DOCKET NO. 453-03-4229.M2
MDR Tracking No. M2-03-1308-01

RS MEDICAL	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
VS.	§	**OF**
	§	
CITY OF EL PASO,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

RS Medical (RS) appealed an independent review organization (IRO) determination that the purchase of an RS-4i Sequential Stimulator (Stimulator) is medically unnecessary to treat a lower-leg injury suffered by a ___(City) employee (Claimant). The City had previously denied RS's request for the purchase. This decision concludes that RS failed to prove the Stimulator is medically necessary because the evidence did not show it is presently needed.

I. PROCEDURAL HISTORY

A hearing was held on December 9, 2003, before the undersigned Administrative Law Judge (ALJ) at the State Office of Administrative Hearings, Austin, Texas. The hearing was initially set to be heard on September 11, 2003, but was continued upon an agreed motion filed by the parties. RS employee and counsel Patrick K. Cougill appeared on behalf of RS. Attorney Tommy W. Lueders represented the City.

As there were no notice or jurisdiction issues, those matters are set forth in the fact findings and legal conclusions without further discussion here.

II. DISCUSSION

A. Background

On or about ___, the Claimant injured her right shin and tibia, while employed as a City laboratory technician, when she ran into a metal cart. She was seen by Michael Boone, M.D., on ___. Dr. Boone placed her on anti-inflammatories and returned her to work. She saw Dr. Boone again on October 8, 2002. Her condition had worsened; he noted swelling and pitting edema. He took her off work for two weeks. Later in October, he extended her off-work status and recommended therapy and continued narcotic medication. She received three weeks of physical therapy beginning on October 28, 2002, and began treatment with the Stimulator.

A follow-up examination on November 12, 2002, indicated modest improvement, but the Claimant began complaining of additional pains radiating to her spine and buttocks as well as her back. Dr. Boone noted a loss of sensation over her superficial peroneal nerve. Her strength was reduced with continued swelling and tenderness. A November 19, 2002, EMG/NCV study identified a contusion of the peroneal nerve.

The City paid for use of the Stimulator for two months. However, it denied the indefinite-use request made pursuant to a January 27, 2003, prescription from Dr. Boone. (The parties agreed that an indefinite-use prescription is the same as a purchase request.) RS requested medical dispute resolution and an IRO concluded on July 1, 2003, that the Stimulator was not medically necessary. It is undisputed that RS submitted a timely appeal of the IRO decision.

Employees have a right to necessary health treatment under TEX. LABOR CODE ANN. §§ 408.021 and 401.011. Section 408.021(a) provides, "An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment." Section 401.011(19) of the Labor Code provides that health care includes "all reasonable and necessary medical . . . services."

As Appellant, RS had the burden of proof.[1]

2. Evidence of Medical Necessity

1. Evidence of Need as of the Hearing Date

Because of the requirement for preauthorization, the ALJ concludes that RS's burden was to show there was a **present** need for the Stimulator, *i.e.*, as of the hearing date.

RS contended the medical necessity issue for the Stimulator should be viewed **as of the time it was prescribed**, on January 27, 2003. It argued and produced evidence to show the device was necessary to relieve the Claimant's compensable injury as of that date. It continued to provide the device to the Claimant after January 27, even though neither the City nor the Texas Workers' Compensation Commission (Commission) authorized its use before it was provided. Its evidence of necessity related to use in 2003, after the January 27, 2003, prescription date.

Statutory and rule law are relevant to this issue. Section 413.014(d) of the Texas Labor Code provides:

> **§ 413.014. Preauthorization Requirements; Concurrent Review and Certification of Health Care**
>
> . . .
>
> (d) The insurance carrier is not liable for those specified treatments and services requiring preauthorization unless preauthorization is sought by the claimant or health care provider and either obtained from the insurance carrier or ordered by the commission.

The Commission's rules at 28 TEX. ADMIN. CODE § 134.600 provide:

[1] 28 TEX. ADMIN. CODE § 148(h).

§ 134.600. Preauthorization, Concurrent Review, and Voluntary Certification of Health Care

(a) The following words and terms, used in this section shall have the following meanings, unless the context clearly indicates otherwise:

. . .

(5) Preauthorization: prospective approval obtained from the insurance carrier (carrier) by the requestor or injured employee (employee) prior to providing the health care treatment or services (health care)

. . .

