not exactly clear whether ATIC's defenses of lack of coverage and lack of a relationship between the accident and the treated condition were premised on a belief that the accident was staged, that Nexray performed the MRI without regard to whether Assignor actually sustained injuries in the accident, or that Assignor indeed had a condition for which an MRI was appropriate but the condition was unrelated to the accident.

At times a No-Fault arbitration respondent insurer will call the arbitrator's attention to the fact that a transcript of the examination under oath taken of the assignor was included in its documentary submission and it alone supports the defense. Relying on this poses litigation risks for the insurer if the lack of coverage is premised upon an underlying theory that the health service was performed without regard to whether the injured person-assignor actually sustained injuries in the accident or that the injured person-assignor indeed had a condition for which the health service was appropriate but the condition was unrelated to the accident; such an underlying theory really necessitates expert medical opinion evidence and an EUO transcript likely will not suffice. Some insurers may rely on a biomechanical expert report which might be probative or not, depending on the arbitrator's assessment of it.

Situations where the lack of coverage defense is predicated on an underlying theory that the accident was staged calls for proper advocacy by the respondent No-Fault insurer. ***11** Submitting a transcript alone without a brief, affidavit, SIU report, or counsel specifically detailing the testimony supporting its position unfairly places the hearing arbitrator in a quandary. The arbitrator has two options: (1) find that the respondent insurer failed to identify the supporting testimony, or (2) review the transcript himself and determine if any of its contents supports the fact or founded belief that there was a lack of causation due to a staged accident, i.e., that fraud took place.

The arbitrator must remain objective and impartial. It is unfair for a respondent insurer to place the arbitrator in the role of evidence explorer on its behalf. The arbitrator is not an investigator or detective. To argue to an arbitrator, “Our defense relies on the EUO testimony,” or offer a similar statement, without any identification of the transcript components being relied on is improper advocacy, and an arbitrator should decline the implied invitation to search the transcript to locate testimony supporting the respondent's defense. It is unknown whether ATIC's counsel made such a statement to Arbitrator Kim. From his award, it is evident that nothing was offered by way of specification as to particular testimony in one or more EUO transcripts. Arbitrator Kim did write that he “carefully review[ed] the EUO transcript of the Assignor, as well as the EUO transcript of the other claimant/passenger in the linked case, and I find it unclear as to what specific testimony Respondent believes adequately supports its assertions/defense and how Respondent made the leap that the Assignor's treated condition was unrelated to the motor vehicle accident (NYSCEF Doc No. 3, Arbitration Award, at numbered p 4).” This burden of reviewing the transcript should not have been placed on Arbitrator Kim. And if ATIC asked him to perform this task, it should not have done so. Rather, ATIC should have submitted a brief, affidavit, or investigator's report identifying by page and line the portions of the testimony it claims were inculpatory and thus made out its defense; or counsel at the hearing should have done so. Preferably the specification should be in writing as a document included in the arbitration submission.

If a No-Fault arbitration hearing respondent (the insurer) fails to adequately support its defense of lack of causation premised under any of the underlying theories -- but especially one claiming that no true accident took place -- because it failed to identify specific EUO testimony, it lacks a legal basis to challenge the hearing arbitrator's award on appeal, either before the master arbitrator or the Article 75 judge.

The foregoing perspectives of this Court are in harmony with the expressions of sister courts. “While plaintiff [insurer] submits the transcripts of the claimants' EUOs, it does not cite to any line or page of the claimants' testimony to support such claims. The Court should not have to undertake the toilsome

