

**SOAH DOCKET NO. 453-05-1087.M4
TWCC MR NO. M4-04-B150-1**

EMPLOYERS INSURANCE COMPANY OF WAUSAU, Petitioner	:	BEFORE THE STATE OFFICE
	:	
	:	
V.	:	OF
	:	
	:	
RS MEDICAL, Respondent	:	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. INTRODUCTION

Employers Insurance Company of Wausau (Carrier) challenges a decision of the Texas Workers' Compensation Commission's (TWCC or Commission) Medical Review Division (MRD) regarding a fee dispute between Carrier and RS Medical (Provider or RS Medical) for medical services furnished to ___(Claimant) on July 30, 2003, and August 30, 2003. MRD found that Provider's monthly rental rate for the RS-4i Sequential Stimulator (RS4i) is fair and reasonable and ordered Carrier to reimburse Provider an additional \$200 plus all accrued interest.

The disputed issues are (1) whether the 1996 Medical Fee Guideline (MFG) or the new MFG, set forth in Section 134.202 of Commission Rules,¹ applies to the medical services RS Medical provided Claimant on July 30, 2003; (2) whether Provider's list price of \$250 per month for rental of the RS4i is a fair and reasonable rate; and (3) whether Carrier has assigned the proper relative value--in effect, the maximum allowable reimbursement amount (MAR)--for the monthly rental of the RS4i provided Claimant on August 30, 2003.

¹ 28 TEX. ADMIN. CODE (TAC) ' 134.202 (West 2005).

As set out below, the Administrative Law Judge (ALJ) finds that the 1996 MFG applies to the medical services RS Medical provided Claimant prior to August 1, 2003. The ALJ further finds that Provider=s list price of \$250 per month for rental of the RS4i on July 30, 2003, is a fair and reasonable rate, and that reimbursement should be at Provider=s list price of \$250 per month for rental of the RS4i on August 30, 2003.

II. DISCUSSION

- A. Whether Rule 134.202 or the 1996 MFG applies to services RS Medical provided Claimant prior to August 1, 2003.

Labor Code ' 413.011(a),² entitled AReimbursement Policies and Guidelines; Treatment Guidelines and Protocols,@ reads in pertinent part as follows:

The commission shall use health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements. To achieve standardization, the commission shall adopt the most current reimbursement methodologies, models, and values or weights used by the federal Health Care Financing Administration, including applicable payment policies relating to coding, billing, and reporting. . . .

In response to the Legislature’s directive, TWCC promulgated a new MFG, effective January 5, 2003, which is set forth in Section 134.202 of the Commission Rules. Rule 134.202 was enjoined from becoming effective by a legal challenge. The challenge was denied by a Travis County district court, which held that Rule 134.202 was valid and “shall be effective for professional

² TEX. LAB. CODE ANN. (Labor Code) § 413.011(a) (Vernon Supp. 2004-2005).

medical services *provided* on or after August 1, 2003.” (Emphasis added.) The district court’s decision was later upheld by the Austin Court of Appeals in *Texas Medical Ass’n v. Texas Workers Compensation Commission*.³

In pertinent part, Sections 134.202(c)(6) and 134.202(d) state the following:

- (c) To determine the maximum allowable reimbursements (MARs) for professional services system participants shall apply the Medicare payment policies with the following minimal modifications.

* * *

- (6) for products and services for which CMS [the Center for Medicare and Medicaid Services] or the commission does not establish a relative value unit and/or a payment amount the carrier shall assign a relative value, which may be based on nationally recognized published relative value studies, published commission medical dispute decisions, and values assigned for services involving similar work and resource commitments.

- (d) In all cases, reimbursement shall be the least of the:

- (1) MAR amount as established by this rule;
- (2) health care provider=s usual and customary charge;
- or,
- (3) health care provider=s workers= compensation negotiated and/or contracted amount that applies to the billed service(s).

Carrier contends that Rule 134.202 applies because it did not receive Provider=s completed medical bills for the service RS Medical provided Claimant on July 30, 2003, until after

³ *Texas Medical Ass’n v. Texas Workers Comp.*, 137 S.W. 3rd 342 (Tex. App. B Austin 2004, no pet.).

August 1, 2003. As a result, Carrier did not process Provider=s requests for reimbursement until after the Rule=s effective date. Under Rule 134.202 and the new MFG, Carrier asserts it has discretion in setting the reimbursement amount for services for which no MAR is provided.

