

### **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 20, 2024. The Ministry determined that the Appellant met the following eligibility requirements:

- The Appellant is eligible to receive health supplements under section 62 of the Regulation;
- The Appellant is requesting pre-authorization for the repairs;
- There are no resources available to pay for the repairs;
- The scooter is the least expensive device appropriate for the Appellant’s needs;
- The scooter was prescribed by a medical practitioner;
- The scooter is damaged, worn out or not functioning; and
- It is more economical to repair the scooter than to replace it.

However, the Ministry denied the Appellant’s request for repairs to her scooter because the Ministry determined that the scooter had been damaged through misuse.

### **Part D – Relevant Legislation**

Employment and Assistance for Persons with Disabilities Act, section 62  
Employment and Assistance for Persons with Disabilities Regulation, Schedule C, sections 3 and 3.4

Full text of the legislation is provided at the end of the decision.

**Part E – Summary of Facts**

The hearing took place by teleconference on May 10, 2024.

Evidence Before the Ministry at Reconsideration:

The Appellant is a recipient of disability assistance.

The Ministry provided the Appellant with a scooter in July 2022. The scooter came with a two-year Client Service Equipment Warranty covering repairs and maintenance until July 2024. In July 2023, the scooter stopped working while the Appellant was using it. The Appellant called the company who sold the scooter ("Company A"), who was responsible for repairs under the original warranty. The company picked up the scooter and took it to their facility.

On July 18, 2023, the Appellant contacted the Ministry and asked them to provide a new scooter because the scooter was broken and not repairable. She told them that Company A was telling her that she was responsible for the damage.

On September 13, 2023, the Appellant requested repairs to the scooter based on an estimate from Company M, which had bought Company A. That estimate stated that the complete front frame assembly of the scooter had to be replaced, for a cost of \$1,280.00 for parts and labour. The estimate stated: "Damage would appear to be from repeated driving off curbs, skid plate is scratched, shroud broken on both sides, welds underneath are broken and rusted. Pictures available. Not manufacturers defect."

The Ministry denied the request for repairs because the Ministry determined that the damage was due to misuse of the scooter. The Appellant submitted a further request for repairs on January 22, 2024. The Appellant also provided a letter from a doctor stating that the Appellant needs a scooter for medical reasons.

On February 23, 2024, the Appellant gave the Ministry a letter with additional information. She stated:

- She had the scooter for 11 months before it broke down the last time, and it had required several repairs to the batteries and the wires.
- The repair technician from Company A told her the scooter was repairable when they picked it up in July 2023.
- The driver who picked up the scooter in July 2023 handled it very roughly and did not use a ramp or lift to load it into the back of his vehicle.

- She had asked for the paperwork for the repairs, but Company A refused to give it to her.
- Company A told her that the scooter was disassembled, and the findings were reported to the manufacturer.
- Company A then told her that the scooter was repairable, but the repairs were not covered under the warranty because the damage was due to misuse.
- Not having the use of the scooter was causing serious and life-threatening health problems for her, because she cannot stay off her foot unless she has the scooter.

In her Request for Reconsideration, the Appellant added further details of her need for the scooter for health reasons, and pointed out the additional cost to the Ministry, and to her, in taxis and medication, as result of not having the scooter.

The Ministry tried to contact Company M on March 19, 2024, to confirm that the damage was caused by repeatedly driving off the curb, but the Ministry states that it “was unsuccessful in the attempt.”

#### Additional Evidence:

#### Appellant:

For the Appeal, the Appellant provided a letter from a vascular surgeon dated April 15, 2024, stating:

- The Appellant has undergone extensive vascular surgery on her foot due to a diabetic foot infection.
- She needs “offloading in order to prevent and or [sic] heal ulcerations” and uses the scooter and specialized foot wear for that purpose.
- The scooter “is an essential piece of equipment for her.”

She also provided a 12 page handwritten letter, some of which is argument, stating:

- On July 18, 2023, A, at Company A, told her that the scooter could not be repaired, and she should ask the Ministry to buy her a new scooter.
- Company A would not give her the estimate of damages because they said she was not the purchaser.
- Over the next two months she repeatedly contacted the Ministry, asking them to contact Company A to get the paperwork.
- Finally, the Ministry told her to tell Company A that she was going to go to their shop in person to get the paperwork, and when she told them that, suddenly they said that the scooter was repairable.