task of reading through pages and pages of testimony in order to ascertain which portions support plaintiff's supposed contentions" that there exists a founded belief that the alleged injuries did not arise from a covered accident. (*Unitrin Advantage Ins. Co. v Advanced Orthopedics and Joint Preservation P.C.*, 2018 NY Slip Op 33296[U] *6-7 [Sup Ct, NY County 2018]). Similarly, it has been held, "It is not the duty of the arbiter, be it an arbitrator or Court, to parse though hundreds of pages of exhibits to make out a claim or defense for a party (*see e.g. Barsella v. City of New York*, 82 AD2d 747, 748 [1st Dept 1981]); such duty belongs to counsel, as advocate. Failing to elucidate evidence in support of a party's claim is not error of the arbitrator but is rather error of counsel, and such failure does not render an arbitrator's award arbitrary and capricious [citation omitted]." *Country-Wide Ins. Co. v M El Sayed Physical Therapy, P.C.*, 2022 NY Slip Op 31874[U] [Sup Ct, NY County 2022]).

There being a paucity of evidence to support ATIC's defense of a fact or founded belief ***12** that Assignor's treated condition was unrelated to the alleged motor vehicle accident, Arbitrator Kim's factual determination against ATIC was eminently reasonable.

Lower and master arbitration awards were supported by a reasonable hypothesis and were not contrary to "fairly described settled law" when a biomechanical report was rejected by the lower arbitrator, who found as follows: "I have reviewed the EUO transcript in its entirety and I do not find sufficient evidence within the EIP's testimony that would give rise to establishing a basis for Respondent's denial. As for the opinion of the Respondent's accident reconstruction expert, I find it is insufficient to establish that the EIP's injuries were not causally related to the underlying accident. Unless an injury for which an EIP is treated is so clearly unrelated to the biomechanics of a motor vehicle accident, a low-impact study (standing alone without any accompanying medical evidence—which does not explain how the EIP's injuries are causally incompatible with the subject accident) does not suffice to prove prima facie that the injuries were not causally related to the accident. Bronx Radiology, P.C. v. New York Cent. Mutual Fire Ins. Co., 17 Misc 3d 97, 847 N.Y.S.2d 313 (App. Term 1st Dept. 2007). [¶] In this case, I find the Respondent has not submitted sufficient evidence to establish its defense that the treatment was not causally related to the MVA." (*Matter of Am. Tr. Ins. Co. v North Shore Family Chiropractic, P.C.*, 2022 NY Slip Op 32663[U] *1-2 [Sup Ct, Kings County 2022]). The decision of Hon. Justice Peter P. Sweeney in the case found that "the lower and master arbitration awards were supported by a reasonable hypothesis' and [were] not contrary to what could be fairly described as settled law. The determinations of the master and lower arbitrators had evidentiary support and a rational basis. (*Id*. at *3.) So too did Arbitrator Kim's award.

Since the instant Article 75 proceeding to vacate is one where vacatur of the master arbitration award is sought, this Court must assess whether Master Arbitrator D'Ammora erred as a matter of law or fact. His findings are related hereinabove at page 7. After reviewing the case law on master arbitration appeals and Arbitrator Kim's findings, Master Arbitrator D'Ammora concluded as follows: "I cannot conclude on the basis of the record before me that Arbitrator Kim's decision was incorrect as a matter of law or arbitrary or capricious" (NYSCEF Doc No. 4, Master Arbitration Award, at numbered p 2).

The standard for Article 75 court scrutiny is whether the master arbitration award was so irrational with respect to *settled law* as to require vacatur (*see Matter of Smith v Firemen's Ins. Co.*, 55 NY2d 224, 232 [1982]; *Matter of Acuhealth Acupuncture, PC v Country-Wide Ins. Co.*, 170 AD3d 1168 [2d Dept 2019]; *Matter of Acuhealth Acupuncture, P.C. v New York City Transit Authority*, 167 AD3d 314 [2d Dept 2018]; *Matter of Acuhealth Acupuncture, P.C. v Country-Wide Ins. Co.*, 149 AD3d 828 [2d Dept 2017]). A master arbitrator's review of a hearing arbitrator's award where an error of a rule of substantive law is alleged must be upheld unless it is irrational (*see Golden Earth Chiropractic & Acupuncture, PLLC v Global Liberty Ins. Co. of New York*, 54 Misc 3d 31 [App Term, 2d Dept, 2d, 11th & 13th Dists 2016]). Clearly, Master Arbitrator D'Ammora did not err in concluding that Arbitrator Kim's decision was not incorrect as a matter of law, because this Court reviewed the latter's discussion of the law and found no error. Cases cited by Arbitrator Kim were directly on point in terms of the law and were likewise cited by this Court.

