SOAH DOCKET NO. 453-05-1687.M4
TWCC MR NO. M4-04-B233-01

LIBERTY MUTUAL FIRE INSURANCE COMPANY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	**OF**
V.	§	
	§	
RS MEDICAL,	§	**ADMINISTRATIVE HEARINGS**
Respondent	§	

DECISION AND ORDER

I. INTRODUCTION

Liberty Mutual Fire Insurance Company ("Petitioner") has challenged a decision by the Texas Workers' Compensation Commission's Medical Review Division ("MRD") in a medical fee dispute. The MRD countermanded Petitioner's denial of full reimbursement to RS Medical ("Respondent") for the rental of an RS-4i muscle stimulator/interferential electrotherapy device, used in the treatment of an injured claimant.

The MRD concluded that the monthly rental of $250.00 charged by Respondent was fair and reasonable and that Petitioner, which had deemed a monthly rental of only $150.00 to be appropriately payable, should reimburse Respondent an additional $100.00 for each month's rental of the RS-4i.

This decision confirms the prior decision of the MRD.

II. JURISDICTION, NOTICE, AND VENUE

The Texas Workers' Compensation Commission ("TWCC" or "the Commission") has jurisdiction over this matter pursuant to §413.031 of the Texas Workers' Compensation Act ("the Act"), TEX. LABOR CODE ANN. ch. 401 *et seq.* The State Office of Administrative Hearings

("SOAH") has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003. No party challenged jurisdiction, notice, or venue.

III. STATEMENT OF THE CASE

The hearing in this docket was convened on June 21, 2005, at SOAH facilities in Austin, Texas. Administrative Law Judge ("ALJ") Mike Rogan presided over the hearing. Petitioner was represented by Patrick Cougill, Attorney. Respondent was represented by Kevin Franta, Attorney. After presentation of evidence and argument, the parties were allowed an opportunity to submit briefing. The record was closed on July 29, 2005.[1]

The record developed at the hearing revealed that, on ___, the claimant suffered a compensable injury. His subsequent treatment included the use of the RS-4i for two monthly periods (July 28 through August 27, and August 28 through September 27, 2003).

Respondent billed for these services at a rental rate of $250.00 per month B a total of $500.00. (Rental of the RS-4i was billed under CPT Code E1399, since it represented a product or service for which neither the Centers for Medicare and Medicaid Services nor TWCC has established a standardized payment amount.) Petitioner, the insurer for the claimant's former employer, declined to reimburse more than $150.00 per month for the disputed services B a total of $300.00. Respondent then initiated an action for medical dispute resolution.

On October 8, 2004, the MRD issued a decision, finding that the $250.00-per-month rental rate charged by Respondent was fair and reasonable, whereas the rate of reimbursement provided by Petitioner was not. According to the decision, this determination was based upon "redacted documentation" submitted by Respondent in support of its position. The MRD accordingly ordered Petitioner to reimburse Respondent $200.00, plus all accrued interest due at the time of such reimbursement. Petitioner properly effected an appeal of the decision to SOAH.

[1] The staff of the Commission formally elected not to participate in this proceeding, although it filed a general "Statement of Matters Asserted" with the notice of the hearing.

IV. THE PARTIES' EVIDENCE AND ARGUMENTS

A. Petitioner

Petitioner argued that proper reimbursement for all disputed services in this case is governed by 28 TEX. ADMIN. CODE ("TAC") § 134.202 (a TWCC rule that, by court decree, is effective for services provided on or after August 1, 2003[2]). Subsection (c)(6) of the rule states 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 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."

In Respondent's interpretation, it exercised proper discretion in this case when assigning a reimbursement rate for rental of the RS-4i, since it "used a fee in the mid-range of all fees charged by RS Medical" and it applied (consistent with recent court decisions on the subject) "methodologies that determine fair and reasonable medical fees, ensure quality medical care to injured workers, and achieve effective cost control."[3]

B. Respondent

Respondent argued that, whether 28 TAC § 134.202 or previously applicable rules govern reimbursement in this case, the MRD correctly found the rental charged by Respondent to be fair and

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[2] *Texas AFL-CIO and Tex. Med. Ass'n v. TWCC and Richard F. Reynolds Exec. Director*, No. GN 202203 (126th Dist. Ct., Travis County, Tex., June 11, 2003); the decision was later upheld in *Tex. Med. Ass'n v. TWCC*, 137 S.W. 3d 342 (Tex. App. - Austin 2004, no pet.).