- Soon after, Company A sold their business to Company M.
- Company M told her that the warranty was void.
- She denied that she misused the scooter, and says she never drove off curbs.
- She was driving the scooter on a flat, even sidewalk when it broke down.
- The scooter had to be repaired three times because the batteries were defective, and a security feature to hold the wiring in place was not put on securely. A repair technician at Company A told her after the last repair that she might need to get something else attached under the scooter.
- The repair technician who picked up the scooter dragged the scooter by the front end 30 to 35 feet down the sidewalk to their truck, then dragged it up onto the truck while pushing and pulling it by the bottom of the scooter. The scooter weighs almost 200 pounds, and it scraped across the lip of the truck as they pushed it in. They then pushed and pulled the scooter to make it fit in the back of the vehicle.
- A, at Company A, suggested that the Appellant had driven the scooter over curbs, and the Appellant says that A just did not want to pay for the repairs.
- Company M based its statement on second- and third-hand information from Company A's database.
- The Appellant was in hospital at the time of writing the statement, using a wheelchair because she had not had a working scooter for eight months.
- As a senior, over 60 years of age and barely able to walk, she would not drive the scooter over a curb because the scooter might tip over and she would be injured, so she would never 'curb jump'.

The Appellant provided a hand-drawn diagram of the way the repair technician moved the scooter.

At the hearing, the Appellant repeated the information in her written statement and added:

- When the scooter broke down the last time, the front wheels turned sideways and locked, so the scooter was not driveable.
- Company A was urging her to get the Ministry to buy her a new scooter and offered her an additional one year warranty as an incentive.
- Company A was lying about the cause of the breakdown because it did not want to pay for the repairs.
- The first week she had the scooter, the rubber bumper on the bottom was peeling off, and a decorative piece had also come off.
- She is not able to bend down or balance well enough to look under the scooter to see if it was scratched or damaged before the last time when Company A took the

scooter away, but she does not think there were scratches on it when Company A replaced the batteries at her home on previous occasions.

- Company M still has the scooter, disassembled.
- The scooter is so essential to her life and her health that she would never risk damaging it by driving off a curb.

Ministry:

In answer to questions from the Panel, the Ministry stated:

- According to the original purchase invoice, the scooter was supplied by Company M, with whom the Ministry has a supply contract, although the Appellant may have gone through Company A.
- The Ministry relied on the assessment of damage from Company M when the Ministry denied the request for repairs, but the Ministry cannot comment on how Company M arrived at their conclusion about the cause of the damage.
- The Ministry file notes do not show what the Ministry did to try to contact Company M on March 19, 2024.
- The Ministry's usual practice when it tries to contact someone is to make three attempts in some form, such as making three phone calls.

Admissibility of Additional Evidence:

The Ministry did not object to the additional written and oral evidence of the Appellant. The Panel finds that the Appellant's additional evidence provides information about the condition of the scooter, the handling of the scooter by the Appellant and Company A, and the Appellant's communications with various parties about the repairs. Therefore, the Panel finds that the Appellant's additional evidence is reasonably required for a full and fair disclosure of all matters related to the decision under appeal and is admissible under section 22(4) of the Employment and Assistance Act.

While the Appellant did not object to the additional oral evidence of the Ministry, referring to case file notes that were not included in the Appeal Record, the Appellant pointed out that she had provided all her additional written evidence through the Tribunal before the hearing, but she could not see the file notes to which the Ministry referred (as the hearing took place by telephone). However, the Panel notes that the additional evidence from the Ministry was not new evidence that the Ministry sought to introduce without prior notice. Rather, the Ministry provided the additional evidence in response to questions from the Appellant and the Panel at the hearing. The Panel finds that the evidence is reasonably necessary to determine the issues in the appeal, and it is in the interest of procedural

fairness to allow the Ministry to refer to additional documents to be able to answer questions from the Appellant and the Panel. Therefore, the Panel finds that the additional evidence is admissible under section 22(4) of the Employment and Assistance Act.

**Part F – Reasons for Panel Decision**

The issue on appeal is whether the Ministry's reconsideration decision, in which it denied the Appellant's request for repairs to her scooter because it determined the scooter was damaged through misuse, was reasonably supported by the evidence, or was a reasonable application of the legislation in the Appellant's circumstances.

Appellant's Position:

The Appellant says that she did not misuse the scooter, and in particular she did not drive the scooter off curbs as Company M maintains. She says that the scooter is essential to her for medical reasons, and she would never risk damaging it. She also says that she would never have driven the scooter off a curb because it would be unstable and she would be risking injury to herself if it tipped over. She also argues that neither Company A nor Company M has direct knowledge of what might have happened to the scooter, so she says it is not reasonable for the Ministry to accept what she says is speculation about misuse. She also says that the repair technician from Company A mishandled the scooter when they loaded it into their vehicle after it broke down, which may have caused the damage that was noted. She maintains that the scooter had broken down three times previously, and the last time, she had been told that wiring had not been properly secured and they might need to add something to the bottom of the scooter. She says that neither she nor the Ministry can know if the parts that broke in July 2023 were already broken when it was bought, as they are all underneath the scooter and she was not shown the underside of the scooter when it was delivered. She argues that the allegation about damage from driving over curbs is a lie that Company A told and Company M repeated, because they did not want to pay for the repairs under the service agreement.

Ministry's Position:

The Ministry says that the Appellant is not eligible for repairs to the scooter because the damage is due to misuse. They rely on the repair estimate from Company M which says that the scooter was damaged from repeatedly driving off curbs. They say that damage due to driving off curbs amounts to misuse of the scooter, and therefore under section 3(6) of the Regulation the Ministry is not authorized to repair the scooter.

Panel Decision:Eligibility Requirements:

The Ministry may provide a health supplement for repairs to the Appellant's scooter if the request meets the eligibility requirements under Schedule C, Section 3 of the Regulation.

The Ministry determined that the Appellant met the following eligibility requirements:

- The Appellant is eligible to receive health supplements under section 62 of the Regulation;
- The Appellant is requesting pre-authorization for the repairs;
- There are no resources available to pay for the repairs;
- The scooter is the least expensive device appropriate for the Appellant's needs;
- The scooter was prescribed by a medical practitioner;
- The scooter is damaged, worn out or not functioning; and
- It is more economical to repair the scooter than to replace it.

With respect to available resources, the Ministry determined that, while the scooter is under warranty until July 2024, the warranty is not an available resource because Company M says that the damage is due to misuse, which is not covered under the warranty.

The reconsideration decision also refers to Schedule C, section 3(5) of the Regulation and says that the Appellants request meets those requirements. However, the Panel finds that Schedule C, section 3(5) is not relevant to the Appellant's request, as it relates to medical equipment not previously provided by the Ministry. The Appellant's scooter was provided by the Ministry.

The Ministry determined that the Appellant's request did not meet the eligibility requirement in Schedule C, section 3(6) of the Regulation, which states that the Ministry may not provide repairs of medical equipment or a medical device if the Ministry considers that the medical equipment or device was damaged through misuse. The Ministry considered the repair assessment from Company M which states that "Damage would appear to be from repeated driving off curbs, skid plate is scratched, shroud broken on both sides, welds underneath are broken and rusted....Not manufacturer's defect." The Ministry notes that "the description of the damage noted by [Company M] does not suggest that it was a result of mishandling by [Company M]". On the basis of the repair assessment from Company M, the Ministry determined that the scooter needed repairs because of misuse, which the Ministry is not authorized to provide under the Regulation.



Procedural Fairness:

In the reconsideration decision, the Ministry says: “On March 19, 2024, the ministry attempted to contact [Company M] to confirm that the damage to the scooter was caused by repeatedly driving off the curb. The ministry was unsuccessful in the attempt.” At the hearing, the Ministry indicated that there was no information in the file note to say how, or how many times, the Ministry tried to contact Company M on March 19, 2024, or what made the attempt unsuccessful. The Ministry did say that the usual practice would be to make three attempts at contact.

In Baker v. Canada (Ministry of Citizenship and Immigration), [1999] 2 S.C.R. 817, the Supreme Court of Canada held that an administrative decision that affects the rights, privileges, or interests of an individual triggers a duty of fairness. The Court went on to state that what is required for procedural fairness depends on the circumstances. The Court set out a list of considerations, which is not exhaustive, but includes:

- the nature of the decision being made and the process followed in making it;
- the nature of the statutory scheme;
- the importance of the decision to the individual affected;
- the legitimate expectation of the individual challenging the decision; and
- the choice of procedure made by the agency itself.

The Panel finds that the Ministry’s administrative decision about the Appellant’s request for repairs to the scooter affected her interests, and therefore triggered a duty of fairness. The Appellant and her doctors confirm that the scooter is essential medical equipment for her, so the Panel finds that a decision about whether that equipment is repaired is very important to her. The Panel also finds that the Appellant had the legitimate expectation that her evidence about whether she had misused the scooter, and the alternate explanation of how the damage might have occurred, would be considered by the Ministry when it made that decision.

The Panel finds that the Appellant has given a different, plausible account of how the damage described in the repair assessment may have happened, and why the Ministry should not accept the statements in the repair assessment without making further enquiries. The Appellant has stated:

- The scooter has broken down three times before, with problems related to defective batteries, and then to faulty wiring that Company A said might have needed further repairs.
- Company A has said contradictory things about whether the scooter could be repaired or not. At first, Company A said the scooter was not repairable, and wanted

the Appellant to get the Ministry to buy a new scooter, offering her an additional year's warranty as an incentive if she would do that. When the Appellant finally demanded the paperwork for the scooter, with the Ministry's support, Company A said the scooter was repairable, but the repairs would not be under warranty.

- Company A had a financial disincentive to repair the scooter under the warranty, especially if Company A was trying to sell its business to Company M.
- The repair technician from Company A mishandled the scooter when they picked it up, which the Appellant says could have caused the damage to the undercarriage.
- Company M did not see the scooter until they bought Company A, and then Company M's repair assessment was just repeating information from the Company A computer database.
- The allegation that the Appellant was driving the scooter off curbs repeatedly is speculation, as neither Company A nor Company M saw that happen.
- It would be unlikely that the Appellant would risk damaging the scooter, which is so essential to her, or risk injuring herself, by driving it off curbs repeatedly, and she denies having done so.

The Panel has also considered the Ministry's choice of procedure in the Appellant's case. The Appellant's account apparently prompted the Ministry to try to contact Company M to make further enquiries to confirm the cause of the damage, which the Panel finds was both reasonable and necessary for procedural fairness in the Appellant's circumstances. The Ministry was unable to provide any information beyond what is stated in the reconsideration decision, that the Ministry made an unsuccessful attempt to contact Company M, on one day. While the Ministry said that the usual practice would involve three attempts to contact in one form or another, the Panel cannot know if the Ministry followed its usual practice this time, or why the Ministry's attempt was not successful.

The Panel finds that it would be reasonable for the Ministry to make further enquiries of Company M, about the nature and possible cause of the damage to the scooter, whether there were electrical issues that caused the original malfunction on July 18, 2023, and whether the mishandling of the scooter by the repair technician at Company A could have caused the damage to the undercarriage of the scooter. The Panel also finds that it would be reasonable for the Ministry to question Company M about the basis for the conclusion that damage was caused by driving the scooter off a curb when that activity was not observed. The Panel considers that all a repair technician might be able to confirm is that damage could be caused by repeated impacts to the undercarriage, which the Appellant observed when Company A picked up the scooter, two and a half months before it came into the possession of Company M. The Panel also finds that there could be a financial incentive for Company A not to disclose either that its repair technician damaged the

scooter, or that the breakdown was due to causes covered by the warranty, for which Company A might have to bear the cost – again, reason for the Ministry to make further inquiries before making a final decision about the request for repairs.

The Ministry apparently also considered that further investigation was reasonably necessary, as it tried to contact Company M. However, the Panel finds that an unsuccessful attempt on one day, with no further explanation of what that attempt was, or why it was not successful, is not reasonable in the Appellant's circumstances.

*Adequacy of Reasons:*

The Panel also finds that the Ministry has not provided adequate reasons for its decision to rely on the statement in the repair estimate rather than the Appellant's statements about her use of the scooter and other possible reasons for the original malfunction and damage observed. The Ministry notes the Appellant's evidence, and then simply states that the repair estimate states that the damage was caused by driving the scooter off curbs, with no explanation of its reasons for preferring the statement by Company M in the repair assessment, about damage that was apparently assessed by Company A. Reasons would not have to be extensive, necessarily, but should be a clear explanation for the Appellant to know why her evidence was not accepted. The Ministry has not offered any explanation, simply stating what is in the repair assessment and then denying the request for repairs.

The Ministry also appears to rely on the absence of evidence from Company M, to support its decision to deny repairs. The Ministry states that "the repair assessment does not indicate that the scooter wires or batteries are in need of repairs" and "the description of the damage noted by [Company M] does not suggest that it was a result of mishandling by [Company M]". The repair assessment does not say anything about the wires or batteries, and does not say anything about how it, or Company A, handled the scooter. The Panel finds it is not reasonable, in the circumstances of this case, when there had been 3 previous breakdowns due to batteries or wiring, to make a positive determination about wiring based on the absence of an assessment about the wiring from Company M. Further, the Panel finds that it would not be surprising that a company does not suggest on its own that it is at fault for damage. The Panel finds it is not reasonable to rely on the absence of an admission of fault, to determine that the company was not at fault. The Panel also notes that the damage the Appellant alleges would have been done by Company A, not Company M. The Panel also notes again that the Ministry apparently concluded that it needed additional information from Company M to confirm the cause of the damage as evidenced by the Ministry's decision to try to contact Company M, and the

Panel finds that it was not reasonable for the Ministry to go on to make a decision without that information.

Summary:

In summary, the Panel finds:

- the Ministry did not meet its duty of procedural fairness to the Appellant, by first determining that it needed to confirm the cause of the damage and then abandoning its efforts to confirm the cause, after one unsuccessful attempt to contact Company M; and
- the Ministry did not provide adequate reasons for its decision to rely on the statement in the repair assessment and not to accept the Appellant's evidence about other possible causes for the breakdown and the damage to the undercarriage of the scooter.

Therefore, the Panel finds that the Ministry's reconsideration decision is not reasonably supported by the evidence and is not a reasonable application of the legislation in the Appellant's circumstances.

Conclusion:

The Panel finds that the Ministry's reconsideration decision is not reasonably supported by the evidence and is not a reasonable application of the legislation in the Appellant's circumstances. The Panel rescinds the Ministry's decision. The Appellant is successful in the appeal.

Relevant 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 — scooters

s. 3.4 (1) In this section, "scooter" does not include a scooter with 2 wheels.

(2) Subject to subsection (5) of this section, the following items are health supplements for the purposes of section 3 of this Schedule if all of the requirements set out in subsection (3) of this section are met:

- (a) a scooter;
- (b) an upgraded component of a scooter;
- (c) an accessory attached to a scooter.

(3) The following are the requirements in relation to an item referred to in subsection (2) of this section:

- (a) an assessment by an occupational therapist or a physical therapist has confirmed that it is unlikely that the person for whom the scooter has been prescribed will have a medical need for a wheelchair during the 5 years following the assessment;
- (b) the total cost of the scooter and any accessories attached to the scooter does not exceed \$3 500 or, if subsection (3.1) applies, \$4 500;
- (c) the minister is satisfied that the item is medically essential to achieve or maintain basic mobility.

(3.1) The maximum amount of \$4 500 under subsection (3) (b) applies if an assessment by an occupational therapist or a physical therapist has confirmed that the person for whom the scooter has been prescribed has a body weight that exceeds the weight capacity of a conventional scooter but can be accommodated by a bariatric scooter.

(4) The period of time referred to in section 3 (3) (b) of this Schedule with respect to replacement of an item described in subsection (2) of this section is 5 years after the minister provided the item being replaced.

(5) A scooter intended primarily for recreational or sports use is not a health supplement for the purposes of section 3 of this Schedule.

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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)  
2024/05/14

Print Name  
Mimi Chang

Signature of Member

Date (Year/Month/Day)  
2024/05/14

Print Name  
Diane O'Connor

Signature of Member

Date (Year/Month/Day)  
2024/05/14