(b) The carrier is liable for all reasonable and necessary medical costs relating to the health care required to treat the compensable injury:

(1) listed in subsection (h) or (i) of this section, only when the following situations occur:

(A) an emergency, as defined in **§** 133.1 of this title (relating to Definitions);

(B) preauthorization on any health care listed in subsection (h) of this section was approved prior to providing the health care;

(C) concurrent review of any health care listed in subsection (i) of this section was approved prior to providing the health care; or

(D) when ordered by the commission; or

(2) per subsection (j) of this section, when voluntary certification was requested and payment agreed upon prior to providing the health care, for any health care not listed in subsection (h) of this section.

With reference to Rule 134.600(b), it is undisputed that the Stimulator was not for an emergency, was not approved prior to its being provided, has not been ordered by the Commission, and was not health care for which voluntary certification was requested. It appears that the indefinite-use prescription for the Stimulator constituted a request for durable medical equipment (DME) in excess of $500 per item as described in subsection (h)(11) of Rule 134.600. The items listed in subsection (h) require preauthorization.

Based on § 413.014(d) of the Labor Code and Rule 134.600, the necessity of the Stimulator must be based on present need (as of the hearing date) rather than past need (on and after the January 27, 2003, prescription date) and use, as argued by RS. To base a necessity determination on past

need and use would require payment for before-preauthorization care in violation of the Rule 134.600(b) provision saying that an insurance carrier is liable for the "reasonable and necessary medical costs" of health care **only** when the care is preauthorized before the provision of health care (except for an emergency, Commission order, or voluntary certification request). It would also convert this case to a retrospective review of medical necessity, *i.e.*, the insurer's obligation being based on the provider's **prior** provision of care and the medical necessity of the care.

3. Medical Necessity as of Hearing Date Not Proved

The ALJ concludes that RS did not prove the Stimulator was medically necessary.

As indicated above, the thrust of RS's argument and evidence was on need at the time Dr. Boone prescribed the Stimulator. RS produced very little present-need evidence for the device.

RS insurance relations manager Susan Keesee testified she did not know the Claimant's condition today, although her understanding is the Claimant has returned to work. Ms. Keesee believes the Claimant used the Stimulator regularly for several months but has improved and now uses it on an as-needed basis. Ms. Keesee is unsure how frequently she now uses the device.[2]

The medical records cited by RS in support of its case do not show a present need for the Stimulator. The following is a description of those records:

- Dr. Boone's prescriptions on November 17, 2002, for two-months use, and January 27, 2003, for indefinite use,[3] contain directions for using both the interferential and muscle stimulation features of the device to relieve and manage chronic pain, relax muscle spasms, prevent or retard disuse atrophy, re-educate muscles, and maintain or increase range of motion.

- A November 19, 2002, nerve conduction study showed there was some degree of peroneal nerve contusion.[4]

- A December 24, 2002, medical record from Dr. Boone said the Claimant had a mild peroneal nerve injury.[5]

- A January 14, 2003, medical record from Dr. Boone said an electromyogram/nerve

[2] Ms. Keesee testified extensively on the efficacy of the Stimulator generally in treating injuries, including showing Federal Drug Administration (FDA) approval for various purposes. However, very little of her testimony addressed the medical necessity issue for this particular worker under the circumstances in this case. The City asserted at one point that the Stimulator had not been shown to be useful at all in treating injuries because there was no expert testimony to that effect. The ALJ believes that Ms. Keesee=s testimony and the FDA approval amply showed that in some cases the device can be useful in relieving pain and in having a curative effect.

[3] RS Ex. 2 at 5 and 6 respectively.

[4] City Ex. 1 at 33. To counter the IRO doctor=s assertion that the Claimant had only a contusion that developed a minor seroma, RS cited records showing the Claimant also had a peroneal nerve injury.

[5] City Ex. 1 at 37.

conduction study showed the Claimant had peroneal neuropathy.[6]

- A letter of medical necessity Dr. Boone wrote on January 27, 2003,[7] shows the Stimulator had helped the Claimant decrease medication, increase function due to pain reduction, and reduce chronic pain. Dr. Boone said generally that the continued use of the device enhanced the Claimant's ability to return to or retain employment.

- A February 5, 2003, medical record from Richard S. Westbrook, M.D., showed the Claimant continued to have pain at the pretibial area of her right side with swelling of the foot. She had decreased sensation in the distribution of the peroneal nerve. Dr. Westbrook wrote, "This is going to stay tender over the pretibial area where she has injured the periosteum to the tibial and it may stay uncomfortable for over a year." [8]

- Dr. Boone's records on February 12, 2003,[9] said that the Claimant saw Dr. Westbrook, who diagnosed her with seroma and said Dr. Boone's treatment was appropriate.

