

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 Medical has the burden of proof.²

B. Testimony and Contentions

1. RS Medical

Ms. Kessee testified that the interferential current portion of the RS 4i Stimulator is a unique modality that is different from other types of electrotherapy.³ It involves simultaneous two-medium-frequency electrical signals into the body that cross, or interfere, with one another. She said this causes a pulsing wave that very effectively reduces pain. According to Ms. Kessee, medium interferential frequency minimizes skin resistance and allows much deeper penetration. This distinguishes it from a TENS unit, which is a low-frequency device that meets significant skin resistance. She said the device has three pain-relief mechanisms compared to a TENS unit, which has only one.

According to Ms. Kessee, the 'Philadelphia Panel Physical Therapy Study' (Philadelphia study), reviewed TENS devices, not interferential devices. Ms. Kessee cited a study by Anthony Yeung entitled, 'Effect of Sequential Elective Surface Stimulation on Medication Utilization Following Selective Endoscopic Discectomy,' in the *Journal of Minimally Invasive Spinal*

City of El Paso (January 6, 2004), that the issue of medical necessity is present need, as of the date of the hearing, rather than past need, as of the date of the prescription.

² 1 TEX. ADMIN. CODE (TAC) ' 155.41; 28 TAC ' 148(h).

³ Ms. Kessee was not shown to be a medical expert.

Technology. Dr. Yeung concluded there was significantly reduced drug consumption by patients using the RS 4i Stimulator after minimally invasive back procedures.

Claimant testified that the RS 4i Stimulator helps to slow down muscle deterioration which occurs because he can not do much exercise with his injured knee. He also testified that it helps him to wind down on the couch and helps with pain. Several reports in the evidentiary record verify that Claimant has used the RS 4i Stimulator, except for a time during this past summer when he was unable to charge it.

2. LOWES

Dr. Hershkowitz, a board-certified neurologist, testified that the interferential current is like two TENS units set to interfere with one another. He acknowledged that the unit is said to give ' a deeper penetration than a TENS unit alone. He indicated the RS 4i Stimulator is a passive modality that is legitimately used in the acute phase, or first six to eight weeks, following an injury, or at the latest, in the subacute phase.

Dr. Herschkowitz agreed with other reviewers ' opinions that the device is inappropriate for use by Claimant more than two-and-one-half years after an injury. He said although he would always factor in patient statements about care, he would also need objective evidence on how a device is working. He explained there is a well-recognized, large placebo effect that patients may receive from treatments that actually have no objective value. He said he would expect to see, in written progress notes, such objective measures as an analog pain scale, what a patient could do by using the device, or medication reductions. He referred to this as Evidence-based medicine, ' and cited it as the medical standard for determining medical necessity.

Dr. Herschkowitz ' s concern is an absence of medical records for the Claimant demonstrating the efficacy of the device. He said he has not seen adequate information to conclude it is medically necessary at this stage of his injury, but agreed that if it does relieve pain, it could be appropriate.

Dr. Herschkowitz referred to the Philadelphia study, which concluded that devices such as electrical stimulators are not helpful after the acute phase of an injury. He agreed that the study did

not mention the interferential modality, but said the RS 4i Stimulator is similar to a TENS unit, which was discussed. He has not seen any studies or other evidence to recommend electrical stimulation after the acute phase.

Lowes argues that in January 2004 Claimant continued to report pain of eight out of ten even though he was using the RS 4i Stimulator. Lowes continues there is no objective testing showing any benefit from the RS 4i Stimulator and therefore medical necessity has not been proven.

C. Analysis

The ALJ concludes that the RS 4i Stimulator is not medically necessary. The ALJ agrees with Lowes and the IRO decision in that Claimant failed to offer objective evidence indicating the efficacy of the device. Claimant continues to have significant constraints on work and exercise, belying his testimony that the RS 4i Stimulator is strengthening his knee. Further, the device apparently does not provide Claimant with significant pain relief as he stated he continues to need pain medication (although it is no longer prescribed) and requested treatment from a pain management program even after using the RS 4i Stimulator. For these reasons, the ALJ concludes that the RS 4i Stimulator is not reasonable medical care for Claimant's present condition.

II. FINDINGS OF FACT

1. Claimant sustained an at-work injury to his left knee on ____.
2. Claimant's diagnosis was a tear of medial cartilage or meniscus.
3. Claimant was prescribed the RS 4i Stimulator for two months on November 6, 2003.
4. When the prescription was renewed on December 19, 2003, for indefinite use, Lowes denied the claim.
5. An independent review organization upheld the denial.
6. It is undisputed that RS Medical requested a hearing not later than the twentieth day after receiving notice of the IRO decision.
7. Claimant requested treatment from a pain management program and believes he continues to need medication for pain relief, even after receiving treatment from the RS 4i Stimulator.

8. Claimant continues to have significant constraints on work and exercise, even after treatment from the RS 4i Stimulator.
9. The RS 4i Stimulator is not shown to be reasonably required by the nature of the Claimant's injury.
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 at the September 13, 2004 hearing in this matter.

III. CONCLUSIONS OF LAW

1. 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.
2. Petitioner timely requested a hearing in this matter pursuant to 28 TEX. ADMIN. CODE (TAC) ' ' 102.7 and 148.3.
3. Notice of the hearing was proper and complied with the requirements of TEX. GOV'T. CODE ANN. ch. 2001.
4. RS Medical has the burden of proof in this matter, which was the preponderance of evidence standard. 28 TAC ' ' 148.21(h); 1 TAC ' 155.41(b).
5. The only issue in this proceeding is whether the device is reasonable and medically necessary for the Claimant as of the date of the hearing. 28 TAC ' 134.600.
6. Lowes proved that the RS 4i Stimulator is not medically necessary for Claimant's compensable injury. TEX. LAB. CODE ANN. ' 408.021(a).
7. Lowes should not have to provide the RS 4i Stimulator to Claimant.

ORDER

IT IS THEREFORE ORDERED that RS Medical 's request for relief is **DENIED** and Lowes is not ordered to provide the RS Medical RS 4i Stimulator for Claimant.

SIGNED October 7, 2004.

**TOMMY L. BROYLES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**