Did Master Arbitrator D'Ammora err in determining that Arbitrator Kim's *factual* findings were erroneous? No. Here, the master arbitrator noted the case law that he cannot conduct a de novo review of the evidence and substitute his interpretation of the evidence. The arbitrator's determination was "rational and supported by the record." (NYSCEF Doc No. 4, ***13** Master Arbitration Award, at numbered p 2.) He was correct. This Court takes into account the general proposition that the admissibility of evidence and the determination of issues of fact are left to the arbitrator's

discretion (*see* *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 483 [2006] ["Manifest disregard of the facts is not a permissible ground for vacatur of an award. . . ."]; *Central Sq. Teachers Assn. v Board of Educ. of Cent. Sq. Cent. Sch. Dist.*, 52 NY2d 918, 919 [1981] ["The path of analysis, proof and persuasion by which the arbitrator reached this conclusion is beyond judicial scrutiny."]; *Matter of Lipson v Herman*, 189 AD3d 440, 441 [1st Dept 2020] ["error of fact . . . will not result in the vacatur of an arbitrator's award"]; *Matter of Bernstein v On-Line Software Intl., Inc.*, 232 AD2d 336, 338 [1st Dept 1996] ["It is well established, however, that arbitrators are not bound by the rules of evidence and may admit or deny exhibits on an equitable basis."]).

The proper standard of master arbitration review is whether the hearing arbitrator reached his decision in a rational manner, i.e., whether it was arbitrary and capricious, irrational, or without a plausible basis; the master arbitrator may not engage in an extensive factual review, which includes weighing the evidence, assessing the credibility of various medical reports, and making independent findings of fact (*see Matter of Petrofsky v Allstate Ins. Co.*, 54 NY2d 207 [1981]). Master Arbitrator D'Ammora adhered to this.

Judicial review of a master arbitrator's authority to vacate a hearing arbitrator's award derives from § 675 (presently § 5106 [c]) of the Insurance Law and involves the question of whether the master arbitrator exceeded his power (*see Matter of Smith v Firemen's Ins. Co.*, 55 NY2d at 231 [1982]). Master Arbitrator D'Ammora did not exceed his power and, therefore, his award must be sustained.

In its petition, ATIC concluded by asserting that Arbitrator Kim's decision was "arbitrary and capricious, without rational basis and incorrect as a matter of law because zero evidence simply cannot outweigh evidence" (*id*. ¶ 49). ATIC was "entitled to a declaration that the arbitration decisions of Kihyun Kim, Esq. and Vic D'Ammora, Esq. in the matter designated AAA number 99-21-1191-8208 have no force or effect" (*id*. ¶ 50). Based on the foregoing analysis, this Court rejects these contentions.

ATIC's petition in this Article 75 proceeding cited the four applicable grounds delineated in CPLR 7511 for vacating an arbitration award where a party participated in the arbitration:

> if the court finds that the rights of that party were prejudiced by:
>
> (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.

(NYSCEF Doc No. 1, petition, ¶ 33.)

This Court finds that ATIC failed to establish that there was corruption, fraud, or misconduct in procuring the award; that there was partiality on the part of either arbitrator; that either arbitrator exceeded his or her power or so imperfectly executed it that a final and definite ***14** award upon the subject matter submitted was not made; or that there was a failure to follow the procedure of Article 75.

Cross-Petition; Interest, Attorney's Fees, Return of Arbitration Filing Fee, Costs, and Disbursements

As mentioned above, Nexray sought in its cross-petition to confirm the arbitration determination. Nexray also sought additional payments in the nature of interest, attorney's fees, return of the arbitration filing fee, and costs and disbursements (NYSCEF Doc No. 13, Notice of Cross-Petition, at numbered p 1). For the reasons set forth above, Nexray is entitled to confirmation of Master Arbitrator D'Ammora's award.

