

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Pain Medical, PLLC  
(Applicant)

- and -

Allstate Insurance Company  
(Respondent)

AAA Case No. 17-17-1065-5800

Applicant's File No. None

Insurer's Claim File No. 0384497086  
2MS

NAIC No. 19232

**ARBITRATION AWARD**

I, Charles Sloane, the undersigned arbitrator, designated by the American Arbitration Association pursuant to the Rules for New York State No-Fault Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Insurance, having been duly sworn, and having heard the proofs and allegations of the parties make the following **AWARD**:

Injured Person(s) hereinafter referred to as: claimant GW

1. Hearing(s) held on 10/24/2018, 10/31/2018  
Declared closed by the arbitrator on 01/28/2019

Sasha Hochman, Esq. from Revaz Chachanashvili and Associates PC participated in person for the Applicant

John Palatianos, Esq. from Allstate Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 900.00**, was NOT AMENDED at the oral hearing.  
Stipulations WERE made by the parties regarding the issues to be determined.

Both the medical necessity and fee schedule issues would be given to AAA to assign for IHC for a determination as to whether the services provided to the claimant herein were medically necessary, and if so, what is the reimbursement for the services provided.

Applicant seeks reimbursement in the sum of \$900.00 for "Nervous System Surgery PENS" using Bio Wave Pro billed under CPT code 64999.

3. Summary of Issues in Dispute

**WHETHER THE MEDICAL SERVICES RENDERED HEREIN WERE MEDICALLY NECESSARY.**

**WHAT, IF ANY, REIMBURSEMENT IS TO BE GIVEN TO THE APPLICANT FOR SERVICES BILLED UNDER CPT CODE 64999.**

4. Findings, Conclusions, and Basis Therefor

This claim seeks reimbursement for nervous system surgery PENS using Bio Wave Pro billed under CPT code 64999 on December 7, 2015, following a MVA that occurred on September 1, 2015.

There are two issues to be determined, namely: 1) whether the surgery itself was medically necessary, and 2) what reimbursement, if any, is appropriate for CPT code 64999.

The peer review issued by Dr. Sohal does not address the issue of fee schedule for CPT Code 64999 and the parties agreed for an IHC for the determination of both the medical necessity for the surgery, and what reimbursement, if any, should be given for such service.

Following the holding of the hearing on October 29, 2018, I forwarded the appropriate documents to the AAA for an IHC to be issued on these issues. The AAA forwarded same to Perry J. Stein, M.D. specializing in Rehabilitation and Electrodiagnostic Medicine to issue an IHC on these issues.

An IHC was issued on January 3, 2019, sent to both parties for comments and the applicant submitted their comments on January 14, 2019. The respondent failed to submit any comments, despite their right to do so.

I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing, plus the IHC and comments submitted by the applicant.

According to the narrative report of the applicant, by Leon Reyfman, M.D., the claim involves a 36 year old male, who was the driver of a care involved in a rear end MVA which occurred on September 1, 2015. He had no emergency room treatment prior to coming under the care of Dr. Bernard on October 7, 2015, more than one month following the accident.

He had complaints of pain to his right shoulder, neck and lower back.

Subsequent to this exam, he had MRI studies performed on the lumbar spine on October 24, 2015, which had findings of a central disc herniation at L5-S1 and a disc bulge at the L4-5 level.

He came to be first seen by Dr. Reyfman on December 2, 2015 for examination and treatment. With regards to the lower back, he made complaints of radiating lower back pain to the left leg with numbness/tingling in the left leg to the feet and toes. The exam noted diffuse tenderness, with moderate spasms. Muscle strength and reflexes were decreased in the left lower extremity and there were sensory deficits on pin prick and light touch at the left L4 dermatome. SLR was positive on the left, without specificity.

He was seen for follow up 5 days later on December 7, 2015 with similar findings and lower back pain rated as 8/10. Based upon these two exams, he recommended that the claimant undergo Lumbar Neuromodulation Pain Therapy, via Biowave PENS device.

There is very little evidence of what other conservative therapy was given to the claimant since the accident, other than some SOAP notes mentioned in the peer review of Dr. Sohal. No mention of the therapy is mentioned in the report of Dr. Reyfman other than the mention of "Medication, Physical Therapy".

The respondent denied the reimbursement based upon a peer review conducted by Dr. Ajendra Sohal on January 13, 2016, which refers to an IME examination conducted by Dr. Scarpinator on December 3, 2015, 4 days prior to the date of service herein, the exams of the applicant and exam by Dr. Bernard and the physical therapy notes from October through December 2015 and the MRI study of the lumbar spine.

