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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated August 4, 2011 which denied the appellant's request to be provided with the Dome accessory for the InterX 5002 Neurostimulation Device. The ministry considered the appellant's request based on the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) as it read on March 31, 2010, the date on which the appellant's original request was received. The specific bases of denial are as follows:

Schedule C, s. 3 [as it read on March 31, 2010]
The ministry determined that not all of the criteria set out in s. 3 of Schedule C for the provision of medical equipment and devices were met. The ministry was satisfied that the equipment, including the Dome accessory, had been prescribed by a medical practitioner and that an assessment by a physiotherapist (PT) had been provided as required by s. 3(2)(a) and (b). However, the ministry determined that the Dome accessory was not any of the medical equipment and devices set out in s. 3(1) and, in particular, was not a positioning device under s. 3(1)(d), and exceeded the policy parameters for the provision of electrotherapy in terms of functionality, quantity, and cost.

Schedule C, s. 2 [as it read on July 4, 2002]
The ministry determined that the appellant is not eligible for the Dome on the basis that she was approved for electrotherapy equipment under the legislation in effect on July 4, 2002 which included a broader category of "durable medical equipment and appliances" not found in the legislation in effect at the time of the appellant's request for the Dome accessory. Further, the ministry determined that previous approval of an electrotherapy device does not establish a precedent that requires the ministry to continue to provide electrotherapy devices indefinitely and the Dome accessory exceeded the policy parameters for the provision of electrotherapy equipment in terms of functionality, quantity, and cost.

s. 69 Life-threatening health need [as it read on March 31, 2010]
The ministry also determined that the appellant was not eligible for the Dome accessory under s. 69 of the EAPWDR [life-threatening health need] because (i) the information does not establish a life-threatening need for the Dome accessory and (ii) the parameters set out in policy are exceeded for the provision of electrotherapy equipment in terms of functionality, quantity and cost.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), s. 16

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), s. 69 and Schedule C, s. 3 in effect on March 31, 2010

Disability Benefits Program Regulation, s. 2, in effect on July 4, 2002

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PART E – Summary of Facts

Preliminary Matters

- The hearing was originally scheduled for September 9, 2011 but was adjourned on September 7, 2011 at the written request of the appellant with the consent of the ministry and the Tribunal chair. The appellant's submission includes the following bases for the adjournment request: the ministry has not provided the appellant with the documents she requires in order to prepare for the hearing, her representative is unable to attend, and medical reasons;

- A rescheduled hearing was to be conducted on November 2, 2011 but was adjourned for a second time on October 12, 2011 at the written request of the appellant with the consent of the ministry and the Tribunal chair. The appellant's submission includes the following basis for the adjournment request: the ministry provided new reasons for denial at the adjudication stage which is a matter that should be resolved by the Ombudsperson prior to the appeal hearing.

- The hearing was rescheduled to take place on June 19, 2012 but was adjourned for a third time on May 23, 2012 at the written request of the appellant with the consent of the ministry and the Tribunal chair. The appellant's submission includes the following basis for the adjournment request: the appellant suffered a flare-up of her chronic fatigue and myofascial pain and requires a period of recovery, as set out in the May 11, 2012 letter from a physician.

- Prior to a date being secured to reschedule the hearing, an extension of time was granted on May 1, 2013 at the written request of the appellant with the consent of the ministry and the Tribunal chair. The appellant's submission includes the following basis for the extension request: to have time to consult with legal counsel, due to health problems she has been unable to work on the appeal and requires a 3-month extension according to her doctor's note dated April 25, 2013, to allow the Ombudsperson to complete an investigation, to get the results of FOI [Freedom of Information] searches, and to prepare for and host a family member, since she cannot prepare for the hearing at the same time.

- The hearing convened on January 29, 2014, with the appellant attending by telephone. The appellant requested an adjournment on the following bases:
    1. Her advocate, who requires the assistance of a care worker, could not physically get to the location for the hearing nor manage the documents without the care worker who cancelled services for today at the last minute.
    2. The appellant requires an advocate to be present and to assist due to her disability.
    3. The appellant has not received sufficient documentation from the ministry.
    4. The Privacy Commissioner is in the process of investigating her complaint regarding the withholding of documents requested of the ministry by the appellant.
    5. Her doctor has said that hearings over an hour in duration are detrimental to her health and her advocate serves to keep her focused.

- The ministry objected to an adjournment on the basis of the length of time that this appeal has been outstanding.

- The panel granted an adjournment of the hearing for the following reason: The care worker cancelled services for the appellant's advocate at the last minute, making it impossible for the

advocate to obtain alternative assistance on short notice. The adjournment is to permit the advocate to make these alternative arrangements so that she can attend and represent the appellant on the appeal.

- The hearing convened on March 20, 2014, with the appellant and the ministry attending by telephone and the appellant's advocate and her care worker attending in person. The panel chair stated a ground rule for conduct of the hearing that the parties would refrain from interrupting each other, that only one person should speak at a time, particularly since the parties were both attending by telephone, and to allow a person to complete his or her thought. The appellant would not agree to this ground rule as she stated that her disability causes her to forget important points that she needs to make so that if she does not raise the issue immediately, which may interrupt the speaker, she is not able to record the thought to raise later. The advocate agreed that it is important that the appellant not be interrupted as her brain injury will compel her to start her thought process over, from the beginning.

- The panel chair pointed out that an adjournment had been granted by the panel to allow the advocate to attend the hearing so that she can assist the appellant with ensuring that all her important points are made, and reiterated that the ground rule will be enforced as part of the panel's ability to give directions necessary to maintain order at a hearing (Section 19.2 of the *Employment and Assistance Act*). The appellant asserted that she views this ground rule as a refusal by the panel to accommodate her disability.

- Given the panel's decision on the ground rule, the appellant requested that she be allowed to record the hearing so that she would have an accurate record of what was said at the hearing. The panel chair referred to the Tribunal's *Practices and Procedures* which prohibits recording of the hearing by a party or any other person attending [Rule 5.2(e)] and to the legislative requirement that hearings be confidential [section 88 of the *Employment and Assistance Regulation*] and refused the appellant's request.

- Given the panel's decision on the ground rule, the appellant stated that she might not be able to complete her presentation within the 3-hour time period allotted for the hearing because of her brain injury and cognitive disability and she requested a commitment from the panel that, in that case, an adjournment of the hearing will be granted to allow the hearing to be completed on another date.

- The panel chair reiterated that the previous adjournment had been granted to allow the appellant's advocate to attend the hearing as the appellant had stated that her advocate is necessary to help to keep her focused, and the panel will rely on the advocate to help ensure the hearing is completed within the time allocated. The panel chair pointed out that close to 2 months have passed since the previous attendance, that the panel has received volumes of written materials, and that the hearing is an opportunity for the appellant to explain her position and to highlight the evidence that she considers important for the panel to consider in making its decision. The hearing was completed within the time allotted so that this issue was not revisited by the appellant.

- The appellant pointed to the May 22, 2002 letter from the Ombudsman confirming it is not appropriate for new grounds for denial to be raised by the ministry during the appeal process.

The appellant requested that the ministry make its presentation to the panel first so that she was sure of the case that she needs to meet, and the ministry agreed.

