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 InterX 5002 Neurostimulation Device ("the InterX 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. The specific bases of denial are 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 InterX device had been prescribed by a medical practitioner and that an assessment by a physiotherapist (PT) had been provided as required by s. 3(2)(a) and (b). However, the ministry determined that the InterX 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 in terms of functionality and cost.

Schedule C, s. 2 [as it read on July 4, 2002]
The ministry determined that the appellant is not eligible for the InterX device 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 InterX device. Further, the ministry determined that previous approval of an electrotherapy device does not establish a precedent that requires the ministry to continue to provide electrotherapy devices indefinitely and the InterX device exceeded the policy parameters for the provision of electrotherapy equipment in terms of functionality and cost.

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 Inter X device under s. 69 of the EAPWDR *[life-threatening health need]* because (i) the information does not establish a life-threatening need for the InterX device and (ii) the parameters set out in policy are exceeded for the provision of electrotherapy equipment in terms of functionality 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 and Schedule C, s. 3

in effect on March 31, 2010.

Disability Benefits Program Regulation, s. 2, in effect on July 4, 2002

PART E – Summary of Facts

Preliminary Matters

1. The hearing was originally scheduled for September 8, 2011 but was adjourned on September 7, 2011 at the written request of the appellant with the consent of the ministry and the Tribunal chair. The appellant's submission includes the following bases for the adjournment request: her representative is unable to attend (letter from the representative attached); the appellant is unable to proceed until she has her own computer at home; and, the ministry has not provided the appellant with the documents she requires in order to prepare for the hearing.

2. A rescheduled hearing was to be conducted on October 19, 2011 but was adjourned for a second time on October 12, 2011 at the written request of the appellant with the consent of the ministry and the Tribunal chair. The appellant's submission includes the following basis 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.

3. The hearing was rescheduled to take place on May 30, 2012. At the commencement of the hearing, the ministry requested an adjournment on the basis that there was insufficient opportunity to evaluate a 101 page submission provided by the appellant just prior to the hearing. The panel notes that the appellant's submission was received electronically by the Tribunal less than 30 minutes before the hearing was to commence. The ministry, who was in attendance by telephone, added that at present, its "system was down" and an electronic copy could not be accessed during the hearing. The appellant objected to the ministry's adjournment request on the bases that: (i) it has already taken so long to have the hearing; (ii) the written submission was provided as a courtesy and is not any different than the ministry "saying stuff" at the hearing; (iii) the written submission could be read aloud at the hearing, and; (iv) the appellant was unable to provide the submission earlier due to her exhaustion. The panel granted the ministry's adjournment request for the following reasons: (i) previous delays of the hearing were at the bequest of the appellant not the ministry; (ii) given the timing and volume of the appellant's submission, the ministry was entitled to sufficient time to review the document and to prepare a response to any new arguments; and (iii) the appellant had over 8 months from the date of the originally scheduled hearing to prepare and to provide additional submissions.

4. The hearing was rescheduled to take place on May 6, 2013 but was adjourned on May 1, 2013 at the written request of the appellant, with the consent of the ministry and the Tribunal chair. The appellant's submission includes the following bases for the adjournment request: the appellant needs additional time to obtain legal advice; the appellant has been too ill to prepare during the last year due to the "ministry causing prolonged physical and mental exhaustion"; the hearing should be delayed until the Ombudsperson investigation, which has not begun, is complete; and, the appellant has an out-of-town family member coming to visit and is unable to prepare for this visit and the appeal at the same time due to her disability.

5. The hearing was rescheduled for July 31, 2013. On July 19, 2013, the appellant submitted a written request for an adjournment which includes the following bases for the adjournment: administrative fairness requires an adjournment until the appellant receives the records

necessary to make her case; ministry staff have been uncooperative in responding to the FOI request; the appellant's physician states that the appellant requires a 2-month extension because of "min + sleep deprivation" (physician's note attached); the appellant is unable to remain at home due to the odor caused by the asphalting of the road by her home. The ministry did not consent to the adjournment request and the adjournment was not approved by the Tribunal chair based on s. 85 of the Employment and Assistance Regulation which states that a "hearing must be held within 15 business days after the appeal form is delivered under section 84, unless the chair of the tribunal and the parties consent to a later date."

6. The hearing re-convened on July 31, 2013. With the consent of the appellant, an observer from the ministry was in attendance. The appellant requested an adjournment on the following bases:

   (i) By failing to provide a written copy of all of the statements and submissions the ministry would make at the hearing, the ministry had failed to comply with its requirement to accommodate the appellant's disability to the point of undue hardship. The appellant stated that a written hearing was not an acceptable alternative because she did not trust the ministry to have the last word.