Provider, however, argues that the 1996 MFG applies because the services were provided before Rule 134.202 became effective. Thus, Provider asserts, the issue is whether Provider=s list price of \$250 per month for rental of the RS4i on July 30,2003, is a fair and reasonable rate.

Clearly, Carrier=s argument that Rule 134.202 applies to requests for reimbursement *processed* after August 1, 2003, is contrary to the plain language of the district court=s decision upheld by the Court of Appeals. The district court held that Rule 134.202 is effective for *services provided* on or after August 1, 2003 B not for requests for reimbursement processed after that date. Because the new MFG set forth in Rule 134.202 became effective on August 1, 2003, it does not apply to the medical services RS Medical provided Claimant on July 30, 2003. Rather, the Commission=s 1996 MFG applies to the services RS Medical provided Claimant prior to August 1, 2003.

B. Whether Provider=s list price of \$250 per month for Claimant=s rental of the RS4i on July 30, 2003, is a fair and reasonable rate.

Paragraph VI of the 1996 MFG AGeneral Instructions@ entitled AREimbursement@ reads in pertinent part as follows:

. . . [Healthcare Common Procedural Coding System (HCPCS)] codes shall be reimbursed as provided in the [Durable Medical Equipment (DME)] Ground Rules.

Pursuant to Paragraph IV of the 1996 DME Ground Rules entitled ANonlisted Items and Documentation of Procedure,@ there is no specific MAR amount for DME items. Instead, Paragraph IV states, in pertinent part, the following:

. . . the insurance carrier shall reimburse the DME provider at. . ., if there is no pre-negotiated amount, the fair and reasonable rate for the item described. Use the miscellaneous HCPCS code, E1399, when no other HCPCS code is present for the DME. . . .

In pertinent part, Subsection C of Paragraph IX of the 1996 DME Ground Rules entitled ABilling@ reads as follows:

. . . Reimbursement shall be an amount pre-negotiated between the provider and carrier or if there is no pre-negotiated amount, the fair and reasonable rate. A fair and reasonable reimbursement shall be the same as the fees set for the AD@ codes in the 1991 [MFG].

The DME Ground Rules in the 1991 MFG state that Asupplies and equipment not addressed in this fee guideline will be reimbursed at a fair and reasonable rate.@

Provider asserts that the RS4i is a four-channel (8 leads) sequential device that incorporates both a muscle stimulation modality and an interferential modality. The AD@ codes in the 1991 MFG provide a code for a muscle stimulator (D0550) with a reimbursement of \$150 per month but, Provider contends, no AD@ code addresses the interferential modality of the RS4i. The closest AD@code addressing the interferential modality is the code provided for a 4-lead TENS unit (D0372), which is reimbursed at \$95 per month. Thus, Provider argues, \$250 is a fair and reasonable reimbursement rate for the RS4i because the device provides both interferential and muscle stimulation modalities.

Carrier contends it reimbursed Provider a fair and reasonable rate of \$150 per month and relies on explanations of benefits for Athe same or similar equipment.@ Carrier also argues that an examination of sales of the RS4i device on eBay demonstrates that the amount of \$250 that Provider

is requesting for reimbursement for the monthly rental of the device is well beyond an appropriate rate under the 1996 MFG Act derogation of the Commission's mandate to control medical costs.

Carrier, however, has failed to show that the RS4i is either the same or similar to other DME items. Apparently, Carrier is arguing that the RS4i is nothing more than a muscle stimulator and thus should be reimbursed at the same \$150 monthly rental rate as that device. However, the record shows that the RS4i is indicated for use not only as a muscle stimulator but also to relieve acute and chronic pain. Carrier had the burden of proof, and it failed to demonstrate that the RS4i is only a muscle stimulator.

Additionally, sales of used RS4i devices on eBay do not prove that Provider's list price of \$250 for the monthly rental of the device is an unfair and unreasonable rate.

The ALJ finds, therefore, that Provider's list price of \$250 per month for rental of the RS4i is a fair and reasonable rate for the medical services RS Medical provided Claimant on July 30, 2003.

C. Whether Carrier has assigned the proper relative value in effect, the MAR -- for the monthly rental of the RS4i on August 30, 2003.

