PART C – Decision under Appeal

The Appellant appeals the reconsideration decision of the Ministry of Social Development and Social Innovation ("Ministry") dated August 11, 2014, in which the Ministry denied the Appellant's request for custom-made foot orthotics on the basis that the request did not meet the criteria set out in section 3.10(3)(d) of Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation,* that is, that the requested custom-made foot orthotics be made from a hand cast mold.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"), s. 62 and Schedule C, Health Supplements, sections 3 and 3.10.

PART E – Summary of Facts

The evidence before the Ministry at the reconsideration included the following:

- A Ministry Orthoses Request and Justification Form signed by the Appellant on March 5, 2014, with section 3 – assessment – completed by a pedorthist on March 19, 2014 (2 pages) (the "Orthoses Request Form"), discussed below;
- An estimate sheet from an orthotics company dated March 19, 2014, estimating the cost of bilateral foot orthotics for the Appellant at $400 (1 page);
- A letter dated February 13, 2014 from the Appellant's doctor (1 page) stating, "This patient needs bilateral orthotics fitted for pes planus";
- The Ministry's medical equipment and devices decision summary dated June 5, 2014 (3 pages) with attached notes from the original adjudicator (1 page), discussed below; and
- The Appellant's request for reconsideration dated July 4, 2014, in which the Appellant wrote that he needed an extra month to gather the needed documents for reconsideration and that the orthotics provider told him that "3D cast has been covered by the ministry for their other clients and that hand cast mold would cost more than the 3D cost."

On the Orthoses Request Form, the Appellant's pedorthist indicated in question 1 that the Appellant requires a "bilateral foot orthotic made of ABS plastics to support medial longitudinal arch, flexor hallucis tendon and plantar fascia." Question 4 of the Orthoses Request Form required the pedorthist to answer the question, "If the orthosis is a custom-made foot orthotic, will it be made from a hand cast mold?" The Orthoses Request Form asks the pedorthist to check one of two boxes in response to this question – the first is marked "No" and the second is marked "Yes, please explain." In response to question 4, the pedorthist checked the box next to "Yes, please explain" and added the explanation "casted using 3D volumetric model of the patient's foot."

The notes of the Ministry adjudicator who prepared the June 5, 2014 medical equipment and devices decision summary indicate that on June 3, 2014, the adjudicator "left message to supplier to call back. Supplier confirms that hand cast model will be used on Section 4 [of the Orthoses Request Form] but mention "3D volumetric model" in their explanation. Need clarification if this method is the computerized version ... " The adjudicator's notes for June 5, 2014 are, "No success contacting this supplier through phone, no call back. Their website mentions that they use "sophisticated digital mapping technology to create a topographic map of each foot." The adjudicator's notes indicate that on June 5, 2014, "ministry regulations require that custom-made foot orthotics are made from a hand-cast mold using a plaster of paris slipper cast. The minister is not satisfied."

Prior to the hearing, the Appellant submitted a letter dated September 6, 2014 from his pedorthist who completed the Orthoses Request Form. In this letter, the pedorthist writes that the bilateral foot orthotics for the Appellant "will be casted by hand in a foam impression box. This casting method will deliver a 3 dimensional volumetric model of the patient's foot when filled with plaster to build the required foot orthotic device. The orthotic device will be fabricated in our lab to the specifications of the above mentioned foot [mold]." The Ministry did not object to the admission of the September 6, 2014 letter from the Appellant's pedorthist.

The panel finds that the September 6, 2014 letter from the Appellant's pedorthist clarifies the information provided on the Orthoses Request Form; in particular, that the requested custom-made foot orthotics for the Appellant will be made from a hand cast mold using 3 dimensional volumetric

modeling, which involves a foam impression box that is then filled with plaster. The panel admits the September 6, 2014 letter of the Appellant's pedorthist under section 22(4)(b) of the *Employment and Assistance Act* as written testimony in support of information that was before the Ministry at the time the decision being appealed was made.

The Ministry notes that the Appellant receives disability assistance and is eligible to receive health supplements (in this case, custom-made foot orthotics) under section 62 and Schedule C of the EAPWDR. The Ministry also notes that the Appellant's physician has confirmed that the requested custom-made foot orthotics are medically required and the minister is satisfied that the custom-made foot orthotics are medically essential to achieve or maintain basic functionality because they will improve the Appellant's physical functioning that has been impaired by a neuro-musculo-skeletal condition. The Ministry notes that the Appellant does not have the resources available to him to purchase the requested custom-made foot orthotics.

PART F – Reasons for Panel Decision

The issue on this appeal is the reasonableness of the Ministry's reconsideration decision of August 11, 2014, denying the Appellant's request for custom foot orthotics on the basis that his request does not meet the eligibility criteria set out in section 3.10(3)(d) of Schedule C of the EAPWDR that the requested custom-made foot orthotics must be made from a hand cast mold.

Applicable Legislation

The Appellant meets the criteria set out in section 62 of the EAPWDR which provides as follows:

General health supplements
s. 62(1) Subject to subsections (1.1) and (1.2), the minister may provide any health supplement set out in section ... 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,
....

The eligibility requirements for medical equipment and devices, which includes custom-made foot orthotics, are set out in section 3 of Schedule C of the EAPWDR. Custom-made foot orthotics are specifically addressed in s. 3.10 of Schedule C of the EAPWDR.

Schedule C – Health Supplements
Medical equipment and devices
3(1) Subject to subsections (2) to (5) of this section, the medical equipment and devices described in section 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 – orthoses
3.10(1) In this section,
"off the shelf", in relation to an orthosis, means a prefabricated, mass-produced orthosis that is not unique to a particular person;
"orthosis" means
(a) a custom-made or off-the-shelf foot orthotic;
(b) ...
...
(2) Subject to subsections (3) to (11) of this section, an orthosis is a health supplement for the purposes of section 3 of this Schedule if
(a) the orthosis is prescribed by a medical practitioner or a nurse practitioner,

(b) the minister is satisfied that the orthosis is medically essential to achieve or maintain basic functionality,
(c) the minister is satisfied that the orthosis is required for one or more of the following purposes:
(i) to prevent surgery;
(ii) for post-surgical care;
(iii) to assist in physical healing from surgery, injury or disease;
(iv) to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition, and
(d) the orthosis is off-the shelf unless
(i) a medical practitioner or nurse practitioner confirms that a custom-made orthosis is medically required, and
(ii) the custom-made orthosis is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.

(3) For an orthosis that is a custom-made foot orthotic, in addition to the requirements of subsection (2) of this section, all of the following requirements must be met:
(a) a medical practitioner or nurse practitioner confirms that a custom-made foot orthotic is medically required;
(b) the custom-made foot orthotic is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist;
(c) Repealed
(d) the custom-made foot orthotic must be made from a hand-cast mold;
(e) the cost of one pair of custom-made foot orthotics, including the assessment fee, must not exceed $450.

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

Table 1

Item	Column 1 Orthosis	Column 2 Limit
1	Custom-made foot orthotic	1 or 1 pair
2	....	...

Subsections 3.10(4) –(8) of Schedule C of the EAPWDR address specific types of orthoses that do not apply to the appellant's request (custom-made footwear, off-the-shelf footwear, off-the-shelf orthopaedic footwear, knee brace, upper extremity brace, cranial helmet and torso or spine brace) and subs 3.10(1)) addresses the replacement of orthoses, which does not apply to the appellant's request.

The Appellant says that his requested custom-made foot orthotics meet the requirements of subsection 3.10(3)(d) – he argues that his pedorthist indicated on the Orthoses Request Form that the requested orthotics are custom-made from a hand cast mold by checking the box "Yes, please explain." The Appellant argues that in the September 6, 2014 letter, his pedorthist has clarified the answer on the Orthoses Request Form, clearly stating that the requested orthotics are to be made from a hand cast mold. The Appellant said that he was not able to reach his pedorthist to get the further information for the reconsideration because his pedorthist was out of town on vacation.

The Ministry has determined that the Appellant's request for custom-made foot orthotics meets the eligibility requirements set out in subsection 3.10(2) and 3.10(3)(a), (3)(b) and (3)(e) of Schedule C of the EAPWDR. The Ministry is satisfied that the requested custom-made foot orthotics are medically essential to achieve or maintain the Appellant's basic functionality (as required by subs. 3.10(2)(b)) and that they are required to improve the Appellant's physical functioning that has been impaired by a neuro-musculo-skeletal condition (as required by subs. 3.10(2)(c)(iv)). The Ministry also finds that the Appellant's physician confirmed that a custom-made foot orthotics is medically required (as required by subs. 3.10(2)(d)(i) and subs. 3.10(3)(a)). The Ministry does not dispute that the Appellant's requested custom-made foot orthotics would be fitted by a pedorthist (the requirement set out in subs. 3.10(2)(d)(ii) and in subs. 3.10(3)(b)) or that the cost of the requested custom-made foot orthotics would be less than $450 (the requirement set out in subs. 3.10(3)(e)).

The panel notes that in the reconsideration decision, the Ministry erroneously refers to subs. 3.10(3)(c) of Schedule C, which has been repealed – the references should be to subs. 3.10(3)(d). The Ministry's reconsideration decision notes that subsection 3.10(3)(d) of Schedule C requires that the Appellant's requested custom-made foot orthotics must be made from a hand cast mold and it states that the information provided by the Appellant's pedorthist in the Orthoses Request Form indicates that the orthotics will be casted with a 3D volumetric model. The Ministry stated in its reconsideration decision that it had attempted to contact the Appellant's pedorthist on August 7 and August 11, 2014 "to inquire and confirm the method used for custom foot orthotics with no success. Therefore, the minister is not satisfied" that the Appellant's request had met the requirement of subsection 3.10(3)(d) of Schedule C of the EAPWDR.

At the hearing, the Ministry's representative agreed that the September 6, 2014 letter clarifies that the Appellant's requested orthotics will be casted by hand in a foam impression box.

Panel's Decision

In order to obtain custom-made foot orthotics, the Appellant's request must meet all of the relevant criteria set out in subsections 3, 3.10(2) and 3.10(3) of Schedule C of the EAPWDR. As noted above, the Ministry agrees that the Appellant's requested custom-made foot orthotics meets all of the criteria set out in subsections 3 and 3.10(2), and three of the four criteria set out in subs. 3.10(3) of Schedule C. The only issue on this appeal is whether the Appellant's request meets the criteria set out in subs. 3.10(3)(d); that is, that the requested custom-made foot orthotics are made from a hand-cast mold.

The panel notes that in the Orthoses Request Form of March 19, 2014, the Appellant's pedorthist checked "yes" in answer to the specific question, "if the orthosis is a custom-made foot orthotic, will it be made from a hand cast mold?" The panel notes that the Ministry's denial of the Appellant's requested for custom-made foot orthotics rests on the explanation added by the Appellant's pedorthist to his "yes" answer to question 4 on the Orthoses Request Form, "casted using 3D volumetric model of the patient's foot." In his letter of September 6, 2014, the pedorthist explained that the Appellant's orthotics will be casted by hand in a foam impression box that will deliver a 3 dimensional volumetric model of the Appellant's foot when the box is filled with plaster to construct the orthotic.

The panel accepts the evidence of the Appellant's pedorthist which clarifies his answer to question 4 on the Orthoses Request Form and confirms that the requested custom-made orthotics will be made

from a hand-cast mold, as required by subs. 3.10(3)(d) of Schedule C of the EAPWDR. The panel finds that the Ministry's denial of the Appellant's requested custom-foot orthosis on the basis that it did not meet the criteria that it be made from a hand-cast mold as set out in subs. 3.10(3)(d) of Schedule C of the EAPWDR is not reasonable based on the evidence provided by the Appellant's pedorthist in the Orthoses Request Form, as clarified in the September 6, 2014 letter.

Accordingly, the panel rescinds the Ministry's reconsideration decision and refers the decision back to the minister for a determination as to the amount.