   (ii) The ministry failed to release information requested by the appellant – purchase authorizations showing the STOB under which TENS devices were issued by the ministry between 2002 and 2010, information the appellant stated is important to one of her arguments. Having made an FOI request to the ministry about 1 to 1 ½ years ago and being unsuccessful in obtaining the information, the appellant contacted the Office of the Ombudsperson in May or June 2013. The appellant stated that the gathering of this information is "currently running" and "will be ready within 30 days."

   (iii) The appellant has not had time and is not well enough to prepare for the hearing as confirmed by her physician. Preparation for this hearing has caused her stress.

   The ministry objected to an adjournment on the bases that:

   (i) The appellant had the option of having a written hearing.

   (ii) The ministry had not suppressed any information. The requested documents relate to other ministry clients and are not available on computer. The information can't be given directly to the appellant and needs to go through the FOI request.

   (iii) The FOI request is an issue for the commissioner not the ministry.

   The panel was not prepared to grant an adjournment on the basis that a written record of the ministry's appeal submission was not provided for two reasons. First, if written communication would better serve the appellant's disability, the appellant could have elected to have a written hearing. Second, as a party to an oral appeal hearing, the ministry is entitled to make its submissions orally whether to explain the reconsideration decision or respond to oral submissions from the other party or questions from the panel. The panel was also not prepared to grant an adjournment on the basis that the appellant was unable to proceed with

the hearing due to her health, her anxiety associated with preparation for the hearing, and having insufficient time. That the appellant's health and anxiety may be impacted by an impending hearing will not be addressed by simply adjourning or delaying the hearing and the appellant has had almost 2 years since the hearing was originally scheduled to prepare and has, in fact, provided significant submissions in terms of both volume and number. While the panel is mindful that the appellant's original request for funding for an InterX device was more than 3 years ago and that her Notice of Appeal was received in August 2011, the panel granted a short adjournment to obtain further information based on the following:

(i) the appellant's representation that her FOI request is being fulfilled currently and will be complete within 30 days;

(ii) the information requested relates to an argument before the ministry at reconsideration which the appellant stated is pivotal to making her case; and

(iii) the ministry acknowledged that the information being sought must be obtained through the FOI process.

7. The hearing was rescheduled for September 18, 2013 at 12 pm. With the consent of the appellant, an observer from the ministry was in attendance. At the outset of the hearing, the appellant requested an adjournment on the following bases:

(i) She was experiencing a crisis as her telephone service died the day before (the appellant was in attendance at the hearing by telephone) and was not fixed until the morning of the hearing. She stated that use of her heater and her 2 deep freezers had caused a fuse on the electrical panel to flip. She stated that she was unaware that her freezers had been without power until about one hour prior to the hearing and that she needed to sort through the freezer contents to determine which items had started to thaw. She required a couple of hours to attend to the food and given her severe chronic fatigue would lose consciousness at about 3:30 pm. In response to questioning, she stated she had no-one to help with the food and she was not prepared to have her representative act in her stead because the appellant stated that they never get to spend enough time together and the representative doesn't know the argument. The appellant also rejected the idea of standing down the hearing for approximately an hour to allow her to attend to her freezer as she stated she could not concentrate due to distress.

(ii) She has deep mental exhaustion due to her disability, the hearing process, and the ministry systematically traumatizing her over the last year, which has left the appellant incapacitated and with only 15 minutes a day of coherent thinking time.

(iii) The ministry's case would not be prejudiced by a short adjournment of 1 to 2 weeks and if the adjournment was granted, and if the information requested through her FOI request had not been provided by that time, she would accept that there was sufficient evidence before the panel to make a decision.

(iv) The representative, who attended the hearing in person to assist the appellant, stated that she has experienced some "staffing issues" with reduced availability because she

has had to retrain staff and the delay has not always been caused by the appellant.

The ministry objected to an adjournment on the following bases:

(i) The appellant has demonstrated a pattern of requesting adjournments.

(ii) The appeal has been ongoing for a couple of years.

The panel did not grant an adjournment for the following reasons:

(i) While recognizing the appellant's position that she faces a time sensitive issue with respect to her freezers, the hearing can be conducted in a timely manner as the usual time allocated for a hearing is 2 hours.

(ii) None of the additional stressors the appellant reported as impacting her ability to proceed would be addressed by an adjournment.

(iii) The appellant has had adequate time to prepare for today's hearing as the matter has been ongoing for over 2 years, owing primarily to 4 adjournments granted at the request of the appellant, and the appellant was provided ample notice of the hearing date as the Notice of Hearing was delivered more than 1 month in advance, on August 6, 2013.

The appellant requested that her objection to the panel's decision not to grant the adjournment be noted on the record as a contravention of Human Rights legislation. The appellant stated that she was not being given a level playing field.

8. Approximately 3 hours after the commencement of the September 18, 2013 hearing, the appellant made a second request for adjournment. The appellant stated that she was unable to proceed further due to her physical impairment and brain injury and that continuing with the hearing would result in serious harm to her and that recovery would require very expensive treatments and could take a year. The appellant made it clear that she would hold the panel responsible for any injury to her health if the adjournment was not granted. Again, the appellant stated that her representative was not capable of making the appellant's case as the written submissions prepared by the appellant were not complete and required the appellant's oral commentary.

   The ministry objected to an adjournment for the same reasons it objected to the first adjournment request at this hearing.

   In considering the adjournment request, the panel again reviewed the history of adjournments, all but one having been at the request of the appellant, and was mindful that the appeal hearing was originally scheduled more than 2 years ago. The panel also considered the legislative intent to provide timely hearings given the medical and financial needs of the ministry clients. The panel also considered the particular circumstances of the hearing to that point. At the appellant's request, the ministry presented its case first for approximately 20 minutes, during the course of which the ministry responded to numerous comments and questions from the appellant. During the appellant's presentation, she dedicated approximately an hour to retrieving and sending documents while the ministry and the panel waited. Despite Tribunal guidelines requesting documents be provided to the panel and the other party at least 3 business days prior to the date of the hearing, the appellant provided her submissions during

the hearing, including copies of correspondence with the Privacy Commissioner and 2 submissions for her representative, both in excess of 30 pages in length. By the time of this second adjournment request, the appellant had been given over 2 ½ hours to present the material from her written submissions supplemented by oral presentations.

Based on the above considerations, the panel was of the opinion that the appellant and her representative had sufficient opportunity to confer and prepare for this hearing and that sufficient time had been provided to the appellant and her representative to present her submissions and that the delays to that point were primarily under the control of the appellant. Accordingly, the panel did not grant the adjournment. The appellant was advised that the panel would consider her 2 written submissions presented and that she and/or her representative also have time to highlight for the panel any important arguments not contained in the written submissions.

The appellant again objected to the panel's decision and stated that it was in contravention of the Human Rights Code.

The panel notes that the appellant and her representative took the opportunity afforded and completed the presentation of the appellant's arguments, primarily by reading the written statements over the course of an additional 2 hours, far in excess of a typical hearing, and that the appellant participated fully throughout.

Substantive Matters

Documentary evidence before the ministry at reconsideration relevant to the issue under appeal comprised:

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. Documentation respecting the original denial and the CellStim microcurrent unit. Attached is a March 22, 2002 physician's letter which repeatedly relates the need for the "biofeedback device" to "essential functions of life." The panel notes that the phrase "essential functions of life" reflects the legislative language in s. 2(1)(a) of the Disability Benefits Program Regulation, the legislation in effect at that date.

2) Ministry policy respecting Eligible Health Supplements dated December 2, 2008 (also May 1, 2005 and December 1, 2003) stating in part:

Electrotherapy (Medical Equipment and Devices) – The following are covered:
- basic TENS unit (cost should not exceed the amount shown in Rate Table: Health Supplements and Programs – Eligible and Non-Eligible Health Supplements)
- gels
- electrodes or accessories

Positioning Devices – Standing frames are covered

The policy includes the following statements: "The following general guidelines are provided to assist in determining which items are eligible for coverage by the ministry. **This list is a**

general guide and is NOT all-inclusive." [Emphasis included]

3) Ministry policy respecting Non-Eligible Items: General Guide dated April 22, 2008.

4) Ministry of Employment and Income Assistance BC Employment and Assistance Rate Tables showing that the maximum amount that may be paid for a Basic TENS unit is $250.

5) March 29, 2010 letter from the appellant's physician stating that the appellant requires positional devices, including the InterX device and accessories, to treat myofascial trigger points throughout her body, muscle imbalances, sacral-iliac joint dysfunction and a displaced coccyx. The appellant requires equipment that allows for home treatment to enable upright positioning through the delivery of electrical current without having to grasp electrodes.