Substantive Matters

Documentary evidence before the ministry at reconsideration relevant to the issue under appeal included:

1) Ministry of Human Resources BC Benefits Reconsideration Decision dated July 4, 2002 stating that the appellant is eligible for a CellStim 600 patient portable microcurrent unit as recommended by her chiropractor. Documentation respecting the original denial and the CellStim microcurrent unit. Attached is a March 22, 2002 physician's letter which relates the need for the "biofeedback device" to "essential functions of life." The panel notes that the phrase "essential functions of life" reflects the legislative language in s. 2(1)(a) of the *Disability Benefits Program Regulation*, the legislation in effect at that date.

2) Ministry policy respecting Eligible Health Supplements dated December 2, 2008 (also May 1, 2005 and December 1, 2003) stating in part:

   Electrotherapy (Medical Equipment and Devices) – The following are covered:

   -basic TENS unit (cost should not exceed the amount shown in Rate Table: Health Supplements and Programs – Eligible and Non-Eligible Health Supplements)
   -gels
   -electrodes or accessories

   Positioning Devices – Standing frames are covered.

   The policy includes the following statements:
   "The following general guidelines are provided to assist in determining which items are eligible for coverage by the ministry. **This list is a general guide and is NOT all-inclusive.**" [Emphasis included]

3) Ministry of Employment and Income Assistance BC Employment and Assistance Rate Tables showing that the maximum amount that may be paid for a Basic TENS unit is $250.

4) Letter dated March 29, 2010 from the appellant's physician stating that the appellant requires positional devices, including the InterX 5002 device and accessories, including the Dome, to treat myofascial trigger points throughout her body, muscle imbalances, sacral-iliac joint dysfunction and a displaced coccyx. The appellant requires equipment that allows for home treatment to enable upright positioning through the delivery of electrical current without having to grasp electrodes.

5) Medical Equipment Request & Justification form (the MERJ) dated March 31, 2010 completed by a physiotherapist requesting the InterX 5002 device and other medical equipment, including the Dome accessory.

6) The ministry's original decision dated May 14, 2010, which held that "the requested positional devices and accessories are not an eligible item...." and the reconsideration decision dated

November 10, 2010, denying the appellant's request for the InterX 5002 device and other devices under the legislation in effect as of April 1, 2010. A copy of the Employment and Assistance Appeal Tribunal (the Tribunal) decision dated March 23, 2011, which determined that the ministry should have considered the request under the legislation in effect at the time of the appellant's request on March 31, 2010.

7) Letter dated July 7, 2010 from the appellant's physician stating that "the following positional supports are necessary to meet her basic needs, to provide assistance with daily living activities, to make her more independent and more able to participate socially." Included in the list of requested items is the InterX 5002 device which the physician describes as being a different technology from microcurrent. It is "a battery operated device that delivers high amplitude electrical pulses through a biofeedback interactive loop with the body. It takes a reading from the skin and delivers what it determines to be the appropriate pulse to deliver. As the electrophysiology of the tissue changes the pulses that are delivered change. The pulses stimulate delta fibers, stimulates the release of endomorphine and dopamine and activates the body's natural pain relieving mechanisms (segmental and descending inhibition) thus decreasing acute, chronic and neurophathic pain, muscle spasm and increasing range of motion." The appellant requires the Dome accessory, which allows the treatment of the contoured areas that cannot be easily reached with the flexible array pad. The Dome is designed to be easily manipulated and does not have to be gripped, therefore it does not pose the same problem as holding the InterX 5002 device itself.

8) Letter dated October 14, 2010 from the appellant's physician described by the physician as a continuation of the MERJ. The physician writes that the appellant's upright positioning is severely restricted and she has to spend most of her day lying down. The listed equipment, including the InterX 5002 and the Dome accessory, is necessary for treatment to enable upright positioning.

9) Letter dated November 2, 2010 from the appellant's physiotherapist to the ministry stating in part that the physiotherapist understands that the appellant "...has electrotherapy devices to help her pain management. These however don't bring her long-lasting relief from her symptoms anymore. Her Dr. [name of doctor] therefore recommended the use of two different machines which allow multiple currents and appliances. I am not familiar with those machines myself, but I trust [the doctor's] opinion on this matter."

10) Letter dated November 9, 2010 from the appellant's physiotherapist stating that she believes the appellant will benefit from the InterX 5002 device, "...along with dome, comb and soft tissue accessories."

11) Letter dated November 9, 2010 from the appellant's physician in response to the ministry's request for additional information respecting trials and costs of the requested items (the InterX 5002 device and two other devices). The physician describes the InterX 5002 device as an interactive neuro-stimulation device that costs $3,995 US plus the cost of the accessories, including the Dome for $250 US.

12) Letter dated January 17, 2011 from the appellant's physician stating in part that the InterX 5002 device is an electrotherapy device and that, like a TENS unit, delivers electric current to the body. "However the type of current varies as does its therapeutic effect and the method of

current delivery." The physician goes on to describe accessories for the InterX 5002 device including the Dome, which allows for hands free delivery of the current to curved areas of the body that the flexible array will not mold to. The dome enables current delivery with the Dome supporting the hand in a loosely cupped position, and with movement that has a different therapeutic effect than stationary delivery of the current. The InterX 5002 device is described as a positional device that through effects including decreasing pain, abnormal muscle hyper tonus, muscle spasm, inflammation, trigger point irritability increases the amount of time the appellant can spend in weight bearing positions (of sitting, standing, walking), increases mobility and enables her to tolerate positions of side lying and supine lying so that sleep is not disturbed.

13) Letter dated March 4, 2011 from the ministry to the appellant stating in part that "TENS machines were being issued as positioning devices but upon review it was deemed that they do not meet the criterion for positioning devices."

14) Letter dated March 11, 2011 from the ministry to the appellant stating in part "I have been unable to find an exact date when TENS devices would have first been included as an eligible item..." and "I have also been unable to find a rational (sic) for defining TENS devices as a positional device in the past, they do not fit into the definition of a positional device."

15) A copy of the ministry's reconsideration decision dated April 14, 2011 which denied the appellant's request for the devices and accessories together, under the legislation in effect until March 31, 2010.

16) Letter dated May 18, 2011 from the appellant in which she describes the differences between various devices she has requested and describes the InterX 5002 device as a device that locates and then treats areas of low electrical impedance. The Dome is "...an external electrode that attaches to the InterX 5002 and allows current delivery with the hand positioned so it is supported on the dome shape instead of having to clasp around the rectangular shaped InterX device- as holding is a problem- to areas of the body where the flexible array won't work because of the body contours."

17) Manufacturer's Product Information for the CellStim CS600 "a convenient easy-to-use patient handheld microcurrent stimulator" which is reported to provide significant and lasting pain reduction by stopping pain at the cellular level resulting in an increase in mobility with day-to-day activities becoming less painful. "This form of therapy is a major advancement over TENS...which temporarily mask pain and inhibit the healing process."

18) Manufacturer's Product Information for the "InterX 5002 Pain Management Neurostimulation Device" and for the Dome accessory. The "InterX Therapy" is described as providing "gentle dynamic electrical impulses" which "stimulates the skin at the area of pain or inflammation." The InterX device provides "Dynamic and active therapy" with "Unique damped, pulsed, sinusoidal, impedance sensitive waveform which provides dynamic, targeted, high density stimulation on these areas" in contrast with TENS or other E-Stim which provide "Passive therapy." The Dome accessory is specifically for treatment applications of a larger area of skin tissue. The ergonomic design of the Dome electrode eases treatment application of large areas, like the thigh or the back.

19) Print out of information regarding the InterX accessories, including the Dome.

20) Online definitions of TENS (transcutaneous electrical nerve stimulation) – a self-operated portable device used to treat chronic pain by sending electrical impulses through electrodes placed over the painful area.

21) Online definitions of "position", "device", "electrotherapy", "may", "medical", "positioning".

22) Wikipedia information about electrotherapy.

23) Written submission on behalf of the appellant received March 18, 2011.

24) Case law, including the decisions in Abrahams, Choi, Forty-Ninth Ventures, Gustavson Drilling, Hudson, Puskas, Rizzo Shoes Ltd. and Waldock; and,

25) Request for Reconsideration dated June 26, 2011.

The following additional documents were submitted by the appellant to the Tribunal subsequent to the reconsideration decision but prior to the hearing and are identified as a subsequent submission in the Appeal Record, as well as Appendices A through P:

1) Print out of the ministry information for eligibility for a diet supplement; excerpt from the Canadian Encyclopedic Digest for administrative law; email correspondence with the Tribunal; print out of the ministry reconsideration procedures;

2) Online definitions of "and."

3) Email correspondence dated May 26, 2010 between the appellant and a legal advocate.

4) Letter dated July 21, 22011 (sic) from the appellant's physician stating in part that trigger points are causing the appellant to experience pain and difficulty with adjusting and maintaining positions. The InterX 5002 and the Dome, along with other equipment, "are medically essential" to facilitate the appellant: (a) adjusting and maintaining positions, and (b) transferring from different positions. Floor to ceiling poles would not eliminate the need for this equipment and slings also are not a suitable option.

5) Copy of the ministry's reconsideration decision dated August 4, 2011 denying the appellant's request for the Enart device pursuant to the legislation in effect until March 31, 2010.

6) Copy of the ministry's reconsideration decision dated August 3, 2011 denying the appellant's request for the Dome accessory for the InterX 5002 device pursuant to the legislation in effect until March 31, 2010.

7) Letter dated September 8, 2011 from the appellant's physician stating, in part, that the InterX 5002 and other requested devices "are not traditional TENS devices. They use different forms of electrical current and function differently in the body. Traditional TENS treatment worsened [the appellant's] pain. Therefore, a traditional TENS device is not an appropriate manner of providing electrotherapy treatment to [the appellant]." The physician continues "...of the

different Inter X models only the Inter X 5002 provides the range of features needed because of [the appellant's] complex needs: sufficient treatment protocols, has the activity reading feature and is capable of attaching to all the electrodes." (Dome, Comb, Soft Tissue and Flexible Array)

8) Letter dated May 11, 2012 from a second physician recommending the InterX 5002 neuro-stimulation device as a positioning device for the appellant in order to facilitate: (a) adjusting and maintaining positions (e.g. side lying, lying supine, and upright weight bearing positions of standing, sitting and walking); (b) transferring from different positions, e.g. sitting to standing, rolling over; and (c) movement of excess body fluids in her lower legs up toward the pelvis. The physician also recommends the InterX device "as a positioning device" for (a) locating positions of low electrical impedance, areas in the skin that are neurologically related to injured tissues, and identifying the optimal treatment locations for delivery of the interactive, damped, pulsed, sinusoidal, high impulse, high density current; and (b) increasing range of motion and improving postural problems.

9) Letter dated October 4, 2012 from a consultant in rheumatology and internal medicine who diagnoses the appellant with a number of medical conditions and past treatment interventions which provided inadequate pain control. The physician prescribes the InterX 5002 device to reduce pain to manageable levels, reduce the risk of suicide and improve sleep and function. The physician notes that the InterX device apparently has distinct proven advantages over regular TENS therapy and has additional features not available with regular TENS equipment.

10) Letter dated October 18, 2012 from a third physician stating in part that in March 2010 the appellant's physician wrote a letter to the ministry advising of the need for the specific devices outlined and these were required to help control pain and reduce the risk of suicide at that time.

11) Letter dated July 22, 2013 from a sports medicine physician stating in part that he prescribes the InterX 5002 and its accessory electrodes [Flexible ray (sic), comb, dome and soft tissue]. He believes that a positioning device is not solely an external device used to assist individuals to transfer and adjust positions. He believes the InterX meets the criteria for positioning device because it has to be applied to the areas which have the lowest amount of impedance or resistance in different areas of the body.

12) Email dated July 26, 2013 from the appellant regarding conduct of both the ministry and the panel at the previous hearing.

13) Letter dated July 29, 2013 from the same sports medicine physician stating in part that the InterX 5002 delivers high amplitude electric pulses through a biofeedback interactive loop with the body. Based on the readings, the user is able to identify the points of lowest impedance, which are the optimal sites for treatment.

14) Letter dated September 10, 2013 from the ministry to the appellant enclosing the reconsideration decision and decision summary.

15) Letter dated October 28, 2013 from the ministry to the appellant responding to questions posed by the appellant.

16) Letter dated January 13, 2014 from the ministry to the appellant advising the records requested are withheld in their entirety as the terms of the sanction limit the amount of time to be spent to 7 hours and it is not possible to accommodate the request within this time.

17) Copies of emails from the appellant to the Privacy Commissioner dated January 21, 2014 requesting a review of the ministry refusal to fill her FOI request and from a warehouse dated January 16, 2014 regarding the time required to locate and retrieve boxes.

18) Letter dated January 22, 2014 from a physician to the ministry stating in part that the appellant "requires the Dome electrode to support her hand in a relaxed, ergonomically correct position (that avoids having to grasp a device with her fingers) when delivering electrotherapy to large muscle areas. This is necessary because of myofascial trigger points. The Dome is also requires (sic) to locate specific sites in the body that have the lowest amount of impedance or resistance to electric current. These sites correlate with areas in need of treatment. Medical literature indicates that delivery of electric current to these sites results in maximal treatment outcomes." Should the appellant be unable to get the InterX 5002, then purchase of the 1000 model is recommended. Although the appellant cannot attach the soft tissue electrode to the Inter X1000, she will still be able to get sufficient therapeutic benefit with using the InterX 1000 to warrant its purchase. "In the medical field positioning equipment include devices that support parts of the body, devices that assist in transferring and devices that locate the positions in the body where abnormalities are present." Examples given by the physician included computerized tomography machines, magnetic resonance imaging devices and X ray equipment, and devices that provide electrotherapy treatment on acupuncture points including the InterX.

19) Email dated January 28, 2014 between the appellant and her advocate regarding the appellant's trust.

20) Copies of Eligible Health Goods/Services Purchase Authorizations for TENS with a STOB of '7928' or '7929' [Medical Equipment Rentals/Repairs and Medical Supplies or Nutritional Supplements, respectively] dated December 17, 2007 to June 26, 2008 and Sample Service Line & STOB Coding Information.

21) Industry White Paper- Electrical Neruostimulation, Neuro Resource Group (NRG).

22) Print out of Distributor information regarding the InterX technology.

23) Print out of an abstract regarding the electrical skin resistance method.

24) Print out of an abstract regarding the fall of impedance and bone and joint pain.

25) Print out of an abstract regarding a method of and device for determining the position of a medical instrument.

26) Print out from a Fall Protection Blog regarding learning about Fall Protection Positioning Devices.

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27) First page of a research article entitled 'Bladder Cancer Detection Using Electrical Impedance Technique.'

28) Print out of Wikepedia information regarding an Electronic Apex Locator.

29) Print out of online information regarding a Contour Bedpan, a lumbar cushion, an All-In-One Aluminum Commode, and beds for the home.

30) Copy of pages from a report by the Office of the Ombudsman regarding Background, Applying for Income Assistance, and Implementation of Previous Commitments.

31) Copies of past Tribunal decisions respecting a lift chair, mattress and cushions and Rollabout chair as positioning devices. Tribunal decision dated April 28, 2003 applying a section of the *Disability Benefits Program Regulation.*

32) On line definition of "limited range of motion": a reduction in the normal distance and direction through which a joint can move.

33) WiseGeek online definition of "verbal adjective" as a verb that is used to modify a noun.

34) Online definition of "ambiguity" as (1) the possibility of interpreting an expression in two or more distinct ways and (2) vagueness or uncertainty of meaning.

35) Online definition of "sense".

36) Online definition of "participle" as the form of a verb used in compound tenses and as an adjective.

37) Print out from the UVic Writer's Guide with definition of "verbal" highlighted, being 'a form of a verb which either does not function as a verb but as a noun or adjective, or combines with another verb to form a predicate.

38) Additional online definitions of "position", "device", "positioning" and "electrotherapy."

39) Additional online definition of TENS– a type of treatment in which electrodes are attached to the skin and a low amount of electricity is sent to the affected nerves to block the pain sensation.

40) Copies of s. 16 of the EAPWDA as it read December 1, 2007 – May 31, 2010 and the current version which took effect June 1, 2010.

41) Excerpts from the *Interpretation Act*, including Section 8.

42) Excerpts from the EAPWDR, including Section 79 (Transition in respect of repealed provisions) and Section 69.

43) Print out from the ministry website of the Persons With Disabilities Fact Sheet.

In her Request for Reconsideration, the appellant wrote that she refers to all records in the previous appeal on this issue, and all of her doctors' letters on the subject, and all letters from the 'physio clinic' and Medical Equipment Justification form, and the HAB [Health Assistance Branch] earlier denial form.

In her Notice of Appeal, the appellant expressed her disagreement with the ministry's reconsideration decision. The appellant wrote that the ministry erred in saying that the Dome cannot be a positioning device.

At the commencement of the hearing, the appellant submitted an undated email from a retired journalist regarding the meaning of grammatical terms and an interpretation of "positioning device." The panel considered this additional information as part of the appellant's argument, containing no new evidence.

The ministry relied on its reconsideration decision. The appellant submitted a request to the ministry for the Dome accessory for the InterX 5002 Neurostimulation Device on March 31, 2010. The *Employment and Assistance for Persons With Disabilities Regulation* was amended, effective April 1, 2010.

At the hearing, the ministry stated that the Dome accessory cannot be viewed in isolation, that it is useless unless used with the InterX 5002 Device and will not meet the requested purpose. The ministry stated that a previous Tribunal decision dated September 18, 2013 confirmed the ministry decision which found that the InterX 5002 is not an eligible item.

At the hearing, the appellant stated that:

- The legislation does not have to expressly provide for "electrotherapy", as long as the criteria are there to allow it.
- Although the ministry stated that she does not have the InterX 5002 device and, therefore, the Dome accessory is useless, the ministry does not know that. She may have secured the device elsewhere, and she still has a judicial review application pending as well as a human rights complaint ongoing and she may still be issued the InterX 5002 device.
- She has a disability trust which is wholly discretionary and while there are not sufficient funds to cover the InterX 5002 and all the accessories, the InterX 1000 device can work with all the accessories except one and it will work with the Dome accessory. She provided a letter from the trustee of the trust which confirms that the trust will fund the InterX 1000. The appellant stated that she will then have a fully operable system.
- While her doctor said that if she gets all the accessories, the InterX 5002 will provide the maximum benefit and treat all her areas of pain, she will still be able to get sufficient therapeutic benefit with using the InterX 1000 to warrant its purchase, as set out in the letter from a physician dated January 22, 2014.
- The physician also confirms in the letter that the Dome accessory will support her hand in a relaxed, ergonomically correct position that avoids having to grasp a device with her fingers when delivering electrotherapy to large muscle areas.
- The applicable legislation only requires that the requested device is a medical device and that it performs a positioning function and is, therefore, a "positioning device." The ministry agrees in its decision that there is no definition of "positioning device" provided in the legislation.
- The definition of "positioning device" as put forth by the ministry, of "providing a direct external

support when there is a deficiency in the ability to perform transfers or adjust one's position" is far too narrow since the legislation does not say that the device is limited to external support. The ministry definition also says under what circumstances the device can be used, that the device is for a certain reason, but this is an error in law to add criteria to the legislation. Items like slings, traction devices and dorsiflexion socks position the muscles and bones so they will heal but the ministry's definition of positioning device would exclude them as well.

- In the letter dated January 22, 2014, the physician describes devices that locate the positions in the body where abnormalities are present, such as tomography machines, magnetic resonance imaging devices, X-Ray equipment, and InterX devices that both located abnormalities and provide electrotherapy treatment. Another form of device is an electrical impedance device that has been used for bladder cancer detection and an Electronic Apex Locator which is used in endodontics to determine the position of the apical foramen.
- The Dome accessory supports her hand because she cannot grip other devices for any length of time. Her doctor wrote in the July 7, 2010 letter that the Dome is designed to be easily manipulated and does not have to be gripped, therefore it does not pose the same problem as holding the InterX device itself.
- Her doctors say that the Dome accessory, and the InterX 5002 device, are "positioning devices" while the ministry is limiting the definition to the occupational therapy area.
- Although the manufacturer does not describe the InterX or the accessories as "positioning devices" specifically there are other devices that the ministry considers fall within the definition that also are not specifically described as positioning devices and can also be used for other purposes, such as preventing pressure sores or to provide relief so muscles do not tense up.
- The decision of the Supreme Court of Canada in *Abrahams* is authority for the position that if there are two definitions that are plausible, the panel must favour the appellant's definition as any 'ambiguity' must be decided in the appellant's favour.
- The dictionary definition of 'ambiguity' is the possibility of interpreting an expression in two or more distinct ways, so if the appellant's definition is plausible it must be favoured by the panel. The panel cannot simply rely on the ministry's definition but must analyze both definitions and decide if there is more than one plausible definition. It is not a matter of determining which definition is the 'best', but whether that put forth by the appellant is plausible.
- The panel needs to interpret the definition in the context of Schedule C of the EAPWDR which deals with medical equipment and devices.
- The court decision in *Rizzo Shoes Ltd.* is the leading case, which applied *Abrahams* and held that the words of an Act are to be read in their entire context and in their grammatical and ordinary meaning.
- Section 8 of the *Interpretation Act* requires a large and liberal interpretation of the term.
- The court held in *Hudson* that social welfare legislation must be interpreted with a benevolent purpose in mind. The court also stated that it is patently unreasonable not to put significant weight on the appellant's evidence unless there is a legitimate reason not to do so.
- The word "positioning" is not an adjective, as the adjective is "positional," and is, rather, a "verbal." The UVic Writer's Guide describes a verbal as a form of a verb which functions as a noun or adjective. In the phrase "positioning device", the word "positioning" modifies "device" and indicates the action the device can perform. The retired journalist confirmed in his email that the word "positioning" as a verb means to put in place or position or to locate, therefore, the term "positioning device" can mean a device used to position or locate something.
- The appellant pointed to an image of the Dome accessory, as set out in the manufacturer's information, and described it as a ball on which the hand is supported so the muscles can rest,