He notes the positive findings in the exams of Dr. Reyfman and that the claimant claims no relief with the current physical therapy protocol. He notes that the manufacturer of the PENS device claims to be "significantly better" than a TENS unit. He discusses the differences between a PENS unit and a TENS unit. He claims that PENS treatment is still considered investigational and that is why there is no proper fee schedule for its introduction. Further, the peer review indicates that there is no evidence that there had been any trial of PENS therapy, as opposed to TENS therapy, prior to its use on December 7, 2015. He further opines that based upon the IME conducted only four days earlier, which found a resolved cervical and lumbar strain and right shoulder sprain, no further treatment was necessary. He indicates that the PENS therapy includes the insertion of a few needle electrodes, which may be appropriate for acupuncture billing.

In rebuttal to the peer review, the rebuttal of Dr. Reyfman takes issue with the peer review of Dr. Sohal. He states that Percutaneous neuromodulation therapy (PNT) is a new, non surgical treatment that is based on the electrical stimulation applied to the deep tissues in the back, which can help in certain types of lower back pain. He notes that such treatment is approved by the FDA to treat chronic, acute and post operative neck and lower back pain. This type of treatment is used in conjunction to other analgesic modalities for the treatment of acute and chronic pain. He provides medical studies which show that PENS therapy is more effective than traditional acupuncture in the treatment of chronic cervical and lumbar pain. He then opines that based upon his exam of the claimant and the determination to try non-surgical treatment, that the PENS therapy was the most appropriate method to treat this claimant.

As I had never had such a treatment come before me before, nor had I ever had the issue of reimbursement for this therapy come before me as well, I determined, with the

consent of the parties to have the documents sent to an IHC for determination of whether this therapy was proper and medically necessary, and if so, what is the appropriate reimbursement for a CPT code 64999, which is a BR code.

For the IHC, Dr. Stein was presented with the reports and peer rebuttal of Dr. Reyfman and the peer review of Dr. Sohal. After reviewing the documentation, he found that there was medical necessity to provide PENS therapy. He determined that the usual and customary fee for such procedure should be \$250.00 per session. He further opines that the use of Bio-Wave should be pre-approved on a case by case basis. He then opined that without proof that such service was actually provided and that pre-approval/authorization was obtained, no payment should be made.

The parties were given 10 days to submit comments to the IHC report.

Only the applicant took the opportunity to comment. The attorney who appeared at the hearing submits a 2 page letter with Exhibits. She comments primarily on the issue of fee schedule, opining that Dr. Stein's opinion of the proper reimbursement was outside the scope of his expertise to make a fee schedule determination. **(What expertise does the applicant have to make this same determination?)** She takes issue with the term "usual and customary" as used by Dr. Stein in his IHC, instead indicating that as CPT code 64999 is a By Report BR code, it is governed by General Ground Rule 3, which as to the fee which lists many factors which go into the proper reimbursement amount, or relative value units, which should go into such evaluation. Such amount should be "consistent in relativity with other RVU shown in the schedule.

The letter from applicant submits supporting documentation issued by other carriers/providers which indicates that the amount billed herein, \$900.00, was accepted as the "proper" amount to be paid by ISG (on behalf of GEICO), TechSource (on behalf of GEICO) and Empire Stat (on behalf of GEICO).

The letter also claims that the respondent has not placed the applicant's requested fee into issue in their denial of claim. In point of fact, the respondent did place the reimbursement sought by virtue of the language used in their denial of claim as follows:

**"...THE AMOUNT CHARGED AND SOUGHT TO BE REIMBURSED EXCEEDS THE AMOUNT PERMITTED UNDER THE APPLICABLE WORKERS' COMPENSATION FEE SCHEDULE AND IS NOT REIMBURSABLE AS BILLED."**

While it is true that the respondent did not present a coder affidavit for the BR surgery billed for by the applicant, it is the applicant's burden of proof to provide, under the Ground Rules, the RVU most "consistent in relativity with other RVUs shown in the schedule.

Other than the GEICO submissions which allowed the sum of \$900.00 for this service when billed to them, does not meet the requirements as set forth in the Ground Rules. I

did not see any affidavit from a coder in conjunction with the Ground Rules that would establish which RVU this procedure would most likely be consistent with in order to justify the \$900.00 fee charged by the applicant.

The purpose of my asking for an IHC to offer an opinion as to the proper amount to be reimbursed is based upon the lack of any coder affidavit which would establish which RVU this procedure was most akin to which would justify this fee.

The IHC, having no interest in the outcome of this award, was the person who had the most neutral and non bias opinion as to what would be the most consistent and proper fee that should be reimbursed if medically necessary.

I am faced with conflicting opinions concerning the medical necessity for the disputed testing and treatment herein. There are no legal issues to resolve. This dispute involves solely an issue of fact, that is, whether or not the testing and treatment was medically necessary. Resolution of that fact is determined by which opinion is accepted by the trier of fact. I have carefully studied the reports, documents and opinions for each side.

Based upon the IHC submitted by Dr. Stein, I am inclined to find that the PENS treatment was medically necessary. I agree with applicant's point that as no-fault does not require pre-authorization or pre-approval, that is not an issue that needs to be dealt with in this award.

Additionally, based upon the IHC opinion of Dr. Stein, the denial of the respondent and the position paper of the applicant, I find that the applicant has not met their burden of proof on the issue of how they arrived at the BR fee charged in the amount of \$900.00. I also take the amount recommended as "usual and customary" in the sum of \$250.00, by a non interested witness (IHC of Dr. Stein) to be reasonable and proper, in light of the lack of a coder affidavit or the requirements under the Ground Rules.

I hereby award to the applicant the sum of \$250.00 in full reimbursement of this claim.

Pursuant to the Court of Appeals decision in LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., decided April 2, 2009 cited as 2009 NY Slip Op 02581, interest shall be calculated from the date listed above, regardless of whether the particular denials herein at issue were timely or untimely.

This claim was filed on June 12, 2017. For claims filed with the AAA after February 5, 2015, pursuant to Section 65-4.6 of the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D), payment of the claim shall be limited as follows: 20 (20%) percent of the total amount of the first party benefits and any additional first party benefits, plus interest thereon, for each applicant per arbitration..., subject to a maximum fee of \$1,360.00.

This award is a full determination of all the no-fault benefit claims submitted to this Arbitrator.

5. Optional imposition of administrative costs on Applicant.  
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

6. **I find as follows with regard to the policy issues before me:**

- ☐ The policy was not in force on the date of the accident
- ☐ The applicant was excluded under policy conditions or exclusions
- ☐ The applicant violated policy conditions, resulting in exclusion from coverage
- ☐ The applicant was not an "eligible injured person"
- ☐ The conditions for MVAIC eligibility were not met
- ☐ The injured person was not a "qualified person" (under the MVAIC)
- ☐ The applicant's injuries didn't arise out of the "use or operation" of a motor vehicle
- ☐ The respondent is not subject to the jurisdiction of the New York No-Fault arbitration forum

Accordingly, the applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	Pain Medical, PLLC	12/07/15 - 12/07/15	\$900.00	Awarded: \$250.00
Total			\$900.00	Awarded: \$250.00

- B. The insurer shall also compute and pay the applicant interest set forth below. 06/12/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Pursuant to the Court of Appeals decision in LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., decided April 2, 2009 cited as 2009 NY Slip Op 02581, interest shall be calculated from the date listed above, regardless of whether the particular denials herein at issue were timely or untimely.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

This claim was filed on June 12, 2017. For claims filed with the AAA after February 5, 2015, pursuant to Section 65-4.6 of the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D), payment of the claim shall be limited as follows: 20 (20%) percent of the total amount of the first party benefits and any additional first party benefits, plus interest thereon, for each applicant per arbitration..., subject to a maximum fee of \$1,360.00.

- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York

SS :

County of Nassau

I, Charles Sloane, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

02/06/2019

(Dated)

Charles Sloane

### **IMPORTANT NOTICE**

*This award is payable within 30 calendar days of the date of transmittal of award to parties.*

*This award is final and binding unless modified or vacated by a master arbitrator. Insurance Department Regulation No. 68 (11 NYCRR 65-4.10) contains time limits and grounds upon which this award may be appealed to a master arbitrator. An appeal to a master arbitrator must be made within 21 days after the mailing of this award. All insurers have copies of the regulation. Applicants may obtain a copy from the Insurance Department.*

## **ELECTRONIC SIGNATURE**

**Document Name:** Final Award Form  
**Unique Modria Document ID:**  
1e9d7ce43ba35faf0329343bd97d7cac

### **Electronically Signed**

Your name: Charles Sloane  
Signed on: 02/06/2019