Interest:

ATIC issued its Form NF-10 denial of claim on July 13, 2020, within 30 days after final verification was received on June 19, 2020; the denial was timely (NYSCEF Doc No. 6, ATIC's Arbitration Submission and Master Arbitration Brief, at 5). Where a claim is timely denied, interest at two per cent per month shall begin to accrue as of the date arbitration was requested by the claimant, i.e., the date

the AAA received the applicant's arbitration request, unless arbitration was commenced within 30 days after receipt of the denial, in which event interest shall begin to accrues as of the 30th day after proof of claim was received by the insurer (*see* Insurance Law § 5106 [a]; 11 NYCRR 65-4.5 [s] [3], 65-3.9 [c]; *Canarsie Med. Health, P.C. v National Grange Mut. Ins. Co.*, 21 Misc 3d 791, 797 [Sup Ct, NY County 2008] ["The regulation provides that where the insurer timely denies, then the applicant is to seek redress within 30 days, after which interest will accrue."]). The plaintiff health care provider in *Canarsie Med. Health, P.C.* argued that where a timely issued denial is later found to have been improper, the interest should not be stayed merely because the provider did not seek arbitration within 30 days after having received the denial. The court rejected this argument, finding that the regulation concerning interest was properly promulgated; this includes the provision staying interest until arbitration is commenced, where the claimant does not promptly take such action.

Nexray arbitration request was received by the AAA on January 22, 2021 (NYSCEF Doc No. 6, Nexray's Arbitration Request Form and Arbitration Submission, at 1), which was clearly more than 30 days after it received the denial of claim issued on July 13, 2020. Thus, interest accrued from the filing date of January 22, 2021, not from the 30th day after proof of claim was received by ATIC. The end date for the calculation of the period of interest shall be the date of payment of the claims. In calculating interest, the date of accrual is excluded from the calculation (*see* General Construction Law § 20 ["The day from which any specified period of time is reckoned shall be excluded in making the reckoning."]). Where a motor vehicle accident occurred after April 5, 2002, interest is calculated at the rate of two percent per month, simple, on a pro rata basis using a 30-day month (*see* 11 NYCRR 65-3.9 [a]; *Gokey v Blue Ridge Ins. Co.*, 22 Misc 3d 1129[A], 2009 NY Slip Op 50361[U] [Sup Ct, Ulster County 2009]). CPLR 5004's nine percent per annum is superseded by Insurance Law § 5106 [a]'s two percent per month (*see Pro-Med Med., P.C. v MVAIC* (74 Misc 3d 130[A], 2022 NY Slip Op 50135[U] [App Term, 2d Dept, 2d, 11th & 13th Dists 2022]).

***15** *Attorney's Fees:*

After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, ATIC shall pay Nexray an attorney's fee equal to 20 percent of that sum total subject to a maximum fee of $1,360.00, as provided for in 11 NYCRR 65-4.6 [d].

Additionally, this Court sustains the $195.00 attorney's fee for preparatory services in connection with the master arbitration. This is in accordance with 11 NYCRR 65-4.10 [j] [2] [i].

Moreover, pursuant to 11 NYCRR 65-4.10 [j] [4], having successfully prevailed in this Article 75 proceeding, Nexray is entitled to an additional attorney's fee (*see Global Liberty Ins. Co. of New York v Nexray Family Chiropractic*, 178 AD3d 525 [1st Dept 2019]; *GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]).

Nexray's counsel did not submit an affirmation specifying details with regard to work performed in this Article 75 special proceeding. It is not known whether an attorney or support staff performed the work. The cross-petition contains mostly boilerplate statements which could apply to most Article 75 proceedings to confirm No-Fault arbitration awards, with a few insertions specific to this particular claim. The cross-petition asserted that Nexray " should be granted leave to serve an afirmation in order to set forth its resonable attroneys' fees in defending this action" (NYSCEF Doc No. 13, Cross-Petition, ¶ 45).

