

**SOAH DOCKET NO. 453-05-3144.M4
TWCC MR NO. M4-04-A631-01**

**LIBERTY MUTUAL INSURANCE
COMPANY,
Petitioner**

V.

**RS MEDICAL,
Respondent**

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**BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

I. INTRODUCTION

Liberty Mutual Insurance Company (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 13, 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 \$100 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 and (2) whether Provider's list price of \$250 per month for rental of the RS4i is a fair and reasonable rate.

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 is a fair and reasonable rate.

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

II. DISCUSSION

A. Whether Rule 134.202 or the 1996 MFG applies in this case.

In response to a Legislative 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 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*.²

Carrier contends that Rule 134.202 applies because it did not receive Provider’s completed medical bill for the service RS Medical provided Claimant in July 2003, until after August 1, 2003. As a result, Carrier did not process Provider’s request 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 maximum allowable reimbursement (MAR) is provided.

Provider, however, argues that the 1996 MFG applies because the service was 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 is a fair and reasonable rate.

Clearly, Carrier’s argument is contrary to the plain language of the district court’s decision and that of the Court of Appeals, which states that Rule 134.202 is effective for *services provided* on or after August 1, 2003 – 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

² *Texas Medical Ass’n v. Texas Workers Comp.*, 137 S.W. 3rd 342 (Tex. App. B Austin 2004, no pet.).

medical service RS Medical provided Claimant on July 13, 2003. Rather, the Commission's 1996 MFG applies to those medical services provided prior to August 1, 2003.

B. Whether Provider's list price of \$250 per month for rental of the RS4i is a fair and reasonable rate.

Paragraph VI of the 1996 MFG "General Instructions" entitled "Reimbursement" 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 "Nonlisted 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 "Billing" 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 "D" codes in the 1991 [MFG].

The DME Ground Rules in the 1991 MFG state that "supplies 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 "D" codes in the 1991 MFG

provide a code for a muscle stimulator (D0550) with a reimbursement of \$150 per month but, Provider contends, no “D” code addresses the interferential modality of the RS4i. The closest “D” 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 “the 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 “in 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.³ 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.

Because the evidence establishes that reimbursement should be at Provider’s list price of \$250 per month for rental of the RS4i, Provider is entitled to be further reimbursed by Carrier in the amount of \$100 plus all accrued interest.

IV. FINDINGS OF FACT

³ 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 both muscle stimulation and pain relief. (Exhibit No. 1.)

1. On _____, _____ (Claimant) sustained a work-related injury to his lower back as a result of his work activities.
2. On the date of injury, the Claimant's employer was _____, and its workers' compensation insurance carrier was Liberty Mutual Insurance Company (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 13, 2003, Claimant's treating physician, John Cobb, M. D., diagnosed Claimant with lumbosacral neuritis. Dr. Cobb prescribed the RS-4i Sequential Stimulator to relieve Claimant's acute pain and relax his muscle spasms.
6. In response to Dr. Cobb's prescription, Provider furnished the RS-4i Sequential Stimulator to Claimant, using the Healthcare Common Procedural Coding System (HCPCS) code shown below, on the date and at the monthly rental rate shown below:

DATE	HCPCS CODE	SERVICE DESCRIPTION AND RENTAL RATE
7/13 - 8/13/2003	E1399	Rental of RS-4i Four Channel Muscle/Interferential Stimulator at the monthly rental rate of \$250

7. Provider sought reimbursement in the amount of \$250 from Carrier for the supplied medical service.

8. There is no maximum allowable reimbursement for Durable Medical Equipment (DME) billed under HCPCS code E1399.
9. The 1991 Medical Fee Guideline (MFG) provides a “D” 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 \$150.
11. Carrier denied Provider’s requested remaining reimbursement amount of \$100 and sent Provider an explanation of benefits setting forth the following reason for the denial:

DATE	CODE	DENIAL REASON
8/13/03	Z560	Charge for this procedure exceeds the fee schedule or usual and customary values as established by Ingenix.

12. On July 6, 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 \$100.
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 January 20, 2005, 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.

V. 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 "D" 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. Based on the above Findings of Fact and Conclusions of Law, Provider is entitled to further reimbursement from Carrier in the amount of \$100.

ORDER

THEREFORE, IT IS ORDERED that Liberty Mutual Insurance Company reimburse RS Medical in the amount of \$100 plus all accrued interest.

SIGNED August 11, 2005.

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