held in place by a strap, and attached to the InterX 5002 device which is a rectangular box approximately 6" X 2" X1" in dimension, so that large areas of the body can be treated by moving the ball around the body to locate optimal treatment area.

- The appellant highlighted the manufacturer's information that the ergonomic design of the Dome electrode eases treatment application of larger areas of skin tissue, like the thigh.
- The ministry cannot issue electrotherapy equipment with no legislative authority for doing so. When the legislation is amended, the ministry reviews its policy to ensure that it fits with the legislation and this was done in 2003, again in 2005 and also in 2008 and electrotherapy equipment continued to be provided. The ministry confirmed with her by way of letter that prior to legislative changes effective April 1, 2010 electrotherapy equipment was considered an eligible item and that TENS machines were being issued as positioning devices.
- The advocate called the ministry department responsible for making decisions regarding this equipment and it was confirmed that electrotherapy equipment is a "legislative orphan."
- Some ministry workers were issuing electrotherapy equipment under another section of the legislation but it is against human rights legislation to grant items to some disabled persons and not to others. Some workers were issuing TENS machines as positioning devices probably because it was recognized that the TENS allows people to position better.
- The InterX device was licensed by the FDA as a TENS device and the use is essentially the same. When she asked a representative of the manufacturer about this, she was told that the InterX had to be licensed as a TENS but it is actually a much more advanced device which is able to locate areas of low impedance whereas the basic TENS machine cannot.
- Her doctor confirmed in a letter dated November 9, 2010 that the Dome accessory can be obtained at a cost of $250, which falls within the parameters set out in the ministry's policy. However, there is nothing in the legislation that restricts the policy to a certain monetary limit.
- In the ministry's policy, a breast pump is listed as a positioning device so a liberal interpretation of the definition and of what is included should be used.
- She had 3 hot plates issued to her as "positioning devices" through a Tribunal decision in 2003, which shows the wide range of items that can be included. She could not reach the height of the stove so the hot plates could be positioned to allow her to reach the hot surface.
- Section 16(1)(d) of the EAPWDA is not relevant to her request.

The ministry did not object to the admissibility of the documents included in the subsequent submission in the Appeal Record and in Appendices A through P, and did not raise an objection to the appellant's oral testimony. The panel determined that the additional documentary evidence submitted by the appellant which relates to her medical conditions and the use of the Dome accessory and the InterX 5002 device as being in support of the information and records before the ministry at reconsideration and, therefore, admissible pursuant to s. 22(4) of the *Employment and Assistance Act*. The panel did not admit the evidence relating to the appellant's need for the InterX 1000 device as this was not in support of information or records that were before the ministry on reconsideration. The panel considered additional information, such as dictionary definitions, as argument.

APPEAL #

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reconsideration decision denying the appellant's request for the Dome accessory (the Dome) for the InterX 5002 Neurostimulation Device (the InterX device) is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the appellant's circumstances.

Legislation

EAPWDA [as it read on March 31, 2010]

Reconsideration and appeal rights

16. (1) Subject to section 17, a person may request the minister to reconsider any of the following decisions made under this Act or the regulations: ...

(d) a decision in respect of the amount of a supplement provided to or for someone in the person's family unit if that amount is less than the lesser of

(i) the maximum amount of the supplement under the regulations, and

(ii) the cost of the least expensive and appropriate manner of providing the supplement. . . .

EAPWDR [as it read on March 31, 2010]

Part 5: Division 4- Health Supplements

General health supplements

62.(1) 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 . . .

EAPWDR Schedule C- Health Supplements, s. 3 [as it read on March 31, 2010]

Section 3 – Medical equipment and devices

(1) The following medical equipment and devices are the health supplements that may be paid for by the ministry if the supplements are provided to a family unit that is eligible under section 62 *[general health supplements]* of this regulation:

(a) wheelchairs, personal motorized mobility devices, canes, crutches and walkers, if . . .

(b) orthotics and bracing, if . . .

(c) hearing aids, if . . .

(d) positioning devices, if

(i) repealed

(ii) repealed

(iii) the person has received the pre-authorization of the minister for the positioning device requested, and

(iv) there are no resources available to the person's family unit to pay the cost of the health supplement;

(e) breathing devices, if . . .

(2) In addition to the requirements of subsection (1)(a) or (d), the minister must require one, and may require both, of the following:

(a) a prescription of a medical practitioner or nurse practitioner for the wheelchair, personal motorized mobility

device, cane, crutches, walker or positioning device;
(b) an assessment by an occupational therapist or physical therapist confirming the need for the wheelchair, personal motorized mobility device, cane, crutches, walker or positioning device.

Disability Benefits Program Regulation, Schedule C, s. 2 [as it read on July 4, 2002]

2(1) The following are the health benefits that may be paid for by the minister if the services or benefits are provided to persons who are eligible under section 32(1) of the regulation:

(a) durable medical equipment and appliances that are medically necessary to provide for basic mobility, positioning, breathing or other functions essential to the sustenance of life and for which no alternate sources of funding are available to the applicant.

EAPWDR Life-threatening Health Need s. 69 [as it read on March 31, 2010]

69. The minister may provide any health supplement set out in Schedule C to a family unit that includes a person with disabilities, if the health supplement is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under this regulation, and if
(a) the person faces a life-threatening health need and there are no resources available to the person's family unit with which to meet that need, and
(b) the minister determines that the health supplement is necessary to meet that need.

Parties' Positions and Panel's Reasons for Decision

Application of section 16 of the EAPWDA

Ministry's Position

The reconsideration decision concluded that the parameters for the provision of electrotherapy equipment are exceeded, making reference to section 16 of the EAPWDA.

Appellant's Position

The appellant's position is that section 16 of the EAPWDA has no application to this appeal and, in the alternative, if found to be applicable, the criteria in the section have been met.

Panel's Reasons
The panel concludes that section 16 of the EAPWDA, which addresses an applicant's right to reconsideration, is not at issue in this appeal and, based on the ministry's lengthy analysis within the reconsideration decision, was not a basis for denial of the Dome accessory.