[3] *TWCC v. Patient Advocates of Texas*, 136 S.W. 3d 643, 656 (Tex. 2004).

reasonable. In addition, Respondent noted that 28 TAC § 133.304(i) requires a carrier to develop, document, and consistently apply a methodology to determine fair and reasonable reimbursement for services for which TWCC has not established a MAR. A carrier thus does not have "unbridled discretion to set reimbursement rates" in such circumstances. Rather, as a recent Texas Supreme Court decision stated, "[C]arriers do not make the final determination of the fees for disputed claims. If a carrier and a provider disagree on the reimbursement amount, TWCC, not the carrier, makes the decision on the proper payment, subject to review."[4] Accordingly, Respondent concluded that Petitioner has failed to meet its burden of establishing that the reimbursement rate determined by the MRD in this case was incorrect.

Respondent also cited a pair of SOAH decisions issued this year (and involving the same parties as this case), which concluded that Petitioner had failed to demonstrate its compliance with 28 TAC §134.202(c)(6) in assigning "a relative value" to disputed goods or services (again, the rentals of an RS-4i).[5] Those decisions noted that Petitioner had merely set the reimbursement for the RS-4i at the $150.00 rate set under HCPCS Code E0745 for a neuromuscular stimulator with a "D" code in TWCC's 1991 *Medical Fee Guideline* ("*MFG*"). But because Petitioner failed to show that the RS-4i was only such a stimulator, properly classified under Code E0745, it also failed to show any valid basis for its valuation of the disputed goods or services.

V. ANALYSIS

In the some 157 pages of exhibits submitted by Petitioner,[6] the only explanation the ALJ can find of Petitioner's "methodology" for valuing the disputed goods or services appears in a letter to the MRD from Carol Crewey of Petitioner's Medical Dispute Department, dated July 23, 2004.[7]

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[4] *Id.*

[5] SOAH Docket Nos. 453-04-8216.M4 and 453-04-8253.M4 (ALJ Wood, issued Apr. 18, 2005).

[6] The exhibits were submitted in both SOAH Docket Nos. 453-05-0581.M4 and 453-05-1687.M4, which related to virtually identical disputes and were consolidated for evidentiary hearing.

[7] Ex. No. 3, p. A0029.

Under the heading "Methodology," that document states:

> Our reimbursement of $150 for rental of the RS4i stimlator had been based on the "D"code reimbursement for neuromuscular stimulators because documentation has not shown that this unit is significantly different or more beneficial than the NMS unit or that reimbursement at a greater rate is "fair and reasonable." We have included extensive documentation that this is the amount we consistently reimburse for these units, including EOBs showing our consistent reimbursement and copies of bills to show that this was for the same type of equipment.

In other words, Petitioner's "methodology"consists of miscategorizing the equipment at issue and then simply making the reimbursement listed for that misidentified category. The ALJ fails to see how this constitutes a legitimate methodology. It is based on exactly the same logic that was rejected in the recent SOAH decisions cited above by Respondent. It certainly is not "based on nationally recognized published relative value studies, published commission medical dispute decisions, and values assigned for services involving similar work and resource commitments," as prescribed by the current 28 TAC §134.202(c)(6).

In the ALJ's view, Petitioner has followed a strikingly disingenuous course in this litigation. In initial proceedings before the MRD, Petitioner took the position that proper reimbursement was governed by TWCC's 1996 *MFG*,[8] which defined fair and reasonable reimbursement for identified categories of durable medical equipment in terms of "D" codes established in the 1991 *MFG*. The MRD rejected Petitioner's classification of the disputed rentals under HCPCS Code E0745, however, concluding instead that they fell under HCPCS Code E1399 B *i.e.*, devices for which no standard MAR had been established. Petitioner has not presented evidence or argument to contest this aspect of the MRD decision directly. Rather, Petitioner has urged before SOAH that the new 28 TAC '§ 134.202(c)(6) governs the controversy and gives a carrier wide discretion to choose a methodology for valuing goods or services that are not subject to a standard MAR. The methodology Petitioner has chosen in this case is to apply, once more, the 1996 *MFG* in the same manner that the MRD previously has found to be improper and a misinterpretation of those rules. This exercise in circularity cannot reasonably be regarded as furthering Petitioner's effort to show that it has identified a fair and reasonable rate of reimbursement in this case, under *either* the 1996 *MFG* or the current 28 TAC § 134.202(c)(6).

[8] 28 TEX. ADMINISTRATIVE CODE § 134.201.

In summary, given that Petitioner bears the burden of proof in this proceeding, the evidence and legal argument it presents are wholly insufficient to justify a reversal of the MRD's previous decision.

VI. CONCLUSION

The ALJ finds that the record in this case supports affirmation of the MRD's prior order that insurer Liberty Mutual Fire Insurance Company reimburse RS Medical, as originally requested, for the rental of an RS-4i muscle stimulator/interferential electrotherapy device, used in the treatment of a claimant with a compensable injury.

VII. FINDINGS OF FACT

1. On ___, the claimant, whose employer was insured by Liberty Mutual Fire Insurance Company ("Petitioner"), suffered a compensable injury under the Texas Worker's Compensation Act ("the Act"), TEX. LABOR CODE ANN. § 401.001 *et seq*.

2. The claimant's subsequent treatment included the use of the RS-4i B a muscle stimulator/interferential electrotherapy device B for two monthly periods (July 28 through August 27 and August 28 through September 27, 2003).

3. RS Medical ("Respondent") billed $250.00 per month for rental of the equipment noted in Finding of Fact No. 2 (Respondent's usual and customary charge for such goods or services), for total charges of $500.00.

4. Petitioner reimbursed Respondent $300.00, but denied the request for reimbursement with respect to $200.00 of the amount billed, on the basis that the fair and reasonable charge for the equipment rental at issue was $150.00 per month.

5. Respondent made a timely request to the Medical Review Division ("MRD") of the Texas Workers' Compensation Commission ("Commission") for medical dispute resolution with respect to the disputed reimbursement.

6. The MRD ordered Petitioner to reimburse Respondent $200.00 (plus accrued interest due at the time of payment) in a decision dated October 8, 2004, in dispute-resolution docket No. M4-04-B233-01. The order reflected a determination that $250.00 per month is a fair and reasonable rate for rental of the equipment noted in Finding of Fact No. 2, based upon documentation supporting Respondent's position and upon the lack of an established

maximum allowable reimbursement ("MAR") for any category of equipment embracing the RS-4i within the Commission's *Medical Fee Guideline* ("*MFG*"), 28 TEX. ADMIN. CODE ("TAC") §134.201.

7. Petitioner requested in timely manner a hearing with the State Office of Administrative Hearings, seeking review and reversal of the MRD decision regarding reimbursement.

8. The Commission mailed notice of the hearing's initial setting to the parties at their addresses on November 19, 2004.

9. A hearing in this matter was convened before SOAH on June 21, 2005, in Austin, Texas. Petitioner and Respondent were represented. The parties were given an opportunity to submit post-hearing briefing, and the record in the case closed on July 29, 2005.

10. The methodology identified by Petitioner for determining its rate of reimbursement, as noted in Finding of Fact No. 4, was to base reimbursement on the "D" code rate for neuromuscular stimulators, as provided in the Commission's 1991 *MFG*.

11. The RS-4i is not properly categorized as only a neuromuscular stimulator.

VIII. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issues presented pursuant to § 413.031 of the Act.

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 §413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.

3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and SOAH's rules, 1 TAC § 155.1 *et seq*.

4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

5. Petitioner, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC §148.14 and 1 TAC §155.41(b).

6. The disputed goods or services were properly categorized under HCPCS Code E1399 B *i.e.*, devices for which the Commission has established no standard MAR.

7. With respect to the disputed goods or services provided before August 1, 2003, Petitioner's evaluation methodology is not consistent with the requirements of applicable regulations B *i.e.*, the Commission's 1996 *MFG* (which incorporates "D" codes from the Commission's 1991 *MFG*).

8. With respect to the disputed goods or services provided on or after August 1, 2003, Petitioner's evaluation methodology is not consistent with the requirements of applicable regulations B *i.e.*, 28 TAC § 134.202(c)(6), which provides that, for products and services for which neither the Center for Medicare and Medicaid Services nor the Commission has established a relative value unit and/or payment amount, a 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.

9. Petitioner failed to demonstrate that a monthly rental rate of $250.00 is not a fair and reasonable charge for the RS-4i muscle stimulator/interferential electrotherapy device

10. Based upon the foregoing Findings of Fact and Conclusions of Law, the Findings and Decision of the Medical Review Division, issued on October 8, 2005, are confirmed. Petitioner's reimbursement to Respondent of an additional $200.00 for two months' rental of an RS-4i muscle stimulator/interferential electrotherapy device used in the treatment of the claimant, should be approved, pursuant to § 413.015 of the Act.

ORDER

IT IS THEREFORE, ORDERED that Petitioner, Liberty Mutual Fire Insurance Company, reimburse RS Medical an additional $200.00 (plus all accrued interest due at the time of payment) for three months' rental of an RS-4i muscle stimulator/interferential electrotherapy device, provided between July 28 and September 27, 2003, in the treatment of an injured claimant under the Texas workers' compensation laws.

SIGNED August 17, 2005.

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MIKE ROGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS