APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision dated August 4, 2011 which denied the appellant's request to be provided with the Soft Tissue Electrode accessory (the "Electrode") 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 Electrode, had been prescribed by a medical practitioner and that an assessment by a physiotherapist had been provided thus meeting the requirements of s. 3(2)(a) and (b). However, the ministry determined that the Electrode 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 Electrode 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 Electrode. 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 Electrode cannot provide electrotherapy alone, but must be used in conjunction with the InterX, and that the request for the Electrode must be considered in conjunction with the request for the InterX. The ministry determined that the Electrode 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 Electrode under s. 69 of the EAPWDR *[life-threatening health need]* because (i) the information does not establish a life-threatening need for the Electrode 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 13, 2011 but was adjourned on September 7, 2011 at the written request of the appellant with the consent of the ministry and the approval of 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 (the "Advocate") is unable to attend; and unspecified medical reasons.

- A rescheduled hearing was to be conducted on November 16, 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 approval of 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 July 9, 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 approval of the Tribunal chair. The appellant's submission included the following basis for the adjournment request: in trying to prepare for a previous hearing the appellant suffered a flare-up of her chronic fatigue and myofascial pain and requires a period of recovery, as set out in a 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 approval of 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 July 23, 2014, the appellant and the ministry were notified that the appeal hearing had been rescheduled for August 13, 2014. On August 6, 2014 the appellant submitted a written request for adjournment. The appellant's submission included the following bases for adjournment:
    1. the appellant suffered a severe flare-up of bronchitis, sinusitis, hypothyroidism, chronic fatigue syndrome, myofascial pain, parasomnia, circadian rhythm disorder, and physical and mental exhaustion according to her doctor's note dated August 6, 2014, which went on to say that "She requires three months of recovery before she will be well enough to proceed";
    2. the appellant's Advocate would not be available;
    3. the appellant is entitled to an oral hearing so that she can raise arguments and ask questions;

4. the record and evidence provided to the panel by the Tribunal was not complete.

The requested adjournment was consented to by the ministry and approved by the acting Tribunal chair on August 11, 2014.

- The hearing was rescheduled for November 17, 2014, but was adjourned for the fifth time on October 23, 2014 at the written request of the appellant with the consent of the ministry and the approval of the Tribunal chair. The appellant's submission included the following bases for the adjournment request: since her previous adjournment request the appellant had suffered two serious relapses as well as additional health problems and soft tissue injury due to an accident. According to a note from her physician, dated October 8, 2014, the appellant requires a further ten week adjournment to recover to the point where she can safely proceed with any appeals; the appellant also submitted that she received new evidence and needs time to seek legal advice.

- The hearing was rescheduled for January 26, 2015, but on January 16, 2015 the appellant submitted a request for adjournment. The appellant's submission included the following bases for adjournment:

    - The appellant had a doctor's appointment on the day scheduled for the appeal and it would take too long to rebook;
    - The appellant was in an accident three months ago and had not recovered sufficiently to participate in an appeal hearing.
    - Appeals have a history of causing flare-ups of pain and incidents of sleepwalking. The appellant is at risk of falling while sleepwalking and her spine has recently collapsed due to falls. Her energy levels are too low and she can only get through making meals and doing laundry.
    - The ministry is withholding medical letters for which the appellant has submitted a Freedom of Information ("FOI") request. These letters (the "FOI'd Medical Letters") allegedly explain why electrotherapy devices were provided to individuals. Time is required in order to see whether the Information and Privacy Commissioner ("IPC") will act on the appellant's complaint. It would be administratively unfair to proceed with a hearing before the appellant receives the documentation to which she is entitled.
    - Because of her disability it takes the appellant inordinately longer to draft communications and to accomplish tasks of daily living. A non-disabled individual could have dealt with the IPC's office much sooner, and the appellant requires accommodation for her disability.

  On January 21, 2015 the ministry consented to the appellant's adjournment request on the condition that the hearing would be rescheduled during the first two weeks of February on a date when the appellant's Advocate would be able to attend. The Tribunal chair approved the adjournment on the conditions consented to by the ministry.

- By letters dated January 22, 2015 the appellant and the ministry were advised that the hearing had been rescheduled for February 6, 2015 - a date on which Tribunal staff had been advised by the Advocate that she would be available. At 4:30 p.m. on February 4, 2015 the appellant

submitted a request for adjournment based on the following grounds:

- In previous related appeals, the appellant had submitted copies of Purchase Authorizations (referred to by the appellant as H407s) to the Tribunal (the "Old H407s"). For purposes of the current appeal, the appellant submitted a new batch of Purchase Authorizations (the "New H407s") which are included in the Appeal Record as Appendix L. The appellant then requested that Tribunal staff review the files of the other, previous appeals and include the Old H407s in the current appeal record, but was advised by Tribunal staff that the appellant would have to resubmit copies of the Old H407s. In support of her request for adjournment, the appellant submitted that her disabilities prevent her from finding her copies of the Old H407s and she is currently waiting for the results of a FOI request and a complaint to the IPC in order to obtain copies of the Old H407s which she stated are pivotal to her case.

- She is also still waiting for the FOI'd Medical Letters and submitted that the panel should not make a decision about the ministry's interpretation of the term "positioning devices" with incomplete information. The ministry is responsible for the delay by not releasing the records as they were required to by law.

- According to an attached letter from the appellant's physician, dated February 2, 2105, the appellant is at high risk of bone fracture due to falls, and she has a sleep disorder that causes her to sleepwalk. Falls during sleepwalking have caused bone fractures and increased the deformity of her back. Participation in appeals increases her sleepwalking episodes. It is not safe for the appellant to participate in appeals until a system is put in place that eliminates the risk of all falls. A four month adjournment will allow the appellant to research service organizations for one which will provide an assistance animal to prevent sleepwalking.

The ministry refused to consent to the appellant's request for adjournment. In accordance with section 4.4(b) of the Tribunal's Practices and Procedures, the Tribunal chair did not approve an adjournment.

- At 4:40 p.m. on February 5, 2015 the appellant submitted a request for adjournment to the Tribunal's office - to the attention of the appeal panel – based on the following written submissions:

  - For the medical reasons outlined in her physician's letter of February 2, 2015, the appellant argued that she is not to attend a hearing. The appellant submitted that though she has an alarm system that is supposed to prevent sleep walking, it doesn't work anymore to prevent ALL episodes. She argued that "If the alarm was sufficient the doctor wouldn't have written that I needed an adjournment to get the service dog to prevent sleepwalking."

  - The appellant stated that her disabilities don't allow her to have a written hearing, and that she is entitled to an oral hearing since she cannot present all her

arguments in writing.

- The Advocate is no longer acting as the appellant's advocate – she is instead going to be a witness. The appellant has been unable to find another advocate to present her case.

- Administrative fairness requires the panel to temper its interest in administrative efficiency with the appellant's right to fully make her case. The Old H407s and the FOI'd Medical Letters are pivotal to the appellant's case and it would be unfair for the panel to proceed without the appellant obtaining the documents to which she is entitled. An adjournment would not prejudice the ministry's case – it would be only a minor inconvenience. If the panel confirms the ministry's reconsideration decision it will be the appellant's last chance to obtain the Electrode since the legislation has changed in the interim. The appellant cannot risk judicial review because she cannot afford to pay costs if she is unsuccessful, and her disabilities make judicial review too difficult.

- If the panel requires supporting evidence for anything asserted by the appellant, she will need additional time to provide it. There is case law to the effect that the appellant's testimony is to be believed unless there is evidence of it not being truthful.

- 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 Advocate to attend in person while the appellant participates by telephone. Tribunal staff contacted the Advocate on the morning of February 6, 2015 to enquire as to whether she had received a copy of the appellant's February 5 adjournment request, and to ensure that she understood the request would have to be considered by the panel at the hearing. Staff was informed by the Advocate that the appellant had instructed her not to attend the appeal hearing.

- The panel opened the telephone line 15 minutes ahead of the time scheduled for the hearing in order to accommodate the appellant's participation. The Advocate did not attend and the appellant did not dial in. After waiting a few minutes past the time scheduled for the hearing, the panel asked for submissions from the ministry with respect to the adjournment request. The ministry stated that it was opposed to an adjournment for the following reasons:

    - There is insufficient evidence of the appellant's sleepwalking problem. The ministry has supplied the appellant with medical equipment that sounds an alarm when the appellant's feet touch the floor. The ministry described the equipment as being "almost the best alarm one can get." In support of her contention the ministry representative produced a copy of an invoice for payment by the government in respect of commercial alarm monitoring services provided on behalf of the appellant during the period December 1, 2013 to November 30, 2014. The ministry stated that it has made unique arrangements with the appellant by scheduling a weekly meeting between the appellant and a ministry worker so the appellant can raise any issues with the ministry. The appellant has not previously advised the ministry that the alarm system is not working. Though

the ministry usually will consent to an adjournment request that is supported by a physician's letter that provides concrete evidence of a medical issue, the letter of February 2, 2015 is not substantive. It references a tenuous link between appeals and sleepwalking.

- Little weight should be given to the physician's letter of February 2, 2015. Ministry staff contacted the physician's office about the letter and was advised that the letter was written by the appellant, and was transcribed onto the physician's letterhead by his staff for his signature.

- The appellant's request for an adjournment is based on an event that may never happen – obtaining an assistance dog to wake her up from sleepwalking.

- Although the appellant wrote that her disabilities don't allow her to have a written hearing, she has demonstrated an ability to adequately communicate her submissions in writing.

The panel had the ministry representative leave the room while it considered the adjournment request. 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 several previous adjournment requests by the appellant over the course of almost three and a half years, each of which relied in part on medical grounds, the note by the physician dated February 2, 2015 is not sufficient evidence that the appellant is unable to proceed with the hearing.

   She has provided insufficient supporting medical evidence that her past involvement in appeal hearings has negatively affected her health condition. The physician's letter gives no indication that the physician is aware that the appellant participates in oral hearings by telephone rather than having to attend in person, or that she has the option of requesting a written hearing. The letter also does not indicate that the physician is aware that the appellant currently has an alarm system to prevent sleepwalking, and provides no confirmation that the alarm system is inadequate and when it ceased being effective. Despite having the unique opportunity of scheduled weekly meetings with a ministry worker, the appellant has not previously raised her concerns about the alarm system to the ministry.

   The appellant's history of adjournment requests indicates to the panel that there is little likelihood of a further adjournment resolving the appellant's medical concerns about participating in the hearing.

2. While every reasonable effort should be made to accommodate an appellant's request for an oral hearing, the appellant does not have an untrammeled and absolute right to an oral hearing. The history of this case demonstrates that the appellant has been given every reasonable opportunity to participate in an oral hearing, it having been rescheduled seven times to accommodate her. She 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 multiple adjournments granted at the request of the appellant.

The appellant was provided ample notice of the hearing date.

The appellant 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*. During the years that this matter has been before the Tribunal the appellant has had the assistance of the Advocate – appointed by the appellant as her representative on August 23, 2011 - and has consulted 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 more than 400 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 other than the possibility that she may eventually obtain copies of the Old H407s and the FOI'd Medical Letters (which are discussed in more detail below). Although the appellant has written that her disabilities don't allow her to participate in a written hearing, she has demonstrated the ability to communicate extensively by way of written submissions in respect of her adjournment requests.

In the panel's view the circumstances do not demonstrate that procedural fairness and accommodation of the appellant's disability will reasonably be enhanced by granting a further adjournment.

3. The appellant has provided no explanation for the last-minute decision to have her long-time Advocate become a witness. There is no indication of a reason that the Advocate cannot act in both roles at the hearing or what evidence the Advocate can provide that is sufficiently material to warrant an adjournment. In the circumstances the panel is not satisfied that the unexplained decision to find another advocate at this late stage justifies an adjournment.

4. The appellant's original request for the Electrode that is the subject of this appeal was submitted almost 5 years ago, on March 31, 2010. Section 85 of the Employment and Assistance Regulation contemplates that a hearing will be held within 15 business days after an appeal form is delivered. The intention of the legislation is to provide a fair but speedy resolution of the appeals of disabled persons. The overwhelming majority of appeals are dealt with within the statutory timeframes. The length of this appeal process – substantially arising at the request of the appellant - strikes at the integrity of the system.

   With respect to the appellant's argument that she requires more time to obtain documents and that the ministry is responsible for the delay by not releasing the records as they were required by law, the appellant acknowledges that the ministry responded to her original FOI request as she previously had the Old H407s in her possession. The fact that she has not retained copies of the Old H407s does not justify an adjournment. Her request for the FOI'd Medical Letters is based on speculation that they exist and that they may contain information to support her appeal. It is clear that the appellant has already made successful FOI requests to obtain both the Old H407s and the New H407s. The request for the FOI'd Medical Letters appears to be a more recent request. In the panel's view, administrative fairness does not require that the appellant be provided with the opportunity to take a protracted, piecemeal approach to the pursuit of evidence, particularly when the evidence being sought is of such a speculative nature.

For the foregoing reasons, the panel finds that the lack of these documents does not justify an adjournment of the hearing.

5. The appellant has argued that case law requires her testimony to be believed without supporting evidence unless there is evidence of it not being truthful. The panel believes that the appellant is referring to *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, [2009] B.C.J. No. 2124, wherein the court stated at paragraphs 64 and 65 that "…nothing in the [*Employment and Assistance for Persons with Disabilities Act*] prevents the Ministry and the Tribunal from placing considerable weight on the Petitioner's evidence, provided the statutory eligibility criteria are met" and that "…to the extent that the Tribunal did not choose to place significant weight on the petitioner's evidence because of a legitimate reason going to credibility, conflict with the medical practitioner's reports, or otherwise, the Tribunal cannot be said to have committed a patently unreasonable error."

   In the circumstances of this case, where:

   - there have been numerous previous adjournment requests over the course of a number of years,
   - the physician's letter is deficient as noted by the panel,
   - the appellant has not previously mentioned to the ministry that there are any problems with her sleep walking alarm,
   - the appellant has had extensive experience with the appeal process,
   - the appellant asks for more time to re-acquire documents that have previously been provided to her,

   the panel has chosen not to place significant weight on the appellant's statements, and has concluded that it is reasonable to expect the appellant to provide additional supporting evidence for her assertion that her immediate health concerns prevent her from participating in a hearing by telephone and that she is not able to participate in a written hearing due to her disabilities. In the panel's view, given the prolonged history of this appeal and the appellant's demonstrated ability to put voluminous materials before the panel, the appellant has had adequate opportunity to provide supporting documentation.

For the above-noted reasons, and having confirmed that the appellant and her designated Advocate 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 Electrode, 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 Electrode is necessary to break up recalcitrant trigger points, and that she (the physician) or a physiotherapist may have to initially perform this task, using this equipment until the appellant's condition improves.

6) 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 'special' soft tissue electrode and letter from the appellant's physician dated October 14, 2010 as a "continuation" of the MERJ stating in part that the specific soft tissue electrode is necessary to break up recalcitrant trigger points.

7) The ministry's original decision (May 14, 2010) and reconsideration decision (November 10, 2010) respecting the appellant's request for the InterX, Electrode 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.

8) 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 [Electrode] has several protuberances which can be positioned on scar tissue. It delivers the high amplitude current while manually manipulating the soft tissue."

9) 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."

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

11) 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 Electrode would cost US$250. The physician added that the appellant's use of self-adhesive electrodes for microcurrent treatment will decrease if provided with the requested devices.

12) 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 Electrode which she described as "a positional device that provides current delivery while mechanically manipulating soft tissue adhesions and recalcitrant trigger points in different parts of her body." 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.

13) 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."

14) 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."

15) May 18, 2011 letter in which the appellant describes the differences between various devices she has requested and describes the Electrode as "an external electrode that attaches to the InterX so that external parts of the body – such as areas of muscle spasm can be manipulated with the device while current is also being delivered."

16) 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."

17) 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 Electrode is "designed for use on muscles [and] can be used as a massage tool and applications may include soft tissue manipulation techniques." 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.

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 & 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 and a Tribunal decision dated April 28, 2003

applying a section of the DPBR.

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) Industry White Paper – Electrical Neurostimulation, Neuro Resource (the “White Paper”).

12) A sample purchase authorization form including a page listing accounting codes, or

STOBs (referred to hereinafter as the "Coding Form"), used by the ministry for financial management purposes. The code assigned to "position/transfer devices" is STOB 7927. The Coding Form stipulates that STOB 7927 "Only includes: wheelchair seating systems, bathing and toileting aids, hospital beds, pressure relief mattresses, and floor or ceiling lift devices."

13) The New H407s, consisting of copies of thirteen redacted Purchase Authorizations from the ministry from 2007 to 2010, as well as purchase receipts, showing payments in the range of $140 to $250 related to TENS machines. The accounting codes, or STOBS, indicate that the payments were almost all in respect of STOB 7928 "medical equipment rentals/repairs" or STOB 7929 "supplies related to equipment". On two of the New H407s (dated May 23, 2007 and November 23, 2007) TENS machines were authorized in whole or in part under STOB 7927.

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

15) 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. This hearing is not an opportunity for the appellant to reargue her eligibility for the InterX.
- the Electrode is useless without the InterX, and in reflecting on the ministry's policy parameters the Electrode must be considered in context with the InterX.
- the appellant's physician's letter of September 8, 2011 confirms that the InterX and Electrode are not traditional TENS devices, yet most of the appellant's arguments related to a TENS machine. The September 8, 2011 letter stated that a regular TENS machine worsened the appellant's pain. The Coding Form makes it clear that TENS machines and electrotherapy equipment were not included as position/transfer devices. There is nothing to show that the ministry issued a device like that requested by the appellant, which functioned to position the equipment rather than to position the individual.
- all the referenced Tribunal decisions regarding "positioning devices" refer to positioning the patient. The Electrode is a device for improved functioning of the InterX, not for positioning the patient.
- the ministry does not pay for an accessory or replacement for a machine which it had not provided.
- 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 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 Electrode 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 related specifically to the Electrode. The panel has set out the appellant's positions as understood from the extensive written argument she provided in respect of the InterX appeal and included in the appeal record for the Electrode, along with her evidence.

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 Electrode 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 Electrode 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 Electrode also identifies 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 Electrode 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 and the two New H407's that authorized the purchase of TENS machines under STOB 7927 confirm 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 Electrode falls within the ministry's parameters. The Electrode was priced at US$250, so it did not exceed the ministry's policy parameters with respect to cost (maximum of $250). The Electrode 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 Electrode 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 Electrode.

(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 Electrode 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 Electrode is a device for improved functioning of the InterX not for positioning the patient.

(4) 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 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 Electrode 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.

(5) The ministry's denial of the InterX and other accessories has been confirmed on appeal. The Electrode is useless without the InterX, and in reflecting on the ministry's policy parameters the Electrode must be considered in context with the InterX. The ministry does not pay for an accessory or replacement for a machine which it had not provided. The Electrode 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 Devices"

The lack of a definition in the legislation gives the ministry a degree of discretion with respect to interpreting the term "positioning devices." 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 is a reasonable interpretation of the legislation and the ministry 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 Electrode 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 Electrode are primarily designed for electrotherapy purposes and pain management;
- section 2 of Schedule C which makes specific provision for various types of therapy;
- the existence of the ministry policy which indicated that electrotherapy equipment was a stand-alone category of health supplement separate from positioning devices;
- the description in the Coding Form which did not include TENS machines or other electrotherapy equipment in the category of position/transfer devices; 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 Electrode 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 or the Electrode. In the panel's view, the fact that a potential benefit of using the Electrode may be an enhanced ability to mobilize or lie down to sleep is a secondary result of the pain treatment provided by the InterX and Electrode in combination and does not equate the Electrode with being a device that "positions" the appellant.

The appellant relies also on the two New H407s that authorized the acquisition of TENS machines under STOB 7927, and argues that the Old H407s are "pivotal" to her case. In the panel's view, the two out of thirteen New H407s that refer to STOB 7927 – when considered in context with the Coding Form, the ministry policy on electrotherapy equipment, and the panel's above-noted statutory analysis – simply indicate that TENS machines were in the ministry's terms "a legislative orphan" and that ministry staff occasionally mistakenly used the wrong STOB number for the purposes of the ministry's financial record-keeping. Even if the Old H407s were to contain references to STOB 7927 for the purpose of purchasing TENS machines they would be insufficient to demonstrate that the Electrode is a positioning device.

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 Electrode. Accordingly, the panel finds that the ministry was reasonable in concluding "positioning devices" did not include TENS machines or the Electrode.

(c) The Ministry's Policy Regarding TENS Machines

The appellant argues that the ministry must have had statutory authority to provide 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 argues that the ministry did not have the authority to limit the provision of positioning devices by policy.

As noted above, the panel has concluded that the ministry was not providing TENS equipment as

"positioning devices"; it was providing the basic TENS unit (with gel and accessories) as electrotherapy equipment.

The panel finds that as the provision of electrotherapy devices precedes EAPWDR Schedule C section 3, it likely 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 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 policy guidelines and parameters for administrative efficiency and to structure its exercise of discretion as previously discussed in these reasons for decision.

In the panel's view, the ministry reasonably determined that the Electrode did not meet the ministry's policy parameters for provision of electrotherapy equipment. Firstly, the Electrode is of little benefit to the appellant without the InterX and other accessories which the ministry has previously decided not to provide. The Electrode has to be considered in context with the InterX and other accessories. Accordingly, the price of the Electrode 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 and Electrode therefore fall outside the ministry's "intended user" parameter.

The evidence of the appellant's physician is that the InterX (and by extension, the Electrode) 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 Electrode) 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 Electrode.

On balance, the panel concludes that the ministry reasonably determined that the Electrode 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 wording used in the previous DBPR.

Given the repeal of the DBPR some 8 years prior to the appellant's request for the Electrode 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 Electrode, 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 Electrode 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 Electrode 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 Electrode 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 appellant's request for the Electrode was a reasonable application of the legislation in the circumstances of the appellant, and accordingly confirms the decision.