

**SOAH DOCKET NO. 453-05-6393.M4
TWCC MR NO. M4-04-7852-01**

**STATE OFFICE OF RISK
MANAGEMENT,
Petitioner**

V.

**RS MEDICAL,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. DISCUSSION

This case concerns the proper level of reimbursement for the rental of an RS-4i neuromuscular stimulator, a piece of durable medical equipment (DME). Medical necessity is not an issue in this docket. The Administrative Law Judge (ALJ) concludes reimbursement should be at the amounts billed by RS Medical.

The captioned docket was joined for hearing on the merits at 10:00 a.m. on December 13, 2005, with other dockets involving the same parties and the same medical fee dispute issues. State Office of Administrative Hearings (SOAH) Administrative Law Judge Howard S. Seitzman presided. J. Red Tripp represented the State Office of Risk Management (SORM) and Patrick K. Cougill represented RS Medical. Some of the joined dockets addressed the proper level of reimbursement for the rental of an RS-4i neuromuscular stimulator, while others addressed the proper level of reimbursement for the purchase of an RS-4i neuromuscular stimulator.

SORM and RS Medical previously litigated these and other issues in SOAH Docket No. 453-05-3779.M4. A Decision and Order in that docket was signed by ALJ Henry D. Card on October 21, 2005. Subsequently, ALJ Card issued identical decisions between the same parties in SOAH Docket Nos. 453-05-3407.M5, 453-05-4170.M4, 453-05-4298.M4, and 453-05-4322.M4.

In his decisions, ALJ Card held: (1) the RS-4i is a dual modality durable medical equipment device that is not equivalent to a muscle stimulator only; (2) the RS-4i has both a muscle stimulation mode and a interferential current mode; (3) each RS-4i mode serves a different purpose; (4) the rental rate of \$250.00 per month for the RS-4i was fair and reasonable; and (5) the purchase price of \$2,495.00 for the RS-4i was fair and reasonable.

On November 8, 2005, ALJ Seitzman ordered the parties to show cause why the referenced facts and issues decided in SOAH Docket No. 453-05-3779.M4 should be re-litigated. SORM filed its brief on November 16, 2005. SORM contended it is entitled to a hearing on the merits and that the decision in SOAH Docket No. 453-05-3779.M4 is not a final decision because SORM is seeking judicial review of that decision.

In Joinder Order No. 5 dated December 7, 2005, the ALJ limited the issues to be litigated at the joined hearing on the merits.¹ Continued re-litigation of issues by the same parties in administrative proceedings should be discouraged.² A judgment is final for purposes of collateral estoppel, issue preclusion, even though the matter is appealed, unless the appeal is by trial *de novo*.³ The appeal of SOAH Docket No. 453-05-3779.M4 to the District Court of Travis County is not by trial *de novo*.

For purposes of the December 2005 hearing on the merits, the ALJ held: (1) the parties in the Joined Dockets were adversaries in SOAH Docket No. 453-05-3779.M4 and the subsequent cases decided by ALJ Card (SORM v. RS Medical Cases); (2) the facts and issues decided in the SORM v. RS Medical Cases are identical to the facts and issues to be decided in the Joined Dockets;

¹ The joined dockets are SOAH Docket Nos. 453-05-4821.M4, 453-05-4983.M4, 453-05-4984.M4, 453-05-6390.M4, 453-05-6391.M4, 453-05-6392.M4, 453-05-6393.M4, 453-05-6432.M4 and 453-05-8286.M5 (Joined Dockets).

² See *Coalition of Cities for Reasonable Utility Rates v. Public Utility Commission of Texas*, 798 S.W.2d 560, 563 (Tex. 1990).

³ *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986); *Prostok v. Browning*, 112 S.W.3d 876, 923-924 (Tex. App.-Dallas 2003), *aff'd in part and rev'd in part on other grounds*, 165 S.W.3d 336 Tex. (2005).

(3) the parties had a full and fair opportunity to litigate these facts and issues in the SORM v. RS Medical Cases; (4) the facts and issues were necessary, essential, and material to the outcome of the SORM v. RS Medical Cases; and (5) a full and final judgment on the merits was rendered in each of the SORM v. RS Medical Cases.

Based upon the foregoing, the ALJ held that SORM was precluded from re-litigating the following issues (Precluded Issues): (1) whether the RS-4i is a dual modality durable medical equipment device that is not equivalent to a muscle stimulator only; (2) whether the RS-4i has both a muscle stimulation mode and a interferential current mode; and (3) whether each RS-4i mode serves a different purpose. The evidence with respect to these Precluded Issues would not change without a change in the device.

The ALJ ruled that SORM could present evidence with respect to the following issues: (1) the fair and reasonable rental rate for the RS-4i; (2) the fair and reasonable purchase price for the RS-4i; and (3) whether a claimant used multiple modes. The evidence with respect to these issues could change without a change in the device.

