APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development ("the ministry") reconsideration decision dated August 3, 2011 which denied the appellant's request to be provided with an Enart 801-V5 neuro-stimulation device ("the Enart device") for use as a "positioning device". 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 basis for the ministry's decision is as follows:

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 device had been prescribed by a medical practitioner and that an assessment by a physiotherapist (PT) had been provided thus meeting the requirements of s. 3(2)(a) and (b). However, the ministry determined that the Enart device was not any of the medical equipment and devices set out in s. 3(1) and, in particular, was not a positioning device under s. 3(1)(d) and exceeded the policy parameters for the provision of electrotherapy, including cost.

Schedule C, s. 2 [as it read on July 4, 2002]
The ministry determined that the appellant is not eligible for the Enart device on the basis that she was approved for electrotherapy equipment under the legislation in effect on July 4, 2002 which consisted of a broader category of "durable medical equipment and appliances", and the legislative provisions have since been amended. Previous approval of an electrotherapy device does not establish a precedent that requires the ministry to continue to provide electrotherapy devices indefinitely.

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

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), s. 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, s. 3(1) and (2);

as they stood at March 31, 2010.

PART E – Summary of Facts

Preliminary Matters

1. With the consent of the appellant, the ministry had two observers attend the appeal hearing.

2. At the commencement of the appeal hearing the ministry requested an adjournment on the following bases:

a) The physician's prescription was for 3 separate types of medical equipment in the nature of electrotherapy devices, including the Enart device. All were declared by the physician to be for the purpose of some form of "positioning", with the combination being able to reduce the amount of microcurrent electrodes and splitters required. The ministry said that this hearing is about only 1 of the prescribed devices, and that the hearing should be adjourned until additional medical evidence could be adduced to show whether the Enart device would deliver any benefit to the appellant if used without the other requested devices, and whether the Enart device would pose any health risk to the appellant if used without the other requested devices.

b) On June 4, 2009 the ministry received an independent medical opinion which it had commissioned on the efficacy of microcurrent therapy as a treatment for fibromyalgia. The ministry's physician did not examine the appellant but reviewed information from the appellant's physicians. By letter to the appellant dated September 8, 2011 the ministry provided two copies of the medical opinion and requested that the appellant's physician provide additional information in response. In a subsequent conversation with the appellant, the ministry advised that it required the response by August 31, 2012. The ministry submitted that the appeal should be adjourned until the requested response is provided by the appellant.

c) On July 13, 2012 the appellant submitted approximately 15 pages of new information to the Tribunal. The ministry did not receive this information until the morning of the appeal hearing, and requested an adjournment in order to have time to review the new material.

The panel heard submissions from the appellant and after deliberating decided not to grant the ministry's request for an adjournment, for the following reasons:

a) The separation of the hearings on the 3 different medical devices had not been initiated by the appellant. On the record, the ministry has known since at least June 23, 2011 that the request for the 3 devices had been separated into individual decisions. The panel concluded that if the ministry believed that additional evidence on the efficacy and safety of the Enart device was necessary, it would have and should have raised the issue sooner than the day of the appeal hearing.

b) The ministry waited more than 2 years to request the appellant's response to its independent medical opinion. Almost another year has passed since it made that request. The ministry has not diligently pursued this matter and cannot now reasonably expect the panel to grant an adjournment on its last-minute claim that the requested response is essential to the proceedings.

c) Unless it occurs for reasons genuinely beyond a party's control, it is both inefficient and

disrespectful to make last-minute submissions in circumstances that don't provide the other party or the panel time to adequately review them. In this case, however, the material provided by the appellant is mostly repetitive of information already before the ministry and the panel. The appellant offered to withdraw most of the additional information if necessary and the remaining information was minimal. The panel notes that the ministry itself submitted additional information to the panel at the hearing, including its independent medical opinion and correspondence with the appellant in respect of it.

For the forgoing reasons, the panel did not grant the ministry's request for adjournment.

Substantive Matters

The documentary information in this case including the appeal record and submissions by the parties exceeds 600 pages. All of the evidence has been reviewed and considered by the panel.

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.

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 device, 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 device is required in conjunction with 2 rectal-vaginal

electrodes 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) The ministry's original decision (May 14, 2010) and reconsideration decision (November 10, 2010) respecting the appellant's request for the Enart and other devices which denied the request under the legislation in effect as of April 1, 2010 and a copy of an Employment and Assistance Appeal Tribunal (the 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.

7) July 7, 2010 letter from the appellant's physician stating that "the following positional supports are necessary to meet her basic needs, to provide assistance with daily living activities, to make her more independent and more able to participate socially." The physician wrote that "All three devices are necessary to meet [the appellant's] treatment needs. Even though both the InterX 5002 and the [Enart device] are interactive devices that deliver high amplitude electrical impulses [the appellant's] needs can't be met thru providing only one of the units."

8) 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."

9) 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 device would cost $2040 US plus shipping, duty and taxes. Also required for the Enart device would be 2 non-disposable rectal/vaginal electrodes at a cost of $200 plus shipping, duty and taxes.

10) January 17, 2011 letter from the appellant's physician stating in part that the Enart 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 accessories are not interchangeable...the intra-vaginal and intra-rectal electrodes can only be used with the [Enart device] ...The [Enart device] and intra-vaginal and intra-rectal 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 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 device] and intra-vaginal and intra-rectal electrodes are positional devices for correcting and maintaining the correct position of her sacral-iliac joint, pelvic girdle and coccyx...The Inter X 5002, [Enart device] and ISO 160 microcurrent are positional devices that ...enables her to tolerate positions of side lying and supine lying so that sleep is not disturbed....."

11) 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."

12) 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."

13) May 18, 2011 letter in which the appellant describes the differences between various devices she has requested and describes the Enart device as "a device that locates areas of abnormality and then treats them with an electric current."

14) 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."

15) Manufacturer's Product Information for the Enart device describing it as "a biofeedback device for professional and individual/family use." It is described as having four main operational modes: 1) to provide diagnostics; 2) to treat large areas and to find any asymmetries on the skin; 3) to be applied locally to treat mainly the atonic (weakened) internal organs of the body, muscle-skeletal disorders, both chronic and acute, and to stimulate muscle contraction; and 4) to trigger a specific body area to achieve fast healing.

16) 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.

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

18) Wikipedia information about electrotherapy;

The following documents were submitted as parts of appendices A through L by the appellant to the Tribunal subsequent to the reconsideration decision but prior to the hearing. The following list is not all-inclusive and not necessarily listed in the order received from the appellant.

1) Online definitions of "and."

2) September 8, 2011 letter from the appellant's physician stating, in part, that "the [Enart device 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 "In terms of the Enart models only the 801 V5 offers the features [the appellant] requires."

3) A May 11, 2012 letter from a second physician recommending one of the other requested devices (the InterX 5002) as a positioning device for the appellant in order to facilitate: (a) adjusting and maintaining positions (e.g. side lying, lying supine, and upright weight bearing positions of standing, sitting and walking); (b) transferring from different positions (e.g. sitting to standing, rolling over; and (c) movement of excess body fluids in her lower legs up toward the pelvis. The physician also recommends the InterX 5002 "as a positioning device" for (a) locating positions of low electrical impedance, areas in the skin that are neurologically related to injured tissues, and identifying the optimal treatment locations for delivery of the interactive, damped, pulsed, sinusoidal, high impulse, high density current; and (b) increasing range of motion and improving postural problems.

4) Email correspondence between the appellant and a legal advocate.

5) Copies of past Tribunal decisions respecting positioning devices.

6) On line definition of "limited range of motion": a reduction in the normal distance and direction through which a joint can move.

The information submitted by the appellant prior to the hearing is of two kinds – evidence and argument. The evidentiary material such as the letters from the physicians provides further information on the intended use of the Enart device or other requested devices. The panel admits this as written testimony in support of the information and records that were before the minister, in accordance with s. 22(4) of the *Employment and Assistance Act* (EAA). The panel accepts additional information, such as the dictionary definitions, as argument.

At the hearing the ministry submitted the following documents:

1. A one-page chronology of events with respect to the ministry obtaining its medical opinion and requesting a response from the appellant.

2. A September 8, 2011 letter from the ministry to the appellant's physician providing a copy of the ministry's medical opinion and asking the physician to "cite scholarly medical authority to support what you are prescribing for your patient...".

3. A September 8, 2011 letter from the ministry to the appellant to follow up on a conversation between the ministry and the appellant the day before, and providing the appellant with a copy of the ministry's second medical opinion and of the letter to the appellant's physician.

