

[REDACTED]

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (the ministry's) reconsideration decision of October 10, 2013 in which the ministry denied the appellant's request for extra funds beyond the legislated limit of \$250 for an off-the-shelf orthotic shoe with a rocker sole. Although it approved the maximum legislated amount of \$250 as set out under Schedule C, Section 3.10 (4.2), Employment and Assistance for Persons with Disabilities Regulation, the ministry determined that it had no legislated authority to approve funds above the legislated amount.

## PART D – Relevant Legislation

Section 62, Employment and Assistance for Persons with Disabilities Regulation.

Schedule C, Sections 3 and 3.10, Employment and Assistance for Persons with Disabilities Regulation.

## PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- A Orthoses Request and Justification form signed by the appellant's medical practitioner on May 29, 2013 and by the appellant's orthotist on June 18, 2013. The information on the form is provided in the following order:

- The medical condition is: cerebral palsy, left leg discrepancy.

- under the question "What type of orthosis is recommended?" the following is written: bilateral foot orthotics and shoes; rocker sole on left shoe; left knee brace for medial joint osteoarthritis.

- Beside the question "Is a custom-made orthosis required?" the box labeled "YES" is checked.

- Beside the question "If the orthosis is a knee brace, will it be required at least 6 hours per day?" "N/A" is written.

- Section 1 of the form. The orthoses required are: one pair extra depth shoes with rocker sole on the left shoe and rigid sole; and left unloading knee orthosis to relieve medial joint compression.

- Section 2. The prescribed item will assist with joint motion and/or support as follows: left first metatarsal joint fused; appellant requires external rocker sole on his shoe to reduce stress on the joint during gait; left medial joint osteoarthritis; left knee brace to reduce medial compartment of left knee.

- Section 3. The item is required for all the following purposes: prevention of surgery; for post-surgical treatment; to assist in physical healing from surgery, injury or disease; and to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition.

- Section 4. The form reads: "If the orthosis is a custom-made foot orthotic, will it be made from a hand cast mold? No [or] Yes (please explain)." This section of the form is not filled in.

- Section 5 provides other information relevant to the application and reads: "Patient has a rigid shank in his current shoe, this will be transferred to his new shoe and 'work' with the rocker sole to reduce stress on the first metatarsal joint. Custom-fitted left knee brace will reduce joint degeneration."

- An Orthoses Request and Justification Quote dated June 18, 2013 from the appellant's orthotist quoting \$895 for a left custom fitted knee brace, \$38 for an undersleeve, \$185 for extra depth shoes, and \$120 for a rocker sole. The total, including GST and PST on shoes only, is \$1,260.20.

- A letter from the ministry dated August 14, 2013 to the appellant advising him that the ministry has approved the appellant's request for "off-the-shelf orthopaedic footwear." The footwear is described as "off-the-shelf orthopaedic shoes including rocker sole (\$250 ministry maximum)."

- The appellant's Reason for Request for Reconsideration in Section 3 of the Request for Reconsideration signed by the appellant on October 6, 2013. The appellant writes: "Shoes-footwear with rocker sole totals: \$327.20 — [minus] \$250 = \$77.20. Difference is what I would like to be



reconsidered . . . .”

• The ministry’s reconsideration decision of October 10, 2013, in which the ministry states that as a Person with Disabilities designation, the appellant is eligible for the health supplements in Schedule C, Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) provided the appellant’s request meets all the eligibility criteria. The ministry states that on August 14, 2013 the appellant was approved for an off-the-shelf orthotic shoe with a rocker sole up to the legislated amount of \$250.

After the ministry’s reconsideration decision the following were submitted.

1) The appellant’s Reasons for Appeal in his Notice of Appeal of October 24, in which the appellant wrote:

“I cannot afford the custom-made footwear, because customized rocker sole is needed due to surgery of toe/ball on foot. Please see attached letter.

2) The attached letter, dated October 22, 2013 from the appellant’s orthotist to the ministry reads. “I am writing in response to your decision of the request for reconsideration. There appears to be some confusion over the cost of footwear (\$185) with the addition of a left rocker sole (\$120). The rocker sole is a modification of the sole of the left foot. Please note this is necessary to protect the fusion on [the appellant’s] first toe. Unfortunately, neglecting to protect the joint properly may lead to further surgery or the need for custom-made footwear . . . .Do not hesitate to contact me ... for further information or clarification.”

The panel finds that 1) and 2) contain information in support of the information and records that were before the minister when the decision being appealed was made; therefore the panel finds that 1) and 2) are admissible as evidence in accordance with the Employment and Assistance Act (EAA), Section 22 (4).