At the December 13, 2005 joined hearing, both SORM and RS Medical presented evidence with respect to the rental rate and the purchase price. Neither party addressed the use of the device by a claimant.

The parties offered as evidence the audio tape of the evidentiary hearing in SOAH Docket No. 453-05-3779.M4.⁴ All evidence regarding the Precluded Issues was excluded by the ALJ but tendered by SORM and RS Medical as offers of proof. On January 9, 2006, the ALJ obtained a copy of the audio tape in SOAH Docket No. 453-05-3779.M4 and the record closed on that date. In essence, the substantive evidence tendered by each party was the same evidence ALJ Card considered in each of his decisions.

⁴ Under legislation effective September 1, 2005, the Texas Workers' Compensation Commission was abolished and its functions transferred to the Division of Workers' Compensation at the Texas Department of Insurance (collectively "DWC"). Because the audiotape had already been returned to DWC, the parties agreed to leave the record open until the file could be retrieved and a copy of the tape could be made for each of the joined dockets.

In the captioned docket, injured worker ___(Claimant) suffered a compensable injury on____. On March 28, 2003, the treating physician prescribed use of the RS-4i neuromuscular stimulator. The purposes for which the treating physician prescribed the unit were to relieve and manage Claimant’s chronic pain, relax muscle spasms, maintain/increase range of motion, and re-educate muscle.⁵

Claimant rented the unit for two months. RS Medical submitted a request for reimbursement to SORM. SORM provided reimbursement for both months of rental, but at a lower rate.⁶ The amount billed, the reimbursement provided, and the amounts in dispute are shown below:

<u>Date of Service</u>	<u>Amount Billed</u>	<u>Amount Paid</u>	<u>Amount in Dispute</u>
3-28-03	\$250.00	\$150.00	\$ 100.00
4-28-03	250.00	150.00	<u>100.00</u>
Total Amount in Dispute			\$200.00

Depending on the date of service, one of two Medical Fee Guidelines (MFG) will apply: (1) the 1996 MFG for dates of service prior to August 1, 2003; or (2) the MFG set forth at 28 TEX. ADMIN. CODE (TAC) § 134.202 (Current MFG) for dates of service on or after August 1, 2003. Since the dates of service are March and April 2003, the 1996 MFG applies.

Under Paragraph IV of the 1996 DME Ground Rules, there is no specific maximum allowable reimbursement (MAR) amount for DME items. Providers are to bill at their usual and customary rate and, if there is a pre-negotiated amount, the carrier reimburses at the pre-negotiated amount. If there is no pre-negotiated rate, then Paragraph IV requires the carrier to reimburse “the fair and reasonable rate for the item described.” The provider is to “Use the miscellaneous HCPCS code, E1399, when no other HCPCS code is present for the DME. . . .”

⁵ SORM Ex. 1 at 17.

⁶ SORM reimbursed RS Medical at the rate allowed for a muscle stimulator. SORM Ex. 1.

The pertinent portion of Subsection C of Paragraph IX of the 1996 DME Ground Rules states:

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 “D” codes in the 1991 [MFG].

RS Medical submitted its request for reimbursement using Code E1399. SORM reimbursed RS Medical at the rate for a muscle stimulator. RS Medical contended the RS-4i is not just a muscle stimulator, but a sequential device that incorporates both a muscle stimulation modality and an interferential modality. Because there is no “D” code for such a dual-modality DME, RS Medical claimed it should be reimbursed at a fair and reasonable rate. RS Medical argued its billed rates are fair and reasonable.

SORM contended that a fair and reasonable monthly rental rate is 10% of the purchase price. SORM, relying on documents obtained from Internet advertising, contended that the following devices are equivalent to the RS-4i and are available on the market at a lesser price than that charged by RS Medical:

- (1) IF-5000 Combo IF/EMS Stimulator \$1,495.00;⁷
- (2) Duet Model PMD103 2-Channel Combination Interferential and Muscle Stimulator \$795.00;⁸
- (3) ALL-STIM TENS 4 Channel 8 Lead Combo Unit \$1,250.00;⁹
- (4) SynchroSonic US/54 Combination Ultrasound 4 Pad Low Volt Stimulator \$1,968.00;¹⁰
- (5) Mettler Sys*Stim 226 \$1,195.00;¹¹

⁷ SORM Ex. 2 at 3-4.

⁸ *Id.* at 5-6.

⁹ *Id.* at 7-10.

¹⁰ *Id.* at 11-12.

¹¹ *Id.* at 13.

