

**Part C - Decision Under Appeal**

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“Ministry”) dated March 29, 2023, in which the Ministry denied funding for a right knee brace.

**Part D - Relevant Legislation**

Employment and Assistance for Persons with Disabilities Regulation (“Regulation”), section 62 and Schedule C, sections 3 and 3.10 (1), (2), (5), (9) and (10)

Full text of the legislation is in the Schedule of Legislation at the end of the Reasons.

**Part E – Summary of Facts**

The hearing took place in person, with the Ministry joining by telephone.

Evidence Before the Ministry at Reconsideration:

The Appellant is designated as a person with disabilities (“PWD”) and receives disability assistance under the Employment and Assistance for Persons with Disabilities Act.

The Appellant injured his right knee in 2021. In August 2022, Doctor #1 sent him for an MRI, and then referred him to the Orthopedic Surgeon. In September 2022, Doctor #2 prescribed a right knee brace, stating that it was needed due to a severely torn right medial meniscus. The Appellant asked the Ministry to provide a semi-rigid neoprene right knee brace (“neoprene brace”). The Ministry approved the request and provided funding for the neoprene brace in October 2022.

On November 2, 2022, the Appellant saw the Orthopedic Surgeon, who determined that the Appellant was not a candidate for surgery. The Orthopedic Surgeon diagnosed “right medial sided knee pain, early degeneration”, with a “knee problem rooted in underlying varus alignment.” They prescribed a right knee valgus producing unloader brace (“unloader brace”). The unloader brace is different in construction from the neoprene brace.

An Orthotist stated:

“Based on the surgeon’s recommendation and the imaging from his X-ray, his current brace is not appropriate in managing the damaging effects of his osteoarthritis. His knee is lacking a big portion of his meniscus and cartilage due to previous knee injuries and he displays a large amount of genu varum deformity. The lack of cartilage along with his anatomical varus are contributing to the rapid progression of his medial osteoarthritis and knee pain.”

Additional Evidence:

The Appellant provided the following documents:

1. Letter from the Orthopedic Surgeon confirming they have prescribed the unloader brace and explaining the benefits.
2. Letter from Doctor #1 stating that they had prescribed the neoprene brace as a temporary measure, in the expectation that the Appellant would be a candidate for surgery. They also explained the benefits of the unloader brace, which would allow the

Appellant to walk without pain, reduce dependence on pain medication and avoid knee replacement surgery.

3. Anterior knee pain physiotherapy prescription from the Orthopedic Surgeon, dated November 2, 2022.

At the hearing, the Appellant stated:

- His knee is worse now than when the Doctor prescribed the first knee brace
- The Orthopedic Surgeon ordered x-rays, which showed that he has no cartilage left in his right knee
- The knee brace the Ministry funded in October 2022 is pliable, and has no support in the front
- With the neoprene brace, it takes him 45 minutes to walk a distance that should take 7 to 10 minutes, and afterwards he has to take pain medication and he cannot function for two days.

Admissibility of Additional Evidence:

The Ministry did not object to the admission of the additional letters from the Doctors, the knee brace prescription, or the additional oral evidence of the Appellant at the hearing.

The Panel finds that the additional evidence is reasonably required for the full and fair disclosure of all matters in the appeal. Therefore, the Panel finds that the additional evidence is admissible under EAA s. 22(4).

**Part F – Reasons for Panel Decision**

The issue on appeal is whether the Ministry's reconsideration decision to deny the Appellant funding for the unloader brace was reasonably supported by the evidence or was a reasonable application of the legislation in the Appellant's circumstances. The Ministry determined that the Appellant was not eligible for replacement of a knee brace until October 2026, because it had provided the neoprene brace in October 2022.

Appellant's Position:

The Appellant says that Doctor #2 and the Orthopedic Surgeon confirm that he needs the unloader brace if he is to avoid knee replacement surgery. He says that, with the neoprene brace, he does not have basic functionality. He acknowledges that, under the legislation, the Ministry may only fund a replacement knee brace every four years. However, he points to the Ministry's published policy, which says that the replacement period does not apply if there has been a change in a person's medical condition. He says that, between the time that he saw Doctor #1 and the Orthopedic Surgeon, the injury is no longer just a torn meniscus; now there is no cartilage remaining in his right knee, and the condition is inoperable.

Ministry's Position:

The Ministry is satisfied that the Appellant meets the eligibility requirements for a knee brace under Schedule C of the Regulation, except that the Ministry is only permitted to provide a replacement knee brace every 4 years. The Ministry says that the Appellant is asking for replacement of a knee brace that the Ministry provided in October 2022. Therefore, the Ministry says that, under Schedule C, section 3.10(10), the replacement period for knee brace is four years, and the Ministry cannot provide a replacement knee brace until October 2026.

The Ministry acknowledges that, under its published policy, the replacement period does not apply if the replacement is required due to changes in a person's medical condition or growth. However, the Ministry maintains that the Appellant needs a replacement knee brace because the Doctor misdiagnosed the Appellant's condition and prescribed the wrong knee brace, not because the Appellant's medical condition changed. Therefore, the Ministry says that the Appellant is not eligible for the unloader brace under the policy exception.

Panel Decision:

The Panel finds that, considering the additional evidence, the Ministry's reconsideration decision was a reasonable application of the legislation in the Appellant's circumstances.

The Ministry agrees that the Appellant meets all but one of the eligibility criteria to receive a right knee brace under Schedule C of the Regulation. The Ministry is satisfied that:

- The Appellant is eligible to receive health supplements under section 3 of Schedule C
- He is requesting pre-authorization
- He does not have resources available to buy the right knee brace
- The unloader brace is the least expensive device appropriate for his needs
- The unloader brace has been prescribed by a medical practitioner
- The unloader brace is medically essential to achieve or maintain functioning
- The Appellant needs the unloader brace to assist in physical healing from surgery, injury or disease, and improve functioning impaired by a neuro-musculoskeletal condition
- He will use the unloader brace at least six hours a day.

However, the Ministry was not satisfied that the Appellant is eligible to receive funding for the unloader brace, because it is a replacement for the neoprene brace, which was provided less than four years ago.

Under Schedule C, section 3(3)(b) the Ministry may replace a medical device previously provided by the Ministry if the period of time set out in Schedule C has passed. Under Schedule C, section 3.10, the period of time for a knee brace is four years.

The Appellant is asking for replacement of a knee brace that the Ministry provided in October 2022. The Ministry correctly determined that, under the legislation, it cannot provide a replacement knee brace until October 2026. The Appellant does not disagree.

However, the Appellant says that he should receive the unloader brace under the Ministry's policy, set out in the Ministry's Policy and Procedure Manual. That policy states: "The replacement time period does not apply when an item is required due to changes in a person's medical condition or growth." The Appellant says that his medical condition has changed; the Ministry disagrees, instead maintaining that the Orthopedic Surgeon has given a new diagnosis, but the underlying condition is not changed. Rather, the Ministry says that Doctor #1 and Doctor #2 misdiagnosed the Appellant's medical condition, which is not an exception to the legislation under the Ministry's policy.

The Panel has considered the Ministry's argument that the Appellant needs the unloader brace because his medical diagnosis changed, not because his medical condition changed. The Panel was not provided with the report but accepts the Ministry's statement that Doctor #2 advised that the Appellant needed the neoprene brace because of a severely torn medial meniscus. The Orthopedic Surgeon says that the Appellant's knee pain is caused by underlying varus alignment. The Orthotist says that the Appellant has severe medial osteoarthritis and is no longer a surgical candidate. Whatever the stated diagnosis, the Panel would place significant weight on the Orthotist's more detailed description of the Appellant's condition, combined with the Appellant's evidence about his knee pain.

The Orthotist reports that "the lack of cartilage along with his anatomical varus are contributing to the rapid progression of his medial osteoarthritis and knee pain." The Appellant confirmed that his right knee pain is worse now. Where Doctor #1 considered that the Appellant would be a candidate for surgery in August 2022, the Orthopedic Surgeon determined in November 2022 that surgery was no longer an option.

There are different stated diagnoses of the cause of the Appellant's knee pain. However, the question for the Ministry under its policy would be whether the Appellant's medical condition has changed since he received the neoprene brace. Doctor #2 diagnosed a torn medial meniscus and Doctor #1 referred the Appellant for surgery. By the time the Orthopedic Surgeon prescribed the unloader brace, it is reported that the Appellant did not have enough cartilage for surgery to be an option. The Orthotist describes the Appellant's medial osteoarthritis as progressive, and the Appellant reports that his knee pain is getting worse.

It appears to the Panel that the Appellant's medical condition has changed since the Ministry provided funding for the neoprene brace, in which case his request would seem to fall within Ministry policy for knee brace replacement. However, under section 24 of the Employment and Assistance Act, the Panel's authority to review the Ministry's reconsideration decision is limited to determining whether:

- the decision is reasonably supported by the evidence, or
- the Ministry applied the legislation reasonably in the Appellant's circumstances.

Where the Ministry has created an exception that contradicts the legislation, and determined whether the Appellant meets the policy exception, the Panel cannot consider whether the Ministry has applied that policy reasonably, if it is not consistent with the legislation. The Panel can only determine if the decision based on the legislation is either reasonably supported by that legislation, or a reasonable application of the legislation in the Appellant's circumstances.

The Appellant would be free to re-apply for the unloader brace under Ministry policy if his

medical condition has changed, perhaps supported by a clear opinion from his Doctor or the Orthopedic Surgeon about whether they consider that his medical condition has changed since Doctor #1 and Doctor #2 prescribed the neoprene brace. The outcome of any further application would be up to the Ministry.

Conclusion:

The Panel finds that the Ministry reasonably applied the legislation in determining that the Appellant is not eligible for replacement of a knee brace until October 2026. The Panel confirms the Ministry's decision. The Appellant is not successful in the appeal.

Schedule of Legislation

Employment and Assistance for Persons with Disabilities Regulation

**General health supplements**

s. 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

**Health Supplements**

**Medical equipment and devices**

s. 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**

s. 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.

(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.

(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 <b>Orthosis</b>	Column 2 <b>Limit</b>
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 Orthosis	Column 2 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

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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)

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

**Part H – Signatures**

Print Name  
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)  
2023/09/14

Print Name  
Mimi Chang

Signature of Member

Date (Year/Month/Day)  
2023/09/14

Print Name  
Warren Fox

Signature of Member

Date (Year/Month/Day)  
2023/09/14