APPEAL NUMBER

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated May 2, 2019, which held that: the appellant was not eligible for a "Kodiak" cold therapy system as a medical supply pursuant to the *Employment and Assistance Act for Persons with Disabilities Regulation,* Schedule C, section 2(1)(a); the appellant was not eligible for a "Kodiak" cold therapy system as an orthotic pursuant to the *Employment and Assistance Act for Persons with Disabilities Regulation,* Schedule C, section 3; the appellant was not eligible for a "Kodiak" cold therapy system as another type of medical equipment pursuant to the *Employment and Assistance Act for Persons with Disabilities Regulation*, Schedule C, section 3; and the appellant was not eligible for a "Kodiak" cold therapy system under section 69, Life-Threatening Health Need, of the *Employment and Assistance Act for Persons with Disabilities Regulation*..

PART D – RELEVANT LEGISLATION

Employment and Assistance Act for Persons with Disabilities Act (EAPWD)
Employment and Assistance Act for Persons with Disabilities Regulation (EAPWDR), Schedule C

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PART E – SUMMARY OF FACTS

Information Before The Ministry at Reconsideration

1. The appellant is a recipient of disability assistance;
2. The appellant was scheduled for ACL reconstruction surgery and a likely consequence of that surgery is significant swelling of the knee;
3. The "Berg Polar Care Kodiak System" ("Kodiak") is a cold therapy system that provides continuous flow of temperature regulated cold water from a reservoir into a compression pad; and
4. The appellant had been prescribed a "Kodiak" system.

Information Provided on Appeal

1. The appellant's Notice of Appeal dated May 8, 2019. In that Notice, the Appellant stated that the Kodiak system was a "medically required ice pack system" and that "not using this system could negatively impact my post op recovery and result in significant disability." The panel determined, pursuant to *Employment and Assistance Act*, section 22(4), that this information was admissible because it was in support of the information before the ministry at reconsideration that the "Kodiak" system had been prescribed; and
2. The appellant informed the panel that she had the surgery on May 21, 2019 and that she was able to borrow a Kodiak system from another individual.

Summary of Relevant Evidence

1. The appellant is a recipient of disability assistance;
2. The appellant had been scheduled to undergo ACL reconstruction surgery;
3. The appellant had been prescribed a "Kodiak" "for an upcoming surgical procedure and treatment of ongoing medical condition thereafter"; and
4. The appellant had been prescribed a "Kodiak" because it is "the best treatment to manage and prevent this post-operative swelling".

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PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decisions that:

1. the appellant was not eligible for a "Kodiak" cold therapy system as a medical supply pursuant to the *Employment and Assistance Act for Persons with Disabilities Regulation,* Schedule C, section 2(1)(a);
2. the appellant was not eligible for a "Kodiak" cold therapy system as an orthotic pursuant to the *Employment and Assistance Act for Persons with Disabilities Regulation,* Schedule C, section 3;
3. the appellant was not eligible for a "Kodiak" cold therapy system as another type of medical equipment pursuant to the *Employment and Assistance Act for Persons with Disabilities Regulation*, Schedule C, section 3; and
4. the appellant was not eligible for a "Kodiak" cold therapy system under a Life-Threatening Health Need pursuant to the *Employment and Assistance Act for Persons with Disabilities Regulation*, section 69.

is reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant.

Relevant Legislation

EAPWDR schedule C, section 2(1)(a) states:

General health supplements

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

(a)medical or surgical supplies that are, at the minister's discretion, either disposable or reusable, if the minister is satisfied that all of the following requirements are met:

(i)the supplies are required for one of the following purposes:

(A)wound care;

(B)ongoing bowel care required due to loss of muscle function;

(C)catheterization;

(D)incontinence;

(E)skin parasite care;

(F)limb circulation care;

(ii)the supplies are

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

(B)the least expensive supplies appropriate for the purpose, and

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

(iii)there are no resources available to the family unit to pay the cost of or obtain the supplies;

EAPWDR schedule C, section 3 states:

Medical equipment and devices

3 (1)Subject to subsections (2) to (5) of this section, the medical equipment and devices described in sections 3.1 to 3.12 of this Schedule are the health supplements that may be provided by the minister if

(a)the supplements are provided to a family unit that is eligible under section 62 *[general health supplements]* of this regulation, and

(b)all of the following requirements are met:

(i)the family unit has received the pre-authorization of the minister for the medical equipment or device requested;

(ii)there are no resources available to the family unit to pay the cost of or obtain the medical equipment or device;

(iii)the medical equipment or device is the least expensive appropriate medical equipment or device.

EAPWDR schedule C, section 3.10 states:

Medical equipment and devices — orthoses

3.10 (1)In this section:

"off-the-shelf", in relation to an orthosis, means a prefabricated, mass-produced orthosis that is not unique to a particular person;

"orthosis" means

(a)a custom-made or off-the-shelf foot orthotic;

(b)custom-made footwear;

(c)a permanent modification to footwear;

(d)off-the-shelf footwear required for the purpose set out in subsection (4.1) (a);

(e)off-the-shelf orthopaedic footwear;

(f)an ankle brace;

(g)an ankle-foot orthosis;

(h)a knee-ankle-foot orthosis;

(i)a knee brace;

(j)a hip brace;

(k)an upper extremity brace;

(l)a cranial helmet used for the purposes set out in subsection (7);

(m)a torso or spine brace;

(n)a foot abduction orthosis;

(o)a toe orthosis;

(p)a walking boot.

(2)Subject to subsections (3) to (11) of this section, an orthosis is a health supplement for the purposes of section 3 of this Schedule if

(a)the orthosis is prescribed by a medical practitioner or a nurse practitioner,

(b)the minister is satisfied that the orthosis is medically essential to achieve or maintain basic functionality,

(c)the minister is satisfied that the orthosis is required for one or more of the following purposes:

(i)to prevent surgery;

(ii)for post-surgical care;

(iii)to assist in physical healing from surgery, injury or disease;

(iv)to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition, and

(d)the orthosis is off-the-shelf unless

(i)a medical practitioner or nurse practitioner confirms that a custom-made orthosis is medically required, and

(ii)the custom-made orthosis is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.

EAPWDR Section 69 states:

Health supplement for persons facing direct and imminent life threatening health need

69 The minister may provide to a family unit any health supplement set out in sections 2 (1) (a) and (f) *[general health supplements]* and 3 *[medical equipment and devices]* of Schedule C, 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 the minister is satisfied that

(a)the person faces a direct and imminent life threatening need and there are no resources available to the person's family unit with which to meet that need,

(b)the health supplement is necessary to meet that need,

(c)a person in the family unit is eligible to receive premium assistance under the *Medicare Protection Act*, and

(d)the requirements specified in the following provisions of Schedule C, as applicable, are met:

(i)paragraph (a) or (f) of section (2) (1);

(ii)sections 3 to 3.12, other than paragraph (a) of section 3 (1).

Ministry Position

The ministry stated that the Appellant was receiving disability assistance and therefore met the requirement of section 62 and Schedule C of the EAPWDR.

The ministry stated that the "Kodiak" was not a medical supply and therefore did not come within the scope of EAPWDR Schedule C, section 2(1)(a). The ministry stated that the "Kodiak" was medical equipment because it was "a motorized medical device which operates by electrical or battery power."

The ministry stated that although the "Kodiak" was a medical equipment, it did not come within the medical equipment articulated in EAPWDR Schedule C, sections 3.1 to 3.12. In particular, the ministry stated that the "Kodiak" was not an orthosis as described in EAPWDR Schedule C, section 3.10(1).

The ministry also stated that the appellant was not entitled to a "Kodiak" as a life-threatening health need under EAPWDR section 69, because section 69 applies to a family unit who is not in receipt of disability assistance but the appellant was in receipt of disability assistance. Essentially, the ministry's position was that EAPWDR section 69 "is intended to provide a remedy for those persons who are facing a direct and imminent life-threatening health need for these supplements and who are not otherwise eligible to receive them."

Appellant Position

The appellant's position was that multiple medical professionals told her that she needed to have access to a "Kodiak" system. The appellant also emphasized that her surgery was a day surgery and that providing a Kodiak system was cost effective. The appellant also stated that it was important for her to recover quickly after the surgery because she had several dependants that she cared for.

Panel Decision

The panel is very sympathetic to the Appellant's situation and understands that she was told by multiple medical professionals that it was important for her to have access to a "Kodiak" system in order to manage the consequences of her surgery. The panel also understands that the appellant is under a lot of pressure to care for her dependents and that she wanted to take every reasonable precaution to make it more likely that she would recover quickly after the surgery.

The panel has considered the ministry's determination that the "Kodiak" was medical equipment rather than a medical supply because it is "a motorized device which operates by electrical or battery power". The panel was provided with no basis for the ministry to make this distinction and the panel's review of the EAPWDR does not indicate that this distinction is articulated in the legislation. Consequently, the panel finds that the ministry's determination that the "Kodiak" was not a medical supply is not a reasonable application of the applicable enactment.

However, if the "Kodiak" is a medical supply under EAPWDR Schedule C, section 2(1), the panel finds that it was not "necessary to avoid an imminent and substantial danger to [the appellant's] health" as required by section 2(1)(ii)(C). The panel notes that portion of the legislation was reproduced in the Reconsideration Decision, although it was not commented on directly. The prescriptions for the "Kodiak" make no reference to any imminent and substantial danger to the appellant's health. Instead they state the "Kodiak" is for "treatment of ongoing medical condition" and "the best treatment to manage and prevent this post-operative swelling". Consequently, the panel finds that the ministry's decision that the appellant was not entitled to a "Kodiak" under EAPWDR Schedule C, section 2(1) was reasonably supported by the evidence before the ministry at reconsideration.

The panel considered the ministry's determination that the "Kodiak" was medical equipment but not an orthosis as defined in EAPWDR Schedule C, section 3.10(1). The definition of orthosis in the enactment is exclusive (as signified using the word "means" rather than "includes" in the definition). The panel notes that the "Kodiak" is not a knee brace but instead a machine that permits the circulation of cool water and the panel accepts that the "Kodiak" is not medical equipment as defined in section 3.10(1) and therefore concludes that the ministry's decision that the appellant was not entitled to a "Kodiak" under EAPWDR Schedule C, section 3.10(1) was reasonably supported by the evidence before the ministry and is a reasonable application of the applicable enactment in the circumstances of the appellant.

The panel considered the ministry's determination that the "Kodiak" did not come within the type of medical equipment provided in the EAPWDR. The panel finds that the "Kodiak" is not analogous to any other category of medical equipment provided in EAPWDR Schedule C, sections 3.1 to 3.12 and that the ministry's decision that the appellant was not entitled to a "Kodiak" under EAPWDR Schedule C, sections 3.1 to 3.12 was reasonably supported by the evidence before the ministry and is a reasonable application of the applicable enactment in the circumstances of the appellant.

The panel considered the ministry's determination that the appellant did not come within the scope of EAPWDR section 69 because she was in receipt of disability assistance. The panel notes that the use of the term "family unit" in the section implies that it is intended to distinguish this section from section 62 which applies to "a family unit in receipt of disability assistance", "a family unit in receipt of hardship assistance" or a "family unit, if the health supplement is provided to or for a person in the family unit who is a continued person." However, the definition of "family unit" in the EAPWD Act is "an applicant or a recipient and his or her dependents" and consequently, the appellant is a family unit. Therefore, the panel finds that the ministry's determination that the appellant was not entitled to benefits under section 69 because as a "recipient of disability assistance", the appellant "[does] nor require the remedy under section 69" is not a reasonable application of the applicable enactment.

However, section 69(a) requires that a "person faces a direct and imminent life threatening need" in order to be eligible to a health supplement. As stated above, the prescriptions for the "Kodiak" make no reference to any imminent or life threatening need and the panel, therefore, finds that the ministry's decision that the appellant was not entitled to a "Kodiak" under EAPWDR section 69 was reasonably supported by the evidence before the ministry at reconsideration.

In conclusion, the panel finds that the ministry's decision that the appellant was not entitled to a "Kodiak" pursuant to EAPWDR section 62 or EAPWDR Schedule C, was reasonably supported by the evidence and was a reasonable application of the applicable enactment in the circumstances of the appellant.

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PART G – ORDER

THE PANEL DECISION IS: (Check one) ☒ **UNANIMOUS** ☐ **BY MAJORITY**

THE PANEL ☒ **CONFIRMS THE MINISTRY DECISION** ☐ **RESCINDS THE MINISTRY DECISION**

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? ☐ Yes ☐ No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) ☒ or Section 24(1)(b) ☐

and

Section 24(2)(a) ☒ or Section 24(2)(b) ☐

PART H – SIGNATURES

PRINT NAME Trevor Morley	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2019/06/14

PRINT NAME Marilyn Mellis	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY)
PRINT NAME Anne Richmond	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019/06/14