3) The appellant’s late submission, received by the Employment and Assistance Appeal Tribunal (the tribunal) on November 27, 2013. The late submission contains a changed version of his October 24 Reasons for Appeal. The late submission reads: “I cannot afford the modified footwear. A customized rocker sole is needed. Please contact the supplier for more information. Please see the attached letter.”

4) The attached letter is the same letter from the appellant’s orthotist of October 22, 2013 as quoted above.

The panel chair accepted the late submission, 3), under Practices and Procedures 5.3 d(iii) as containing additional information in support of the information and records that were before the minister when the decision being appealed was made; and the panel admits the additional information as evidence in accordance with the Employment and Assistance Act (EAA), Section 22 (4).

The panel notes that 4) was accepted under 2) above.



5) A submission to the tribunal from the ministry dated December 4, 2013 in response to the appellant's late submission quoted above. The ministry wrote:

"It appears some clarification may be required here.

"There is no mention of a custom orthosis so this was denied as an off-the-shelf orthosis. They mentioned a knee brace but this is not what is being considered.

"Shoe cost 185 . . . Extra Depth Shoes  
Soles 120 Rocker Sole  
Total \$305

"The client was approved for \$250. Reconsideration was for remainder of \$55.

"Section 3.10(4.2) For an orthosis that is an off-the-shelf orthopaedic footwear, in addition to the requirements in subsection (2) of this section, the cost of footwear must not exceed \$250. (B.C. Reg. 144/2011)

"The ministry notes that [the appellant] [was] approved for an off-the-shelf orthotic shoe with a rocker sole up to the legislated amount of \$250.00 on August 14, 2013. The ministry has no legislated authority to approve funds above the legislated amount...."

The panel accepts the information in 5) as clarification and argument from the ministry.



**PART F – Reasons for Panel Decision**

The issue under appeal is whether the ministry's decision to deny the appellant's request for extra funds beyond the legislated limit of \$250 for an orthotic shoe with a rocker sole was a reasonable application of the legislation in the circumstances of the appellant or was reasonably supported by the evidence. Although it approved the maximum legislated amount of \$250 as set out under Schedule C, Section 3.10 (4.2), EAPWDR, the ministry determined that it had no legislated authority to approve funds above the legislated amount.

**Section 62, Employment and Assistance for Persons with Disabilities Regulation**

**General health supplements**

**62 (1)** Subject to subsections (1.1) and (1.2), the minister may provide any health supplement set out in section 2 [*general health supplements*] or 3 [*medical equipment and devices*] of Schedule C to or for a family unit if the health supplement is provided to or for a person in the family unit who is

(a) a recipient of disability assistance,

[Section 62 (1) and (2) describe several other categories of persons eligible for health supplements.]

**Schedule C, Sections 3 and 3.10, Employment and Assistance for Persons with Disabilities Regulation**

**Medical equipment and devices**

**3 (1)** Subject to subsections (2) to (5) of this section, the medical equipment and devices described in sections 3.1 to 3.12 of this Schedule are the health supplements that may be provided by the minister

(a) the supplements are provided to a family unit that is eligible under section 62 [*general health supplements*] of this regulation . . .

[Section 3 goes on to describe several conditions under which health supplements may be provided by the minister.]

**Medical equipment and devices — orthoses**

**3.10 (1)** In this section:

**"off-the-shelf"** , in relation to an orthosis, means a prefabricated, mass-produced orthosis that is not unique to a particular person;

**"orthosis"** means

(a) a custom-made or off-the-shelf foot orthotic;

(b) custom-made footwear;

(c) a permanent modification to footwear;

(d) off-the-shelf footwear required for the purpose set out in subsection (4.1) (a);

(e) off-the-shelf orthopaedic footwear;

(f) an ankle brace;

(g) an ankle-foot orthosis;

(h) a knee-ankle-foot orthosis;

(i) a knee brace;

[(j) to (o) indicate other categories of orthoses.]

(2) Subject to subsections (3) to (11) of this section, an orthosis is a health supplement for the purposes of section 3 of this Schedule if

(a) the orthosis is prescribed by a medical practitioner or a nurse practitioner,

(b) the minister is satisfied that the orthosis is medically essential to achieve or maintain basic functionality,

(c) the minister is satisfied that the orthosis is required for one or more of the following purposes:

(i) to prevent surgery;

(ii) for post-surgical care;

(iii) to assist in physical healing from surgery, injury or disease;

(iv) to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition, and

(d) the orthosis is off-the-shelf unless

(i) a medical practitioner or nurse practitioner confirms that a custom-made orthosis is medically required, and

(ii) the custom-made orthosis is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.

(3) For an orthosis that is a custom-made foot orthotic, in addition to the requirements in subsection (2) of this section, all of the following requirements must be met:

(a) a medical practitioner or nurse practitioner confirms that a custom-made foot orthotic is medically



required;

(b) the custom-made foot orthotic is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist;

(c) Repealed. [B.C. Reg. 144/2011, Sch. 2.]

(d) the custom-made foot orthotic must be made from a hand-cast mold;

(e) the cost of one pair of custom-made foot orthotics, including the assessment fee, must not exceed \$450.

(4) For an orthosis that is custom-made footwear, in addition to the requirements in subsection (2) of this section, the cost of the custom-made footwear, including the assessment fee, must not exceed \$1 650.

(4.1) For an orthosis that is off-the-shelf footwear, in addition to the requirements in subsection (2) of this section,

(a) the footwear is required to accommodate a custom-made orthosis, and

(b) the cost of the footwear must not exceed \$125.

(4.2) For an orthosis that is off-the-shelf orthopaedic footwear, in addition to the requirements in subsection (2) of this section, the cost of the footwear must not exceed \$250.

(5) For an orthosis that is a knee brace, in addition to the requirements in subsection (2) of this section, the medical practitioner or nurse practitioner who prescribed the knee brace must have recommended that the knee brace be worn at least 6 hours per day.

[(6) to (8) indicate requirements for other types of orthoses]

(9) Subject to section 3 of this Schedule, the limit on the number of orthoses that may be provided for the use of a person as a health supplement for the purposes of section 3 of this Schedule is the number set out in Column 2 of Table 1 opposite the description of the applicable orthosis in Column 1.



Item	Column 1 Orthosis	Column 2 Limit
1	custom-made foot orthotic	1 or 1 pair
2	custom-made footwear	1 or 1 pair
3	modification to footwear	1 or 1 pair
4	ankle brace	1 per ankle
5	ankle-foot orthosis	1 per ankle
6	knee-ankle-foot orthosis	1 per leg
7	knee brace	1 per knee
8	hip brace	1
9	upper extremity brace	1 per hand, finger, wrist, elbow or shoulder
10	cranial helmet	1
11	torso or spine brace	1
12	off-the-shelf footwear	1 or 1 pair
13	off-the-shelf orthopaedic footwear	1 or 1 pair
14	foot abduction orthosis	1 or 1 pair
15	toe orthosis	1

(10) [Table 2 lists the period of time for the replacement of different orthoses.]

[(11) Lists items that are not health supplements for the purposes of section 3 of this Schedule and  
(12) deals with orthoses accessories and supplies.]

The position of the appellant is that he cannot afford what he refers to in his late submission of November 27, 2013 as "modified footwear." He writes that he needs "a customized rocker sole." He provides a letter, dated October 22, from his orthotist indicating that the appellant needs footwear that costs \$185, with the addition of a left rocker sole, described by the orthotist as "a modification to the sole of the left shoe," that costs \$120. The appellant believes he is entitled to receive \$77.20 as he states in his request for reconsideration.

The position of the ministry as set out in its submission of December 4, 2013 is that "there is no mention of a customized orthosis." The ministry states that the appellant was approved for an off-the-shelf orthotic shoe with a rocker sole up to the legislated amount of \$250 on August 14, 2013. The ministry states that it "has no legislated authority to approve funds above the legislated amount."



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The panel finds that the ministry's reconsideration decision deals with the appellant's request for funds in excess of \$250 to cover "one pair [of] extra depth shoes with a rocker sole on the left shoe and [a] rigid sole." This is the orthosis recommended in the Orthoses Request and Justification form signed by the appellant's medical practitioner as well as by his orthotist. Although the recommendation in the form includes the appellant's need for a knee orthosis, determination of coverage for this device is not part of the ministry's reconsideration decision and is therefore not within the panel's scope.

The panel notes that Schedule C, section 3.10, EAPWDR specifies two categories of orthoses which exceed \$250 in coverage for eligible recipients:

**1. Schedule C, section 3.10 (3)(e), EAPWDR:** For an orthosis that is a custom-made foot orthotic, "the cost of one pair of custom-made foot orthotics, including the assessment fee, must not exceed \$450."

The panel notes that section 3.10 (2)(d) specifies that an orthosis as a health supplement is considered off-the-shelf unless

- (i) a medical practitioner or nurse practitioner confirms that a custom-made orthosis is medically required, and
- (ii) the custom-made orthosis is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.