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

7) The ministry's original decision dated May 14, 2010, which held that "the requested positional devices and accessories are not an eligible item...." and the reconsideration decision dated November 10, 2010, denying the appellant's request for the InterX device and other devices under the legislation in effect as of April 1, 2010. A copy of an Employment and Assistance Appeal Tribunal (the Tribunal) decision dated March 23, 2011, which determined that the ministry should have considered the request under the legislation in effect at the time of the appellant's request on March 31, 2010.

8) July 7, 2010 letter from the appellant's physician stating that "the following positional supports are necessary to meet her basic needs, to provide assistance with daily living activities, to make her more independent and more able to participate socially." Included in the list of requested items is the InterX device which the physician describes as being a different technology from microcurrent. It is "a battery operated device that delivers high amplitude electrical pulses through a biofeedback interactive loop with the body. It takes a reading from the skin and delivers what it determines to be the appropriate pulse to deliver. As the electrophysiology of the tissue changes the pulses that are delivered change. The pulses stimulate delta fibers, stimulates the release of endomorphine and dopamine and activates the body's natural pain relieving mechanisms (segmental and descending inhibition thus decreasing acute, chronic and neurophathic pain, muscle spasm and increasing range of motion."

9) October 14, 2010 letter from the appellant's physician described by the physician as a continuation of the MERJ. The physician writes that the appellant's upright positioning is severely restricted and she is having to spend most of her day lying down. This equipment (InterX and two other devices) is necessary for treatment to enable upright positioning.

10) 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."

11) November 9, 2010 letter from the appellant's physiotherapist stating that she believes the appellant will benefit from the InterX device.

12) November 9, 2010 letter from the appellant's physician in response to the ministry's request for additional information respecting trials and costs of the requested items (the InterX device and two other devices). The physician describes the InterX device as an interactive neuro-stimulation device that costs $3,995 US plus the cost of the attachments. The physician adds that the appellant's use of self-adhesive electrodes for microcurrent treatment will decrease if provided with the requested devices.

13) January 17, 2011 letter from the appellant's physician stating in part that the InterX device is an electrotherapy device and that, like a TENS unit, delivers electric current to the body. "However the type of current varies as does its therapeutic effect and the method of current delivery." The physician goes on to describe accessories for the InterX device including a dome and cone which are described as positional devices. The InterX device is described as a positional device that through effects including decreasing pain, abnormal muscle hyper tonus, muscle spasm, inflammation, trigger point irritability increases the amount of time the appellant can spend in weight bearing positions (of sitting, standing, walking) and enables her to tolerate positions of side lying and supine lying so that sleep is not disturbed.

14) 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."

15) 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 (sic) for defining TENS devices as a positional device in the past, they do not fit into the definition of a positional device."

16) May 18, 2011 letter in which the appellant describes the differences between various devices she has requested and describes the InterX device as a device that locates and then treats areas of low electrical impedance.

17) 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."

18) Manufacturer's Product Information for the "InterX 5002 Pain Management Neurostimulation Device" described as being designed specifically for pain and rehabilitation specialists and "InterX Therapy" which "delivers gentle dynamic electrical impulses and stimulates the skin at the area of pain or inflammation." The manufacturer states that the InterX device provides "Dynamic and active therapy" with "Unique damped, pulsed, sinusoidal, impedance sensitive waveform which provides *dynamic, targeted,* high density stimulation on these areas" in

contrast with TENS or other E-Stim which provide "Passive therapy." Additionally, the InterX device is described as providing "a non-drug alternative for the effective relief and management of pain and injury" and that "unlike some pain management products, treatment from InterX does not simply block the pain..." "InterX therapy is a comfortable treatment" which "delivers gentle dynamic electrical impulses and stimulates the skin at the area of pain or inflammation." "Because the InterX therapy provides the ability to target treatment on optimal points, the benefit of treatment may be more effective than other modalities."

19) Online definitions of TENS (transcutaneous electrical nerve stimulation) – a self-operated portable device used to treat chronic pain by sending electrical impulses through electrode placed over the painful area.

20) Online definitions of "position", "device", "electrotherapy", "may", "medical", "positioning".

21) Wikipedia information about electrotherapy.

The following documents were submitted by the appellant to the Tribunal subsequent to the reconsideration decision but prior to the hearing rescheduled for May 30, 2012 and are identified as Appendices A – E in the appeal record.

1) Online definitions of "and."

2) September 8, 2011 letter from the appellant's physician stating, in part, that the InterX and other requested 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 different Inter X models only the Inter X 5002 provides the range of features needed because of [the appellant's] complex needs: sufficient treatment protocols, has the activity reading feature and is capable of attaching to all the electrodes. Although the Inter X 5002 is marketed primarily to professionals it can also be used by patients with complex pain problems."