A special proceeding, such as one commenced pursuant to CPLR 7511 to vacate an arbitration award, "is a civil judicial proceeding in which a right can be established or an obligation enforced in summary fashion. Like an action, it ends in a judgment (CPLR 411), but the procedure is similar to that on a motion (CPLR 403, 409). Speed, economy and efficiency are the hallmarks of this procedure." (Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C401:01.) Counsel should have included an affirmation containing details describing the work performed (*see Matter of Bay Needle Care Acupuncture, P.C. v Country Wide Ins. Co.*, 176 AD3d 695 [2d Dept 2019] [claim for hourly fee for prevailing on policy issue not substantiated with any time records]). It behooved counsel to do so considering the expedited nature of special proceedings.

In a Kings County No-Fault insurance case involving an appeal to the Court of Appeals, the court awarded $250.00 per hour but this was in connection with the litigation of a novel or unique issue (*see Viviane Etienne Med. Care PC v Country-Wide Ins. Co.*, 59 Misc 3d 579 [Sup Ct, Kings County 2018]). The issues in the case at bar was neither novel nor unique, especially since there was already a plethora

of case law dealing with them and Nexray's cross-petition contained boilerplate statements of law.

Consdering the factors delineated herein, this Court awards $140.00 for work performed by Nexray's counsel on this Article 75 proceeding. This Court applies the $70.00 per hour fee for policy issues litigated in arbitration or at the trial level (*see* 11 NYCRR 65-4.6 [c]), having assumed that there was attorney involvement for two hours at the most. It does not apply the $80.00 per hour fee for personal appearances before the arbitration forum or court (*see id*.), inasmuch as this proceeding was determined on the submissions.

Return of Arbitration Filing Fee:

ATIC shall also pay Nexray $40.00 as reimbursement for the fee paid to the AAA (*see* 11 NYCRR 65-4.5 [s] [1]).

***16** *Costs and Disbursements:*

As the prevailing party, Nexray shall recover its costs and disbursements, to be taxed by the Clerk.

Other Requested Relief

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected.

Conclusion

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that:

(1) ATIC's petition to vacate the master arbitration award of Victor J. D'Ammora in AAA Case No. 99-21-1191-8028 is dismissed.

(2) Nexray's cross-petition to confirm said master arbitration award is granted.

(3) Said master arbitration award is confirmed in its entirety.

(4) Nexray is awarded the principal amount of $878.67 as No-Fault insurance health service benefits, along with simple interest thereon (i.e., not compounded) at two per cent per month on a pro rate basis using a 30-day month, computed from January 22, 2021 to the date of payment of the principal amount, but excluding January 22, 2021 from being counted within the period of interest.

(5) After calculating the sum total of the principal amount of $878.67 plus the interest thereon, ATIC shall pay Nexray an attorney's fee equal to 20 percent of that sum total, subject to a maximum fee of $1,360.00.

(6) ATIC shall pay Nexray an attorney's fee of $195.00 in connection with the master arbitration.

(7) ATIC shall pay Nexray an attorney's fee of $140.00 for work performed by counsel on this Article 75 proceeding.

(8) Nexray shall recover from ATIC costs and disbursements as allowed by law to be taxed by the Clerk.

E N T E R

Dated: Brooklyn, New York, May 25, 2023

_____

HON. AARON D. MASLOW

Justice of the Supreme Court of the

State of New York

FOOTNOTES

Footnotes

1 A reply affirmation from Respondent's counsel (NYSCEF Doc No. 15) is not considered inasmuch as it was filed on the motion calendar date of May 19, 2023, several days after all counsels were advised that this

proceeding was being determined on submissions. The time of filing of 1:13 p.m. on May 19, 2023, was after the calendar call too.