4. A copy of the ministry's medical opinion of July 4, 2009, addressed to a senior adjudicator at the ministry.

With respect to admissibility of the medical opinion, the appellant's position is that it was not mentioned at all in the reconsideration decision, and specifically that it was not identified as being a reason for denial, so it should not be admitted as evidence. On questioning from the panel, the appellant said that she had asked her physician to respond to the ministry's request but that she could not force the physician to do so. Neither the appellant nor her physician advised the ministry that there would be no response forthcoming. The ministry sought to rely on this documentation to

obtain an adjournment, which for the reasons given above was not granted. In argument the ministry also sought to rely on the documents to challenge the legitimacy of the physician's prescription.

It is clear from its date that the ministry was in possession of the medical opinion at the time of the reconsideration decision that is the subject of this appeal. It formed part of the appellant's file and so it must be considered to have been "before the minister when the decision being appealed was made" as per s. 22(4) of the EAA. The subsequent documents – the chronology and the correspondence with the appellant and her physician – are directly related to the medical opinion and are seeking to clarify information submitted by the appellant, so in the panel's view they are information "in support" as contemplated by EAA s. 22(4). However, the reconsideration decision did not mention the ministry's medical opinion and did not expressly rely on it. Though the ministry provided the appellant with the medical opinion months ago and the appellant could have anticipated that the ministry would rely on it to question the recommendations of her physician, the ministry did not provide either the appellant or the panel with advance notice that it would be relying on this opinion. Nor did the ministry provide the panel with any evidence with which the panel could assess the applicability of the medical opinion – which was provided in relation to fibromyalgia – to the diagnosis of taut diaphragm muscles and misaligned coccyx which is the medical condition for which the Enart device was prescribed. Also, in the reconsideration decision the ministry found the legislative criterion regarding the physician's prescription to have been fulfilled – the legitimacy of the prescription is no longer at issue. Accordingly, the panel has decided to put little weight on the ministry's medical opinion and supporting documents.

At the hearing the appellant said that she has trouble sleeping because of pain in her shoulders, legs, hips and back. She said she was only able to stay awake for the hearing because she took extra thyroid medication, which carries some risk. She said she had an Enart device on loan for a month. It decreased the pain so much that she was able to fall asleep, she stopped being suicidal, and she was able to reduce her use of narcotic pain killers by 25%. Before using the Enart device she needed 3 hours per week of therapy that she didn't require at all when on the Enart device. She still has some of those gains. On questioning by the panel, the appellant said that she'd had the Enart device on loan a couple of years ago. She is still feeling the beneficial impacts. It fixes the newest injuries first. The Enart device healed her knees – she hasn't had pain there again, only minor discomfort. Because of her use of the Enart device she is walking again – she can walk to the grocery store. She is also cooking again. Before using the Enart device she wasn't able to be up at all.

The appellant's oral testimony provides more detail about her impairment and the benefits of the Enart device that was the subject of the reconsideration decision. The panel accepts it as oral testimony in support of the records and information that was before the minister at the time of reconsideration, in accordance with EAA s. 22(4).

Other than the medical opinion and supporting documents dealt with above, the ministry relied on its reconsideration decision.

APPEAL #

PART F – Reasons for Panel Decision

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

Legislation

EAPWDA [as it read on March 31, 2010]

Reconsideration and appeal rights

16. (1) Subject to section 17, a person may request the minister to reconsider any of the following decisions made under this Act or the regulations: ...

(d) a decision in respect of the amount of a supplement provided to or for someone in the person's family unit if that amount is less than the lesser of

(i) the maximum amount of the supplement under the regulations, and

(ii) the cost of the least expensive and appropriate manner of providing the supplement...

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

Section 3 – Medical equipment and devices

(1) The following medical equipment and devices are the health supplements that may be paid for by the ministry if the supplements are provided to a family unit that is eligible under section 62 *[general health supplements]* of this regulation:

(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;

(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.

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:

(a) 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.

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

(b) the minister determines that the health supplement is necessary to meet that need.

Positions and Reasons for Decision

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

The appellant's position is that the Enart device is a positioning device within the meaning of s. 3 of Schedule C. In support of this position, the appellant argues that:

1. The term "positioning devices" is not defined, so any devices – including the Enart device - that can function as a positioning device in the circumstances of the appellant were a benefit available under the legislation. Previous Tribunal decisions have supported this principle, finding that a lift chair, a roll-about chair, and a viscoform mattress and pillows respectively qualified as "positional devices." On the evidence, the appellant experiences pain when either lying down or sitting upright. In her situation the Enart device will relieve pain and allow her to maintain these positions. The ministry's interpretation – that positioning devices are intended to provide a direct external support when there is a deficiency in the ability to perform transfers or to adjust one's position – is too narrow. The appellant says that a positioning device is better defined as a device that can be used for any of the following purposes: a) locating sites on the body that need to be treated; b) using internal electrodes to achieve positioning of a person for beneficial medical purposes or to be position for longer periods of time; c) delivering medically beneficial electric current intra-vaginally and intra-rectally to areas that need treatment; d) facilitating improvement in posture and joint positioning by relaxing taut muscles or other means.

2. The ministry relied only on criteria set in policy, rather than legislation, to deny the benefit. The fact that electrotherapy devices and positioning devices were identified under separate headings in the ministry policy that was in effect at the time does not help the ministry. Several items such as grab bars and raised toilet seats, which the ministry admits are positioning devices, are listed under other headings in the ministry policy.

3. Case law and s. 8 of the *Interpretation Act* require the panel to resolve any ambiguity in the legislative language in favour of the appellant as it is social welfare legislation.

4. The Enart device is the least expensive appropriate device, as the TENS is not suitable. The ministry's reference to s. 16(1) of the EAPWDA is irrelevant. If the ministry intended to rely on s. 16(1)(d)(ii) of the EAPWDA as authority for the ministry to set a cap on the cost of health supplements, it has misread that provision.

With respect to eligibility for the Enart under s. 3 of Schedule C of the EAPWDR, the ministry takes the position that the Enart device is not any of the medical equipment or devices set out, including positioning devices under (d). Accordingly, says the ministry, there is no legislative authority to issue this device. The ministry notes that the legislation does not define "positioning devices" and submits that, in terms of medical equipment, positioning devices provide a direct external support when there is a deficiency in the ability to perform transfers or adjust one's position such as hospital beds, pressure relief mattresses, custom seating for wheelchairs, lifts, grab bars, raised toilet seats, and floor-to-ceiling poles. The ministry noted that the devices involved in the Tribunal decisions cited by the appellant fit within the definition proposed by the ministry. The ministry also says that the Enart device is promoted as an electrotherapy device, and that it promotes "healing" by increasing the body's production of neuro-peptides. The ministry stated that electrotherapy equipment is not inherently a positioning device; it is medical equipment used to administer electrotherapy. The ministry said that if relaxing muscles or pain reduction constitutes "positioning", then any muscle relaxant or analgesic would fit the definition of "positioning device".

Regarding the policy respecting s. 3 of Schedule C [medical equipment and devices] in effect on March 31, 2010, the ministry argues that there are a number of items which may fall within the category of positioning devices such as beds, specialized mattresses, lumbar supports but that 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 (gels, accessories) were provided only within the specified parameters respecting quantity (single unit), functionality (basic TENS), and cost (max. $250). The ministry argues that despite the March 4, 2011 letter from the ministry to the appellant, TENS devices were not provided as positioning devices.

Panel's Reasons

The core of the issue is the scope of the definition of "positioning device". Referring to a definition provided by the appellant, "positioning" is "the deliberative placement of the patient or a body part to promote physiological and/or psychological well-being". (Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing and Allied Health 7th Edition, appendix p. 75). In the panel's view this accords with the plain meaning of the legislative language and rules out the appellant's proposals that the term should be interpreted so broadly as to include "locating sites on the body that need to be treated", use of electrodes, delivering electric current intra-vaginally and intra-rectally and so on. Positioning means simply putting a body or body part in a desired position, and a positioning device is a tool meant to accomplish that end.

The lack of a definition in the legislation gives the ministry a degree of discretion with respect to interpreting the term. The ministry must exercise that discretion reasonably. The ministry has attempted, through policy and previous decisions, to establish guidelines as to the types of devices likely to constitute a positioning device. It is entitled to do so both as a means of guiding its own decision-makers and to inform applicants of the kinds of considerations the ministry takes into account in deciding individual cases. Without legislative authority to make binding policy, the ministry is only entitled to rely on and refer to policy so long as it continues to be open to considering case-specific circumstances. The appellant says that the ministry improperly relied solely on policy when it came to its reconsideration decision denying the appellant's request for an Enart device. In the

panel's view it's clear from the reconsideration decision that the ministry considered policy, but it didn't decide solely on the basis of policy in finding that a positioning device provides "direct external support".

The panel is not convinced that the opinion of one ministry worker in the March 4, 2011 letter is sufficient to establish that the ministry ever approved electrotherapy devices on the basis that they were "positioning devices". Even if the ministry had done so, that policy could not be determinative of the issue. It is likely that the ministry's previous provision in policy of electro-therapy devices stemmed from the formerly broad language of EAPWDR s. 2 in relation to "other functions essential to the sustenance of life".

In the panel's view, the "deliberative placement of a body or body part" requires that the device itself physically and directly either places the body/body part into a desired position or holds it in place. In the panel's view the term "positional device" cannot be so broad as to refer to therapeutic equipment which induces muscle relaxation or pain abatement so as to allow a patient to assume various positions or to have a broader range of motion of joints or muscles. The interpretation proposed by the appellant would lead to equipment as diverse as ice packs, heat packs, electric blankets, morphine pumps, hot tubs and vibrating massage chairs being classed as "positional devices". A "positional device" is a mechanical device that directly holds or supports a body/body part rather than an instrument which provides therapy that subsequently facilitates a shift of position or increased range of motion. This interpretation is consistent with the types of devices considered in the previous Tribunal decisions relied upon by the appellant. On basic principles of administrative law the panel, of course, is not bound by those previous decisions. The appellant's physician's use of the term "positional device" with regard to the Enart device is her own innovation and is not determinative – the manufacturer's product information makes no reference to "positioning" as one of the functions or purposes of the Enart device and it is not the physician's role to interpret the legislation. In the panel's view, the appellant's proposed interpretation doesn't accord with the plain meaning or intended purpose of the legislation.

Based on the foregoing analysis, the panel does not believe the term "positional device" is ambiguous. It is not sufficiently broad to include electro-therapy devices such as the Enart device.

The ministry's reference to s. 16(1) of the EAPWDA is not relevant to the issue in dispute.

For the foregoing reasons the panel concludes that the ministry reasonably decided that the Enart device is not a positioning device within the meaning of the EAPWDR.

Schedule C, s. 2 [as it read on July 4, 2002]

The appellant did not expressly take a position on this finding.

The ministry acknowledges that the appellant was provided with a CellStim device which is a microcurrent machine on July 4, 2002 at a cost of $631.30, but argues that it has not been established that it was provided as a positioning device. Rather, the ministry points to the legislation in effect on July 4, 2002 which allowed for the provision of "durable medical equipment and appliances" for positioning and other specified purposes and that the legislation has since been

amended. The ministry also notes that 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 ministry also takes the position that its 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's Reasons

On the evidence, the July 4, 2002 decision did not specify whether the CellStim device was granted for "positioning" or for "other functions essential to the sustenance of life." Given that omission, and the significant changes that took place in the legislation subsequently, that decision is not relevant to interpreting the legislation that is at issue here. Further, administrative decisions generally are not binding on subsequent decision-makers, though they may be persuasive.

The ministry reasonably concluded that its decision to provide the CellStim device in 2002 does not set a binding precedent that would now necessitate the provision of an Enart device.

EAPWDR Section 69 Life-threatening Health Need [as it read on March 31, 2010]

The appellant did not expressly take a position on this finding.

The ministry's position is that the appellant is not eligible for the Enart device under s. 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 Enart device requested exceeds the parameters for the provision of electrotherapy equipment in terms of both function and cost.

Panel's Reasons

On the plain meaning of the legislative language, there is no evidence to indicate that the appellant's condition is "life-threatening" or that it was "life-threatening" at the time of reconsideration. The panel finds that the ministry reasonably concluded that the legislative criteria for EAPWDR s. 69 have not been satisfied.

Conclusion

Based on the foregoing reasons, the panel finds that the ministry's decision to deny the Enart device was a reasonable application of the legislation in the circumstances of the appellant, and accordingly confirms the decision.