3) A May 11, 2012 letter from a second physician recommending the Inter X 5002 neuro-stimulation device 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 device "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.

7) Copies of s. 16 of the EAPWDA as it read December 1, 2007 – May 31, 2010 and the current version which took effect June 1, 2010.

Documentation submitted by the appellant at the rescheduled hearing on May 30, 2012 included:

1) A 20 page type-written submission from the appellant's advocate.

2) Additional copies of case law and physicians' letters previously submitted by the appellant.

3) A new physician's letter dated July 21, 22011 (sic) reiterating that myfascial trigger points cause pain and impair muscle functioning resulting in difficulty adjusting and maintaining positions. The InterX device and attachments are medically essential to fascilitate adjusting and maintaining positions and transferring from different positions. Floor to ceiling poles do not eliminate the need for the InterX device and slings are not suitable.

Approximately 2 weeks in advance of the July 31, 2013 rescheduled hearing, the appellant provided further documents in excess of 150 pages, identified as Appendices F, G and H including:

1) Additional definitions.

2) Information already in the appeal record.

Less than 2 days prior to the July 31, 2013 rescheduled hearing, the appellant provided three additional written submissions identified as Appendices I, J and K in the appeal record which included:

1) Requests respecting the conduct of both the ministry and the panel at the hearing.

2) A copy of a 2 page sample blank ministry Eligible Health Goods/Services Purchase Authorization.

3) An October 2012 letter from a physician referring to another physician's letter (the March 29, 2010 letter set out above) stating that the devices outlined in the 2010 letter were required to help control pain as the appellant was experiencing complex pain at that time and was referred to a psychiatrist due to suicidal risk.

4) A July 22, 2013 letter from a sports medicine physician to whom the appellant was referred in June 2011 for help with assessment, diagnosis and management of chronic pain. He writes that he was a licensed professional engineer in the past and has knowledge in electronics and electrical engineering and their applications superior to that of the lay person and other physicians not trained in the discipline. The physician reports that parathyroid disease is the stimulus for the appellant's inadequate bone health – severe thoracic scoliosis, severe osteoarthritis, and bone fragility. The physician confirms that he has reviewed the information available on the InterX device and concurs with the appellant's other physicians as to the need

for the InterX device and concludes that the appellant can't sustain any quality of life without adequate pain relief from what he describes as "her life-threatening medical condition." The physician states that he does not believe that a positioning device is solely an external device and recognizes that the InterX is "fairly costly" and may exceed the allowable allowances for positioning devices.

5) A July 29, 2013 letter from the same sports medicine physician summarizing how the InterX device works based on literature.

6) An October 4, 2012 letter from a consultant in rheumatology and internal medicine who diagnoses the appellant with a number of medical conditions and past treatment interventions which provided inadequate pain control. The physician prescribes the InterX device to reduce pain to manageable levels, reduce the risk of suicide and improve sleep and function. The physician notes that the InterX device apparently has distinct proven advantages over regular TENS therapy and has additional features not available with regular TENS equipment.

7) An October 18, 2012 letter from a physician noting a previous physician's request that the ministry provide the appellant with specific medical devices outlined in the previous physician's letter.

8) Information respecting the InterX device and electrical skin resistance including manufacturer information which distinguishes the stimulation it provides from TENS or IFT and notes that InterX technology was cleared by the US FDA for pain relief and pain management.

At the re-scheduled hearing on September 18, 2013, the appellant submitted copies of two written submissions, each in excess of 30 pages in length, consisting of argument, legislation and definitions. The relevant arguments are set out in Part F of the panel's decision as the appellant's position. The appellant also submitted copies of email correspondence she sent to the Privacy Commissioner at the end of May and beginning of July 2013 respecting her FOI request for ministry records. The bodies of the emails are shown without any transmittal information and no correspondence from the Privacy Commissioner is included. Also included is a copy of an email sent by the appellant to the Ministry of Citizens' Services on May 30, 2013 which is an FOI request for documents including purchase authorization forms for "position/transfer devices" or for TENS equipment.

When asked whether the ministry objected to the admissibility of the documentary information provided by the appellant subsequent to reconsideration, up to and including today's submissions, the ministry stated that it did not object but noted that the evidence of the sports medicine physician, the July 22, 2013 letter, speaks to the appellant's medical condition after 2011 not at the time of the original request or reconsideration.

The panel determined that the additional documentary evidence submitted by the appellant related to her medical conditions and arguments before the ministry at reconsideration and is therefore admissible as being in support of the information and records before the ministry at reconsideration pursuant to s. 22(4) of the *Employment and Assistance Act*.

The oral testimony of the appellant and the ministry consisted of argument and references to documentary evidence either before the ministry at reconsideration or admitted on appeal.

APPEAL #

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reconsideration decision denying the appellant's request for an InterX 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...

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

Section 3 – Medical equipment and devices

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

(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.

Disability Benefits Program Regulation, 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.

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 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.

Parties' Positions and Panel's Reasons for Decision

Application of s. 16 of the EAPWDA

Appellant's Position

The appellant's position is that s. 16 of the EAPWDA has no application to this appeal and, in the alternative, if found to be applicable, the criteria set out therein are met.

Ministry's Position

At the hearing, the ministry did not take a position respecting the application of s. 16 of the EAPWDA. The reconsideration decision concludes that the parameters for the provision of electrotherapy equipment are exceeded making reference to s. 16 of the EAPWDA.

Panel's Reasons

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

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

Application of s. 3(2)(b)

Appellant's Position

The appellant argues that by virtue of having accepted that the criterion of s. 3(2)(b) is met, the ministry's reconsideration decision is inconsistent, and more importantly, has in fact accepted that the InterX device is a positioning device under s. 3(1)(d).

Ministry's Position

The ministry did not expressly take a position on this matter.

Panel's Reasons

The reconsideration decision states that the PT's letters of November 2nd and 9th of 2010, together with the information in the physician's letter of November 9th 2010, were "accepted by the ministry as fulfilling the requirement for an assessment set out in the EAPWD Regulation, Schedule C, subsection 3(2)(b)." The panel is of the opinion that this conclusion is not tantamount to the ministry finding that the requested device is a positioning device or that the ministry is barred or pre-empted from making a determination as to whether the requested device is a positioning device under subsection 3(1)(d). Rather, the panel finds that the ministry retains the discretion to make a determination as to whether the criterion of subsection (1) is met, namely whether the ministry is satisfied that the requested item is a positioning device. At most, the panel finds that the ministry has accepted that the PT's assessment confirms that the appellant would benefit from use of the InterX device and that the PT defers to the physician who is of the opinion, expressed in her letter accepted as the prescription, that the InterX is a positioning device. To read further into this, and find that the ministry has thereby concluded that the InterX device is a positioning device is to usurp the ministry's authority and responsibility to interpret the legislation, particularly as "positioning device" is not defined, and substitute the opinion of the PT (and physician). While the panel is clear in its finding that the ministry has not deferred its decision-making authority to the PT, the panel is of the view that such a contention is particularly unsupportable in these circumstances where the PT states that she is not familiar with the "machines" or "modalities" and has not characterized or referenced the InterX device as a positioning device.

Application of s. 3(1)(d) – meaning of "positioning device"

Appellant's Position

At the hearing, the appellant stressed that her primary argument is that the InterX device is a "positioning device" within the meaning of s. 3 of Schedule C of the EAPWDR and that arguments respecting ministry policy are secondary. Specifically, the appellant argues that:

(1) The legislation does not define the term "positioning device" and nothing in the legislation restricts how a positioning device accomplishes the positioning function, and merely requires that it be a medical device. The medical evidence clearly establishes that the appellant requires the InterX device to facilitate adjusting and maintaining positions for beneficial medical purposes. Therefore, in the appellant's case, the overall purpose and intended use of the InterX device is as a positioning device. The fact that the InterX device functions by means of electrotherapy does not change the fact that it qualifies as a positioning device.

(2) Dictionary definitions of "positioning" are consistent with language used in the manufacturer's information for the InterX device stating that it is able to scan and identify optimal treatment points.

(3) The appellant's own testimony, the ministry's Health Assistance Branch adjudicator's classification of the InterX as a positioning device in its original decision on May 14, 2010, past Tribunal decisions, and the provision of a front-loading washing machine and hot packs to the appellant as positioning devices establish that the InterX device is a positioning device.

(4) Case law and s. 8 of the *Interpretation Act* require that the term "positioning device" must be interpreted in a large and liberal manner and any ambiguity in the legislative language must be resolved in the appellant's favour. Ambiguity in this case arises from the lack of a clear definition and that there are two different meanings.

(5) The ministry cannot provide a benefit/supplement without legislative authority. The policy manual respecting the legislation in place on March 31, 2010 lists electrotherapy devices as approved benefits. In this case, the legislative authority is s. 3 of Schedule C, specifically subsection (1)(d) which identifies the medical equipment and devices which may be provided. As TENS machines are not wheelchairs, personal motorized mobility devices, canes, crutches, or walkers, the ministry must have provided them under the authority to provide positioning devices as confirmed by the March 4, 2011 ministry letter stating that up until April 1, 2010, TENS machines were issued as positioning devices. The panel should draw an adverse inference from the fact that the ministry did not provide the documents requested by the appellant, namely copies of purchase authorization forms for "position/transfer devices" or for TENS equipment issued between January 1, 2008 and March 2010.

(6) The ministry failed to apply the legislative criteria for positioning devices instead relying only on non-binding ministry policy and in particular, a list of devices under the heading "Positioning Devices." The ministry guideline is clearly identified as being non-exhaustive and to limit positioning devices to only those items listed under the heading "Positioning Devices" is illogical given that other guideline headings list devices including hospital beds, lifts, and raised toilet seats, which are identified as positioning devices in the reconsideration decision. The ministry also incorrectly relied on the policy parameter respecting cost in place for TENS devices which do not apply to the InterX device and which in effect creates additional criteria not found in the legislation for electrotherapy devices provided as positioning devices.

Ministry's Position

The InterX device is not any of the medical equipment or devices set out under s. 3 of Schedule C of the EAPWDR, including positioning devices under subsection (1)(d). 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 InterX device is electrotherapy equipment intended primarily for pain management and is not inherently a positioning device; it is medical equipment used to administer electrotherapy.

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, and 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 within the set out parameters respecting quantity (single unit), functionality (basic TENS), and cost (max. $250).

Ministry information does not describe medical equipment used for electrotherapy as a positioning device or that it was provided to the appellant as a positioning device, notwithstanding the ministry's March 4, 2011 letter to the appellant. Medical equipment used for electrotherapy appears to be a "legislative orphan."

The ministry argues that a basic TENS unit is a battery powered device which attaches to the body with electrode pads to send impulses through nerve endings to the brain as artificial messages which causes the brain to produce endorphins to manage the pain. Microcurrent is a low-volt battery powered TENS device which works in the same manner as TENS. The InterX device has a biofeedback component and is therefore neither a basic TENS unit nor a microcurrent device and consequently falls outside the policy parameters for the provision of electrotherapy equipment.

Panel's Reasons

When considering the application of s. 3(1)(d) to the circumstances of this case, at issue is the meaning of "positioning device." In the absence of a legislated definition, the panel has first considered the plain meaning of the term in which "positioning" is an adjective describing the noun "device", and on the face of it means a device that is used to position a person or a body part and hold in place for a period of time. This view is consistent with the definition proffered by the ministry – a device which provides external support to address a deficiency in a person's ability to independently position. To counter this, the appellant has provided numerous physicians' letters describing the InterX device as a positioning device which, the appellant argues, are consistent with the manufacturer's information before the ministry at reconsideration respecting the ability of the InterX device to locate or position optimal treatment points or to facilitate adjusting and maintaining positions through pain relief. The panel finds that the use of the word "positioning" as proffered by the appellant and her physicians does not equate with its usage in the term "positioning device" but rather is akin to the activity of locating or identifying. The appellant's physician's interpretation of the legislative language is not determinative of the issue and furthermore, their interpretation is not supported by the manufacturer's information which repeatedly refers to the InterX device as electrotherapy treatment or therapy for pain relief. For example, the manufacturer's information describes the InterX device as providing "a non-drug alternative for the effective relief and management of pain" and as a "pain management neurostimulation device" providing therapy described as "a comfortable treatment." The manufacturer also notes that the InterX was cleared by the US FDA for pain relief and pain management.

Further, the panel finds that the fact that a benefit of using the InterX may be enhanced ability to mobilize or lay down to sleep is, in fact, a secondary result of the pain treatment provided by the InterX device and does not equate with the InterX being a device that positions the appellant.

The panel is also not persuaded that the fact that the ministry's original decision denying the InterX device refers to "positioning device" can reasonably be viewed as establishing the ministry's acceptance of the InterX as a positioning device. That position is untenable given that a primary basis

for denial is that the InterX device is not a positioning device. The panel is of the view that the ministry has simply reflected the language of the request by the physician and appellant.

Additionally, while noting that past Tribunal decisions may be persuasive, though not binding on either the ministry or this panel, the panel finds that the past Tribunal decisions proffered by the appellant do not support the appellant's contention. Rather, they serve as examples of external devices or equipment that physically place or hold a person into a desired position, such as a lift or rollabout chair and a mattress and cushions, and are readily distinguishable from the InterX device on that basis.

For the above reasons, the panel is of the opinion that the interpretation of "positioning devices" in a broad and liberal manner in accordance with s. 8 of the *Interpretation Act* cannot stretch to the point of including an electrotherapy device such as the InterX device and that the term "positioning devices" is not ambiguous. The definition provided by the ministry is reasonable in view of the ordinary meaning of the term.

With respect to the appellant's argument that the ministry solely relied on policy not legislation to deny her request for the InterX device, the panel concurs that the provision of positioning devices is not limited to standing bed frames, which is acknowledged in the reconsideration decision; however, the panel finds that the analysis within the decision demonstrates that the ministry considered the request under both the legislation, s. 3 of Schedule C and policy.

While the appellant asserts that the legislative authority for electrotherapy devices must be s. 3(1)(d) – positioning devices – as confirmed by the March 4, 2011 letter from the ministry, the panel finds that given that the provision of electrotherapy devices precedes this legislation, the policy respecting the provision of electrotherapy devices likely arose from the much broader language of the predecessor Disability Benefits Program Regulation, 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. While it is unclear to the panel under what legislative authority electrotherapy devices were being provided, such deficiency is not a basis for entitlement or eligibility.

The panel also finds that the March 4, 2011 letter from one ministry worker stating that TENS machines were being issued as positioning devices is insufficient to establish that electrotherapy devices are positioning devices or even that the ministry accepted them as such, particularly in view of the subsequent letter of March 11, 2011 stating that TENS devices "do not fit into the definition of a positional device."

Furthermore, even if, as requested by the appellant, the panel drew an adverse inference that the ministry provided TENS machines as positioning devices due to non-disclosure of the requested purchase authorization, that policy could not be determinative of the issue of the provision of the requested InterX device because the InterX device is not a TENS machine as evidenced by the information from the manufacturer and the appellant's physician.

It appears to the panel that ministry policy respecting electrotherapy in effect at the time of the

appellant's request for the InterX device, which the ministry refers to as a "legislative orphan", expands upon the health supplements provided under s. 3 of Schedule C, as electrotherapy is not reasonably be viewed as a positioning device or any of the other devices set out in that section. Irrespective of this, the panel finds that the ministry has considered this policy, which allows for the provision of a basic TENS machine within certain parameters, and has reasonably concluded, based on the manufacturer's and physician's description of the InterX device, that the InterX device clearly exceeds the parameters set out in policy for the provision of a basic TENS machine. For example, the information from the appellant's physician in the January 17, 2011 letter is that the InterX device differs from a TENS unit by the type of current provided and the therapeutic effect delivered. The information from the InterX manufacturer also distinguishes the InterX device from TENS or other E-Stim in terms of the electrical impulses and therapy provided. Furthermore, the cost of the InterX device exceeds the cost parameter as set out in the ministry policy for a basic TENS machine more than tenfold.

In conclusion, for the above reasons, the panel finds that the ministry reasonably determined that the appellant was not eligible for the InterX device under s. 3 of Schedule C of the EAPWDR or under the policy respecting the provision of electrotherapy devices.

Disability Benefits Program Regulation, Schedule C, s. 2 [as it read on July 4, 2002]

Appellant's Position

The appellant argues that the microcurrent device (CellStim) provided to her in July 2002 was provided as a positioning device.

Ministry's Position

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 set out purposes including "other functions essential to the sustenance of life" 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

As noted above, the July 4, 2002 ministry decision granting approval of the CellStim device did not specify under which legislative criteria it was provided, that is, for "positioning" or for "other functions essential to the sustenance of life." Irrespective of this, the panel finds that given the subsequent substantial changes made to the legislation the July 4, 2002 decision is of no value or assistance to interpreting s. 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 the CellStim device in 2002 does not establish a precedent for the provision of the InterX device and that each request must be determined under the legislation in effect at the time of the request.

EAPWDR, s. 69 Life-threatening Health Need

Appellant's Position

The appellant did not expressly take a position respecting a life-threatening health need but argued that based on the wording of s. 69, the ministry has agreed that the InterX device is a Schedule C supplement.

Ministry's Position

The ministry's position is that the appellant is not eligible for the InterX 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 InterX 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 insufficient evidence to indicate that the InterX device in particular was required to meet a life-threatening health need at the time of the original request in March of 2010, at the time of reconsideration, or at present.

Further, the panel finds that the ministry appears to have considered the request under s. 69 as a request for an electrotherapy device under policy given its conclusion that the parameters for the provision of TENS machines were exceeded. This consideration cannot reasonably be viewed as the ministry's acceptance of the InterX device as a positioning device under Schedule C.

Conclusion

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