2 The notice of petition seeks vacatur of "the arbitration award issued by Arbitrator Kihyun Kim, Esq. and/or Master Arbitrator Victor J. D'Ammora, Esq." (NYSCEF Doc No. 2, notice of petition), but it must be deemed to seek vacatur of just the master arbitration award inasmuch as the latter is the final determination of the arbitration process. Insurance Law § 5106 (c) provides that "The award of a master arbitrator shall be binding except for the grounds for review set forth in article seventy-five of the civil practice law and rules. . . ." The No-Fault Regulations provide that "court review pursuant to an article 75 proceeding" is from the "decision of a master arbitrator" (11 NYCRR 65-4.10 [h] [1] [i]). In fact, a party may not appeal from an arbitration award without first seeking master arbitration (*see Matter of Staten Is. Hosp. v USAA*, 103 AD2d 744 [2d Dept 1984]; *Matter of Griffith v Home Indem. Co.*, 84 AD2d 332 [1st Dept 1982]; *Matter of Lampasona v Prudential Property & Cas. Ins. Co.*,111 Misc 2d 623 [Sup Ct, Kings County 1981]). "[T]he Legislature intended the provision of CPLR article 75 to apply only to the review of the awards of master arbitrators (*see,* Insurance Law § 5106[c])" (*Matter of Custen v General Acc. Fire and Life Ins. Co.*, 126 AD2d 256 [2d Dept. 1987]). Naturally, if the hearing arbitrator's award is imperfect, this can impact judicial review of a master arbitration award affirming it.

3 Rather than denote the parties here as "Petitioner" and "Respondent" in discussion, the parties' names are used. This is to facilitate the reader's understanding of the facts, arguments, analysis, and determination. This also minimizes confusion because the respondent in the underlying arbitration (ATIC) is not the respondent herein but rather is the petitioner herein. The respondent herein, Nexray, was not the respondent in the arbitration, but was the applicant.

4 Health service providers obtain standing to pursue No-Fault insurance compensation in arbitration by virtue of having received an assignment of benefits from the respective person claiming to have been injured in a covered motor vehicle accident; such person is often denoted as an "assignor."

5 Paragraph 28 of the petition describes the AAA Case No. as 99-21-1191-8028, which was assigned to the master arbitration appeal. The original arbitration was assigned AAA Case No. 17-21-1191-8028.

6 This statutory scheme was developed by New York's legislature in 1973, as part of a tradeoff whereby lawsuits for pain and suffering sustained from personal injuries in motor vehicle accidents were limited to instances of serious injury. (*See generally* Insurance Law art 51; L 1973, ch 13, *as amended* L 1977, ch 892; John R. Dunne, *New York's No-Fault Automobile Insurance Law—A Glimpse of the Past and a Glance at the Future*, 50 NY St BJ 284 [June 1978]; J. Benedict, *New York Adopts No-Fault: A Summary and Analysis*, 37 Albany L Rev 662 [1973]).

7 Although Insurance Law article 51 does not mention the term "No-Fault," shortly after the post-motor vehicle accident economic loss compensation system was enacted in 1973, the appellation "No-Fault" was adopted in common parlance to describe it.

8 This Court uses the term "health service bills" instead of "medical bills" because the No-Fault Law provides for reimbursement of "(i) medical, hospital . . . , surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services; (ii) psychiatric, physical therapy . . . and occupational therapy and rehabilitation . . . and (iv) any other professional heath services" (Insurance Law § 5102 [b] [1]). Hence, the No-Fault insurance system encompasses not just "medical" services. In the instant case, the service was an MRI.

9 The prescribed claim forms are included within 11 NYCRR Part 65 (Regulation 68) Appendix 13. In addition to Form NF-3 (verification of treatment by attending physician or other provider of health service), Appendix

13 contains Form NF-4 (verification of hospital treatment) and Form NF-5 (hospital facility form). Other official No-Fault forms also appear in Appendix 13.