EAPWDR, Schedule C, s. 3 [as it read on March 31, 2010]

Application of section 3(1)(d) – meaning of "positioning device"

Ministry's Position- Legislation
The appellant is eligible to receive health supplements under section 62 of the EAPWDR but the requested item, the Dome accessory, is not an eligible item as medical equipment or devices under

section 3 of Schedule C of the EAPWDR, including "positioning devices" under subsection (1)(d). The ministry noted that the legislation does not define "positioning devices" and submitted that, in terms of medical equipment, "positioning devices" provide a direct external support when there is a deficiency in the ability to perform transfers or adjust one's position, such as hospital beds, pressure relief mattresses, custom seating for wheelchairs, lifts, grab bars, raised toilet seats, and floor-to-ceiling poles. The Dome accessory is electrotherapy equipment intended primarily for pain management and is not inherently a positioning device; it is medical equipment used to administer electrotherapy.

When the appellant's request for a Cellstim 600 patient portable microcurrent unit was approved by reconsideration decision dated July 4, 2002, the *Disability Benefits Program Regulation* was in effect, but the decision did not reference the section or part thereof that was relied upon. Ministry information does not describe medical equipment used for electrotherapy as a "positioning device" or that it was provided to the appellant as a "positioning device", notwithstanding the ministry's March 4, 2011 letter to the appellant. Medical equipment used for electrotherapy appears to be a "legislative orphan."

Appellant's Position- Legislation
The requested item, the Dome accessory, is an eligible item as a "positioning device" under section 3(1)(d) of Schedule C of the EAPWDR. The appellant argued that the ministry failed to reasonably interpret the meaning of "positioning device," as the only limiting parameter set out in the legislation is that a positioning device must be a medical device. Since the ministry agrees that the legislation does not define the term "positioning device", the phrase must be interpreted according to the principles of statutory interpretation as set out in the case law in *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27, *Abrahams v. Canada* (1983), 142 D.L.R. (3d) 1, and *Hudson v. EAAT* (2009) BCSC 1461, and section 8 of the *Interpretation Act* RSBC 1996, c. 238. The appellant argued that *Re Rizzo & Rizzo Shoes Ltd.* is authority for the position that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense. The appellant argued that the court held in *Hudson* that social welfare legislation must be interpreted with a benevolent purpose in mind.

Case law and s. 8 of the *Interpretation Act* require that the term "positioning device" must be interpreted in a large and liberal manner and any ambiguity in the legislative language must be resolved in the appellant's favour. The dictionary definition of 'ambiguity' is the possibility of interpreting an expression in two or more distinct ways, so if the appellant's definition is plausible it must be favoured by the panel. The appellant argued that the ministry's definition of a "positioning device" as "intended to provide a direct external support when there is a deficiency in the ability to perform transfers or to adjust one's position" is too restrictive. The appellant argued that it is an error in law for the ministry to add criteria to the legislation since section 3 of Schedule C does not say that the device is limited to external support or restrict the circumstances under which the device can be used.

The appellant argued that the Supreme Court of Canada held that words from legislation are to be read in their ordinary sense and, the appellant argued, since dictionaries provide the ordinary meaning of a word, dictionary definitions can be used to establish the meaning of a legislative term. According to the dictionary definitions of "positioning" provided, the device can be used to put something in a particular or appropriate place or position or to locate something, to determine the position of something. In a letter dated January 22, 2014, her physician describes several medical devices that locate the positions in the body where abnormalities are present, such as tomography

machines, magnetic resonance imaging devices, X-Ray equipment, and InterX devices that both located abnormalities and provide electrotherapy treatment. Given that the physician describes these as examples of positioning equipment, it is not appropriate for the ministry to limit the definition of "positioning devices" to devices related only to occupational therapy. The appellant argued that she had 3 hot plates issued to her as "positioning devices" through a Tribunal decision in 2003, which shows the wide range of items that can be included within this definition.

The appellant argued that the court held in *Hudson* that it is patently unreasonable not to put significant weight on the appellant's evidence unless there is a legitimate reason not to do so. The appellant argued that the medical evidence establishes that, in her particular case, the Dome accessory is used as a positioning device. The appellant described the Dome accessory, as set out in the manufacturer's information, as a ball on which the hand is supported so the muscles can rest, held in place by a strap, and attached to the InterX device so that larger areas of skin tissue, like the thigh or back, can be treated with a form of electrotherapy by moving the ball over the body. The appellant argued that the InterX technology both locates areas of the body that require treatment and, through the use of the Dome accessory, holds her hand in an ergonomically correct position in order to deliver this treatment.

The appellant argued that the ministry cannot provide a benefit/supplement without legislative authority. The policy manual respecting the legislation in place on March 31, 2010 lists electrotherapy devices as approved benefits. In this case, the legislative authority is section 3 of Schedule C, specifically subsection (1)(d) which identifies the medical equipment and devices which may be provided. The ministry confirmed in a letter to her dated March 4, 2011 that TENS machines were considered an eligible item prior to April 1, 2010 and that they were being issued as "positioning devices."

Panel's Reasons- Legislation
Defining "Positioning Device"
When considering the application of section 3(1)(d) to the circumstances of this case, at issue is the meaning of the term "positioning device." The appellant referred to the modern principle of statutory construction that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." The appellant argued that the words "positioning" and "device" should be considered separately and are thereby rendered ambiguous as capable of two or more plausible meanings. The appellant pointed to a dictionary definition of "positioning" as meaning both "to put in place or position" as well as "to determine the position of, locate." The appellant argued that "positioning device" can be defined as a device that locates positions in the body where abnormalities are present and the sites on the body that need to be treated, which is consistent with language used in the manufacturer's information for the InterX technology together with the Dome accessory, stating that it is able to scan and identify optimal treatment points and treat only those areas that are injured. The appellant argued that since the definition that she puts forth is plausible, it must be favoured by the panel, as set out by the Supreme Court of Canada in *Abrahams*.

While the Supreme Court of Canada held in *Abrahams* that any doubt arising from difficulties in legislative language should be resolved in favour of the claimant, the court also opined that it is not particularly helpful to consider possible meanings of one of the words standing alone, when the word is part of a legislative phrase. The panel finds that the ministry reasonably considered the phrase "positioning device" with the words together to jointly refer to a device similar in type to the other

items of medical equipment and devices listed in section 3 of Schedule C. "Wheelchairs/ canes" [Section 3(1)(a)], "orthotics/ bracing" [Section 3(1)(b)], "hearing aids" [Section 3(1)(c)] and "breathing devices" [Section 3(1)(e)] all have a common feature of functioning to provide external support or aid to address a deficiency in a person's ability to independently [ambulate], [hear], or [breathe]. All of the medical equipment and devices listed in the section are basic items for personal use and are of a different type than those listed by the physician in the January 22, 2014 letter, which are sophisticated diagnostic and treatment equipment primarily intended for use in a clinical or hospital setting.

There is no need to dissect the words when, together, there is plain and common sense meaning, consistent with the context of the other listed items in section 3. Statutory "interpretation," or relying on extra-textual considerations, is only required when a text is found to be ambiguous, or capable of two or more plausible meanings, in order to decide which of two or more plausible alternatives is better. In the context of the section setting out various types of medical equipment and devices, the panel finds that the ministry provided a plausible, or reasonable, definition of "positioning device" as "…a device which provides external support to address a deficiency in a person's ability to independently position." The appellant argued that this definition is too restrictive and it is an error in law for the ministry to add criteria to the legislation since section 3 of Schedule C does not say that the device is limited to external support or restrict the circumstances under which the device can be used.

