

RS MEDICAL	§	BEFORE THE
<i>Petitioner</i>	§	
	§	
VS.	§	STATE OFFICE OF
	§	
ARGONAUT MIDWEST INSURANCE	§	
COMPANY,	§	
<i>Respondent</i>	§	ADMINISTRATIVE HEARINGS

### DECISION AND ORDER

RS Medical (RS) appealed an Independent Review Organization (IRO) determination that the purchase of a RS-4i Sequential Stimulator (Stimulator) is medically unnecessary and should not be authorized to treat a lower back injury suffered by an injured worker (Claimant). Argonaut Midwest Insurance Company (Argonaut) had previously denied RS's request for the purchase. This decision concludes that RS failed to prove the Stimulator is medically necessary because there was no medical-expert evidence that it was needed after the Claimant's back surgery in June 2003.

#### I. PROCEDURAL HISTORY

A hearing in this matter was held on September 18, 2003, before the undersigned Administrative Law Judge (ALJ) at the State Office of Administrative Hearings, Austin, Texas. At the hearing, Argonaut moved to dismiss the case for lack of jurisdiction based on its contention that RS is not entitled to seek medical dispute resolution. After the hearing, the parties briefed the jurisdictional issue, and the evidentiary record was reopened on October 30, 2003, to take evidence on that matter. The hearing finally closed on that date. RS employee and counsel Patrick K. Cougill appeared on behalf of RS. Attorneys Shane Thompson and Peter L. Macaulay represented Argonaut.

#### II. MOTION TO DISMISS

Argonaut moved to dismiss based on its contention that RS is not a "health care provider" as defined in TEX. LABOR CODE ANN. § 401.011(22)<sup>1</sup> and thus not entitled to seek medical dispute resolution concerning Argonaut's refusal to authorize the purchase of a Stimulator.<sup>2</sup>

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<sup>1</sup> Health care provider is defined as a "health care facility" or "Ahealth care practitioner." Health care facility is defined as "a hospital, emergency clinic, outpatient clinic, or other facility providing health care." Health care practitioner is defined as "an individual who is licensed to provide or render and provides and renders health care" or "a nonlicensed individual who provides or renders health care under the direction or supervision of a doctor." TEX. LABOR CODE §' 401.011(20)-(22).

<sup>2</sup> The Stimulator is an electrotherapy device approved by the United States Food and Drug Administration to treat acute and chronic pain, muscle spasms, disuse atrophy, range-of-motion limitations, muscle re-education, and blood circulation issues. Appellant's Ex. 4.

At the post-hearing conference held on October 30, 2003, the parties produced additional evidence on the issue of whether RS is a health care provider. Among other matters, the evidence showed that the treating physician, Dr. Gardner, prescribed the Stimulator specifically to relieve and manage chronic pain, relax muscle spasms, maintain or increase range of motion, and increase local blood circulation.<sup>3</sup> RS account manager Jennifer Humphrey met with the Claimant in Dr. Gardner's office to fit the Stimulator to his needs and instruct him on its use.<sup>4</sup> She programmed the Stimulator to meet Dr. Gardner's specifications. She is not a licensed medical professional.

Argonaut argued that RS is not a health care provider because RS is neither a "health care facility" or "health care practitioner." It contended RS is not a health care practitioner because it is a company rather than an individual. It contended the statutory-construction principal *ejusdem generis*<sup>5</sup> should apply to the words "or other facility providing health care" in the definition of health care facility, thereby limiting the words to the type of facility named in the first part of the definition, *i.e.*, a clinic or other place where people go to receive health care.

RS maintained it is in fact providing health care services and is doing so under Dr. Gardner's supervision or direction, as required by the definition of health care practitioner at § 401.011(21) of the Labor Code. It argued these facts are shown by the doctor's prescription and specifications for the Stimulator, which it followed in fitting and instructing the Claimant. RS contended it is a health care facility given the fact it is providing health services to injured workers that a doctor could not provide alone. In support of its standing, RS cited the November 30, 2001, *Texas Register* adoption preamble to Commission Rule § 134.600,<sup>6</sup> where the Commission said the responsibility for requesting preauthorization has changed to allow a health care provider delivering and billing for health care to request preauthorization.

The Administrative Law Judge concludes that RS is a health care facility and thus a health care provider.<sup>7</sup> The Commission's definition of health care provider at 28 TEX. ADMIN. CODE § 133.1(9) and the adoption preamble to that rule in the March 10, 2000, *Texas Register* are instructive. The rule provides:

**§ 133.1. Definitions for Chapter 133, Benefits-Medical Benefits**

...

(9) Health care provider or provider-

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<sup>3</sup> Appellant's Ex. 2 at 2.

<sup>4</sup> Argonaut paid for the Claimant to use the Stimulator for two months before denying the claim that gave rise to this appeal.

<sup>5</sup> This principal says when words of a general nature are used in conjunction with the designation of particular objects, classes of persons, or things, the meaning of the words will be restricted to the particular designation. *Hilco Electric Coop v. Midlothian Butane Gas Co.*, 111 S.W. 3d 75, 81 (Tex. 2003).

<sup>6</sup> 26 Tex. Reg. 9874.

<sup>7</sup> The evidence shows that RS through Ms. Humphrey provided "health care" to the injured worker. Health Care is defined to include medical aid and medical service. TEX. LABOR CODE ANN. § 401.011(19).

1. an individual who is licensed to provide or render and who provides or renders health care; or
2. a nonlicensed individual who provides or renders health care under the direction or supervision of a doctor; or
3. a hospital, emergency clinic, outpatient clinic, or other facility that provides health care.

In substance, this is the same definition as stated in § 401.011(20)-(22) of the Labor Code. The adoption preamble contains the following language regarding § 133.1(9):

COMMENT: Commenter requested clarification of the word “facility”, and for clarification of the requirements this subsection places on suppliers such as TENS (transcutaneous electroneuro stimulators) supply companies, and orthotics and prosthetics companies.

RESPONSE: § 401.011(20) of the Texas Labor Code defines “health care facility” as “a hospital, emergency clinic, outpatient clinic, or other facility providing health care.” The definition of health care in § 401.011(20) **includes TENS supply companies**, and orthotics and prosthetics companies; they are, therefore, subject to the rule. (Emphasis added.)

The ALJ believes the comment is persuasive on the issue of whether RS should be considered a health care provider. The Commission has concluded that the definition of “health care facility” includes entities such as TENS supply companies. Although RS Medical witness Susan Keseer testified that a TENS unit is not the same as a Stimulator, her testimony also indicated that both are electrotherapy devices cleared for treatment by the United States Food and Drug Administration. The TENS unit is cleared for treating acute and chronic pain. The Stimulator is cleared for those and purposes and other purposes indicated above. Thus, both devices appear to be in the same category of medical equipment. The *Texas Register* comment shows the Commission’s understanding of § 401.011(20) that companies supplying these devices are health care facilities.

Argonaut’s *ejusdem generis* argument on this issue was not convincing for two reasons. First, it is contrary to the Commission’s interpretation, which includes health care supply companies in the definition of health care provider. Construction of a statute by the administrative agency charged with its enforcement is entitled to be given consideration and great weight as long as it is reasonable and does not contradict the plain language of the statute.<sup>8</sup> The plain language of the statute in this case defines health care facility to include “any other facility providing health care.”<sup>9</sup>

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<sup>8</sup> *State v. Public Utility Com’n. of Texas*, 883 S.W. 2d 190, 196 (Tex. 1994); *Tarrant Approval District v. Moore*, 845 S.W. 2d 820, 823 (Tex. 1993).

<sup>9</sup> “Facility” is defined broadly as “something (as a hospital, machinery, plumbing) that is built, installed or established to perform some particular function or serve or facilitate some particular end.” *Webster’s Third New International Dictionary* (1986 edition).

Second, the *ejusdem generis* doctrine is inapplicable to a statute containing language disclosing a contrary legislative intent.<sup>10</sup> An intent contrary to Argonaut's construction is shown at several places in the Labor Code, including, for example, § 408.027(d), concerning requirements for insurance carrier payments to "health care providers;" § 413.042, concerning a prohibition against "health care providers" pursuing private claims against workers' compensation claimants; § 413.041, concerning required financial-interest disclosures by "health care providers;" § 413.043, concerning overcharges by "health care providers;" §§ 415.003 and 415.0035, concerning certain administrative violations by "health care providers;" and § 415.005, concerning an administrative violation for overcharges by "health care providers." These provisions show an obvious legislative intent to include all persons or entities providing health care in the definition of health care provider.

The foregoing construction is supported by other factors. As cited by RS, the Commission said in its November 30, 2001 *Texas Register* adoption preamble to Rule 134.600 that the rule contemplates allowing persons who provide and bill health care to request preauthorization. The construction is also consistent with a plain understanding of the term "health care provider" as a natural or artificial person providing health care.

### III. DISCUSSION OF MEDICAL NECESSITY

#### 4. Background

The Claimant suffered an at-work injury on \_\_\_\_, when he walked up steps to the platform of a cement truck stand. The platform broke and he fell about thirteen feet to the ground, injuring his arm, right shoulder, and lower back. His shoulder was operated on in May 2002. Based on a prescription from his doctor, Robert Gardner, M.D., the Claimant began to use the Stimulator in October 2002. Argonaut authorized this use for about two months, but denied a later request to purchase the Stimulator in letters dated April 2, 2003, and April 10, 2003.<sup>11</sup> An IRO declined to authorize the Stimulator in a decision dated July 1, 2003.<sup>12</sup>

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.<sup>13</sup>

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<sup>10</sup> *Carbide International Ltd. v. State*, 695 S.W. 2d 653, 658 (Tex. App. BAustin 1985, no writ).

<sup>11</sup> Appellant's Ex. 1.

<sup>12</sup> Appellant's Ex. 5.

<sup>13</sup> 28 TEX. ADMIN. CODE § 148(h).

## 5. Analysis

The ALJ concludes that RS did not carry its burden of proving that the Stimulator is medically necessary for the Claimant's condition. On December 30, 2002, Dr. Gardner prescribed the Stimulator for use on the Claimant's lower back for an indefinite period.<sup>14 15</sup> Also on December 30, 2002, Dr. Gardner wrote a letter stating his opinion that the Stimulator would be medically beneficial to the Claimant for long-term pain management and treatment of the underlying causes of his condition. He said he thought it would continue to help the Claimant on a daily basis and permit him to engage in some daily-living activities.

The Claimant underwent surgery in June 2003 to relieve his back condition. There is no medical-expert evidence subsequent to the surgery demonstrating a need to purchase the Stimulator.<sup>16</sup> Although the Claimant said he still uses the Stimulator in conjunction with pain pills, he uses it less than he did before the surgery and he has had less need for it. The evidence was not developed on how much less he uses it. The record is also silent concerning whether Dr. Gardner would now prescribe a purchase of the Stimulator, prescribe it for a limited time as he did in October 2002, or not prescribe it at all. The significance of post-operative evidence on the need for the Stimulator can be demonstrated by the Claimant's experience with his injured shoulder. He had severe right shoulder pain from his \_\_\_\_, injury before his shoulder operation in May 2002.<sup>17</sup> He had post-operative pain after the operation until as late as October 8, 2002, but the pain then subsided significantly as of November 2002,<sup>18</sup> at which time an orthopedic specialist said the shoulder "is doing overall very well."<sup>19</sup> In summation, to carry its burden of proof, it was necessary for RS to show a continuing need for purchasing the Stimulator after the Claimant's June 2003 back surgery, but it failed to do so.

### IV. FINDINGS OF FACT

1. The Claimant suffered an at-work injury on \_\_\_\_, when, after he walked up steps to the platform of a cement truck stand, the platform broke and he fell about thirteen feet to the ground, injuring his arm, right shoulder, and lower back.
2. The Claimant's shoulder was operated on in May 2002.
3. Based on a prescription from his doctor, Robert Gardner, M.D., in October 2002, the Claimant began to use a RS-4i Sequential Stimulator (Stimulator) provided by RS Medical.

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<sup>14</sup> Appellant's Ex. 2 at 5.

<sup>15</sup> The parties appear to agree that, in effect, the prescription was to purchase the Stimulator.

<sup>16</sup> The only medical-expert evidence after the Claimant's June surgery was a statement from the IRO on July 1, 2003, that there is no clear evidence of long-term improvement from the Stimulator.

<sup>17</sup> See Respondent's Ex. 1 at 16.

<sup>18</sup> Respondent's Ex. 1 at 89, 93, 95.

<sup>19</sup> *Id.* at 93.

4. Dr. Gardner prescribed the Stimulator specifically to relieve and manage chronic pain, relax muscle spasms, maintain or increase range of motion, and increase local blood circulation.
5. An RS Medical account manager met with the Claimant in Dr. Gardner's office to fit the Stimulator to his needs and instruct him on its use.
6. The RS Medical account manager programmed the Stimulator to meet Dr. Gardner's specifications.
7. In dealing with the Claimant, RS Medical was a facility providing health care.
8. Argonaut Midwest Insurance Company (Argonaut) was the Claimant's workers' compensation insurance carrier during all times relevant to this hearing.
9. Argonaut authorized the use of the Stimulator for about two months, but denied a later request for its purchase in letters dated April 2, 2003, and April 10, 2003.
10. RS Medical requested medical dispute resolution.
11. An independent review organization declined to authorize the purchase of the Stimulator in a decision dated July 1, 2003.
12. The Claimant requested a hearing not later than the 20<sup>th</sup> day after it received notice of the independent review organization decision.
13. 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.
14. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.
15. The Claimant had back surgery in June 2003 to relieve back problems resulting from his \_\_\_\_, injury.
16. The Claimant now uses the Stimulator less than he did before his back surgery.
17. The Claimant now has less need for the Stimulator since his back surgery.
18. There was no medical-expert evidence on the effect of the June back surgery on the need to purchase the Stimulator.
19. The record is silent concerning whether Dr. Gardner would now prescribe a purchase of the Stimulator, prescribe it for a limited time as he did in October 2002, or not prescribe it at all.

## 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.
2. RS Medical was a health care provider under the above-stated facts. TEX. LAB. CODE ANN. § 401.011(22).
3. All parties received adequate and timely notice of the hearing. TEX. GOV'T CODE ANN. §2001.052.
4. RS Medical has the burden of proof in this matter. 28 TEX. ADMIN. CODE § 148.21(h).
5. RS Medical did not prove the Stimulator is now reasonably required by the nature of the Claimant's injury. TEX. LAB. CODE ANN. §§ 401.011 and 408.021.
6. 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 motion to dismiss for lack of jurisdiction urged by Argonaut Midwest Insurance Company be, and the same is hereby, denied.

**IT IS ORDERED FURTHER** that the request by RS Medical for authorization of the purchase of a Stimulator to be used by the Claimant and covered by Argonaut Midwest Insurance Company be, and the same is hereby, denied.

**Signed November 19<sup>th</sup>, 2003.**

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**James W. Norman**  
**Administrative Law Judge**