

FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/163644

PRELIMINARY RECITALS

Pursuant to a petition filed February 2, 2015, under Wis. Admin. Code § DHS 10.55, to review a decision by the [REDACTED] Family Care in regard to Medical Assistance, the Division of Hearings and Appeals conducted a hearing for Petitioner in Milwaukee, Wisconsin.

This matter was originally scheduled for a phone hearing on March 17, 2015. Ms. [REDACTED] sister and guardian, requested an in-person hearing. Arrangements were made to accommodate the guardian's request.

Petitioner's guardian sought assistance from [REDACTED] [REDACTED], an ombudsman with Disability Rights Wisconsin (DRW), and requested an adjournment to see if the parties could resolve the issue. In addition, DRW was still deciding whether it would represent the Petitioner at hearing. So, at the request of Petitioner's guardian and Ms. [REDACTED], on March 16, 2015, the matter was rescheduled to April 28, 2015.

On April 13, 2015, Ms. [REDACTED] contacted the Division of Hearings and Appeals to report that the Petitioner had passed away.

On April 27, 2015, Petitioner's guardian sent an e-mail requesting an adjournment, due to the Petitioner's passing and because her mother became hospitalized. The hearing was then rescheduled to June 9, 2015.

Petitioner's guardian subsequently requested another adjournment because she was having health issues. The matter was rescheduled to June 23, 2015. In addition, the matter was set as a phone hearing, because Petitioner's guardian indicated she was having difficulties walking.

On the date of the June 23, 2015 hearing, three phone numbers were used in an attempt to reach the Petitioner's Guardian. The first number, xxx-[REDACTED] indicated it was no longer valid. The second number xxx-[REDACTED] went to voice mail and a message was left for Petitioner's guardian. The third number, xxx-[REDACTED] also went to voice mail. The appeal would have been dismissed as abandoned. However, Petitioner's guardian called back and indicated that she changed residences without advising the Division of Hearings and Appeals. Consequently, she did not get the notice for the June 23, 2015 hearing. Good cause was found for her failure to be available for the hearing and at the request of Petitioner's guardian, a new hearing date was scheduled for August 13, 2015.

On August 12, 2015, Petitioner's guardian stopped in at the Division of Hearings and Appeals and requested another adjournment, because she wanted time to get an attorney and because she was receiving treatment for stage 4 cancer. Consequently, the matter was rescheduled to September 22, 2015.

On or about September 21, 2015, Petitioner's guardian requested another adjournment, because her mother was terminally ill and going into the hospital for surgery. Petitioner's guardian was also working on retaining Attorney [REDACTED]. The matter was then rescheduled to October 20, 2015.

On October 20, 2015, Petitioner's guardian requested another adjournment, because she needed more time to retain Attorney [REDACTED], and because she had just been assaulted by her brother. The matter was rescheduled to November 17, 2015.

Petitioner's guardian formally retained Attorney [REDACTED], however he contacted the Division of Hearings and Appeals and indicated that he was not available for the November 17, 2015 hearing date and sought an adjournment. Attorney [REDACTED] indicated that he might need more than the usual 30 days because he was seeking to have Petitioner's guardian appointed a Special Administrator for Petitioner's estate, in order to proceed with the hearing. Attorney [REDACTED] submitted a Waiver of Time Limits that same date, in order to obtain a January 7, 2016 hearing date.

On December 30, 2015, Attorney [REDACTED] requested another adjournment, because he was still seeking to have Petitioner's guardian appointed Special Administrator. Consequently, the matter was scheduled for hearing on February 16, 2016.

The hearing proceeded on February 16, 2016. However, neither party was capable of clearly and succinctly explaining their positions. The record was held open until March 1, 2016, to give the parties an opportunity to submit clear documentation of what services and in what amounts the Petitioner received, and what additional services were requested but denied.

On February 18, 2016, [REDACTED] Family Care submitted their summary of what services they approved and in what amounts they approved the services. It has been marked as Exhibit 9 and entered into the record.

On February 22, 2016, ALJ Ishii sent [REDACTED] Family Care and the Petitioner an e-mail, requesting further clarification regarding what services and in what amounts were approved. Ms. [REDACTED] sent a response on February 26, 2015. It has been marked as Exhibit 10 and entered into the record.

