PART C – Decision under Appeal

The decision under appeal is the reconsideration decision dated April 7, 2016 made by the Ministry of Social Development and Social Innovation (the ministry) which determined that the appellant was not eligible to receive funding for a knee brace as the request does not meet the requirements set out in section 3 of Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation*.

PART D – Relevant Legislation

The relevant legislation is sections 3 and 3.10 of Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR).

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision consisted of:

An Orthoses Request and Justification Form (ORJ) dated January 27, 2016, completed by the appellant's Certified Orthotist. In the form, the Orthotist indicates that the appellant requires a "custom left unloading knee orthosis - $1650". The knee brace will be required at least 6 hours per day. It is required in order to "align knee in a more neutral position to [decrease] pain by opening up the [joint] space." The brace is required for the prevention of surgery, to assist in physical healing from surgery, injury or disease and to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition.

A prescription dated November 13, 2015, prepared by the appellant's physician which states: "Osteo-arthritic knees / Left worse – painful / Medial compartment severe / Has weighting brace – loose now – needs adjusting or new brace to walk – waiting for left TKR → other".

The ministry denied the appellant's request for a replacement knee brace on the grounds that the prescribing medical practitioner has not recommended that the brace be worn at least 6 hours per day as required by the legislation.

In her request for reconsideration the appellant states:

- "Any time I work or stand for more than 10 minutes it is required. It presently doesn't fit and constantly slides down making it painful to wear, walking or standing. I have had to increase pain killer consumption and still no pain relief."
- "Last adjustment to brace failed in that the materials [used] cause abrasions to skin and have to use clothing as barrier which defeats purpose of materials as they are meant to touch skin. Abrasions cause infections due to diabetes II."
- "[Orthotist] marked 'YES' to more than 6 hours per day usage."

The ministry denied the appellant's request on the basis that it did not meet the legislative requirements that:

1. the item requested be the least expensive appropriate medical equipment or device,
2. it is at least 4 years since the last supplement for the same item was approved, and
3. that a medical professional has indicated that the knee brace must be worn at least 6 hours per day.

At the hearing the appellant stated that she had concerns with the information provided by the ministry to the tribunal. Specifically, that, in her opinion, the materials contained personal information not relevant to the appeal. The panel notes that the information provided by the ministry to the tribunal is the information and records that were before the Minister when the reconsideration decision under appeal was made as is required by the legislation.

The issue under appeal is whether the ministry's determination that the appellant was not eligible to receive a medical supplement for a new knee brace because the request did not meet the requirements set out in section 3 of Schedule C of the EAPWDR was reasonably supported by the evidence and/or a reasonable interpretation of the legislation.

The relevant legislation is sections 3 and 3.10 of Schedule C of the EAPWDR.

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 3.12 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.

(2) For medical equipment or devices referred to in sections 3.1 to 3.8 or section 3.12, in addition to the requirements in those sections and subsection (1) of this section, the family unit must provide to the minister one or both of the following, as requested by the minister:

(a) a prescription of a medical practitioner or nurse practitioner for the medical equipment or device;

(b) an assessment by an occupational therapist or physical therapist confirming the medical need for the medical equipment or device.

(2.1) For medical equipment or devices referred to in section 3.9 (1) (b) to (g), in addition to the requirements in that section and subsection (1) of this section, the family unit must provide to the minister one or both of the following, as requested by the minister:

(a) a prescription of a medical practitioner or nurse practitioner for the medical equipment or device;

(b) an assessment by a respiratory therapist, occupational therapist or physical therapist confirming the medical need for the medical equipment or device.

(3) Subject to subsection (6), the minister may provide as a health supplement a replacement of medical equipment or a medical device, previously provided by the minister under this section, that is damaged, worn out or not functioning if

(a) it is more economical to replace than to repair the medical equipment or device previously provided by the minister, and

(b) the period of time, if any, set out in sections 3.1 to 3.12 of this Schedule, as applicable, for the purposes of this paragraph, has passed.

(4) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was previously provided by the minister if it is more economical to repair the medical equipment or device than to replace it.

(5) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was not previously provided by the minister if

(a) at the time of the repairs the requirements in this section and sections 3.1 to 3.12 of this Schedule, as applicable, are met in respect of the medical equipment or device being repaired, and

(b) it is more economical to repair the medical equipment or device than to replace it.
(6) The minister may not provide a replacement of medical equipment or a medical device under subsection (3) or repairs of medical equipment or a medical device under subsection (4) or (5) if the minister considers that the medical equipment or device was damaged through misuse.

Medical equipment and devices — orthoses
3.10 (1) In this section:
"off-the-shelf" , in relation to an orthosis, means a prefabricated, mass-produced orthosis that is not unique to a particular person;
"orthosis" means
(a) a custom-made or off-the-shelf foot orthotic;
(b) custom-made footwear;
(c) a permanent modification to footwear;
(d) off-the-shelf footwear required for the purpose set out in subsection (4.1) (a);
(e) off-the-shelf orthopaedic footwear;
(f) an ankle brace;
(g) an ankle-foot orthosis;
(h) a knee-ankle-foot orthosis;
(i) a knee brace;
(j) a hip brace;
(k) an upper extremity brace;
(l) a cranial helmet used for the purposes set out in subsection (7);
(m) a torso or spine brace;
(n) a foot abduction orthosis;
(o) a toe orthosis.
(2) Subject to subsections (3) to (11) of this section, an orthosis is a health supplement for the purposes of section 3 of this Schedule if
(a) the orthosis is prescribed by a medical practitioner or a nurse practitioner,
(b) the minister is satisfied that the orthosis is medically essential to achieve or maintain basic functionality,
(c) the minister is satisfied that the orthosis is required for one or more of the following purposes:
(i) to prevent surgery;
(ii) for post-surgical care;
(iii) to assist in physical healing from surgery, injury or disease;
(iv) to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition, and
(d) the orthosis is off-the-shelf unless
(i) a medical practitioner or nurse practitioner confirms that a custom-made orthosis is medically required, and
(ii) the custom-made orthosis is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.
(3) For an orthosis that is a custom-made foot orthotic, in addition to the requirements in subsection (2) of this section, all of the following requirements must be met:
(a) a medical practitioner or nurse practitioner confirms that a custom-made foot orthotic is medically required;
(b) the custom-made foot orthotic is fitted by an orthotist, pedorthist, occupational therapist, physical

therapist or podiatrist;
(c) Repealed. [B.C. Reg. 144/2011, Sch. 2.]
(d) the custom-made foot orthotic must be made from a hand-cast mold;
(e) the cost of one pair of custom-made foot orthotics, including the assessment fee, must not exceed $450.
(4) For an orthosis that is custom-made footwear, in addition to the requirements in subsection (2) of this section, the cost of the custom-made footwear, including the assessment fee, must not exceed $1 650.
(4.1) For an orthosis that is off-the-shelf footwear, in addition to the requirements in subsection (2) of this section,
(a) the footwear is required to accommodate a custom-made orthosis, and
(b) the cost of the footwear must not exceed $125.
(4.2) For an orthosis that is off-the-shelf orthopaedic footwear, in addition to the requirements in subsection (2) of this section, the cost of the footwear must not exceed $250.
(5) For an orthosis that is a knee brace, in addition to the requirements in subsection (2) of this section, the medical practitioner or nurse practitioner who prescribed the knee brace must have recommended that the knee brace be worn at least 6 hours per day.
(6) For an orthosis that is an upper extremity brace, in addition to the requirements in subsection (2) of this section, the upper extremity brace must be intended to provide hand, finger, wrist, elbow or shoulder support.
(7) For an orthosis that is a cranial helmet, in addition to the requirements in subsection (2) of this section, the cranial helmet must be a helmet prescribed by a medical practitioner or nurse practitioner and recommended for daily use in cases of self abusive behaviour, seizure disorder, or to protect or facilitate healing of chronic wounds or cranial defects.
(8) For an orthosis that is a torso or spine brace, in addition to the requirements in subsection (2) of this section, the brace must be intended to provide pelvic, lumbar, lumbar-sacral, thoracic-lumbar-sacral, cervical-thoracic-lumbar-sacral, or cervical spine support.
(9) Subject to section 3 of this Schedule, the limit on the number of orthoses that may be provided for the use of a person as a health supplement for the purposes of section 3 of this Schedule is the number set out in Column 2 of Table 1 opposite the description of the applicable orthosis in Column 1.

Table 1

Item	Column 1 Orthosis	Column 2 Limit
1	custom-made foot orthotic	1 or 1 pair
2	custom-made footwear	1 or 1 pair
3	modification to footwear	1 or 1 pair
4	ankle brace	1 per ankle
5	ankle-foot orthosis	1 per ankle
6	knee-ankle-foot orthosis	1 per leg
7	knee brace	1 per knee
8	hip brace	1
9	upper extremity brace	1 per hand, finger, wrist, elbow or shoulder
10	cranial helmet	1

11	torso or spine brace	1
12	off-the-shelf footwear	1 or 1 pair
13	off-the-shelf orthopaedic footwear	1 or 1 pair
14	foot abduction orthosis	1 or 1 pair
15	toe orthosis	1

(10) The period of time referred to in section 3 (3) (b) of this Schedule with respect to replacement of an orthosis is the number of years from the date on which the minister provided the orthosis being replaced that is set out in Column 2 of Table 2 opposite the description of the applicable orthosis in Column 1.

Table 2

Item	Column 1 Orthosis	Column 2 Time period
1	custom-made foot orthotic	3 years
2	custom-made footwear	1 year
3	modification to footwear	1 year
4	ankle brace	2 years
5	ankle-foot orthosis	2 years
6	knee-ankle-foot orthosis	2 years
7	knee brace	4 years
8	hip brace	2 years
9	upper extremity brace	2 years
10	cranial helmet	2 years
11	torso or spine brace	2 years
12	off-the-shelf footwear	1 year
13	off-the-shelf orthopaedic footwear	1 year
14	toe orthosis	1 year

(11) The following items are not health supplements for the purposes of section 3 of this Schedule:
(a) a prosthetic and related supplies;
(b) a plaster or fiberglass cast;
(c) a hernia support;
(d) an abdominal support;
(e) a walking boot for a fracture.
(f) Repealed. [B.C. Reg. 144/2011, Sch. 2.]
(12) An accessory or supply that is medically essential to use an orthosis that is a health supplement under subsection (2) is a health supplement for the purposes of section 3 of this Schedule.

THE APPELLANT'S POSITION

In her appeal submission and at the hearing the appellant made the following arguments:

1. The brace she is currently using is appropriate for a person who has had a modern knee surgery where only part of the meniscus is removed and the brace supports recovery which takes about 2 years. Her older surgery removed all the meniscus from her knee meaning that it is a permanent condition, aggravated over time, that is much more serious, debilitating and painful requiring a different type of brace which is what she is requesting at this time. Such a brace would

substantially reduce her pain and allow her to move about more freely.
2. Her Orthotist indicated in the ORJ that she requires the brace for more than 6 hours per day.
3. Her physician incorrectly indicated that an adjustment to the current brace would be adequate to deal with this situation.

THE MINISTRY'S POSITION

The ministry maintained that the appellant does not meet the following legislative criteria:

1. EAPWDR Schedule C section 3(1)(iii): a new brace is not the least expensive appropriate medical equipment or device as the appellant's physician has indicated that an adjustment to the current brace may be all that is required.
2. EAPWDR Schedule C sections 3(3)(b) and 3.10(10): the request does not meet the requirement that the minister may only provide a medical supplement for a knee brace once every 4 years as the current brace was supplied in January 2013.
3. EAPWDR Schedule C section 3.10(5): The physician does not indicate that the brace is required for at least 6 hours per day. The Orthotist does so, but is not a medical practitioner or a nurse practitioner as defined in the legislation.
4. At the hearing the ministry also submitted that the physician does not indicate that a new type of brace is needed.

THE PANEL'S DECISION

The appellant's submission regarding the nature of her injury and the fact that her current brace is not appropriate to it while the newly-requested brace is appropriate is new evidence that was not before the ministry at the time of the reconsideration decision. Section 22(4) of the Employment and Assistance Regulation (EAR) states that, in order to be admissible, new evidence must be testimony in support of information and records before the ministry at the time of the reconsideration decision. In this case, the appellant's testimony that the reason for her requesting a replacement brace is that her condition requires a different type of brace is a different justification from that before the ministry at the time of the reconsideration decision, which was that her current brace did not fit properly. Accordingly, the panel finds that, in accordance with section 22(4) of the EAR the appellant's testimony in this regad is new evidence not in support of information and records before the ministry at the time of the reconsideration decision and therefore not admissible.

In order for the ministry to approve a request for a medical supplement the request must meet the legislated criteria. The legislation stipulates that the minister may provide a medical supplement for a knee brace only every 4 years. In this case, the appellant received such a supplement in January 2013, meaning that she is not entitled to another until January 2017.

The legislation also requires that a medical practitioner or nurse practitioner indicate that the medical equipment or device is required. In this case, as an Orthotist, who is not a "medical practitioner", completed the ORJ and the appellant's physician, who is a "medical practitioner", provided the prescription, the ministry must look to the prescription.

That prescription:

1. Indicates that a new brace may not be necessary as adjustments to the current brace may be all that is required; and
2. Does not indicate that the brace is required at least 6 hours per day.

As the appellant's request does not the legislative requirements the ministry's determination that it could not provide the medical supplement to the appellant was a reasonable interpretation of legislation.

The panel confirms the ministry's decision.

PART G – Order