The panel notes that the Orthoses Request and Justification form indicates that a "custom-made orthosis" is required but the panel finds that the evidence shows the orthosis referred to in the form as a "custom-made orthosis" is a custom-fitted left knee brace for medial joint osteoarthritis, not a custom-made foot orthotic. The panel notes that section 3.10(3)(d) specifies that a custom-made foot orthotic must be made from a hand-cast mold. As noted above, section 4 the Orthoses Request and Justification form reads: "If the orthosis is a custom-made foot orthotic, will it be made from a hand cast mold? No [or] Yes (please explain)." The panel notes that section 4 of the form is not filled in.

The panel also notes that the appellant's orthotist does not use the term "custom-made foot orthotic" in his quote of June 18 or his letter of October 22, 2013 describing the footwear he is recommending for the appellant. In his letter of October 22, 2013 the orthotist writes: "The rocker sole is a modification to the sole of the left shoe."

The panel notes that in the legislation, the term "modification" is not defined as equivalent to "custom-made." Schedule C, section 3.10(1), EAPWDR reads in part:

**"orthosis" means**

- (a) a custom-made or off-the-shelf foot orthotic;
- (b) custom-made footwear;



(c) a permanent modification to footwear;

(d) off-the-shelf footwear required for the purpose set out in subsection (4.1) (a);

(e) off-the-shelf orthopaedic footwear;

**2. Schedule C, section 3.10 (4), EAPWDR:** "For an orthosis that is custom-made footwear . . . the cost of the custom-made footwear, including the assessment fee, must not exceed \$1,650." The panel notes that section 3.10(1), EAPWDR distinguishes between a custom-made or off-the-shelf foot orthotic [(3.10(1)(a))] and custom-made footwear [(3.10(1)(b))] without elaborating on the difference between the two.

The panel notes that the Orthoses Request and Justification form does not recommend "custom-made footwear." As noted above, the form does indicate that a "custom-made orthosis" is required but the panel's finding is that the "custom-made orthosis" referred to in the form is a left knee brace for medial joint osteoarthritis, not the recommended pair of extra depth shoes with rocker sole on the left shoe and rigid sole.

The panel also notes that the appellant's orthotist does not use the term "custom-made footwear" in his quote of June 18, 2013 or his letter of October 22, 2013 to describe the footwear he is recommending for the appellant. In the letter he refers to the appellant's "need for custom-made footwear" if the recommended footwear is not provided.

Next the panel wishes to address the type of orthosis which the ministry approved in its letter to the appellant of August 13, 2013. Schedule C, section 3.10(4.2), EAPWDR states that: For an orthosis that is off-the-shelf orthopaedic footwear . . . the cost of the footwear must not exceed \$250. The panel notes the following:

- Schedule C, Section 3.10(1), EAPWDR states "off-the-shelf, in relation to an orthosis, means a prefabricated, mass-produced orthosis that is not unique to a particular person."

- the orthosis recommended in the Orthoses Request and Justification form signed by the appellant's medical practitioner as well as by his orthotist is "one pair [of] extra depth shoes with a rocker sole on the left shoe and [a] rigid sole."

- the orthosis is not specified in the form as "off-the-shelf orthopaedic footwear" or in the June 18, 2013 quote from the firm of the appellant's orthotist.

- the appellant's orthotist does not use the term "off-the-shelf orthopaedic footwear" in his letter of October 22, 2013. The orthotist writes that "the rocker sole is a modification to the sole of the left shoe" but does not indicate if the shoe is available off-the-shelf with this modification. He does state, however, as noted above, that "neglecting to protect the joint properly may lead to further surgery or the need for custom-made footwear" for the appellant. Further, the panel notes that in advising the appellant by letter dated August 14, 2013 of its approval for an allowance of a maximum of \$250 for footwear for the appellant, the ministry referred to the item as "off-the-shelf orthopaedic footwear." It is described by the ministry in the letter as "off-the-shelf orthopaedic shoes including rocker sole" and in the same letter the ministry cited the name of the supplier for the item, the firm of the appellant's

orthotist.

The panel finds that the evidence supports the reasonableness of the ministry's determination that the footwear recommended and approved for the appellant is not a custom-made foot orthotic or custom-made footwear but is an orthosis that is off-the-shelf orthopaedic footwear. The panel therefore finds that the ministry's decision that the cost of the footwear must not exceed \$250 as set out in section 3.10 (4.2), EAPWDR is reasonable and confirms the ministry's decision that the appellant is not eligible for extra funding beyond the \$250 legislated costs.