10 There is a prescribed assignment of benefits form (Form NF-AOB) in 11 NYCRR Part 65 (Regulation 68) Appendix 13.

11 The process of submitting a No-Fault claim to the insurer is governed by 11 NYCRR subpart 65-3, which contains §§ 65-3.1 *et seq*.

12 Form NF-10 is also included within 11 NYCRR Part 65 (Regulation 68) Appendix 13.

13 References to NYSCEF filings lacking page numbers are to the PDF page numbers.

14 The AAA's electronic case management and filing platform maintained on the Internet is known as “Modria,” which was the name of the company which developed it for the AAA (see *Liveblogging #ODR2014: The Developing Field of Online Dispute Resolution*, https://civic.mit.edu/index.htmlp#=1452.html [last accessed Mar. 19, 2023]; *Welcome to the Modria Resolution Center for the American Arbitration Association*, https://aaa-nynf.modria.com/ [last accessed Mar. 19, 2023]).

15 Among the more substantial changes in the 1977 legislation were the adoption of fee schedules to limit health service expenses and modifying the threshold categories to be able to sue for pain and suffering.

16 Nothing in the Governor's Bill Jacket for Chapter 13 of the Laws of 1977 or other contemporary records comments on the provision adopting master arbitration review of hearing arbitrators' decisions, so it is not known why the master arbitration process was created.

17 Most non-No-Fault insurance arbitration awards cannot be vacated due to an error of law (*see Matter of Sprinzen v Nomberg*, 46 NY2d 623, 629-630 [1979]). No-Fault insurance arbitrations are different; an error of law can be the basis for reversal—by a master arbitrator. In that sense, the master arbitrator's review is broader than that of a court, since a court will not vacate an arbitration award due to an error of law (*see Matter of Petrofsky v Allstate Ins. Co.*, 54 NY2d 207, 211-212 [1981]; *Acuhealth Acupuncture, P.C. v Country-Wide Ins. Co.*, 176 AD3d 800, 802 [2d Dept 2019]).

18 11 NYCRR 65-4.10 (a) provides as follows:

> Grounds for review. An award by an arbitrator rendered pursuant to section 5106(b) of the Insurance Law and section 65-4.4 or 65-4.5 of this Subpart may be vacated or modified solely by appeal to a master arbitrator, and only upon one or more of the following grounds:
>
> (1) any ground for vacating or modifying an award enumerated in article 75 of the Civil Practice Law and Rules (an article 75 proceeding), except the ground enumerated in CPLR subparagraph 7511(b)(1)(iv) (failure to follow article 75 procedure);
>
> (2) that the award required the insurer to pay amounts in excess of the policy limitations for any element of first-party benefits; provided that, as a condition precedent to review by a master arbitrator, the insurer shall pay all other amounts set forth in the award which will not be the subject of an appeal, as provided for in section 65-4.4 or 65-4.5 of this Subpart;
>
> (3) that the award required the insurer to pay amounts in excess of the policy limitations for any element of additional first-party benefits (when the parties had agreed to arbitrate the dispute under the additional personal injury protection endorsement for an accident which occurred prior to January 1, 1982); provided that, as a condition precedent to review by a master arbitrator, the insurer shall pay all other amounts set

forth in the award which will not be the subject of the appeal, as provided for in section 65-4.4 or 65-4.5 of this Subpart;

(4) that an award rendered in an arbitration under section 65-4.4 or 65-4.5 of this Subpart, was incorrect as a matter of law (procedural or factual errors committed in the arbitration below are not encompassed within this ground);

(5) that the attorney's fee awarded by an arbitrator below was not rendered in accordance with the limitations prescribed in section 65-4.6 of this Subpart; provided that, as a condition precedent to review by a master arbitrator, the insurer shall pay all other amounts set forth in the award which will not be the subject of the appeal, as provided for in section 65-4.4 or 65-4.5 of this Subpart.

19 This Court served as a No-Fault insurance arbitrator for close to 21 years.