Both Carrier and Provider agree there is no MAR for DME items billed under the HCPCS code E1399. That is, DME items billed under E1399 are products for which neither CMS nor the Commission has established a relative value unit and/or a payment amount. Therefore, according to the procedure set forth in Section 134.202(c)(6) of the new MFG, Carrier is instructed to, in effect, create the MAR by assigning a relative value based on (1) nationally recognized published relative value studies, (2) published Commission medical dispute decisions, and (3) values assigned for services involving similar work and resource commitments.

Carrier argues that the RS4i does not provide pain relief. Hence, Carrier contends, the MAR for the RS4i should be at the same \$150 monthly rental rate as a muscle stimulator under the AD@ code in the 1996 MFG (D0550).

However, the record shows that the RS4i is indicated for use not only as a muscle stimulator but also to relieve acute and chronic pain.⁴ Carrier had the burden of proof, and it failed to demonstrate that the RS4i is only a muscle stimulator. Because Carrier did not assign a relative value for the RS4i, which is a DME item that the evidence shows is intended for both muscle stimulation and pain relief, there is, in effect, no maximum allowable reimbursement amount - no MAR - for this product.

Pursuant to Section 134.202(d), if there is no MAR amount, the health care provider=s usual and customary charge or its workers= compensation negotiated and/or contracted amount determines reimbursement. In this case, Provider has no workers= compensation negotiated or contracted amount. Therefore, reimbursement shall be at Provider=s Ausual and customary@ charge, which is Provider=s list price of \$250 for the monthly rental of the RS4i.

Because the evidence establishes that reimbursement should be at Provider=s list price of \$250 per month for rental of the RS4i after August 1, 2003, and that Provider=s list price of \$250 is a fair and reasonable rate for rental of the RS4i before August 1, Provider is entitled to be further reimbursed by Carrier in the amount of \$200 plus all accrued interest.

⁴ According to the United States Food and Drug Administration, the RS4i Sequential Stimulator is a Class II medical device that is safe and effective for muscle stimulation and pain relief. (Exhibit No. 1.)

III. FINDINGS OF FACT

1. On ____, ____ (Claimant) sustained a work-related injury to his left shoulder as a result of his work activities.
2. On the date of injury, the Claimant=s employer was Sam Kane Beef Processors, Inc., and its workers= compensation insurance carrier was Employers Insurance Company of Wausau (Carrier).
3. RS Medical (Provider) is the manufacturer and distributor of the RS-4i Sequential Stimulator device.
4. The RS-4i Sequential Stimulator is a Class II medical device that the United States Food and Drug Administration has determined is safe and effective for the following specified indicated uses:
 - a. Muscle stimulation:
 - (1) Relax muscle spasms
 - (2) Prevent or retard disuse atrophy
 - (3) Maintain or increase range of motion
 - (4) Increase local blood circulation
 - (5) Re-educate muscle
 - (6) Immediate post-surgical stimulation of calf muscles to prevent venous thrombosis
 - b. Pain relief:
 - (1) Relieve acute pain
 - (2) Relieve and manage chronic pain
5. On July 30, 2003, Claimant=s treating physician, Nicholas Adame, D.C., prescribed the RS-4i Sequential Stimulator to relieve Claimant=s pain, relax his muscle spasms, re-educate his muscles, increase his range of motion, and increase local blood circulation.
6. In response to Dr. Adame=s prescription, Provider furnished the RS-4i Sequential Stimulator to Claimant, using the Healthcare Common Procedural Coding System (HCPCS) code shown below, on the dates and at the monthly rental rate shown below:

DATES	HCPCS CODE	SERVICE DESCRIPTION AND RENTAL RATE
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7/30 - 8/29/2003	E1399	Rental of RS-4i Four Channel Muscle/Interferential Stimulator at the monthly rental rate of \$250
8/30 - 9/29/2003	E139 9	Rental of RS-4i Four Channel Muscle/Interferential Stimulator at the monthly rental rate of \$250

7. Provider sought reimbursement in the amount of \$500 from Carrier for the supplied medical service.
8. There is no maximum allowable reimbursement (MAR) for Durable Medical Equipment (DME) billed under HCPCS code E1399.
9. The 1991 Medical Fee Guideline (MFG) provides a AD@ code for a muscle stimulator (D0550) with a reimbursement of \$150 per month.
10. Carrier reimbursed Provider at the monthly rate of \$150, for a total amount of \$300.
11. Carrier denied Provider=s requested remaining reimbursement amount of \$200 and sent Provider explanations of benefits setting forth the following reason for the denials:

DATES	CODE	DENIAL REASON
8/26/03	Z560	The charge for this procedure exceeds the fee schedule or usual and customary values as established by Ingenix
9/26/03	Z560	The charge for this procedure exceeds the fee schedule or usual and customary values as established by Ingenix.

