

**RS MEDICAL,
Petitioner**

V.

**HARTFORD UNDERWRITERS
INSURANCE COMPANY,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

RS Medical (Petitioner) requested a hearing before the State Office of Administrative Hearings (SOAH) following a decision of the Texas Workers' Compensation Commission (Commission) acting through Texas Medical Foundation, an Independent Review Organization (IRO), denying the preauthorization request of Petitioner for the purchase of an interferential and muscle stimulator for indefinite use by ___ (Claimant).¹

This decision denies the relief sought by Petitioner.

A hearing convened on August 4, 2004, before Administrative Law Judge (ALJ) Stephen J. Pacey. Patrick K. Cougill represented Petitioner. W. Jon Grove represented Hartford Underwriters Insurance Company (Respondent). Susan Keesee, Petitioner's Insurance Relations Manager, and Claimant testified for Petitioner. Leonard Hershkowitz, M.D., testified for Respondent.² There were no contested issues of notice or jurisdiction.

On the day of the hearing, Respondent filed a Motion to Dismiss that was based on an exception to the jurisdiction. The ALJ instructed the parties to brief the issue. The original of the last reply brief was received September 13, 2004, and an order denying the Motion to Dismiss issued September 15, 2004. The record closed September 15, 2004.

¹ The decision by the IRO is deemed to be a Commission Decision and Order.

² Petitioner and Respondent adopted ALJ Norman's summary of Ms. Keesee's and Dr. Herschkowitz's testimony from the Decisions and Orders in Docket Nos. 453-04-1176.M2 and 453-04-1317.M2.

I. DISCUSSION

Claimant sustained a work-related injury to his back on or about _____. No details were presented concerning the injury's cause or Claimant's medical history. Apparently, in 1994, Claimant had a lumbar laminectomy, and in 1995, another back surgery was performed on Claimant. On April 30, 1997, Aaron Calodney, M.D., Claimant's current physician, performed a spinal cord stimulator implantation on Claimant. Claimant complained of a low back pain and leg pain with spasms. Dr. Calodney reported that the symptoms increased with activity. Dr. Calodney diagnosed Claimant's symptoms as chronic laminectomy syndrome, fusion syndrome and chronic pain syndrome.

On January 24, 2003, Dr. Calodney prescribed an RS Medical RS-4i interferential and muscle stimulator for a two-month period to treat back pain and the muscle spasms. On March 27, 2003, Dr. Calodney prescribed the RS Medical RS-4i interferential and muscle stimulator for indefinite use.

The RS Medical RS-4i interferential and muscle stimulator is a class II medical device approved by the United States Food and Drug Administration (FDA) for specified indications. Some medical professionals question whether, or the mechanism by which, the device works. The ALJ finds that the general efficacy of the device is not an issue so long as the device is prescribed and used for the indications approved by the FDA. Dr. Calodney prescribed the RS Medical RS-4i for FDA-approved indications. Therefore, the only issue in this proceeding is whether the device is reasonable and medically necessary for Claimant as of the date of the hearing.³

The RS-4i contains an onboard data collection system. Petitioner retrieved utilization data from the RS-4i for the period from January 25, 2004, through June 28, 2004. The data revealed that Claimant did not use the RS-4i from April 2003 to March 2004. The data further revealed that Claimant used the RS-4i once in March and once in April 2004. Although Claimant had the RS-4i

³ The ALJ adopts the reasoning of ALJ Norman that the issue of medical necessity is present need, as of the date of the hearing, and not past need, as of the date of the prescription. SOAH Docket No. 453-03-4229.M2, MDR No. M2-03-1308-01; *RS Medical v. City of El Paso* (January 6, 2004).

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his possession during the pendency of the review process, Claimant said that he could not use the RS-4i because he did not obtain supplies.⁴ Claimant testified that he obtained relief from his pain and muscle spasms from the RS-4i. The usage reports are inconsistent with the medical records and Claimant's testimony. If the RS-4i was medically necessary to treat Claimant's condition, Claimant would not have waited more than a year to use the RS-4i but would purchased the supplies as necessary. Claimant's actions indicate that the RS-4i was not medically necessary to treat his condition.

Petitioner had the burden of proof in this proceeding. The evidence shows Claimant did not use the RS-4i for over a year. Consequently, Petitioner did not prove that the purchase of an RS-4i interferential and muscle stimulator for indefinite use by Claimant is reasonable and medically necessary as of the date of the hearing.

II. FINDINGS OF FACT

1. ____ (Claimant) sustained a work-related injury on or about ____.
2. Claimant experienced pain and muscle spasms as a result of his work-related injury.
3. Neither a 1994 surgery nor a 1995 surgery relieved Claimant's severe back pain or the pain radiating into his legs.
4. Aaron Calodney, M.D., prescribed an RS Medical RS-4i interferential and muscle stimulator on January 25, 2003, for a two-month period for treatment of Claimant's back pain and muscle spasms.

⁴ Claimant explained that the insurance company would not pay for his monthly supplies. The supplies cost approximately \$80.00 a month.

5. On March 27, 2003, Dr. Calodney prescribed an RS Medical RS-4i interferential and muscle stimulator for indefinite use for treatment of Claimant's back and leg pain.
6. The RS Medical RS-4i interferential and muscle stimulator is a class II medical device approved by the United States Food and Drug Administration (FDA) for specified indications.
7. Dr. Calodney prescribed the RS Medical RS-4i for FDA approved indications.
8. Data was retrieved from the RS-4i's data collection system for the period January 25, 2003, through June 28, 2004.
9. Claimant did not use the RS-4i from April 2003 to March 2004, and Claimant only used the RS-4i once in March and once in April 2004.
10. Claimant's usage of the RS Medical RS-4i interferential and muscle stimulator indicates that it does not relieve Claimant's pain.
11. On or about April 1, 2003, Hartford Underwriters Insurance Company (Respondent) denied Claimant's preauthorization request for purchase of an RS Medical RS-4i as not medically necessary.
12. On or about April 14, 2003, Respondent denied Claimant's request for reconsideration.
13. RS Medical (Petitioner) seeks preauthorization for Claimant's purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use by Claimant.
14. By letter dated July 3, 2003, Texas Medical Foundation, an Independent Review Organization (IRO), denied the preauthorization request of Petitioner for the purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use by Claimant.
15. The IRO decision is deemed a Decision and Order of the Texas Workers' Compensation Commission (Commission).
16. Petitioner requested a hearing to contest the Commission's decision.
17. By letter dated August 21, 2003, the Commission issued a notice of hearing.
18. The hearing was reset several times at parties' request.
19. Administrative Law Judge Stephen J. Pacey convened a hearing on August 4, 2004, in the hearing rooms of the State Office of Administrative Hearing. After a post-hearing motion was decided, the record closed on September 15, 2004.

20. Patrick K. Cougill represented Petitioner. W. Jon Grove represented Respondent.

III. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issue presented pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 413.031.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.
3. Petitioner timely requested a hearing in this matter pursuant to 28 TEX. ADMIN. CODE (TAC) §§ 102.7 and 148.3.
4. Notice of the hearing was proper and complied with the requirements of TEX. GOV'T. CODE ANN. ch. 2001.
5. An employee who has sustained 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 cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a).
6. Petitioner had the burden of proof in this matter, which was the preponderance of evidence standard. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41(b).
7. Petitioner did not prove by a preponderance of the evidence that the purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use by Claimant is medically necessary.

ORDER

THEREFORE IT IS ORDERED that Petitioner RS Medical's request for relief is **DENIED** and the preauthorization of the purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use by ___ is **DENIED**.

SIGNED September 29, 2004.

**STEPHEN J. PACEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**