The panel finds that the ministry's definition appropriately includes the common features of the items listed in section 3, all of which are equipment or devices designed to address a deficiency in a person's ability to independently perform a particular physical function and accomplishes this through providing a basic, external support or aid. While the appellant proposes a possible definition of "positioning device" to include devices that locate and treat the positions in the body where abnormalities are present, the panel finds that this definition is not plausible, or reasonable, in the context of section 3. The appellant argued that she was granted 3 hot plates as "positioning devices;" however, the panel finds this was as a result of a Tribunal decision which applied section 2 of the *Disability Benefits Program Regulation* relating to "durable medical equipment and appliances that are medically necessary to provide for basic mobility, positioning, breathing or other functions essential to the sustenance of life."

Considering the larger context of Schedule C of the EAPWDR relating to health supplements, section 2 of the legislation already provides the option for using various services employing pain relief therapies under 'general health supplements.' Services for acupuncture, naturopathy, and physiotherapy, for example, include forms of treatment, using different types of techniques and equipment that are applied specifically to the site of the body that need to be treated. If the legislative eligibility criteria for section 2 of Schedule C of the EAPWDR are met, a person with disabilities is entitled to receive treatments to alleviate pain and, thereby, attain greater independence.

In the context of the health supplements section of Schedule C, the panel has considered the plain meaning of the term in Section 3 in which "positioning device" means a device that is used to position a person or a body part and support it in place for a period of time. This view is consistent with the definition proffered by the ministry – a device which provides external support to address a deficiency in a person's ability to independently position.

Applying "Positioning Device"
The panel finds that the Dome accessory does not fall within the plain meaning of "positioning device" which, as stated above, the panel finds consistent with the ministry's definition for "positioning device," as a device which provides external support to address a deficiency in a person's ability to independently position. The appellant provided numerous physicians' letters describing the InterX equipment, including the Dome accessory, as "positioning devices" which, the appellant argued, are consistent with the manufacturer's information before the ministry at reconsideration respecting the ability of the InterX equipment to locate or position optimal treatment points. The panel finds that the appellant's physicians' defining of the InterX equipment as a "positioning device" or purporting to interpret the legislative language is not determinative of the issue. The manufacturer's information repeatedly refers to the InterX equipment as electrotherapy treatment or therapy for pain relief. Further, the panel finds that although the Dome accessory serves to hold the appellant's hand in an ergonomically correct position, the primary use of the accessory is to attach to the InterX device and to deliver the pain treatment provided by this technology.

The appellant argued that TENS machines, as a type of electrotherapy equipment, were provided by the ministry, that this must have been done with legislative authority as "positioning devices," pursuant to section 3 of Schedule C, and this position has been confirmed by the ministry in the March 4, 2011 letter to her. The ministry described a basic TENS unit as a battery-powered device which attaches to the body with electrode pads to send impulses through nerve endings to the brain as artificial messages which causes the brain to produce endorphins to manage pain. The panel finds that electrotherapy equipment, as a pain management therapy, cannot be said to be a device which provides external support to address a deficiency in a person's ability to independently position and, therefore, does not fall within the plain meaning of "positioning device." The March 4, 2011 letter from one ministry worker stating that TENS machines were being issued as "positioning devices" was followed by a letter to the appellant dated March 11, 2011 stating that TENS devices "do not fit into the definition of a positional device."

The ministry stated that electrotherapy equipment appears to be a "legislative orphan," which the panel finds means there was no legislative "parent" or authority for issuing this equipment in the past. If a TENS machine was provided by the ministry as a "positioning device" in the past, this may have been done in error, and this past practice would not be determinative of the appellant's request. The ministry acknowledged that electrotherapy equipment has been provided prior to April 1, 2010 and the ministry also considered the appellant's request under the ministry's policy that applies, as set out below.

For the above reasons, the panel is of the opinion that "positioning devices" as used in the context of section 3 of Schedule C of the EAPWDR is not ambiguous and is capable of a plain and common sense meaning that corresponds with a reasonable definition put forth by the ministry. The panel finds that the ministry reasonably determined that the Dome accessory does not fall within the "positioning device" definition and is, therefore, not an eligible item under section 3 of Schedule C of the EAPWDR.

Ministry's Position- Policy
Regarding the policy respecting section 3 of Schedule C [medical equipment and devices] in effect on March 31, 2010, the ministry argued that there are a number of items which may fall within the category of 'positioning devices' such as beds, specialized mattresses, and lumbar supports but that equipment used for electrotherapy is not included in this list. Rather, a separate category exists in

the policy for "electrotherapy" specifically as medical equipment and devices under which only basic TENS (plus gels, electrodes or accessories) were provided within the set out parameters respecting functionality (basic TENS), quantity (single unit), and cost (maximum of $250).

Regarding functionality, the ministry argued that a basic TENS unit is a battery powered device which attaches to the body with electrode pads to send impulses through nerve endings to the brain as artificial messages which causes the brain to produce endorphins to manage the pain. Microcurrent is a low-volt battery powered TENS device which works in the same manner as TENS. The InterX device has a biofeedback component and, together with the Dome accessory, is therefore neither a basic TENS unit nor a microcurrent device. The ministry argued that the evidence from the manufacturer of the InterX device and the Dome accessory is that the equipment is intended for use by pain and rehabilitation specialists. The ministry argued that the functionality of the Dome falls outside the policy parameters for the provision of a basic TENS as electrotherapy equipment.

The ministry argued further that the Dome does not meet the other parameters with respect to quantity (single unit) and cost (maximum of $250). Regarding quantity, the ministry argued that the Dome is an accessory to the InterX device and cannot provide electrotherapy alone, but must be used in conjunction with the InterX device; therefore, the appellant's request must be considered in conjunction with the appellant's eligibility for the InterX device. The ministry argued that the evidence from the appellant's physician in her letter dated July 7, 2010 is that the high amplitude pulses are delivered through the electrode on the InterX device by attaching one of the accessories, including the Dome, to the InterX device, and that the appellant's needs cannot be met through only one of the units. With respect to cost, the ministry pointed out that the evidence from the appellant's physician in her letter dated November 9, 2010 is that the cost for the InterX device is $3,995 USD and the Dome is $250 USD, for a total cost of $4,245 USD, which exceeds the maximum of $250.

Appellant's Position- Policy

The ministry cannot provide a benefit/supplement without legislative authority, and this has been confirmed by the ministry in the letter to her dated October 28, 2013. The policy manual respecting the legislation in place on March 31, 2010 lists electrotherapy devices as approved benefits. The appellant argued that electrotherapy equipment has been provided as a benefit by the ministry since 2002. When the legislation is amended, the ministry reviews its policy to ensure that it fits with the legislation and this was done in 2003, again in 2005 and also in 2008 and electrotherapy equipment continued to be provided and, therefore, must have had a legislative basis. The appellant argued that breast pumps are listed as being eligible for coverage in the ministry's policy guideline and are categorized as "positioning devices" and this shows wide latitude in how the ministry is to consider what is included within the definition of "positioning" devices.

The appellant's position is that the parameters set in the ministry's policy for electrotherapy equipment do not apply but, in the alternative, if found to be applicable, the parameters have been met with respect to the Dome accessory. The appellant argued that, with respect to functionality, the InterX devices and accessories qualify as basic TENS machines as they were licensed by the FDA as such. The appellant argued that although the ministry argued that she does not have the InterX 5002 device and, therefore, the Dome accessory is useless, she still has a judicial review application pending as well as a human rights complaint ongoing and she may still be issued the InterX 5002 device. The appellant argued that even without the InterX 5002, she will be able to secure the InterX 1000 device for which the Dome accessory is compatible. The appellant argued that her doctor has confirmed that while the InterX 5002 device and all the accessories are ideal for her complete

treatment, that she will still be able to derive some benefit from use of the InterX 1000 device and the Dome accessory. The appellant argued that her doctor has also confirmed that the cost of the Dome accessory is $250 and does not exceed the maximum set out in the policy.

Panel's Reasons- Policy

The panel concurs that the provision of positioning devices is not limited to standing bed frames, which is acknowledged in the reconsideration decision; however, the panel finds that the analysis within the decision demonstrates that the ministry considered the appellant's request under both the legislation, section 3 of Schedule C, and the ministry policy.

While the appellant asserts that the legislative authority for electrotherapy devices must be section 3(1)(d) – positioning devices – of Schedule C of the EAPWDR, the panel finds that given that the provision of electrotherapy devices precedes this legislation, the policy respecting the provision of electrotherapy devices may have originated from the much broader language of the predecessor *Disability Benefits Program Regulation*, namely the provision of "durable medical equipment and appliances" that are medically necessary to provide for "other functions essential to the sustenance of life." The panel notes that the physician's request for the CellStim electrotherapy device repeatedly references this legislative language, although the July 4, 2002 ministry decision finding the appellant eligible did not specify the section of legislation relied upon. The ministry stated in its reconsideration decision that electrotherapy equipment appears to be a "legislative orphan" and proceeded to consider the appellant's request, which is the subject of this appeal, under the parameters set out in the ministry policy at the time of the appellant's request on March 31, 2010.

It appears to the panel that ministry policy respecting electrotherapy in effect at the time of the appellant's request for the Dome accessory expands upon the health supplements provided under section 3 of Schedule C, as electrotherapy is not reasonably viewed as a "positioning device" or any of the other devices set out in that section. The panel finds that the ministry has considered this policy, which allows for the provision of a basic TENS machine (plus gels, electrodes or accessories) within certain parameters, and has reasonably concluded, based on the manufacturer's description of the Dome accessory, that it exceeds the parameters set out in policy.

The ministry argued that the Dome is an accessory to the InterX 5002 device and cannot provide electrotherapy alone, but must be used in conjunction with the InterX 5002 device; therefore, the appellant's request must be considered in conjunction with her eligibility for the InterX device. The appellant's physician wrote in her July 7, 2010 letter that the high amplitude pulses are delivered through the electrode on the InterX 5002 by attaching one of the accessories. Although the appellant argued that she may still receive the InterX 5002 device as a result of a pending judicial review application and a human rights claim, the panel finds that the ministry reasonably concluded that the accessory cannot deliver electrotherapy on its own. By a decision of the Tribunal dated September 18, 2013, the ministry's decision denying the appellant's request for the InterX 5002 device was confirmed, and the panel finds that the Dome, as an accessory to the InterX 5002 device, has no function without the device. The appellant stated that her disability trust does not currently have sufficient funds to purchase the InterX 5002 device.

With respect to cost, the ministry pointed out that the evidence from the appellant's physician in her letter dated November 9, 2010 is that the cost for the InterX device is $3,995 USD and the Dome is $250 USD, for a total cost of $4,245 USD, which exceeds the maximum amount of $250 as set out in the policy. Although the cost of the accessory alone was $250 in US dollars in 2010, the panel finds

that the Dome, as an accessory to the InterX 5002 device, exceeds the maximium cost allowed for the TENS machine itself, which is $250 in Canadian funds, and the Dome accessory has no function without the device.

Disability Benefits Program Regulation (DBPR), Schedule C, section 2 [as it read on July 4, 2002]

Ministry's Position
The ministry acknowledged that the appellant was provided with a CellStim device which is a microcurrent machine on July 4, 2002 at a cost of $631.30, but argued that it has not been established that it was provided as a "positioning device." Rather, the ministry pointed to the legislation in effect on July 4, 2002 which allowed for the provision of "durable medical equipment and appliances" for positioning and other set out purposes including "other functions essential to the sustenance of life." The ministry also noted that the decision to provide the CellStim device does not speak to the legislation that was applied or specify whether the microcurrent unit was necessary to provide basic mobility, positioning, breathing or other functions essential to the sustenance of life.

The ministry's position is that its past decision to provide the CellStim microcurrent device does not set a precedent obliging the ministry to continue to provide the appellant with electrotherapy equipment indefinitely or to provide electrotherapy equipment that exceeds the parameters set out in the policy in effect on March 31, 2010.

Appellant's Position
The appellant argues that the microcurrent device (CellStim) provided to her in July 2002 was provided as a "positioning device."

Panel's Reasons
The July 4, 2002 ministry decision granting approval of the CellStim microcurrent device did not specify under which legislative criteria it was provided. The *Disability Benefits Program Act* was repealed by the EAPWDA, which came into effect September 30, 2002, and the new Regulation provided for 'medical equipment and devices' in Schedule C by setting out the eligible items in detail. The panel finds that the July 4, 2002 decision is of no value or assistance to interpreting section 3 of Schedule C as it read on March 31, 2010, the date of the appellant's request, given the substantial amendments that have been made to the legislation since 2002. Further, while administrative decisions may be persuasive, they are generally not binding on subsequent decision-makers. The panel finds that the ministry reasonably concluded that its decision to find the appellant eligible for the CellStim device in 2002 does not establish a precedent for the provision of the InterX equipment, including the Dome, and that each request must be determined pursuant to the legislation in effect at the time of the request.

EAPWDR, section 69 Life-threatening Health Need

Ministry's Position
The ministry's position is that the appellant is not eligible for the Dome for use in conjunction with the InterX device, under section 69 because: (1) information has not been provided to establish that the appellant faces a life-threatening health need for the requested equipment, and (2) the Dome accessory requested exceeds the parameters for the provision of electrotherapy equipment in terms of function, cost and intended user.

Appellant's Position
The appellant did not advance a position that she is eligible for the Dome accessory under section 69 of the EAPWDR.

Panel's Reasons
The panel finds that the ministry reasonably concluded that there is insufficient evidence to indicate that the Dome accessory in particular was required to meet a life-threatening health need at the time of the appellant's original request in March of 2010, at the time of reconsideration, or at present. The panel finds that the ministry appears to have considered the request under s. 69 as a request for an electrotherapy device under policy given its conclusion that the parameters for the provision of TENS machines were exceeded.

Conclusion

Based on the foregoing reasons, the panel finds that the ministry's decision to deny the Dome accessory was a reasonable application of the legislation in the circumstances of the appellant and confirms the decision.