On March 1, 2016, Attorney [REDACTED] submitted a cover letter, an affidavit from Petitioner's Guardian [REDACTED], and an affidavit from [REDACTED] (formerly [REDACTED]), [REDACTED] Petitioner's nephew who acted as one of her paid caregivers. They have been marked as Exhibits 11, 12 and 13, respectively.

Also on March 1, 2016, [REDACTED] Family care requested an extra day to submit copies of Petitioner's two most recent Supportive Home Care Assessments. That request was granted.

On March 2, 2016, [REDACTED] Family Care submitted e-mail correspondence between Petitioner's guardian and [REDACTED] staff regarding the services provided to Petitioner. That has been marked as Exhibit 14. In addition, [REDACTED] Family Care submitted a Supportive Home Care Assessment dated May 29, 2014, a Notice of Action (Detail) printout dated October 14, 2014, with three tables attached, and a Supportive Home Care Assessment dated December 29, 2014. They have been marked as Exhibits 15, 16 and 17, respectively.

The issue for determination is whether Petitioner's appeal is timely, and if so, whether [REDACTED] Family Care correctly denied Petitioner's request for "24/7" care.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED] [REDACTED], Quality Improvement Coordinator
[REDACTED] Family Care
901 N. 9th St.
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. On May 29, 2014, [REDACTED] Family Care, formerly Milwaukee County Department of Family Care, completed a Supportive Home Care Assessment. At that time, it indicated a need for:
 - a. Supportive home care services in the amount of 5.25 hours per week/.73 hours per day for cleaning the toilet, dusting/vacuuming, changing bed linens, laundry, cleaning adaptive equipment and emptying garbage.
 - b. "Attendant Care Services" / Personal Care Services with Activities of Daily Living, in the amount of 42 hours per week/6 hours per day for assistance with grooming, dressing, bathing, incontinence care and mobility.
 - c. "Medically Oriented Tasks" in the amount of 28.5 hours per week / 4.07 hours per day, for assistance with transfers, medication administration, G-tube site care, g-tube feedings, suctioning, and a bowel program. In addition, time for wound care, was approved in the amount of 15 minutes, three times per week or 0.11 hours per day.

This totaled an average of 10.91 hours per day of services.

(Exhibit 7, pgs. 16-19; Exhibit 15)

3. On October 8, 2014, the Petitioner requested "24/7" support services. (Exhibit 7, pg. 5)
4. On October 21, 2014, [REDACTED] Family Care, formerly Milwaukee County Department of Family Care, sent the Petitioner a notice indicating that it was denying the request for "24/7" services, "as informal supports of 38 hours per 7 days is required". The notice further indicated it was approving 47.5 hours per week of services from Comfort Care; 27 hours per week of services from [REDACTED] and 56 hours per week of "self-directed" supports. – This averages out to be 18.64 hours per week. (Id.)
5. On November 26, 2014, a Member Centered Plan was developed for Petitioner with four Long Term Care Outcomes:

- a. "Caregivers will assist member to maintain a comfortable respiratory status by providing suctioning and/or oxygen several times daily as needed."
- b. "Member will receive assistance with completing all ADL and IADL tasks."
- c. "Member's nutritional needs will be met with appropriate resources". (Petitioner was G-tube fed)
- d. "Member's skin to become intact and free from infection."

(Exhibit 3)

- 6. The Petitioner filed a grievance and on December 18, 2014, ██████████ Family Care's Grievance and Appeal Committee, issued its decision in a notice to the Petitioner, indicating that it was denying the request for 24/7 services. The notice stated that ██████████ Family Care was approving an increase in services to 19 hours per day, 132 hours per week of services. The committee further stated that skilled nursing services were being provided for wound care, in an unspecified amount. (Exhibit 7, pg. 45)
- 7. For reasons not entirely made clear in the record, the parties did not proceed to fair hearing. Rather, the Grievance and Appeal Committee reconvened at the request of Petitioner's guardian, ██████████ (Exhibit 7, pg. 48; Testimony of Ms. ██████████)
- 8. On December 29, 2014, ██████████ Family care completed another supportive home care assessment. At that time it indicated a need for:

8 hours per week for supportive home care services, including cleaning the bathroom since, the toilet and floor; dusting and vacuuming the bedroom; changing bed linens and; doing laundry, cleaning adaptive equipment and emptying the garbage.

13.75 hours per week of "attendant care" services for grooming, dressing, bathing, incontinence care and mobility-meaning range of motion exercises and positioning.

18 hours per week of medically oriented services, including ostomy care, medication administration, skin care, g-tube site care, tube feedings, respiratory assistance, administering a bowel program, wound care (15 minutes, 8 times per week), and checking vital signs.

This works out to be 5.67 hours per day.

(Exhibit 17)

- 9. On January 29, 2015, the Grievance and Appeal committee issued another decision, but not in writing, again denying the request for "24/7" services. However, the level of Petitioner's services was increased, again. (Exhibit 7, pg. 48; Testimony of Ms. ██████████)
- 10. As of late January / February 2015, ██████████ Family Care approved the following services:

Monday - Friday

4 hours per day of what it defined as "personal care" services

6 hours per day of "attendant care" services;

10 hours per day of Supportive Home Care Services (Cleaning, vacuuming, laundry, etc.)

-This totals 20 hours per day of services, Monday – Friday

Saturday – Sunday

4 hours per day of what it defined as "personal care" services

6 hours per day of "attendant care" services

6 hours per day of Supportive Home Care Services

-This totals 16 hours per day of services for Saturday and Sunday

Additionally, during the week, 1 hour – 3x per week was approved for wound care.

Averaged out this works out to be:

100 hours M-F + 32 hours Sat. and Sun. + 3 hours wound care = 135 hours
 135 hours ÷ 7 = 19.30 hours per day of services

(Exhibits 9 and 10)

11. The Petitioner's guardian, on behalf of the Petitioner, filed a request for fair hearing that was received by the Division of Hearings and Appeals on February 2, 2015. (Exhibit 1)
12. The Petitioner passed away on April 5, 2015. (Testimony of Petitioner's guardian)
13. Petitioner suffered from advanced stage multiple sclerosis and terminal cancer. As of December 19, 2014, Petitioner's hospital physician discussed with Petitioner's family, Petitioner's poor prognosis and her need for palliative care. Petitioner was noted to be at risk of aspiration and other infections and showed signs of sacral osteomyelitis, though her sacral ulcer appeared to be healing. (Exhibit 4 and Exhibit 7, pg. 15)
14. During the time in question, the Petitioner lived with her guardian, [REDACTED] (Exhibits 12, 15 and 17)
15. [REDACTED] was a paid caregiver for Petitioner, through [REDACTED], until her employment was terminated in October 2014. Petitioner's nephew, [REDACTED]'s son, was also a paid caregiver for Petitioner, through [REDACTED] (Exhibits 12, 13 and 14)

DISCUSSION

Timeliness

A hearing officer can only hear cases on the merits if there is jurisdiction to do so. There is no jurisdiction if a hearing request is untimely. An appeal of a negative action by a county agency concerning medical assistance must be filed within 45 days of the date of the action. Wisconsin Stat. § 49.45(5); Income Maintenance Manual § 3.3.1. In this case, the negative action was the denial of "24/7" services.

[REDACTED] Family Care sent a written notice on December 18, 2014, indicating that its Grievance and Appeal Committee had denied the request for "24/7" services, but increased Petitioner's service hours from an unspecified amount to 19 hours per day. Had that been the last action taken by [REDACTED] Family Care, Petitioner's appeal would be untimely, as 45 days from December 18, 2014, fell on Monday, February 1, 2015, and Petitioner's appeal was filed on February 2, 2015.

However, [REDACTED] Family Care completed another Supportive Home Care Assessment tool on December 29, 2014, that actually decreased the Petitioner's service hours. Then, for reasons not entirely made clear in the record, [REDACTED] Family Care's Grievance and Appeal Committee agreed to reconvene and reconsidered the request for "24/7" services. On January 29, 2015, the Grievance and Appeal committee issued another decision, though not in writing, again denying the request for "24/7" services, but again increasing the number of services hours the Petitioner received. (Exhibit 7, pg. 48) Ms. [REDACTED] testified that the agency did not feel the need to issue another written notice, since it was upholding the decision issued on December 18th.

Petitioner's February 2, 2015 request for fair hearing must be considered timely, because the agency took another action in the matter by completing a new supportive home care assessment tool, convening another meeting of the Grievance and Appeal committee, issuing another denial of the request, and changing/increasing the approved number of hours. As such, the date of action became, at the earliest, January 29, 2015. Petitioner's appeal must also be considered timely, since [REDACTED] Family Care did not provide the written notification required by Wis. Admin. Code §10.52(3).

The Rules and Definitions

The Family Care Program is a subprogram of Wisconsin's Medical Assistance (MA) program and is intended to allow families to arrange for long-term community-based health care and support services for older or impaired family members without resort to institutionalization, *Wis. Stats.* §46.286; *Wis. Admin. Code* §DHS 10.11. The Family Care Long Term Care program (FCP) is a long-term care benefit for the elderly, people with physical disabilities and those with developmental disabilities. *Medicaid Eligibility Handbook (MEH)*, §29.1.

An individual, who meets the functional and financial requirements for Family Care, participates in Family Care by enrolling with a Care Management Organization (CMO) – sometimes referred to as an MCO, which, in turn, works with the participant and his/her family to develop an individualized plan of care. *See Wis. Stats.* §46.286(1) and *Wis. Admin. Code* §DHS 10.41. The CMO, in this case [REDACTED] Family Care, implements the plan by contracting with one or more service providers. Here, [REDACTED] Family Care subcontracted with [REDACTED] [REDACTED] (a Care Management Unit a.k.a. CMU) to administer the Family Care benefits. (See Exhibit 7, pg.25)

Wis. Admin. Code DHS 10.41(2) states that:

Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department's contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n (c) and ss. 46.275, 46.277 and 46.278, Stats., the long-term support community options program under s. 46.27, Stats., and specified services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan.

Emphasis added

The following is included in the aforementioned code provision:

Note: The services that typically will be required to be available include adaptive aids; adult day care; assessment and case planning; case management; communication aids and interpreter services; counseling and therapeutic resources; daily living skills training; day services and treatment; **home health services**; home modification; home delivered and congregate meal services; **nursing services**; nursing home services, including care in an intermediate care facility for the mentally retarded or in an institution for mental diseases; **personal care services**; personal emergency response system services; prevocational services; protective payment and guardianship services; residential services in an RCAC, CBRF or AFH; respite care; durable medical equipment and specialized medical supplies; outpatient speech; physical and occupational therapy; supported employment;

supportive home care; transportation services; mental health and alcohol or other drug abuse services; and community support program services.
Emphasis added, Wis. Admin. Code §DHS10.41(2)

Thus, home health services, nursing services, personal care services and supportive home care services are among the services that typically will be required to be available. *Id.*

The 2015 MCO contract refers to the Wisconsin Administrative Code to define home health services, nursing services and personal care services that are required to be part of the Family Care benefit package. *See Addendum X, Section B :*

<https://www.dhs.wisconsin.gov/familycare/mcos/cy2015mcocontract-original.pdf>

A. Home Health Services

Home health services, are defined in Wis. Admin. Code §DHS 107.11(2) and include skilled nursing services; home health aide services; medical supplies, equipment and appliances suitable for use in the recipient's home; and therapy and speech pathology services provided in recipient's home.

Skilled nursing, under home health services, means skilled nursing services provided in a recipient's home, less than 8 hours per calendar day, which are performed by a Registered Nurse (RN) or a Licensed Practical Nurse (LPN), according to a written plan of care; services, which due to the recipient's medical condition may only be safely and effectively provided by an RN or LPN; assessments performed only by a registered nurse; and teaching and training of the recipient, the recipient's family or other caregivers requiring the skills of an RN or LPN. *Wis. Admin. Code §DHS 107.11(2)(a)*

Home Health Aide Services are defined as "medically oriented tasks which cannot be safely delegated by an RN...which may include but are not limited to medically oriented activities directly supportive of skilled nursing services provided to the recipient. This may include administration of oral, rectal and topical medications ordinarily self-administered and supervised by an RN..." *Admin. Code §DHS 107.11(2)(b)1.* Home Health Aide Services also include "assistance with the recipient's activities of daily living, only when provided in conjunction with a medically oriented task that cannot be safely delegated to a personal care worker, as determined and documented by the delegating RN..." *See Admin. Code §DHS 107.11(2)(b)2. and 3.*

B. Nursing Services

Nursing Services are defined in Wis. Admin. