PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the "Ministry") reconsideration decision of December 5, 2017 (the "Reconsideration Decision"), which denied the Appellant a health supplement for custom made orthotics and custom made footwear with wide forefeet because the Appellant did not meet all of the statutory requirements of sections 3(1) and 3.10 of Schedule C to the *Employment and Assistance for Persons With Disabilities Regulation* ("EAPWDR") because:

- the orthotics and footwear recommended for the Appellant were not the least expensive appropriate medical equipment or device for the Appellant as required by section 3(1)(b)(iii) of Schedule C to the EAPWDR;

- the Ministry was not satisfied that the orthotics and footwear recommended for the Appellant were medically essential to achieve basic functionality, as required by section 3.10(2)(b) of Schedule C to the EAPWDR;

- the Ministry was not satisfied that the orthotics and footwear recommended for the Appellant was required to prevent surgery, for post-surgical care, to assist in physical healing from surgery, injury or disease, or to improve physical function that has been impaired by a neuro-musculo-skeletal condition, as required by section 3.10(c) of Schedule C to the EAPWDR;

- the orthotics and footwear recommended for the Appellant did not meet the requirements for a custom made orthosis as no medical practitioner had confirmed that a custom-made orthosis was medically necessary for the Appellant, as required by section 3.10(d) of Schedule C to the EAPWDR; and

- the orthotics and footwear recommended for the Appellant did not meet the requirements for a custom made foot orthotic because a custom made foot orthotic must be made from a hand-cast mold to be eligible for a supplement, pursuant to section 3.10(3)(d) of Schedule C to the EAPWDR.

PART D – RELEVANT LEGISLATION
EAPWDR, section 62 and Schedule C- sections 3 and 3.10

PART E – SUMMARY OF FACTS

The Appellant is the minor and dependent child of a recipient of disability assistance. On July 25, 2017, the Appellant submitted a Medical Equipment Request and Justification (the "Request") with a letter from a physiotherapist, dated July 25, 2017 (the "Letter"), and a Statement of Account (the "Statement"). The Appellant did not submit an Orthoses form, which typically permits the inclusion of more specific information about a request for orthotics or orthoses than a Medical Equipment Request and Justification.

In a letter, dated October 5, 2017, the Ministry denied the Appellant's request for a supplement for custom made orthotics.

Information before the Ministry at the time of the Reconsideration Decision

- the Request, which set out that:
    - the Appellant suffers from "severe pes planus, wide forefeet"; and
    - "costum (sic) made orthotics" and "costum (sic) made shoes with wide forefeet" were recommended;
- the Letter, which set out that:
    - the Appellant presented with "severe pes planus, bilateral pronation of subtalar joint, reduced ankle dorsiflexion and derangement of bilateral feet when not supported;
    - a 3D foot scan of the Appellant's foot indicated "altered transfer of force through her feet during walking and standing";
    - the Appellant is "experiencing discomfort with walking and playing sports at school";
    - the Appellant had been using foot support for three years but that new orthotics were recommended as her current orthotics were "too small for her"; and
    - that, because the Appellant was still growing, her orthotics "be renewed every year to ensure proper growth and development of her lower-extremities";
    - the Account, which set out the total cost for the recommended orthotics and footwear in the amount of $950.00;

- the Appellant's Request for Reconsideration, dated November 10, 2017 (the "RFR"), in which the Appellant is described as suffering from pes planus or "bone malalignment in feet", which requires the use of orthotics and orthopedic shoes. In the RFR, the Appellant also states that her condition can not be cured with a "pronated control program."

Information submitted in support of the Appeal

In her Notice of Appeal, dated December 21, 2017 (the "Notice of Appeal", the Appellant states

that:

- the recommended orthotics are "made based on the information from plaster of paris casting technique" and

- that the doctor's prescription indicates that the Appellant has "Pes Planus";

The panel admits the information contained in the Notice of Appeal about the condition with which the Appellant is presenting as written testimony in support of information that was before the Ministry at the time of the Reconsideration Decision, pursuant to section 22(4) of the *Employment and Assistance Act* (the "EAA").

The panel does not admit the information contained in the Notice of Appeal about the type of casting that would be done to create that orthotics as this was information that was not before the Ministry at the time of the Reconsideration Decision.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the Ministry was reasonable in its determination that the Appellant was not eligible for a health supplement for custom made orthotics and footwear, having decided that the Appellant did not meet all of the statutory requirements of sections 3(1) and 3.10 of Schedule C to the Employment and Assistance for Persons With Disabilities Regulation ("EAPWDR") because:

- the orthotics and footwear recommended for the Appellant were not the least expensive appropriate medical equipment or device for the Appellant as required by section 3(1)(b)(iii) of Schedule C to the EAPWDR;
- the Ministry was not satisfied that the orthotics and footwear recommended for the Appellant were medically essential to achieve basic functionality, as required by section 3.10(2)(b) of Schedule C to the EAPWDR;
- the Ministry was not satisfied that the orthotics and footwear recommended for the Appellant was required to prevent surgery, for post-surgical care, to assist in physical healing from surgery, injury or disease, or to improve physical function that has been impaired by a neuro-musculo-skeletal condition, as required by section 3.10(c) of Schedule C to the EAPWDR;
- the orthotics and footwear recommended for the Appellant did not meet the requirements for a custom made orthosis as no medical practitioner had confirmed that a custom-made orthosis was medically necessary for the Appellant, as required by section 3.10(d) of Schedule C to the EAPWDR; and
- the orthotics and footwear recommended for the Appellant did not meet the requirements for a custom made foot orthotic because a custom made foot orthotic must be made from a hand-cast mold to be eligible for a supplement, pursuant to section 3.10(3)(d) of Schedule C to the EAPWDR.

Statutory Framework

Section 62 of the EAPWDR permits the Ministry to provide health supplements set out in section 3 of Schedule C of the EAPWDR to eligible recipients of disability assistance or persons in their family units, including, as in the case of the Appellant, a dependent child:

General health supplements

62 The minister may provide any health supplement set out in section 2 *[general health supplements]* or 3 *[medical equipment and devices]* of Schedule C to or for

(a) a family unit in receipt of disability assistance,

(b) a family unit in receipt of hardship assistance, if the health supplement is provided to or for a person in the family unit who is a dependent child, or

(c) a family unit, if the health supplement is provided to or for a person in the family unit who is a continued person.

[en. B.C. Reg. 145/2015, Sch. 2, s. 4.]

Section 3 of Schedule C to the EAPWDR sets out the general requirements for eligibility for supplements in respect of the medical equipment enumerated in sections 3.1 to 3.12 of Schedule C:

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.

Section 3.10 of Schedule C to the EAPWDR sets out the requirements for approval of orthoses generally:

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.

Appellant's Position

The Appellant's position is that she suffers from severe *pes planus* and that orthotics are necessary for her in order to ameliorate her discomfort when walking and engaging in other activities such as playing sports at school. The Appellant states that a "pronated control program" is insufficient to deal with her condition.

Ministry Position

The Ministry's position is as set out in the Reconsideration. Namely, the Ministry accepts that the Appellant meets most of the statutory requirements set out in sections 3(1) and 3.10, with the exception of the following:

- the orthotics and footwear recommended for the Appellant are not the least expensive appropriate medical equipment or device for the Appellant;
- the Ministry was not satisfied that the orthotics and footwear recommended for the Appellant were medically essential to achieve basic functionality;
- the Ministry was not satisfied that the orthotics and footwear recommended for the Appellant was required to prevent surgery, for post-surgical care, to assist in physical healing from surgery, injury or disease, or to improve physical function that has been impaired by a neuro-musculo-skeletal condition;
- the orthotics and footwear recommended for the Appellant did not meet the requirements for a custom made orthosis as no medical practitioner had confirmed that a custom-made orthosis was medically necessary for the Appellant; and
- the orthotics and footwear recommended for the Appellant did not meet the requirements

for a custom made foot orthotic because a custom made foot orthotic must be made from a hand-cast mold to be eligible for a supplement.

Panel Decision

Under section 3(1)(b)(iii) of Schedule C to the EAPWDR, an applicant for any type of medical equipment or device listed in sections 3.1 through 3.12 must show that "the medical equipment or device is the least expensive appropriate medical equipment or device."

Although both the medical practitioner and the physiotherapist recommended custom orthotics and footwear for the Appellant, neither ruled out the use of less expensive orthotics or footwear for use by the Appellant. In the Letter, the physiotherapist references the Appellant's current orthotics as being worn out but it is not clear whether those orthotics were custom and there is no indication in the Letter that the Appellant had used custom footwear in the past. In the result, the panel finds that the Ministry reasonably determined that the Appellant had not met the criteria set out in section 3(1)(b)(iii) of Schedule C to the EAPWDR.

Section 3.10(2)(b) of Schedule C to the EAPWDR requires the Ministry to be satisfied that an orthosis is "medically essential to achieve or maintain basic functionality."

Although the Letter indicates that custom orthotics and footwear are recommended because the Appellant is experiencing discomfort with walking and playing sports, neither the Letter, the Request, nor information contained in the RFR or Notice of Appeal indicates a loss of basic functionality on the part of the Appellant or that custom orthotics and footwear are medically essential to achieve or maintain the Appellant's basic functionality. In the result, the panel finds that the Ministry reasonably determined that the Appellant had not met the criteria set out in section 3.10(2)(b) of Schedule C to the EAPWDR.

Section 3.10(2)(c) of Schedule C to the EAPWDR requires the Ministry to be satisfied that an orthosis is required for one of the following purposes:

- to prevent surgery;
- for post-surgical care;
- to assist in physical healing from surgery, injury or disease;
- to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition.

In the circumstances of the Appellant, there is no indication in any of the material that was before the Ministry at the time of the Reconsideration Decision that, in the absence of custom orthotics and footwear, she will require surgery. There is likewise no indication of any previous surgery for which custom orthotics and footwear are required for post-surgical care. Although the information submitted in and with the Request indicates that the Appellant presents with *Pes Planus* and other foot conditions described in the Letter, it is not clear from the information in the Letter or the Request that custom orthotics and custom footwear are required to assist in

healing either the Appellant's *Pes Planus* or the other conditions described in the letter. As noted above, the Appellant does not require healing from surgery and there is no indication that she has suffered an injury for which custom orthotics and footwear are required for healing. Finally, the information that was before the Ministry at the time of the Reconsideration Decision does not indicate that the Appellant suffers from any musculo-skeletal condition for which custom orthotics and footwear are required to improve the Appellant's physical functioning. In the result, the panel finds that the Ministry reasonably determined that the Appellant had not met the criteria set out in section 3.10(2)(c) of Schedule C to the EAPWDR.

Section 3.10(2)(d)(i) of Schedule C to the EAPWDR sets out that an "orthosis is off-the-shelf unless a medical practitioner or nurse practitioner confirms that a custom-made orthosis is medically required."

Although section 2 of the Request includes a signature in the space for a medical practitioner or nurse practitioner to sign and indicates that custom made orthotics and custom made footwear with wide forefeet are "recommended medical equipment", the only confirmation that custom made orthotics and custom made shoes are "required medical equipment" comes from the Appellant's physiotherapist who is neither a medical practitioner, as defined in the Interpretation Act, or nurse practitioner and who signed the part of the Request which sets out which medical equipment is "required" to meet the Appellant's needs. In the result, the panel finds that the Ministry reasonably determined that the Appellant had not met the criteria set out in section 3.10(2)(d)(i) of Schedule C to the EAPWDR.

Finally, Section 3.10(3)(d) of Schedule C to the EAPWDR requires, for approval of a custom made foot orthotic, that "the custom-made foot orthotic must be made from a hand-cast mold."

Although it appears that the reason for this deficiency in the Appellant's application for a supplement may have been the result of only the Request having been completed rather than an Orthoses form, it is nevertheless the case that there wasn't an indication in the information before the Ministry at the time of the Reconsideration Decision that the custom made orthotics being recommended for the Appellant would be made from a hand-cast mold. In the result, the panel finds that the Ministry reasonably determined that the Appellant had not met the criteria set out in section 3.10(3)(d) of Schedule C to the EAPWDR.

In view of all of the foregoing, the panel finds that the Reconsideration was a reasonable application of the relevant statutory provisions to the circumstances of the Appellant and that the Reconsideration Decision was reasonably supported by the evidence and the panel confirms the Reconsideration Decision.