APPEAL NUMBER

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the reconsideration decision dated September 6, 2019 (the "Reconsideration Decision") of the Ministry of Social Development and Poverty Reduction (the "Ministry") which found that the appellant was not eligible for a new left knee brace under Schedule C, subsection 3 (1) and subsections 3.10 (1) to (12) of the *Employment and Assistance for Persons with Disabilities Regulation* ("EAPWDR").

APPEAL NUMBER

**PART D – RELEVANT LEGISLATION**

Employment and Assistance for Persons with Disabilities Regulation, section 62 and 69 (“EAPWDR”)
EAPWDR, Schedule C, sections 3 and 3.10

APPEAL NUMBER

**PART E – SUMMARY OF FACTS**

The evidence before the Ministry at the time of the Reconsideration Decision consisted of the following:

- An Orthosis Request and Justification form signed by the appellant June 11, 2019, with section 2 completed by the appellant's physician on June 11, 2019 describing the appellant's medical condition as: "a left knee full reconstruction and medial and lateral meniscal repair, postoperative". The type of orthosis recommended was stated to be: "brace to support the reconstructed ACL and the repaired medial and lateral meniscus". Section 3 of the form was not completed.
- An attachment from a pharmacy providing a quote for a made-to-measure custom ACL/MCL/meniscus grade 2 injury left knee brace.
- A quote dated June 5, 2019 from a brace manufacturer providing a quote for a custom manufactured knee brace used in the treatment of combined knee ligament instability and unique compartmental osteoarthritis or meniscal damage.
- A prescription dated June 5, 2019 from a family physician for walking crutches.
- A prescription dated June 5, 2019 from a family physician for a knee brace for ACL, MCL and meniscal tear.
- An undated letter from the appellant in support of their application for reconsideration of a request for a new knee brace. The letter notes that while a previous knee brace received by the appellant may seem similar to the new knee brace they are requesting, the new knee brace is needed to accommodate new medical information provided to the appellant post-surgery. The knee brace the appellant already had no longer fulfils the medical purpose they had because during surgery the physician discovered that the meniscus was also damaged. Post-surgery, additional knee support is required and that required a differently designed knee brace

In the appellant's notice of appeal dated September 17, 2019 the appellant stated that they disagreed with the Ministry's Reconsideration Decision as there was a "change to diagnosis from the surgeon".

In the Reconsideration Decision, the Ministry reviewed the background and context of the appellant's initial request for a left knee brace. It noted the following:

- On March 28, 2019 the Ministry issued a purchase authorization for a left knee brace. This was based on information provided in documents submitted at the appellant's request described in more detail below. The Ministry received an invoice from the supplier dated March 28, 2019 that was paid by the Ministry on April 8, 2019.
- The documentation submitted with the initial request is summarized as follows:
- On March 6, 2019 the appellant submitted documents from a medical practitioner indicating the appellant had sustained a left knee MCL and ACL injury. A G2 knee brace was prescribed. The Ministry provided the appellant with an Orthosis Request and Justification form, section 2 of which was subsequently completed by the appellant's physician on March 7, 2019. The appellant's physician described the appellant's medical condition as MCL and ACL left knee sprain and recommended a G2 knee brace, or comparable.
- On March 21, 2019 a supplier sent a quote for a custom knee brace.
- On March 22, 2019 the Ministry received the Orthoses Request and Justification form with section 3 completed by the appellant's physician. The section 3 information indicated
- That the appellant had anterior instability, ACL rupture, MCL sprain and knee brace is required for treatment.
- the knee brace will improve stability of the left knee when performing daily functional activities
- the knee brace is required for the prevention of surgery and to assist in physical healing from surgery, injury or disease.
- Confirming that a custom left knee brace was required.
- On March 27, 2019 the knee brace supplier forwarded section 3 of the Orthosis Request and Justification form completed by a pedorthist. The pedorthist advised that the appellant required a custom ACL carbon fibre knee brace to aid in recovery after surgery, the brace will help postoperatively with ACL support and aid in pain relief and stability, the brace is required for post-surgical treatment and to assist in physical healing from surgery, injury or disease. The brace will be used after surgery to stabilize ACL to prevent re-

injury of the ACL and that a custom-made brace was required, as an off-the-shelf brace will not properly support the ACL post-surgery.

On June 5, 2019 the Ministry received a note from a physician prescribing a brace for a ACL, MCL and meniscus tear. A quote was received from a knee brace supplier. The quote was completed by a kinesiologist.

On June 7, 2019 the Ministry received a quote from a different supplier.

On June 12, 2019 the Ministry received an Orthoses Request and Justification form. Section 2 was completed by the appellant's physician who described the medical condition as: left knee ACL reconstruction and medical and lateral meniscal repair, post-operative.

The physician recommended a brace to support the reconstructed ACL and the repaired medial and lateral meniscus.

Ministry notes indicate the appellant asked an Employment and Assistance worker [EAW] if it was necessary to have section 3 of the Orthoses Request and Justification form completed again. The EAW informed the appellant that section 3 would need to be completed again because the type of knee brace requested had changed from the first brace. The EAW suggested that a specific kinesiologist with the knee brace supplier could assist the appellant with getting the paperwork completed.

On June 14, 2019 the Ministry received an excerpt from section 2 of the Orthoses Request and Justification form signed by a medical practitioner and confirming that the brace would be required for at least six hours per day.

On July 18, 2019 the Ministry denied the appellant's request.

On August 22, 2019 the Ministry received the plaintiff's Request for Reconsideration attaching the undated letter referred to above. In the appellant's letter the appellant stated:

"*The hinge on the old knee brace is designed to protect my ACL. However, it will not hold my medial and lateral meniscus-as these are differently designed knee braces for this purpose.*
*…*
*Though I recognize that the time frame established in 3.10 (10), Table 2, for a new knee brace has yet to elapse, I submit that I do not require the previous knee brace to be replaced, the time frame for which this clause seeks to establish; rather, I need a brand-new knee brace for a newly discovered injury (menisci were torn prior to surgery) that must be protected."*

The appellant's letter also noted that due to these newly discovered and repaired injuries the reconsideration should take into account extraordinary circumstances.

APPEAL NUMBER

**PART F – REASONS FOR PANEL DECISION**

The issue on appeal is whether the Ministry reasonably denied a replacement left knee brace because the request did not meet the eligibility requirements set out in the EAPWDR, Schedule C, section 3 (3). The Ministry further determined that although there is provision in policy allowing the Ministry to provide replacement of medical equipment previously provided by the Ministry if there is a need due to changes in medical condition, the appellant's medical practitioner had not confirmed the appellant's medical condition had changed from the time the Ministry provided a left knee brace in March 2019 to the time of the decision and that the change required another knee brace for post-surgical care and to assist in physical healing of the ACL as well as the meniscus; and further determining that it would be necessary for section 3 of the Orthoses Request and Justification form to be completed by one of the professionals designated in the legislation.

**Legislative framework**

Section 62 of the EAPWDR and Schedule C, section 3 and section 3.10 contain the relevant legislation.

## General health supplements

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

(a) a family unit in receipt of disability assistance,
(b) a family unit in receipt of hardship assistance, if the health supplement is provided to or for a person in the family unit who is under 19 years of age, or
(c) a family unit, if the health supplement is provided to or for a person in the family unit who is a continued person.

## Schedule C

Definitions

**"orthotist"** means a person who is certified by and in good standing with the Canadian Board for Certification of Prosthetists and Orthotists;

**"pedorthist"** means a person who is certified by and in good standing with the College of Pedorthics of Canada;

**"physical therapist"** means a physical therapist registered with the College of Physical Therapists of British Columbia established under the *Health Professions Act*;

## Medical equipment and devices

APPEAL NUMBER

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

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

(b) all of the following requirements are met:

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

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

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

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

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

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

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

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

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

(3) Subject to subsection (6), the minister may provide as a health supplement a replacement of medical equipment or a medical device, previously provided by the minister under this section, that is damaged, worn

out or not functioning if

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

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

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

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

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

(b) it is more economical to repair the medical equipment or device than to replace it.

(6) The minister may not provide a replacement of medical equipment or a medical device under subsection (3) or repairs of medical equipment or a medical device under subsection (4) or (5) if the minister considers that the medical equipment or device was damaged through misuse.

**Medical equipment and devices — orthoses**

**3.10** (1) In this section:

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

**"orthosis"** means

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

(b) custom-made footwear;

(c) a permanent modification to footwear;

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

(e) off-the-shelf orthopaedic footwear;

(f) an ankle brace;

(g) an ankle-foot orthosis;

(h) a knee-ankle-foot orthosis;

(i) a knee brace;

(j) a hip brace;

(k) an upper extremity brace;

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

(m) a torso or spine brace;

(n) a foot abduction orthosis;

(o) a toe orthosis;

(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.

(3) For an orthosis that is a custom-made foot orthotic, in addition to the requirements in subsection (2) of this section, all of the following requirements must be met:

(a) a medical practitioner or nurse practitioner confirms that a custom-made foot orthotic is medically required;

(b) the custom-made foot orthotic is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist;

(c) Repealed. [B.C. Reg. 144/2011, Sch. 2.]

(d) the custom-made foot orthotic must be made from a hand-cast mold;

(e) the cost of one pair of custom-made foot orthotics, including the assessment fee, must not exceed $450.

(4) For an orthosis that is custom-made footwear, in addition to the requirements in subsection (2) of this section, the cost of the custom-made footwear, including the assessment fee, must not exceed $1 650.

(4.1) For an orthosis that is off-the-shelf footwear, in addition to the requirements in subsection (2) of this section,

(a) the footwear is required to accommodate a custom-made orthosis, and

(b) the cost of the footwear must not exceed $125.

(4.2) For an orthosis that is off-the-shelf orthopaedic footwear, in addition to the requirements in subsection (2) of this section, the cost of the footwear must not exceed $250.

(5) For an orthosis that is a knee brace, in addition to the requirements in subsection (2) of this section, the medical practitioner or nurse practitioner who prescribed the knee brace must have recommended that the knee brace be worn at least 6 hours per day.

(6) For an orthosis that is an upper extremity brace, in addition to the requirements in subsection (2) of this section, the upper extremity brace must be intended to provide hand, finger, wrist, elbow or shoulder support.

(7) For an orthosis that is a cranial helmet, in addition to the requirements in subsection (2) of this section, the cranial helmet must be a helmet prescribed by a medical practitioner or nurse practitioner and recommended for daily use in cases of self abusive behaviour, seizure disorder, or to protect or facilitate healing of chronic wounds or cranial defects.

(8) For an orthosis that is a torso or spine brace, in addition to the requirements in subsection (2) of this section, the brace must be intended to provide pelvic, lumbar, lumbar-sacral, thoracic-lumbar-sacral, cervical-

thoracic-lumbar-sacral, or cervical spine support.

(9) Subject to section 3 of this Schedule, the limit on the number of orthoses that may be provided for the use of a person as a health supplement for the purposes of section 3 of this Schedule is the number set out in Column 2 of Table 1 opposite the description of the applicable orthosis in Column 1.

**Table 1**

| Item | Column 1<br>**Orthosis** | Column 2<br>**Limit** |
|---|---|---|
| 1 | custom-made foot orthotic | 1 or 1 pair |
| 2 | custom-made footwear | 1 or 1 pair |
| 3 | modification to footwear | 1 or 1 pair |
| 4 | ankle brace | 1 per ankle |
| 5 | ankle-foot orthosis | 1 per ankle |
| 6 | knee-ankle-foot orthosis | 1 per leg |
| 7 | knee brace | 1 per knee |
| 8 | hip brace | 1 |
| 9 | upper extremity brace | 1 per hand, finger, wrist, elbow or shoulder |
| 10 | cranial helmet | 1 |
| 11 | torso or spine brace | 1 |
| 12 | off-the-shelf footwear | 1 or 1 pair |
| 13 | off-the-shelf orthopaedic footwear | 1 or 1 pair |
| 14 | foot abduction orthosis | 1 or 1 pair |
| 15 | toe orthosis | 1 |

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

**Table 2**

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

(11) The following items are not health supplements for the purposes of section 3 of this Schedule:

(a) a prosthetic and related supplies;

(b) a plaster or fiberglass cast;

(c) a hernia support;

(d) an abdominal support.

(e) Repealed. [B.C. Reg. 94/2018, App. 2, s. 1 (b).]

(f) Repealed. [B.C. Reg. 144/2011, Sch. 2.]

(12) An accessory or supply that is medically essential to use an orthosis that is a health supplement under subsection (2) is a health supplement for the purposes of section 3 of this Schedule.

***Panel decision***

The appellant noted that post surgery she could not use the original knee brace due to knee swelling.

The appellant emphasized that after surgery the surgeon advised that now the medial lateral and medial collateral ligaments were involved. Previously, an MRI had been used to confirm the involvement of only the anterior cruciate ligament [ACL].

The appellant noted that the ACL prevents anterior movement but the meniscus functions as a shock absorber. Recovery is longer after a surgical repair of the meniscus because of decreased blood supply. A knee brace can help with recovery that can be up to nine months according to the appellant's surgeon. A complicating factor is the possibility of the development of arthritis. There is a risk of falling.

The appellant noted that she was unable to fully extend her knee and that in turn can cause muscle atrophy, muscle weakness and a further risk of falling.

The appellant noted that the brace previously obtained was directed only to the stability of the ACL. It did not protect the meniscus.

The appellant argued that without a new brace she could not return to normal activities including certain recreational activities. There was a risk, she argued, of a further injury.

In response to a question from the hearing panel the appellant noted that the appellant had spoken to staff at the Ministry and specifically asked whether the appellant should obtain a new Orthoses Request and Justification form. The appellant stated that she was advised that she should use the old form. The appellant stated that they asked about section 3 of the form and whether a new section 3 was required. The appellant said that she was told a new section 3 would not be required.

The appellant said that she had requested to speak to a staff supervisor at the Ministry but that she never received a return call.

At the hearing the appellant was asked why she did not submit a completed Schedule 3 as requested by the Ministry staff which would have met the criteria required. The appellant responded that it costs money to get the

Schedule completed by the appropriate professional.

In respect of the appellant's dealings with the Ministry staff, the Ministry representative at the hearing indicated that occasionally front office staff "might not have the full picture".

The Ministry representative noted that the Reconsideration Decision was based upon the information provided by the appellant. The Ministry representative noted that section 3 of the Orthosis Request and Justification form was incomplete i.e. it had not been completed at all.

The Ministry representative also noted that the new knee brace quote came from a kinesiologist who is not a designated specialist as required by the EAPWDR.

The Ministry representative noted that there is an exception to the replacement provisions in the legislation. If a new brace is required that requirement must be based upon a change in medical circumstances. The Ministry representative noted that information in respect of a change in medical circumstance was provided by the appellant but only by way of a letter from the appellant. The information contained in that letter was not verified by a medical practitioner and section 3 of the Orthoses Request and Justification form had not been completed.

The Ministry representative also noted that the quote for the brace had not been provided by a designated specialist as provided by the EAPWDR.

The Ministry representative has acknowledged that the appellant is in receipt of disability assistance and therefore the appellant is eligible to receive health supplements set out in EAPWDR, Schedule C, regarding medical equipment and devices.

Consequent upon the appellant's entitlement, the Ministry paid for a left knee brace for the appellant on April 8, 2019.

Section 3 (3) of the EAPWDR sets out the eligibility requirements regarding the replacement of medical equipment or device the Ministry has previously provided. The Minister may provide as a health supplement a replacement of medical equipment or medical device previously provided by the Minister that is damaged, worn out or not functioning if it is more economical to replace than to repair the medical equipment or device previously provided, and the period of time set out in Schedule C has passed.

Subsection 3.10 (10) specifies the duration for the replacement of a knee brace as four years.

In this case the four year period for replacement of a knee brace has not expired. Accordingly, this requirement has not been met.

In the appellant's newly submitted Orthoses Request and Justification form dated June 11, 2019, section 2 was completed by the appellant's physician along with a quote for a new left knee brace; the quote was completed by a clinician who was a kinesiologist.

A kinesiologist is not one of the health professionals designated in the EAPWDR, Schedule C, subsection 3.10 (2) (d) (ii) as authorized to fit a custom-made orthosis. Those health professionals include an orthotist, pedorthist, occupational therapist, physical therapist, or podiatrist. A kinesiologist is not one of those health professionals as designated.

Additionally, section 3 of the Orthoses Request and Justification form was not completed.

Although the information in the appellant's letter is compelling it is not supported or acknowledged by a medical practitioner or other health professional described in the legislation as having authority to assess the need to provide anorthosis. Consequently, relevant information is missing from the plaintiff's request. In particular exactly how the appellant's medical condition has changed from the time the Ministry approved the first request for a left knee brace in March 2019 and the time the request for the replacement knee brace was submitted. Further, exactly why the knee brace provided by the Ministry no longer meets the appellant's needs, why the knee brace provided by the Ministry cannot be modified, why it would be more economical to replace it rather the modify it, how the knee brace requested will improve the appellant's basic functionality and whether the knee brace requested will be fitted by one of the professionals set out in the legislation.

If section 3 of the Orthoses Request and Justification form had been completed, the information required by the Ministry would likely have been available to the Ministry for consideration.

Although the Ministry was willing to apply the exception set out in its policy in the unique circumstances of the appellant's case, the confirmatory information the Ministry required was not available to it.

On a review of all the evidence and relevant legislation the panel finds that the Reconsideration Decision was a reasonable application of the relevant provisions of the EAPWDR as described in this decision, in the appellant's circumstances, and was reasonably supported by the evidence. In the result, the panel confirms the Ministry's decision and the appellant is not successful in the appeal.

**PART G – ORDER**

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

**THE PANEL** X **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) X or Section 24(1)(b) X

and

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

**PART H – SIGNATURES**

| PRINT NAME | |
|---|---|
| Perry Mazzone | |
| SIGNATURE OF CHAIR | DATE (YEAR/MONTH/DAY)<br>2019/October/28 |

| PRINT NAME | |
|---|---|
| Rob Nijjar | |
| SIGNATURE OF MEMBER | DATE (YEAR/MONTH/DAY)<br>2019/October/28 |
| PRINT NAME | |
| Nancy Eidsvik | |
| SIGNATURE OF MEMBER | DATE (YEAR/MONTH/DAY)<br>2019/October/28 |