12. On July 26, 2004, Provider filed a request for medical dispute resolution with the Texas Workers= Compensation Commission (TWCC).
13. TWCC=s Medical Review Division (MRD) determined that Provider=s monthly rental rate of \$250 was fair and reasonable and ordered Carrier to reimburse Provider in the amount of \$200.
14. After the MRD decision was issued, Carrier asked for a contested-case hearing by a State

Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ).

15. Notice of a contested-case hearing concerning the dispute was mailed on November 4, 2004, to Carrier and Provider. The notice informed the parties 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 the matters to be considered.
16. On May 11, 2005, Carol Wood, a SOAH ALJ, held a contested-case hearing concerning the dispute at the William P. Clements Office Building, Fourth Floor, 300 West 15th Street, Austin, Texas. Although the hearing concluded that day, the record remained open until June 13, 2005, for the submission of written arguments.
17. Carrier appeared at the hearing through its attorney, Kevin J. Franta.
18. Provider appeared at the hearing through its representative, Patrick K. Cougill.

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. LABOR CODE ANN. (Labor Code) ' ' 402.073(b) and 413.031(k) (Vernon Supp 2004-2005) and TEX. GOV=T CODE ANN. (Gov=t Code) ch. 2003 (Vernon 2000).
2. Adequate and timely notice of the hearing was provided in accordance with Gov=t Code ' ' 2001.051 and 2001.052.
3. Based on the above Findings of Fact and Gov't Code ' 2003.050 (a) and (b), 1 TEX. ADMIN. CODE (TAC) ' 155.41(b) (2005), and 28 TAC ' ' 133.308(v) and 148.21(h) (2005), Carrier has the burden of proof in this case.
4. 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 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. Labor Code § 408.021(a) (Vernon 1996).
5. The 1996 MFG applies to medical services RS Medical provided Claimant prior to August 1, 2003.
6. If there is no pre-negotiated amount between the provider and insurance carrier, reimbursement shall be the fair and reasonable rate. A fair and reasonable reimbursement

shall be the same as the fees set for the “D” codes in the 1991 MFG. *Medical Fee Guideline*, DME Ground Rules, Paragraph IX, Subsection C, effective April 1, 1996.

7. There is no AD@ code for the RS-4i Sequential Stimulator in the 1991 MFG.
8. Provider=s list price of \$250 per month for rental of the RS-4i Sequential Stimulator is fair and reasonable because, unlike a 4-lead TENS unit (D0372) or a muscle stimulator (D0550), the RS-4i Sequential Stimulator provides both muscle stimulation and pain relief.
9. For coding, billing, reporting, and reimbursement of professional medical services, Texas Workers' Compensation system participants shall apply the Medicare program reimbursement methodologies, models, and values or weights including its coding, billing, and reporting payment policies in effect on the date a service is provided with any additions or exceptions in this section. 28 TAC § 134.202(b) (2005).
10. For products and services for which CMS [the Center for Medicare and Medicaid Services] or the Commission does not establish a relative value unit and/or a payment amount, the carrier shall assign a relative value, which may be based on nationally recognized published relative value studies, published Commission medical dispute decisions, and values assigned for services involving similar work and resource commitments. 28 TAC ' 134.202(c)(6).
11. Because Carrier has not assigned a relative value for the RS-4i, which is a DME item that is intended for both muscle stimulation and pain relief, no MAR has been established by Commission Rule for the RS-4i product.
12. Provider has no workers= compensation negotiated or contracted amount that applies to the monthly rental of the RS-4i.
13. If there is no MAR amount as established by Commission Rule or a health care provider’s workers’ compensation negotiated and/or contracted amount that applies to the billed service,
the health care provider’s usual and customary charge shall be the reimbursement amount.
28 TAC § 134.202(d).
14. Based on the above Findings of Fact and Conclusions of Law, Provider is entitled to further reimbursement from Carrier in the amount of \$200.

ORDER

THEREFORE, IT IS ORDERED that Employers Insurance Company of Wausau reimburse RS Medical in the amount of \$200 plus all accrued interest.

SIGNED August 12, 2005.

**CAROL WOOD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**