(6) Quartet Model PMD101 4-Channel Interferential and Neuromuscular Stimulator \$1,195.00 (suggested retail price is \$3,195.00);¹²

(7) EMS 400 Combination Electronic Muscle Stimulator EMS and TENS Unit \$89.00;¹³ and

(8) EMS 400 Combination Electronic Muscle Stimulator EMS and TENS Unit \$441.525 (sic).¹⁴

SORM argued that the devices it tendered for cost comparisons are equivalent to the RS-4i. RS Medical argued that the devices SORM tendered are not equivalent to the RS-4i. The ALJ is unable to find from the Internet advertising that the devices tendered by SORM are equivalent to the RS-4i and, therefore, concludes that they are not equivalent devices. SORM failed to prove the rates charged by RS Medical are not fair and reasonable.

RS Medical filed a timely request for medical dispute resolution with DWC. On April 8, 2005, DWC found in favor of RS Medical. On April 21, 2005, SORM filed a timely request for a contested hearing. DWC issued notice of the hearing on May 25, 2005.

Under 28 TAC § 148.14(a), the party requesting the contested case hearing has the burden of proof in hearings, such as this one, conducted pursuant to TEX. LAB. CODE ANN. § 413.031.

In summary, the RS-4i is a dual modality durable medical equipment device that has both a muscle stimulation mode and an interferential current mode. None of the devices tendered by SORM are equivalent to the RS-4i. There is no MAR for the RS-4i and no pre-negotiated rate with SORM. The ALJ concludes RS Medical billed its usual and customary charge for the purchase of an

¹² *Id.* at 14-17.

¹³ *Id.* at 21-22. Offered by David Steele.

¹⁴ *Id.* at 23-24. Offered by General Home Medical Supply. The two EMS 400 units appear to be identical except for the price.

RS-4i. Further, the ALJ finds RS Medical's charge to be fair and reasonable. Therefore, SORM is ordered to reimburse RS Medical for the disputed dates of service at the billed amount.

II. FINDINGS OF FACT

1. Injured worker __ (Claimant) suffered a compensable injury on ____.
2. On April 18, 2003, the treating physician prescribed the use of the RS-4i neuromuscular stimulator.
3. The purposes for which the physician prescribed the unit were to relieve and manage Claimant's chronic pain, relax muscle spasms, maintain/increase range of motion, and re-educate muscle.
4. Claimant rented the unit for two months; from March 28, 2003 through April 27, 2003, and from April 28, 2003, through May 27, 2003.
5. RS Medical submitted a \$250.00 request for reimbursement to the State Office of Risk Management (SORM) for each month's rental.
6. SORM reimbursed RS Medical \$150.00 for each month's rental.
7. The total amount in dispute is \$200.00.
8. SORM reimbursed RS Medical at the rate for a muscle stimulator.
9. RS Medical filed a timely request for medical dispute resolution with the Texas Workers' Compensation Commission.
10. Under legislation effective September 1, 2005, the Texas Workers' Compensation Commission was abolished and its functions transferred to the Division of Workers' Compensation at the Texas Department of Insurance (collectively "DWC").
11. On April 8, 2005, DWC found in favor of RS Medical.
12. On April 21, 2005, SORM filed a timely request for a contested hearing before the State Office of Administrative Hearings (SOAH).
13. DWC issued notice of the hearing on May 25, 2005.
14. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

15. The hearing on the merits convened on December 13, 2005, with SOAH Administrative Law Judge Howard S. Seitzman presiding. Both parties appeared and presented evidence. The hearing was adjourned on December 13, 2005, but the record remained open until January 9, 2006, for the addition of Joint Exhibit No. 1, the audiotape in SOAH Docket No. 453-05-3779.M4.
16. The RS-4i is a dual modality DME device that is not equivalent to a muscle stimulator only.
17. The RS-4i has both a muscle stimulation mode and an interferential current mode.
18. Each RS-4i mode serves a different purpose.
19. None of the devices tendered by SORM are equivalent to the RS-4i.
20. There is no maximum allowable reimbursement for the RS-4i and no pre-negotiated rate with SORM.
21. RS Medical's usual and customary charge is a \$250.00 per month rental rate for the RS-4i.

III. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to the Texas Workers' Compensation Act, specifically TEX. LAB. CODE ANN. §413.031(k), and TEX. GOV'T CODE ANN. ch. 2003.
2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and 28 TEX. ADMIN. CODE (TAC) ch. 148.
3. The request for a hearing was timely made pursuant to 28 TAC §148.3.
4. Adequate and timely notice of the hearing was provided according to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. The party requesting the contested case hearing has the burden of proof.
6. The 1996 Medical Fee Guidelines apply.
7. SORM did not meet its burden of proving that RS Medical should be reimbursed at rates lower than the rates at which it billed.
8. RS Medical's rental rate is a fair and reasonable rate.

9. SORM should reimburse RS Medical at the billed rental rate for the RS-4i neuromuscular stimulator on the disputed dates of service.

ORDER

THEREFORE IT IS ORDERED that the State Office of Risk Management reimburse RS Medical at the billed rate, together with any applicable interest, for the RS-4i neuromuscular stimulator rented on the disputed dates of service.

SIGNED March 2, 2006.

**HOWARD S. SEITZMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**