APPEAL #

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 comb accessory (the "Comb") for an InterX 5002 Neurostimulation Device ("InterX"). 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.

Specifically, the bases for the ministry's denial are as follows:

A. EAPWDR, 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 InterX and other accessories including the Comb, had been prescribed by a medical practitioner and that an assessment by a physiotherapist ("PT") had been provided thus meeting the requirements of s. 3(2)(a) and (b). However, the ministry determined that the Comb 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.

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

The ministry determined that the appellant is not eligible for the Comb 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 Comb. Further, the ministry found that previous approval of an electrotherapy device does not establish a precedent that requires the ministry to continue to provide electrotherapy devices indefinitely or to provide the appellant with electrotherapy equipment that exceeds the parameters set out in policy. The ministry also found that the Comb cannot provide electrotherapy alone, but must be used in conjunction with the InterX, and that the request for the Comb must be considered in conjunction with the request for the InterX. The ministry determined that the Comb exceeded the policy parameters for the provision of electrotherapy equipment in terms of function, cost and intended user.

C. EAPWDR 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 Comb under s. 69 of the EAPWDR *[life-threatening health need]* because (i) the information does not establish a life-threatening need for the Comb and (ii) the parameters set out in policy are exceeded in terms of function, cost, and intended user.

APPEAL #

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act ("EAPWDA"), section 16

Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR")
s. 69 *[health supplement for persons facing direct and imminent life threatening health need];* and
Schedule C, section 3 in effect on March 31, 2010.

Disability Benefits Program Regulation ("DBPR"), section 2 in effect on July 4, 2002.

APPEAL #

PART E – Summary of Facts

Preliminary Matters

- The hearing was originally scheduled for September 11, 2011 but was adjourned on September 7, 2011 at the written request of the appellant with the consent of the ministry and the chair of the Employment and Assistance Appeal Tribunal (the "Tribunal"). The appellant's submission included 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 9, 2011 but was adjourned for a second time on November 3, 2011 at the written request of the appellant with the consent of the ministry and the Tribunal chair. The appellant's submission included the following bases 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 appellant is suffering from fatigue; and the ministry has not provided the appellant with the records she needs for appeal.

- The hearing was rescheduled to take place on June 26, 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 included the following bases 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 at least 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 searches; and to prepare for and host a family member, since she cannot prepare for the hearing at the same time.

- By letters dated May 5, 2014, the appellant and the ministry were notified that the appeal hearing had been rescheduled for May 21, 2014. On May 20, 2014 the appellant submitted a written request for adjournment. The appellant's request and supporting submission from her advocate included the following bases for adjournment:
    1. the appellant suffered a flare-up of her chronic fatigue, myofascial pain syndrome and sleep disturbance and could not participate in a hearing without it causing significant worsening of her condition according to her doctor's note dated May 15, 2014, which went on to say that "A note will be provided when she has recovered sufficiently to attend a hearing";
    2. procedural problems;
    3. the Tribunal must provide reasonable accommodation of disabilities and the appellant is entitled to an oral hearing so that she can raise arguments and ask questions;
    4. the need for the adjournment is not something the appellant could have anticipated and prevented;

5. given that the matter has already been delayed this long a few more months shouldn't matter as it won't prejudice the ministry's case or pose an undue hardship to the ministry; and
6. the need to allow completion of an Ombudsperson investigation and Human Rights complaint regarding a "possible apprehension of bias" of a panel member.

- The ministry consented to the adjournment request on May 20, 2014. Later that day the parties were notified that the Tribunal chair had denied the adjournment request for reasons including the following: this was the appellant's 5th request for adjournment on substantially similar grounds; there were no specified or substantiated grounds for an apprehension of bias; and the original Notice of Appeal was received by the Tribunal on August 23, 2011 and the issue needs to proceed to hearing.

- In accordance with the preferences expressed by the appellant in her Notice of Appeal, the appeal hearing was planned as an oral hearing to allow the appellant's advocate to attend the hearing in person while the appellant participated by telephone from her home.

- At five minutes past the hour scheduled for commencement of the hearing the appellant telephoned the hearing room and advised the panel that her advocate had decided not to attend the hearing in the circumstances, where the appellant's adjournment request had been supported by a doctor's note.

- The appellant advised that she wished to add another ground for adjournment: her computer had stopped working and she could not access documents. The appellant made the following submissions in support of her adjournment request:

  - previous panels of the Tribunal had made errors of law but the appellant could not take the "life-threatening" financial risk of costs being awarded against her at judicial review, so she said that she wanted the Tribunal to take those decisions to the courts to receive instruction on the proper interpretation of the legislation; and
  - she was making a formal disability accommodation request because her medical condition would be aggravated if she had to participate in the hearing. She stated that she had over-extended herself at the last appeal hearing and that to attend another hearing when she was having a flare-up would put her at "life threatening risk of committing suicide" and she was "not willing to go there."

- The appellant advised the panel that she was going to hang up and not participate further in the hearing. The panel advised that it would consider her submissions in deliberating whether to grant her adjournment request, and recommended that she should stay on the line to hear the panel's decision. The appellant refused and disconnected.

- The panel left the telephone line open in the event the appellant wished to dial back in. The panel asked for submissions from the ministry representative with respect to proceeding with the hearing. In answer to questions from the panel, the ministry representative stated that: because the appellant had asked for an adjournment and had a supporting physician's note the ministry had consented to the adjournment request made by the appellant the previous day; the ministry representative was "not in a position to have an objection" to proceeding; and

she was prepared to proceed if that was the panel's decision.

- The panel had the ministry representative leave the room while it considered the adjournment request. During deliberations the appellant reconnected to the open phone line to make another submission with respect to the adjournment request. She said that she had asked the physician to identify in his note a specific period of time by which she would likely be ready to attend a hearing, but he had refused to do so. The appellant stated that in her experience she would require about 2 months. She then disconnected again.

The panel deliberated and concluded it was not prepared to grant an adjournment to the hearing for the following reasons:

1. When viewed in the context of the history of this appeal, including the 4 previous adjournment requests by the appellant over the course of more than 2 and a half years, each of which relied in part on medical grounds, the note by the physician dated May 15, 2014 is not sufficient evidence that the appellant is unable to proceed with the hearing. She has provided no supporting medical evidence that her past involvement in appeal hearings has negatively affected her health condition. Further, past history indicates to the panel that there is little likelihood of an adjournment resolving the appellant's concerns about participating in the hearing.

2. The appellant has had adequate time to prepare for the hearing as the matter has been ongoing since the Notice of Appeal was submitted to the Tribunal on August 23. 2011, owing primarily to 4 adjournments granted at the request of the appellant. The appellant was provided ample notice of the hearing date.

3. During the more than 2 years that this matter has been before the Tribunal the appellant has had the assistance of an advocate and has indicated that she intended to consult with legal counsel. The appellant has demonstrated an ability to put her information before the panel. She has submitted extensive materials in support of her appeal including appendices A through L consisting of almost 600 pages of material, in addition to the appeal record of 434 pages which consists substantially of the appellant's submissions. The appellant has given no indication that she has additional evidence or argument to present today. She also has had the opportunity to request that the hearing proceed in writing in accordance with section 22(3) of the *Employment and Assistance Act*. In the panel's view the appellant has had ample opportunity to make her case, and the circumstances do not demonstrate that procedural fairness and accommodation of her disability will reasonably be enhanced by granting a further adjournment.

4. The appellant's original request for the Comb that is the subject of this appeal was submitted more than 4 years ago, on March 31, 2010 and her Notice of Appeal was received by the Tribunal more than 2 and a half years ago. Section 85 of the Employment and Assistance Regulation contemplates that a hearing will be held within 15 business days after the appeal form is delivered. The intention of the legislation is to provide a fair but speedy resolution of the appeals of disabled persons. The length of this appeal process – substantially arising at the request of the appellant - strikes at the integrity of the system. Furthermore, in the panel's view further adjournments would tend to prejudice the appellant's case by raising questions as

to whether they are being requested in good faith.

5. The appellant has been provided with printed copies of all the records and submissions that are before the panel. The appellant has had ample opportunity to provide the Tribunal and the ministry with any other documents to which she may have wished to refer. A limitation on her ability to access documents due to a computer problem is not sufficient grounds for adjournment.

6. The appellant has made a general claim of "possible apprehension of bias" or "conflict of interest" against a panel member. She has provided to the panel no specific examples of bias or any substantial basis for an apprehension of bias to support her claim. In the circumstances the appellant's claim does not justify an adjournment.

7. This panel's jurisdiction is to assess the reasonableness of the reconsideration decision that is the subject of the appeal. The panel is not bound by previous decisions of previous panels. Unsubstantiated claims of unspecified errors made by previous panels are not sufficient grounds for granting an adjournment.

For the above-noted reasons, and having confirmed that the appellant had been notified of the hearing, the panel proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation. The telephone line was left open throughout the hearing to accommodate the appellant should she decide to participate.

Substantive Matters

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

1) A July 4, 2002 Ministry of Human Resources BC Benefits Reconsideration Decision stating that the appellant is eligible for a CellStim 600 patient portable microcurrent unit as recommended by her chiropractor. Attached is a Mar 22/02 physician's letter which repeatedly relates the need for the "biofeedback device" to "essential functions of life" which is the legislative language in s. 2(d) of the old legislation – the DBPR.

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 policy respecting Non-Eligible Items: General Guide dated April 22, 2008

4) 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.

5) March 29, 2010 letter from the appellant's physician stating that the appellant requires positional devices, including the InterX device and accessories such as the Comb, to treat myofascial trigger points throughout her body, muscle imbalances, sacral-iliac joint dysfunction and a displaced coccyx. In particular, the physician wrote that the Comb allows for treatment of trigger points in the scalp treating neck hyperextension.

6) The ministry's original decision (May 14, 2010) and reconsideration decision (November 10, 2010) respecting the appellant's request for the InterX, Comb and other devices which denied the request under the legislation in effect as of April 1, 2010 and a copy of a Tribunal decision (March 23, 2011) which determined that the ministry should have considered the request under the legislation that had been in effect at the time of the appellant's request on March 31, 2010.

7) July 7, 2010 letter 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." The physician wrote that "All three devices are necessary to meet [the appellant's] treatment needs. Even though both the InterX [ ] and the [other device] are interactive devices that deliver high amplitude electrical impulses [the appellant's] needs can't be met thru providing only one of the units." The physician described the InterX as being a different technology than microcurrent, and wrote that "The [Comb] is a positional device needed for the current to get past the hair and into the scalp. She will have to modify how she holds the device by attaching it to a long handled device that she can tolerate. This technique won't work with the [InterX] as it is too difficult to manipulate and attain the necessary degree of pressure and angle."

8) November 2, 2010 letter 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."

9) Letter dated November 9, 2010 from the appellant's physiotherapist stating that she believes the appellant will benefit from the InterX "along with dome, [C]omb and soft tissue accessories."

10) November 9, 2010 letter from the appellant's physician in response to the ministry's request for additional information respecting applications and costs of the requested items. The physician reports the InterX would cost US$3,995 and the Comb would cost US$195. The physician added that the appellant's use of self-adhesive electrodes for microcurrent treatment will decrease if provided with the requested devices.

11) January 17, 2011 letter from the appellant's physician stating in part that the InterX is an electrotherapy device and that, like a TENS unit, it 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 the accessories for the InterX including the Comb which she described as "a positional device she requires that allows for the current to reach the scalp." The InterX is described as a positional device that through its effects including decreasing pain, abnormal muscle hyper tonus, muscle spasm, inflammation, and 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.

12) March 4, 2011 letter 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."

13) March 11, 2011 letter 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 been unable to find a rational[e] for defining TENS devices as a positional device in the past, they do not fit into the definition of a positional device."

14) May 18, 2011 letter in which the appellant describes the differences between various devices she has requested and describes the Comb as "an external electrode that attaches to the InterX so that current from the InterX device can be delivered to muscles in the head."

15) 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."

16) Manufacturer's Product Information for the "InterX 5002 Pain Management Neurostimulation Device" described as being designed specifically for pain and rehabilitation specialists and "InterX therapy" which "delivers gentle dynamic electrical impulses and stimulates the skin at the area of pain or inflammation." The manufacturer states that the InterX provides "Dynamic and active therapy" with "Unique damped, pulsed, sinusoidal, impedance sensitive contrast with TENS or other E-Stim which provide "Passive therapy." The Comb is "designed for enhanced application on areas of skin which have thicker hair and on the scalp." The InterX is "designed specifically for pain and rehabilitation specialists", while another model – the InterX 1000 – is recommended for self-treatment under the guidance of a practitioner and as a support to professional treatment.

17) Industry White Paper – Electrical Neurostimulation, Neuro Resource Group (the "White Paper").

18) 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.

19) Online definitions of "position", "device", "electrotherapy", "may", "medical", "positioning";

20) Wikipedia information about electrotherapy;

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

The following documents were submitted as parts of appendices A through L by the appellant to the Tribunal subsequent to the reconsideration decision but prior to the hearing. The following list is not all-inclusive and not necessarily listed in the order received from the appellant.

1) Online definitions of "and".

2) September 8, 2011 letter from the appellant's physician stating, in part, that "the [InterX, its accessories and other named 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 InterX models only the InterX 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. Although the Inter X 5002 is marketed primarily to professionals it can also be used by patients with complex pain problems."

3) Copies of past Tribunal decisions respecting a lift chair, mattress and cushions, and Rollabout chair as positioning devices.

4) Online definitions of the term "limited range of motion" and the word "position".

5) 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 and electrodes, 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 are not a suitable option.

6) Letter dated May 11, 2012 from a second physician recommending the InterX as a positioning device for the appellant in order to facilitate: (a) adjusting and maintaining positions, (b) transferring from different positions, and (c) movement of excess body fluids in her lower legs up toward the pelvis. The physician recommended the InterX "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.

7) 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 to reduce pain to manageable levels, reduce the risk of suicide and improve sleep and function. The physician notes that the InterX apparently has distinct proven advantages over regular TENS therapy and has additional features not available with regular TENS equipment.

8) Letter dated October 18, 2012 from a physician stating in part that on March 29, 2010 the appellant's physician wrote a letter to the ministry advising of the need for the specific medical devices outlined and these were required to help control pain and reduce the risk of suicide at that time.

9) Letter dated July 22, 2013 from a sports medicine physician stating in part that he prescribes the InterX and its accessories. He believes 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.

10) Letter dated July 29, 2013 from the same sports medicine physician stating in part that the InterX 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.

11) A page listing accounting codes, or STOBs, used by the ministry for financial management purposes. The code assigned to "position/transfer devices" is STOB 7927.

12) Redacted copies of purchase authorizations from the ministry from 2007 and 2008 showing payments in the range of $140 to $224 related to TENS machines. The accounting codes, or STOBS, indicate that the payments were in respect of STOB 7928 "medical equipment rentals/repairs" or STOB 7929 "supplies related to equipment".

13) Excerpts of a document from the Office of the Ombudsman regarding adequacy of reasons for decision.

14) A printed excerpt from the ministry's website, dated March 12, 2010, regarding reconsideration procedures and the need for substantive reasons.

The ministry did not object to the admissibility of these documents. The panel viewed the additional documentary evidence as being offered to corroborate the appellant's previous evidence, and admitted it as written testimony in support of the information and records that were before the ministry at reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision, and stated that:

- the appellant's appeals with respect to the InterX and other accessories had resulted in the ministry's denials being confirmed.

- the appellant's physician's letter of September 8, 2011 confirms that the InterX and Comb are not traditional TENS devices, and that a regular TENS machine worsened the appellant's pain.
- all the referenced Tribunal decisions regarding "positioning devices" refer to positioning the patient. The Comb is a device for improved functioning of the InterX, not for positioning the patient.
- the reconsideration decision provided great detail of the reasons for denial; there is nothing to prevent the appellant from being able to present a full argument.
- the Comb is useless without the InterX, and in reflecting on the ministry's policy parameters the Comb must be considered in context with the InterX.
- the ministry would never pay for an accessory or replacement for a machine which it had not provided.
- in interpreting the legislation it is unreasonable to expect the ministry to have to apply every possible meaning of every word, and that fairness, equity and consistency require that it not be stretched to unreasonable limits.

The panel assessed the ministry's submissions as going to 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 Comb 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 Schedule C, 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;

(d) 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.

EAPWDR Schedule C, s. 3 [as it read on April 1, 2010]

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 3.11 of this Schedule are the health supplements that may be provided by the minister if

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

(b) all of the following requirements are met:

(i) the family unit has received the pre-authorization of the minister for the medical equipment or device requested;

(ii) there are no resources available to the family unit to pay the cost of or obtain the medical equipment or device;

(iii) the medical equipment or device is the least expensive appropriate medical equipment or device.

Medical equipment and devices — bathing and toileting aids

3.5 (1) The following items are health supplements for the purposes of section 3 of this Schedule if the minister is satisfied that the item is medically essential to facilitate toileting or transfers of a person or to achieve or maintain a person's positioning:

(a) a grab bar in a bathroom;

(b) a bath or shower seat;

(c) a bath transfer bench with hand held shower;

(d) a tub slide;

(e) a bath lift;

(f) a bed pan or urinal;

(g) a raised toilet seat;

(h) a toilet safety frame;

(i) a floor-to-ceiling pole in a bathroom or bedroom;

(j) a portable commode chair;...

DBPR, 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:

(c) 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 *[health supplements]* 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

(d) the minister determines that the health supplement is necessary to meet that need.

* * *

Parties Positions and Panel's Reasons for Decision

The appellant did not attend the appeal hearing and, despite having had ample opportunity to do so, she did not provide the panel with a written outline of argument. The panel has set out the appellant's positions as understood from her extensive written submissions.

The ministry's positions are derived from the reconsideration decision and oral submissions made by the ministry at the hearing.

(A)EAPWDR, Schedule C, section 3 [as it read on March 31, 2010]

Appellant's position:

(1) The ministry's reasons for decision do not comport with the principles of administrative fairness because they don't provide substantive reasons for denial. They merely recite submissions and evidence and state a conclusion rather than clearly setting out which legislative criteria were or were not met and why.

(2) The Comb is an eligible item as a positioning device under section 3(1)(d) of Schedule C of the EAPWDR. The term "positioning devices" is not defined, so one must apply the principles of statutory interpretation to derive the intended meaning. Those principles are set out in the case law and section 8 of the *Interpretation Act* RSBC 1996, c. 238 and can be summarized as follows: a) 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 the legislature; b) being social welfare legislation, the EAPWDR 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 term "positioning device" is ambiguous in that it is not expressly defined in the legislation and it is capable of having more than one meaning.

The dictionary meaning of "positioning" – the "ordinary sense" – is to put something in place or position, or to determine the position of something. The manufacturer's product information, the White Paper, and the letters from her physicians all indicate that the Comb helps to alleviate pain and improve her range of motion so that the appellant can achieve and maintain positions that she would not otherwise be able to do. The Comb and InterX also identify areas of the body that need treatment.

(3) Her physicians' evidence is that the term "positioning device" is not limited only to devices that provide external mechanical support and that in her circumstances the Comb acts as a positioning device.

(4) The ministry had policy with respect to the provision of TENS machines, and the purchase authorizations show that the ministry was providing and paying for TENS equipment. It must

have had legislative authority to provide the TENS equipment. "Positioning devices" is the only category of medical equipment or devices listed in the relevant legislation under which TENS machines could be provided. The ministry's letter of March 4, 2011 confirms that TENS machines were being issued as positioning devices up until the legislative changes took effect on April 1, 2010.

(5) The policy parameters set by the ministry for provision of TENS machines were too narrow. Alternatively, the Comb falls within the ministry's parameters. The Comb was priced at US$195, so it did not exceed the ministry's policy parameters with respect to cost (maximum of $250). The Comb is a positioning device, so it did not exceed the ministry's policy parameters with respect to function. The physician's letter of September 8, 2011 confirmed that although the InterX is marketed primarily to professionals it can also be used by patients with complex pain problems, so it did not exceed the ministry's policy parameters with respect to intended user.

Ministry's position:

(1) The reconsideration decision provided extensive detail of the reasons for denial. There is nothing to prevent the appellant from being able to present a full argument and to know the case she has to meet.

(2) The Comb is not any of the medical equipment or devices set out in section 3 of Schedule C of the EAPWDR, including positioning devices under paragraph 3(1)(d). Accordingly, it does not have legislative authority to provide the Comb.

(3) In terms of medical equipment, positioning devices provide a direct external support when there is a deficiency in the ability to perform transfers or to 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 Comb and InterX are promoted as electrotherapy devices, and electrotherapy equipment is not inherently a positioning device. All the referenced decisions regarding "positioning devices" refer to positioning the patient. The Comb is a device for improved functioning of the InterX not for positioning the patient.

(4) In interpreting the legislation it is unreasonable to expect the ministry to have to apply every possible meaning of every word. For example, a legislative reference to a "bed" could be argued to include a flower bed. Fairness, equity and consistency require that the legislative language not be stretched to unreasonable limits.

(5) Regarding the policy respecting s. 3 of Schedule C [medical equipment and devices] in effect on March 31, 2010, there are a number of items which may fall within the category of positioning devices such as beds, specialized mattresses, 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 equipment (including gels and accessories) were provided only within the specified parameters respecting quantity (single unit), functionality (basic TENS), and cost (max. $250). The appellant's physician's letter of September 8, 2011 confirms that the InterX and Comb are not traditional TENS devices, and that a regular TENS machine worsened the

appellant's pain. Despite the March 4, 2011 letter from the ministry to the appellant, TENS devices were not provided as positioning devices. The legislative authority for supplying electrotherapy equipment is not clear – it is a "legislative orphan" – but it is not inherently a positioning device.

(6) The ministry's denial of the InterX and other accessories has been confirmed on appeal. The Comb is useless without the InterX, and in reflecting on the ministry's policy parameters the Comb must be considered in context with the InterX. The ministry would never pay for an accessory or replacement for a machine which it had not provided. The Comb and InterX together far exceed the maximum allowable cost of $250 provided by policy. The manufacturer's promotional material identifies the InterX as "a new product...designed specifically for pain and rehabilitation specialists." The policy contemplates items for use by a client in her home. The ministry's intention when it set the parameters was for electrotherapy equipment to be "the least expensive and appropriate manner of providing the supplement" as per section 16(1) of the EAPWDA.

Panel Decision:

(a) Adequacy of Reasons

With respect to the adequacy of the ministry's reasons for decision, in the panel's view the reasons provide sufficient detail of the criteria against which the appellant's request was assessed and of the reasons for denial. The decision is significantly more detailed than most reconsideration decisions, substantially because the ministry attempted to address the relevant issues raised by the appellant's extensive submissions. In the panel's view, the reconsideration decision is sufficiently detailed and explicit to allow the appellant to know the case she has to meet and to otherwise satisfy the requirements of procedural fairness.

(b) Interpreting the term "Positioning Device"

The lack of a definition in the legislation gives the ministry a degree of discretion with respect to interpreting the term "positioning device." The ministry must exercise that discretion reasonably. The ministry has attempted, through policy and previous decisions, to establish guidelines as to the types of devices likely to constitute a positioning device. It is entitled to do so both as a means of guiding its own decision-makers and to inform applicants of the kinds of considerations the ministry takes into account in deciding individual cases. Without legislative authority to make binding policy, the ministry is only entitled to rely on and refer to policy so long as it continues to be open to considering case-specific circumstances.

In the context of the legislative provision setting out the various types of medical equipment and devices, the ministry provided a reasonable and plausible definition of "positioning device" as a device which provides a direct external support when there is a deficiency in the ability to perform transfers or to adjust one's position. The appellant prefers a broader interpretation of the term, and relies on letters from her physicians expressing the view that the InterX and electrodes are positioning devices.

When considered in context with:

- section 3 of Schedule C which sets out the various types of medical equipment and devices;
- the manufacturers' product information, which indicates that the InterX and Comb are primarily designed for electrotherapy purposes and pain management;
- section 2 of Schedule C which makes specific provision for various types of therapy; and
- the types of devices considered in the previous Tribunal decisions provided by the appellant (though the panel is not bound by decisions of previous panels),

the panel believes that the ministry's definition is more in keeping with the plain meaning of the term as intended by the legislature. The appellant's physician's use of the term "positioning device" to describe the Comb and the InterX – purporting to interpret the legislative language – is not determinative or, in the circumstances, persuasive. It is not in keeping with the manufacturer's material, which refers to the InterX as a "pain management Neurostimulation device" and makes no reference to "positioning" as one of the functions or purposes of the InterX. In the panel's view, the fact that a potential benefit of using the Comb may be enhanced ability to mobilize or lie down to sleep is a secondary result of the pain treatment provided by the InterX and does not equate the Comb with being a device that "positions" the appellant.

A statutory provision is not ambiguous merely because two parties can advance different arguments as to what it means. It can only be said to be ambiguous when, after the application of statutory interpretation principles to determine the legislative intent, the provision is still capable of two or more equally plausible but different meanings. Based on the reasons set out above, the panel does not believe that the term "positioning device" is ambiguous. It is not sufficiently broad to include electrotherapy devices such as the Comb.

(c) The Ministry's Policy Regarding TENS Machines

The appellant says that the ministry must have had statutory authority to have a policy of providing TENS machines. Her position is that the only legislative heading under which the ministry could have provided TENS machines is as a "positioning device", and points to the ministry's letter of March 4, 2011 in support. The panel notes, however, that by letter a week later – on March 11, 2011 the ministry stated that on review it could not find a rationale for providing TENS machines as "positioning devices" in the past and that they do not fit the definition of a "positioning device".

The purchase authorizations provided by the appellant support the ministry's position, in showing that TENS equipment was provided under different accounting codes than the STOB which was assigned for "position/transfer devices".

It's clear from the ministry policy document that it was providing the basic TENS unit (with gel and accessories) as electrotherapy equipment. The ministry cannot point to legislative authority for providing electrotherapy equipment under section 3 of Schedule C of the EAPWDR up to March 31, 2010, referring to it as a "legislative orphan".

Considering that the only evidence that TENS machines were ever provided as "positioning devices" is a letter from the ministry which was essentially retracted a week later, and in light of the purchase authorizations that show that TENS equipment was being provided under STOBs other than the one

assigned to "position/transfer devices", and in the context of the panel's conclusions with respect to the definition of the term "positioning device", the panel concludes that the ministry was not relying on the legislative authority of "positioning device" in providing TENS equipment.

(d) Policy Parameters

The panel has concluded that the ministry was not providing TENS equipment as "positioning devices"; it was being provided expressly as electrotherapy equipment. The panel finds that given the provision of electrotherapy devices precedes EAPWDR Schedule C section 3, it may have originated from the much broader language of the DBPR, 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 for the Comb under the parameters set out in ministry policy at the time.

The ministry was not able to point out the legislative basis for its provision of TENS equipment after the repeal of the DBPR in 2002, and the panel has not been able to identify one. Assuming for the purposes of this appeal that the ministry did have such authority, in the absence of legislative criteria for the provision of such equipment the ministry was entitled to develop reasonable guidelines and parameters for administrative efficiency and to structure its exercise of discretion.

In the panel's view, the ministry reasonably determined that the Comb did not meet the ministry's policy parameters for provision of electrotherapy equipment. Firstly, the Comb is of little benefit to the appellant without the InterX and other accessories which the ministry has previously decided not to provide. The Comb has to be considered in context with the InterX and other accessories. Accordingly, the price of the Comb and InterX far exceed the $250 range which the purchase authorizations demonstrate was being applied by the ministry. Despite the assurance of the appellant's physician that the InterX can be used at home by the appellant, the manufacturer's material clearly states that the InterX is designed for professional use, and that a different model – the InterX 1000 – is intended for supervised use by patients. The InterX therefore falls outside the ministry's "intended user" parameter.

The evidence of the appellant's physician is that the InterX (and by extension, the Comb) is a different device than a TENS machine, and that a regular TENS machine would be harmful to the appellant. Thus the InterX (and by extension, the Comb) don't meet the ministry's "functionality" parameter.

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 Comb.

On balance, the panel concludes that the ministry reasonably determined that the Comb did not meet the parameters for the provision of electrotherapy equipment.

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

Appellant's position:

(1) The microcurrent device (CellStim) provided to her in July 2002 was provided as a positioning device. The ministry continued to provide electrotherapy equipment until April 1, 2010 as a positioning device.

Ministry's position:

(1) The appellant was provided with a CellStim device, which is a microcurrent device, on July 4, 2002 at a cost of $631.30. However, it has not been established that it was provided as a positioning device. 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.*"

(2) The 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.

Panel Decision:

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 eligibility terms in some detail. The new section did not make reference to the previous DBPR.

Given the repeal of the DBPR some 8 years prior to the appellant's request for the Comb which is the subject of this appeal, the panel finds that the July 4, 2002 decision is of no value or assistance in interpreting section 3 of Schedule C as it read on March 31, 2010. 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 a CellStim device in 2002 does not establish a precedent for the provision of the InterX equipment, including the Comb, and that each request must be determined in accordance with the legislation in effect at the time of the request.

(C) EAPWDR, section 69 Life-threatening health need

Appellant's position:

The appellant did not take a position on this finding.

Ministry position:

The ministry's position is that the appellant is not eligible for the Comb 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 Comb exceeds the parameters for the provision of electrotherapy equipment in terms of function, cost and intended user.

Panel Decision:

On the plain meaning of the legislative language, there is insufficient evidence to indicate that the Comb was required to meet a life-threatening health need at the time of the original request in March of 2010, at the time of reconsideration, or at present.

The panel finds that the ministry reasonably concluded that the legislative criteria for EAPWDR s. 69 have not been satisfied.

(D) Conclusion

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