- In a March 5, 2003, medical note, Dr. Boone wrote that the Claimant's pain and tingling seemed to be abating very slowly.[10]

- On March 26, 2003, Dr. Boone wrote the Claimant had regressed a little, with worsening pain, feeling of swelling and heaviness to the right leg, and tingling over the right foot. Pain radiating along the outer aspect of the calf and thigh caused Dr. Boone to conclude she may have some secondary radicular problem.[11]

With the possible exception of Dr. Westbrook's February 5, 2003, statement that the Claimant's discomfort may last for over a year, these records do not show a need for the Stimulator as of the December 9, 2003, hearing date, which was more than eight months after the latest record cited.[12] It is not clear whether Dr. Westbrook meant that discomfort may last for more than a year from his February 5, 2003, medical note or from the ___, date of injury. In any case, in the last

medical record in evidence, on July 23, 2003, Dr. Boone said the Claimant had returned to work,

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[6] City Ex. 1 at 39.

[7] RS Ex. 2 at 7-8.

[8] City Ex. 1 at 44.

[9] RS Ex. 2 at 9.

[10] City Ex. 1 at 48.

[11] City Ex. 1 at 50.

[12] Ms. Keesee=s testimony indicated Dr. Boone=s indefinite-use prescription did not mean the Claimant would need the Stimulator for the rest of her life, but that she would need the device long enough for it to be less expensive to pay the $2,495 purchase price than to continue to pay the monthly fee of approximately $250.

was doing "very well" although she had a difficult first week at work, and was taking medication on an as-needed basis.[13]

Overall, RS failed to carry its burden of proof. There was very little evidence on the issue of present need for the Stimulator and the latest evidence, from Dr. Boone in July of 2003, implied that it was no longer necessary.

IV. FINDINGS OF FACT

1. On or about ___, a worker (Claimant) injured her right shin and tibia, while employed as a ___(City) laboratory technician, when she ran into a metal cart.
2. The Claimant began seeing Michael Boone, M.D., on ___.

3. Eventually, Dr. Boone took the Claimant off work and recommended physical therapy and the use of the RS-4i Sequential Stimulator (Stimulator).

4. The Claimant began using the Stimulator at the end of October 2002.

5. The City provided workers' compensation coverage to its employees at the time of the Claimant's injury.

6. The City paid for the Claimant to use the Stimulator for two months, but denied an indefinite-use request made pursuant to a January 27, 2003, prescription from Dr. Boone.

7. RS requested medical dispute resolution.

8. An independent review organization (IRO) concluded on July 1, 2003, that the Stimulator was not medically necessary.

9. RS requested a hearing not later than the 20th day after receiving notice of the IRO decision.

10. All parties received not less than 10 days' notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

11. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

12. The most recent medical record showing a need for the Stimulator was in March 2003, more than eight months before the December 9, 2003, hearing date.

13. The last medical record in evidence was dated July 23, 2003.

14. As of July 23, 2003, the Claimant had returned to work, was doing very well after a difficult first week, and was taking medication on an as-needed basis.

[13]City Ex. 1 at 66.

15. There was insufficient evidence to show a present need for the Stimulator.

16. The Stimulator was not shown to be reasonably required by the nature of the Claimant's injury.

V. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §413.031(k) and TEX. GOV'T CODE ANN. ch. 2003. All parties received adequate and timely notice of the hearing. TEX. GOV'T CODE ANN. §2001.052.

2. RS Medical has the burden of proof. 28 TEX. ADMIN. CODE § 148.21(h).

3. It was RS Medical's burden to prove the Stimulator is at present reasonably required by the nature of the Claimant's injury. TEX. LAB. CODE ANN. §§ 401.011, 408.021, and 413.014; 28 TEX. ADMIN. CODE § 134.600.

4. RS Medical failed to carry its burden of proof.

5. RS Medical's request for authorization of the purchase of the Stimulator should be denied. TEX. LAB. CODE ANN. §§ 401.011 and 408.021.

ORDER

IT IS THEREFORE ORDERED that the request by RS Medical for authorization of the purchase of a Stimulator to be used by the Claimant and covered by ___be, and the same is hereby, denied.

Signed January 6, 2004.

JAMES W. NORMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS