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 3, 2011 which denied the appellant's request to be provided two intra-vaginal and intra-rectal electrode accessories (the "Electrodes") for an Enart 801-V5 neuro-stimulation device ("Enart"). 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 Enart and accessory Electrodes 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 Electrodes were not any of the medical equipment and devices set out in s. 3(1) and, in particular, were not positioning devices under s. 3(1)(d) and exceeded the policy parameters for the provision of electrotherapy in terms of function 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 Electrodes 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 Electrodes. 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 Electrodes cannot provide electrotherapy alone, but must be used in conjunction with the Enart, and that the request for the Electrodes must be considered in conjunction with the request for the Enart. The ministry determined that the Electrodes exceeded the policy parameters for the provision of electrotherapy equipment in terms of function and cost.

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

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, sections 2(1)(a) and 3 in effect on March 31, 2010.

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

PART E – Summary of Facts

With the consent of the appellant the ministry had an observer attend the hearing and the appellant's advocate (the "Advocate") had an attendant.

Background

On March 31, 2010 the appellant submitted to the ministry a request for three types of electronic devices: the Enart and Electrodes, an InterX 5002 pain management neurostimulation device and accessories, and an ITO microcurrent machine. The ministry's subsequent denials of the appellant's requests for each of these devices and accessories have been the subject of several appeals before the Employment and Assistance Appeal Tribunal (the "Tribunal").

Preliminary Matters

- The appeal hearing for the Electrodes was originally scheduled for September, 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 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; the Advocate is unable to attend; and unspecified medical reasons.

- A rescheduled hearing was to be conducted on November 30, 2011 but was adjourned for a second time on November 16, 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; and the appellant has a conflicting medical appointment.

- The hearing was rescheduled to take place on July 3, 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 another hearing scheduled for May 30, 2012 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 Freedom of Information ("FOI") searches; and to prepare for and host a family member, since she cannot prepare for the hearing at the same time.

- Subsequently, appeal hearings were held for each of the other requested devices and accessories, with the Electrodes being the last remaining devices under appeal.

- By letters dated March 17, 2015, the appellant and the ministry were notified by the Tribunal that the appeal hearing had been rescheduled for April 8, 2015. On March 27, 2015 the appellant submitted a written request for adjournment. The basis for the appellant's request was set out in a letter from the appellant's physician dated March 27, 2015 (the "March 27/15 Physician's Letter"): "[The appellant] has…two fractured ribs and torn cartilage…developed bronchitis again…The pain and difficulty of breathing is disrupting her sleep and has caused a state of physical and mental exhaustion. Three months of recovery is required before she will be well enough to participate in any hearings." In her written request for adjournment the appellant indicated that additional medical letters would be forthcoming. In subsequent conversations with Tribunal staff, the appellant advised staff that no additional letters would be forthcoming and that her adjournment request should be assessed with the existing information.

  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.

- To accommodate 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. On the morning of the appeal the Advocate advised Tribunal staff by telephone that she would be 10 to 15 minutes late to the hearing because of difficulties with her ride. The panel opened the telephone line for the appellant at 12:56 p.m. The appellant dialed in to the hearing at 1:09 p.m. and the Advocate arrived at 1:11 p.m. The appellant and the Advocate confirmed that the usual preliminary remarks from the panel could be dispensed with as they are familiar with the hearing process. The ministry did not object.

- The appellant requested that the hearing be adjourned on the following bases:

  1. The appellant stated that she is not medically fit to attend a hearing at this time. In support of this contention the appellant stated that:
     - The March 27/15 Physician's Letter asserted that three months of recovery is required before the appellant can participate in any hearing.
     - She had proffered two other physician's letters in previous appeals for other devices and had instructed Tribunal staff to include them in all future appeal records.
     - One of those early physician's letters stated that due to her disabilities the appellant can only attend hearings in segments of 20 to 30 minutes a day (the "Segments Letter").
     - The other early physician's letter – which the appellant said was dated February 2, 2015 - stated that hearings cause the appellant to suffer stress, which causes her to sleepwalk. (the "Sleepwalking Letter".) The appellant stated that when she sleepwalks she has a tendency to fall and fracture bones. She is at high risk of bone fractures due to osteopenia and has suffered recent fractures. A recent fall had caused the scoliosis-related curvature of the appellant's spine to increase by 14 degrees. The hearing must be adjourned until a system is put in place to eliminate all risk of falls and fractures, such as obtaining a service dog that will block her way when she gets out of bed to sleepwalk. The appellant stated that

she has an alarm system to wake her when she starts to sleepwalk, but it does not always stop all her sleepwalking. The appellant said she also sometimes forgets to set the alarm.
- The appellant does not have the option of participating in written hearings because typing and writing worsen her pain, causing numbness and seizures.
- Every panel hearing has caused her stress and damage to her body. Because of her myofascial pain, the larger the stress the larger is the reaction.
- Tribunal staff has been uncooperative about providing documents from previous appeals to the panel. The appellant does not have a fax machine and cannot afford $1.00 for a stamp each time to keep mailing documents to the Tribunal's office. She has impaired mobility and can't deliver documents to the Tribunal's office in person. Her health dictates that she uses her energy to take care of her daily needs rather than "running around to please [the Tribunal] with doctors' notes."

2. The appellant's computer broke down last week and she can't afford approximately $100 to have it fixed. Her food and medical expenses take every penny. In support of this contention the appellant stated that:
   - She is looking for a volunteer to repair the computer since she cannot afford to pay for the service, but most volunteers are students who are busy with exams right now and looking for summer jobs.
   - She must have her computer in order to proceed with the appeal hearing since she cannot remember everything and she and her advocate have not necessarily discussed everything.
   - The last time her computer broke down it took her several months to find a volunteer to repair it.

3. The appellant is still waiting to obtain evidence that the ministry has been suppressing. In support of this contention the appellant stated that:
   - She has proof on her broken computer – in the form of an e-mail from the office of the Information and Privacy Commissioner (the "FOI Office") – that delays in her obtaining requested documents have been caused by the ministry's refusal to comply with orders from the FOI Office.
   - The appellant had made an FOI request for ministry purchase authorization forms (the "Purchase Authorizations") for electrotherapy devices, which she received from the ministry after a delay. The appellant then made another FOI request for any physician's letters which had been provided to the ministry in support of the requests for the electrotherapy devices (the "FOI'd Medical Letters"). The ministry refused to produce the FOI'd Medical Letters and the FOI Office has ordered the ministry to produce them. The appellant expressed her opinion that the FOI'd Medical Letters will state that the electrotherapy devices supplied by the ministry were requested for purposes of pain management. The appellant said that the ministry has still not provided the FOI'd Medical Letters.

- In further support of her request for adjournment, the appellant argued that:
  - If an appellant requests an adjournment for health-related reasons, human rights law obligates the panel to reasonably accommodate her request "to the point of

undue hardship." The physician's expectations must be complied with. The appellant is entitled to have a panel hearing that is safe for her health.
    - Of course hearings are going to be stressful – hearings must be conducted in a manner to ensure that stress doesn't make the appellant's health worse. The appellant has offered two ways to reduce the impact of the stress of hearings: to have them conducted in "segments" of 20 to 30 minutes a day, or to wait until she has a service dog to prevent sleepwalking.
    - The ministry is in a position of power and has the staff and money to prepare documents. The appellant does not have either. It is unreasonable and idiotic to expect the appellant to have to keep supplying documentary evidence afresh with each appeal.
    - There is case law confirming that in the absence of evidence that an appellant is being untruthful, the panel must accept her evidence in full.
    - The ministry has already waited a long time for the appeal. There is no adverse effect to the ministry to wait for two or three more months.

- In response to the panel's request for submissions on the adjournment request, the ministry representative stated that:
    - It is problematic not to have the full information from the Segments Letter or the Sleepwalking Letter.
    - There is no specific evidence that stress from hearings is a direct cause of sleepwalking and falls. Such an assertion assumes that there are no other stressors in the appellant's life that would cause sleepwalking.
    - The legislation requires appeal hearings to be conducted within 15 days. There have already been significant delays in this case. There is no benefit to the appellant or the ministry to delay the hearing further.

- In response to a question from the panel, the Advocate responded that she did not have copies of the Segments Letter or the Sleepwalking Letter.

Having heard from the parties, the panel deliberated and concluded it was not prepared to grant an adjournment 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 medical evidence, including the March 27/15 Physician's Letter, is not sufficient to persuade the panel that an adjournment is warranted.

   The appellant has alleged that Tribunal staff has not provided evidence to the panel as requested by the appellant, notably the Segment Letter and the Sleepwalking Letter. The panel accepts the appellant's oral testimony as to the existence of these letters and their contents. The panel notes, however, that the appellant has had extensive experience with Tribunal appeals. Numerous examples are evidenced in the appeal record (for example Appendices A, C, D and E) where the appellant has in writing asked Tribunal staff to ensure that specific evidence is to be included in all future appeals dealing with the devices she requested on March 31, 2010. Staff readily accommodates this request. The appellant has been advised by Tribunal staff in the past, however, that staff will not search through records of

previous appeals to retrieve evidence that the appellant retroactively decides should be included in a future appeal. The appellant has not provided the panel with any supporting evidence to demonstrate that at the time she submitted the Segment Letter or the Sleepwalking Letter, she requested staff to include them in future appeal records. The appellant claims that her ability to provide supporting evidence is limited by her broken computer, but the panel notes that the appellant had the opportunity to share all of this information with her Advocate at the time she submitted it to the Tribunal, and she appears not to have done so. For the foregoing reasons, the panel has given little weight to the appellant's assertions that Tribunal staff has failed to forward evidence to the panel.

Even accepting the appellant's oral evidence with respect to the Segments Letter and the Sleepwalking Letter, there is insufficient supporting medical evidence that her past involvement in appeal hearings has negatively affected her health condition. There is no indication that the physician is aware that the appellant participates in oral hearings by telephone rather than having to attend in person, that she has the assistance of the Advocate in attendance at the hearing, or that she has the option of requesting a written hearing. There is also no evidence to indicate that the physician is aware that the appellant currently has an alarm system to prevent sleepwalking, and no confirmation from a physician that the alarm system is inadequate or that it has ceased being effective.

In the panel's view the evidence does not demonstrate on the balance of probabilities that it is reasonably necessary to accommodate the appellant's request for the hearing to be conducted in the form of 20 to 30 minute "segments" over a number of days, or that it be adjourned on speculation that the appellant may be able to obtain a service animal to prevent her from sleepwalking.

The appellant's history of adjournment requests, and her assertions that both oral and written hearings cause her stress, indicate 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 – for example in circumstances that amount to an abuse of process. 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 several times over a period of years 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 O consisting of almost 450 pages of material, in addition to the appeal record of over

430 pages which consists substantially of the appellant's submissions and includes several court decisions. The appellant has given no indication that she has additional evidence to present other than the possibility that she may eventually obtain copies of the FOI'd Medical Letters (which are discussed in more detail below). Although the appellant has argued 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. Appendix O alone consists of six pages of handwritten submissions prepared by the appellant and submitted this week.

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 been provided with printed copies of all the records and submissions that are before the panel. The majority of this material originated with the appellant. 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. She has had the opportunity to ensure that her Advocate has copies of all relevant supporting information. A recent limitation on her ability to access documents due to a computer problem is not sufficient grounds for adjournment.

4. The appellant's original request for the Electrodes that are 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 (albeit with some delay) as she did eventually receive the Purchase Authorizations. The Purchase Authorizations substantially constitute the appellant's Appendices L and N. 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 a successful FOI request to obtain the Purchase Authorizations. The request for the FOI'd Medical Letters is a subsequent 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 given significant weight 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 medical evidence, even accepting the appellant's oral evidence of the Segment Letter and the Sleepwalking Letter, is deficient as noted by the panel, and
- the appellant has had extensive experience with the appeal process,

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 an oral 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, the panel denied the appellant's adjournment request.

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 Enart and accessories such as the Electrodes, 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 Enart and Electrodes are necessary to provide treatment intra-vaginally and intra-rectally (one for each area for home treatment), to treat intra-vaginal and intra-rectal trigger points and abnormal muscle tension that is holding the coccyx and sacral-iliac joint in an abnormal position and is limiting weight-bearing positioning.

6) Medical Equipment Request & Justification form (the "MERJ") dated March 31, 2010 completed by a physiotherapist requesting the Electrodes and other medical equipment.

7) June 21, 2010 letter from the trustee of the appellant's trust fund (date stamped as being received by the ministry on July 14, 2010), stating that the appellant's request for her trust fund to purchase the Enart and Electrodes, along with the other requested electrotherapy equipment, had been denied.

8) The ministry's original decision (May 14, 2010) and reconsideration decision (dated April 14, 2011) respecting the appellant's request for the Electrodes 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.

9) 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 [the other device] and the Enart [ ] are interactive devices that deliver high amplitude electrical pulses [the appellant's] needs can't be met thru providing only one of the units. For example, of the two units only the [Enart] has vaginal-rectal electrodes to place inside the vagina and rectum to treat the pelvic floor muscles…[the Enart provides] treatment internally to correct the sacral-iliac joint blockage and displaced coccyx. This requires treatment with the [Enart] and [Electrodes]."

10) October 14, 2010 letter, stated to be a continuation of the MERJ, in which the appellant's physician wrote that the Enart and the Electrodes are "needed to treat intra-vaginal and intra-rectal trigger points and abnormal muscle tension that is holding the coccyx and sacral-iliac joint in an abnormal position and is limiting weight bearing positioning."

11) 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."

12) Letter dated November 9, 2010 from the appellant's physiotherapist stating that she believes the appellant will benefit from the Enart and Electrodes.

13) 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 Enart would cost US$2,040 (plus any duty, taxes and shipping) and the Electrodes would cost US$200 (plus any duty, taxes and shipping.) The physician added that the appellant's use of self-adhesive electrodes for microcurrent treatment will decrease if provided with the requested devices.

14) January 17, 2011 letter from the appellant's physician stating in part that the Enart (with Electrodes) 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 write that "The [Enart and Electrodes] function as a unit together to deliver the scenar current intra-vaginally and intra-rectally to correct muscle tension and muscle shortening that is holding her sacral-iliac joint and pelvic girdle in an anteriorly rotated position, and coccyx to be rotated instead of it being correctly in a neutral position. This abnormal positioning is one of the primary causes of her having such severe pain in weight bearing positions that she can't spend enough time in them on a daily basis to prevent loss of muscle mass and lymphedema. The [Enart and Electrodes] are positional devices for correcting and maintaining the correct position of her sacral-iliac joint, pelvic girdle, and coccyx."

15) 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."

16) 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."

17) Written submission by the appellant and her Advocate dated March 14, 2011.

18) May 18, 2011 letter in which the appellant describes the differences between various devices she has requested and describes the Electrodes as "external electrodes that attach to the [Enart]. One to be placed in the vagina to deliver current to pelvic floor muscles, the other to be placed inside the rectum to deliver current to muscles that affect the placement of the coccyx."

19) 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."

20) Manufacturer's product information for the Enart and Electrode which describes the Enart as "a biofeedback device for professional and individual/family use" which allows the user to accurately locate the site to be treated. It is "ideal for pain relief, first aid and general medical care." The manufacturer states that the Enart and accessories "create ideal conditions for the body to heal itself" which by means of "dynamically changing signals" achieve a "dialogue" (through biofeedback) between the body and the device. The Electrodes are described as "special attachment[s] to treat areas, such as anus and vagina, difficult to access with the built-in electrodes."

21) 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.

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

23) Wikipedia information about electrotherapy;

24) 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 O 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 [Enart 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 Enart models only the [Enart] offers the features [the appellant] requires."

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 Enart 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 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.

7) 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.” STOB 7925 is for “mobility devices” which “Only includes: canes, crutches, walkers, manual wheelchairs, power wheelchairs, and scooters.” STOB 7928 is for “medical equipment rentals/repairs.” STOB 7929 is for “supplies related to equipment” and examples include “wheelchair batteries, suction machines and related supplies, percussors.”

8) The Purchase Authorizations, consisting of copies of 21 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 and accessories. 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 Purchase Authorizations TENS machines were authorized in whole or in part under STOB 7927 *[position/transfer devices]* and on two under STOB 7925 *[mobility devices]*.

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

10) 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*.

In her oral testimony the appellant stated that:

- In its reconsideration decision, the ministry said that it relied on section 16(1) of the EAPWDA

for the authority to set parameters as to cost and functionality on its provision of electrotherapy devices. Section 16 is about an appellant's appeal rights, it is not about authorizing the ministry to limit the provision of electrotherapy equipment. The ministry has to provide evidence as to the source of its authority to develop policy – there is no such evidence with respect to section 16 or any other legislative provision.

- The legislation allows for electrotherapy devices. There is no legislative provision re: limiting the cost of the devices. The policy manual is not the law, it is only guidelines.
- Tribunal staff have failed to provide the panel with letters submitted by the appellant stating that policy must be driven by legislation.
- The Purchase Authorizations show that the ministry was issuing electrotherapy devices from 2002 and beyond. Not all such devices were TENS machines. The ministry issued the appellant the CellStim 600, which refutes the ministry's claim that it could only provide basic TENS machines. The ministry has also provided the appellant with $30,000 of cloth-covered electrodes.
- Since the ministry was issuing electrotherapy devices to others, it should do the same for the appellant. If the ministry provided electrotherapy equipment to some people it has to do so for all people. It is unfair and discriminatory for the ministry to treat the appellant differently. The ministry was unreasonable not to provide the Electrodes to the appellant.
- The Purchase Authorizations show that the ministry also provided electrodes and other accessories for electrotherapy devices such as leadwires, batteries, and carrying cases.
- The ministry was using a discretionary power to issue electrotherapy devices to others but would not use its discretion for the appellant.
- The ministry keeps referring to a basic TENS machine. Some people use the term TENS sloppily. All electrotherapy devices are TENS machines.
- Reading from an online definition included in the appeal record, the appellant said that TENS is an "acronym for transcutaneous electrical nerve stimulation: the application of low-voltage electric impulses to the skin to relieve rheumatic pain and provide some pain relief in labour. The pulses are said to stimulate the release of pain-killing endorphins." A TENS machine is "a self-operated portable device used to treat chronic pain by sending electrical impulses through electrodes placed over <u>the</u> painful area." *[emphasis included in the original]*
- The Electrodes are a TENS device. They operate like a TENS device. They are just not a "basic" TENS device. They transmit electric current intra-vaginally and intra-rectally to core muscles for treatment of chronic pain. The basic TENS made her pain worse.
- Her physician's letter of September 8, 2011 stated that the Electrodes are not "traditional" TENS devices, but they are still TENS devices, and they fit the within the ministry's $250 cost criterion.
- The appellant is eligible for the Electrodes in three ways. The Purchase Authorizations show that the ministry issued TENS devices as: 1) "positioning devices" as contemplated by section 3(1)(d) of Schedule C of the EAPWDR as it read at the time of her equipment request on March 31, 2010. 2) mobility devices, and 3) medical supplies.
- The term "positioning" is not an adjective; it is a "verbal". The Tribunal staff "screwed up again" by not providing the panel with proof of this in the form of an e-mail from a journalist that the appellant had submitted to Tribunal staff for a previous appeal with instructions to include it in all future appeals. The appellant has also received legal advice to the effect that the term "positioning devices" is ambiguous.
- The legislation does not define "positioning devices". The ministry definition is too narrow since the device does not have to be 'external.' It is illegal for the ministry to "add to" the

legislation. In accordance with the *Abrahams* decision, social welfare legislation is to be interpreted in a broad way, and any ambiguity in the meaning of the term "positioning devices" must be resolved in favour of the appellant. The panel is obligated to follow case law. If the panel does not apply the *Abrahams* decision to rescind the ministry's decision it must record why it does not have to follow *Abrahams*.

- When the legislation changed in 2002, the ministry continued to supply TENS machines as "positioning devices". The appellant requested the Electrodes and other devices before the legislation changed again on April 1, 2010 to repeal the provision of "positioning devices".
- The purpose of the Electrodes is to reduce pain. Pain reduction will improve the appellant's mobility. Accordingly the appellant qualifies for the Electrodes as mobility devices.
- The ministry supplied the basic TENS device as a medical supply. It may not appear to be a medical supply as medical supplies are supposed to be disposable (though the appellant surmised it could be a medical supply as it could wear out), but the panel has to decide whether at that time the ministry was treating her reasonably. The Electrodes are a medical supply.
- The fact that the ministry denied her request for the Enart - so she does not currently have an Enart - is not sufficient grounds to deny her the Electrodes which otherwise meet the ministry's criteria for supplying TENS machines. If the Human Rights Commission does not provide her with an Enart, the appellant will purchase one herself. However, she cannot afford both the Enart and the Electrodes, so the ministry should supply the Electrodes.

In oral testimony, the ministry stated that:

- The ministry did supply basic TENS units during the relevant period. However, this hearing is not dealing with the machine itself, it is dealing with the Electrodes.
- Legislation is not ambiguous simply because the parties can advance two competing arguments about its interpretation.
- There is no ambiguity with respect to the ministry's application of the term "positioning devices". The Coding Form is specific as to what that term includes. The Electrodes are not a positioning device. To the extent that the Purchase Authorizations show that TENS machines were sometimes provided as "positioning devices", they were not properly coded.
- "Positioning devices" are for positioning a patient. The Electrodes are for enhancing the ability to improve the positioning or functioning of the Enart.
- The electrodes referred to in the Purchase Authorizations were for basic TENS machines. The appellant's physician stated in a letter that traditional TENS therapy worsened the appellant's pain and was not an appropriate manner of supplying electrotherapy to the appellant.
- For liability reasons, the ministry does not pay for accessories for equipment it has not itself purchased.

In response to questions from the appellant as to the source of the ministry's authority to limit the provision of electrotherapy devices through policy parameters, the ministry replied that section 16 of the EAPWDA is only one piece of the legislation, and that the legislation itself – including the EAPWDR provisions – set out the criteria for what may be provided.

The panel assessed the oral testimony of both the appellant and the ministry as consisting substantially of argument.

Additional Procedural Matters

At the beginning of the hearing, the parties were advised that two hours were allotted because of limitations in availability of the hearing room. Subsequently the parties were advised that arrangements had been made to have the hearing room for an additional hour if required.

On being advised of the panel's decision not to grant her adjournment request, the appellant was asked whether she wished to proceed with her submissions. She responded that she did not wish to proceed but that she would do so "under duress". The appellant was offered a brief recess which she declined. Twenty minutes later, at the appellant's request the panel granted a 10 minute recess.

The hearing reconvened 13 minutes later. The appellant had not reconnected by telephone. In accordance with section 86(b) of the Employment and Assistance Regulation, the hearing recommenced in the absence of the appellant. The Advocate made submissions on the appellant's behalf for 10 minutes until the appellant reconnected to the telephone line.

Throughout the hearing the appellant frequently became agitated, shouted at the panel, and interrupted the order of proceedings. At one point the appellant apologized for "losing it." The Advocate noted that the appellant's health is in jeopardy and that she is in pain, so she is not always well-behaved. She suggested that some poor behaviour should be expected and tolerated from a person in the appellant's circumstances. On more than one occasion the appellant stated that, because of her disabilities, she must be permitted to interrupt to ask questions or make an argument when thoughts occur to her, otherwise her disabilities prevent her from remembering or writing down her questions. She stated that her disability causes her to make "long tangential dissertations" and that the panel was obligated to accommodate her disability by allowing her to speak and to ask her questions at will. The panel gave the appellant significant leeway with respect to her behaviour, but imposed reasonable limitations to maintain the order of proceedings and to ensure that the appellant had an adequate opportunity to be heard.

The appellant began a cross examination of the ministry, and the ministry objected to the panel about the appellant's behaviour and stated that she would be making a formal complaint about it. The panel informed the ministry that it took note of her objection. Subsequently the appellant objected that the ministry representative was not "giving straight answers" to her questions about the ministry's legislative authority. The panel ruled that the appellant should move on to another line of questioning.

Subsequently the appellant objected to the ministry's statement that for liability reasons it does not pay for accessories for equipment it has not purchased. The appellant argued that procedural fairness requires that the appellant knows the case she has to meet, and that the ministry's statement constituted a "new ground for denial" of the Electrodes. There is no evidence before the panel that prior to the hearing the appellant had previously suggested she would purchase an Enart for herself. The appeal record contains a letter from the trustee of the appellant's trust fund (date-stamped as being received by the ministry on July 14, 2010) stating that the trustee had denied the appellant's request to purchase an Enart and the Electrodes, and the appellant argued in her request for adjournment of this hearing that her basic living expenses use up "every penny" and that she could not afford $100 to have her computer repaired. In the panel's view, since this is a new argument being advanced by the appellant, the ministry is entitled to respond to it and has done so

appropriately.

The hearing ran for the allotted three hours. After completion of the hearing the Advocate thanked the panel for having remained calm. The appellant then started to make additional submissions to the panel about requirements for the panel to provide adequate reasons for decision. On being reminded that the hearing was over and that no more submissions were being accepted and would not be considered by the panel, the appellant disconnected.

APPEAL #

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reconsideration decision denying the appellant's request for the Electrodes is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the appellant's circumstances.

Specifically, was the ministry reasonable in making the following determinations?

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 Enart and other accessories including the Electrodes, 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 Electrodes were not any of the medical equipment and devices set out in s. 3(1) and, in particular, were not positioning devices under s. 3(1)(d) and exceeded the policy parameters for the provision of electrotherapy in terms of function 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 Electrodes 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 Electrodes. 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 Electrodes cannot provide electrotherapy alone, but must be used in conjunction with the Enart, and that the request for the Electrodes must be considered in conjunction with the request for the Enart. The ministry determined that the Electrodes exceeded the policy parameters for the provision of electrotherapy equipment in terms of function and cost.

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

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…

APPEAL #

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

Section 2(1)(a)

disposable medical or surgical supplies other than bottled water, nutritional supplements, food, vitamins or minerals, if

(i) the supplies are

(A) prescribed by a medical practitioner or nurse practitioner,

(B) used in a medical procedure or treatment, and

(C) necessary to avoid an imminent and substantial danger to health, and

(ii) there are no resources available to the family unit to cover the cost of the supplies;

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

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

Appellant's position:

(1) The Electrodes are eligible items as positioning devices under section 3(1)(d) of Schedule C of the EAPWDR. The term "positioning devices" is not defined, so one must interpret the words in accordance with case law – notably *Abrahams*. 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 word "positioning" is a verbal rather than an "adjective" – it is a verb that acts in the form of an adjective - and thus means "to put in place or position". The Electrodes position the device internally – in the vagina for example. Since this is a different, and plausible, interpretation from the ministry's definition of positioning, it introduces ambiguity into the legislation.

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 confirms that the Electrodes enable the Enart to be used to accurately locate the area to be treated. The letters from her physician 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.

(2) Her physicians' evidence is that the term "positioning device" is not limited only to devices that provide external mechanical support and that in the appellant's circumstances the Electrodes act as positioning devices. The ministry misinterpreted her physician's comments that the requested device (and attachment) is not a "traditional" TENS.

(3) 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. The Purchase Authorizations confirm that positioning devices, mobility devices and medical supplies are all legislated categories under which TENS machines were provided. The ministry's letter of March 4, 2011 and the two Purchase Authorizations 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. The Electrodes constitute a TENS device (though not a "basic" TENS) since they deliver electric current for the treatment of pain.

(4) The ministry does not have the legislative authority to develop policy limiting the criteria by which TENS devices are granted. The ministry improperly relied on section 16(1) of the EAPWDA to develop its policy. Section 16(1) deals with an appellant's appeal rights; it doesn't authorize the ministry to develop policy limiting the cost or function of TENS devices.

(5) Alternatively, the ministry was exercising a discretionary power in providing TENS devices, and the Electrodes fall within the ministry's parameters. The Electrodes were priced at

US$200 (plus duty, tax and shipping) so it did not exceed the ministry's policy parameters with respect to cost (maximum of $250). The Electrodes are a positioning device and a TENS device, so did not exceed the ministry's policy parameters with respect to function. The ministry was issuing TENS devices to others, and it discriminated against the appellant and treated her unfairly by not issuing the Electrodes to her.

(6) The appellant is willing to pay for the Enart if she must, but can't afford both the Enart and the Electrodes. The fact that the ministry denied her the Enart is not sufficient grounds for now denying her the Electrodes.

Ministry's position:

(1) The Electrodes are 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 Electrodes. The legislation sets out specific categories of the devices and equipment which may be provided, and the Electrodes do not fit within any of those legislated categories. The legislation is not ambiguous.

(2) 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 the devices indicated under STOB 7927 of the Coding Form. The Enart and Electrodes 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 Electrodes are devices for improved functioning of the Enart, not for positioning the patient.

(3) 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 hospital beds, specialized mattresses, and floor or ceiling lift devices 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 functionality (basic TENS), and cost (max. $250). The appellant's physician's letter of September 8, 2011 confirms that the Enart and Electrodes 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.

(4) The ministry's denial of the Enart has been confirmed on appeal. The Electrodes are useless without the Enart, and in reflecting on the ministry's policy parameters the Electrodes must be considered in context with the Enart. For liability reasons, the ministry does not pay for an accessory or a machine which it has not provided. The Electrodes and Enart together far exceed the maximum allowable cost of $250 provided by policy. Section 16 of the EAPWDA does not expressly give authority for the ministry to develop policy with respect to electrotherapy devices, but 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) Interpreting the Legislation

The appellant argued that the Purchase Authorizations demonstrate that the ministry was issuing TENS devices and accessories as "positioning devices", "mobility devices", and "medical supplies." At issue then is the meaning of the terms "positioning device", "mobility device", and "medical supplies." The appellant argued that the word "positioning" is a verbal rather than an adjective, and that it should be considered separately from the word "device." The appellant stated that the term "positioning device" is ambiguous as capable of two or more plausible meanings. The appellant pointed to a dictionary definition of "positioning" as meaning both "to put in place or position" as well as "to determine the position of, locate." The appellant argued that "positioning device" can be defined as a device that locates positions in the body where abnormalities are present and the sites on the body that need to be treated, which is consistent with language used in the manufacturer's information for the Enart technology together with the Electrodes, stating that it allows the user to accurately locate the site to be treated.

The appellant argued that the Electrodes are also mobility devices since they reduce pain, and reduced pain improves mobility. Similarly (while acknowledging that medical supplies are disposable items), the appellant argued that the Electrodes are eventually disposable and that the ministry obviously considered TENS equipment to be medical supplies since it coded them to STOB 7929 in many of the Purchase Authorizations.

Finally, the appellant argued that since the definition that she puts forth is plausible, it must be favoured by the panel, as set out by the Supreme Court of Canada in *Abrahams.*

The modern principle of statutory construction is that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. While the Supreme Court of Canada held in *Abrahams* that any doubt arising from difficulties in legislative language should be resolved in favour of the claimant, the court also opined that it is not particularly helpful to consider possible meanings of one of the words standing alone, when the word is part of a legislative phrase. The panel finds that the ministry reasonably considered the phrase "positioning device" with the words together to jointly refer to a device similar in type to the other items of medical equipment and devices listed in section 3 of Schedule C. "Wheelchairs/ canes" [Section 3(1)(a)], "orthotics/ bracing" [Section 3(1)(b)], "hearing aids" [Section 3(1)(c)] and "breathing devices" [Section 3(1)(e)] all have a common feature of functioning to provide external support or aid to address a deficiency in a person's ability to independently [ambulate], [hear], or [breathe].

There is no need to dissect the words when, together, there is plain and common sense meaning, consistent with the context of the other listed items in section 3. In the context of the section setting out various types of medical equipment and devices, the panel finds that the ministry provided a

plausible, or reasonable, definition of "positioning device" as "…a device which provides external support to address a deficiency in a person's ability to independently position." The appellant argued that this definition is too restrictive and it is an error in law for the ministry to add criteria to the legislation since section 3 of Schedule C does not say that the device is limited to external support or restrict the circumstances under which the device can be used.

The panel finds that the ministry's definition appropriately includes the common features of the items listed in section 3, all of which are equipment or devices designed to address a deficiency in a person's ability to independently perform a particular physical function and accomplishes this through providing a basic, external support or aid. While the appellant proposes a possible definition of "positioning device" to include devices that locate and treat the positions in the body where abnormalities are present, the panel finds that this definition is not plausible, or reasonable, in the context of section 3.

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 Enart and Electrodes are primarily designed for electrotherapy/biofeedback 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, mobility devices and medical supplies;
- the description in the Coding Form which did not include TENS machines or other electrotherapy equipment in the category of position/transfer devices, mobility supplies, or medical supplies; 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 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 Electrodes and the Enart – 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 Enart as a "biofeedback device" and makes no reference to "positioning" as one of the functions or purposes of the Enart or the Electrodes. In the panel's view, the fact that a potential benefit of using the Electrodes may be an enhanced ability to mobilize or improve range of motion of muscles is a secondary result of the electrotherapy and biofeedback treatment provided by the Enart and Electrodes in combination and does not equate the Electrodes with being devices that "position" the appellant or are meant specifically to assist her with mobility. They are also not "disposable" as that term is ordinarily used as there is no evidence that they diminish, degrade or become less efficacious with use in a way that requires them to be routinely discarded.

In the panel's view, the Purchase Authorizations, 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 used various inapplicable STOB numbers for the purposes of the ministry's financial record-keeping.

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 believes that when read in context the terms "positioning device," "mobility device" or "medical supplies" are not ambiguous. They are not sufficiently broad to include electrotherapy devices such as the Electrodes. Accordingly, the panel finds that the ministry was reasonable in concluding these legislative provisions did not authorize provision of the Electrodes.

(b) The Ministry's Policy Regarding TENS Machines

The appellant argued that the ministry must have had statutory authority to provide TENS machines. Her position is that the ministry did not have the authority to limit the provision of positioning devices by policy. Alternatively she argued that the ministry was exercising a discretionary power in providing TENS machines and that the Electrodes fall within the parameters used by the ministry. She stated that the ministry provided TENS devices and accessories to others, and that fairness requires the ministry to provide the Electrodes to her.

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

As noted above, the panel has concluded that the ministry was not providing TENS equipment as positioning devices, mobility devices, or disposable medical supplies; it was providing the basic TENS unit (with gel and other 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 was exercising a non-legislative "discretionary" power as contended by the appellant, 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.

In the panel's view, the ministry reasonably determined that the Electrodes did not meet the ministry's policy parameters for provision of electrotherapy equipment (basic TENS machine/gels/accessories up to $250). Firstly, the Electrodes are of little benefit to the appellant without the Enart and other electrotherapy equipment which the ministry has previously decided not to provide. In the words of the appellant's physician in her letter of July 7, 2010 "All three devices are necessary to meet [the appellant's] treatment needs." The Electrodes have to be considered in context with the Enart. While the appellant suggested at the hearing that she would purchase the Enart herself, at a cost reported in 2010 to be US$2,040 (plus any duty, taxes and shipping), the appeal record contains a letter from the trustee of the appellant's trust fund (date-stamped on July 14, 2010) stating that the trustee had denied the appellant's request to purchase an Enart and the Electrodes. The appellant argued in her request for adjournment of this hearing that she could not afford $100 to have her computer repaired and the ministry stated that, for liability reasons, the ministry does not pay for accessories for equipment it has not itself purchased. Accordingly, the price of the Electrodes and Enart far exceed the $250 range which the Purchase Authorizations demonstrate was being applied by the ministry.

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

Finally, with respect to the appellant's contention that she was treated differently than other applicants and that the ministry was obliged to provide her with the Electrodes, the evidence of the Purchase Authorizations demonstrates that the ministry consistently applied its policy with respect to provision of electrotherapy equipment in terms of both cost (up to $250) and functionality (basic TENS devices and accessories). The appellant has acknowledged that the Electrodes do not constitute a "basic TENS" device.

On balance, the panel concludes that the ministry reasonably determined that the Electrodes did not meet the parameters for the provision of electrotherapy equipment as set out in policy.

(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 proves that the ministry was not restricted to supplying only the basic TENS device and accessories.

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, the decision to provide the CellStim device does not speak to the legislation that was applied or specify whether the microcurrent unit was necessary to provide "*basic mobility, positioning, breathing* or *other functions essential to the*

sustenance of life." The DBPR – rather than the EAPWDR - was in effect at the time the CellStim was provided.

(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" and "disposable medical or surgical supplies" 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 Electrodes, 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 Electrodes, 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 advance an argument on this finding.

Ministry position:

The ministry's position is that the appellant is not eligible for the Electrodes 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 Electrodes exceed the parameters for the provision of electrotherapy equipment in terms of function and cost.

Panel Decision:

On the plain meaning of the legislative language, there is insufficient evidence to indicate that the Electrodes were 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 Electrodes was a reasonable application of the legislation in the circumstances of the appellant, and accordingly confirms the decision.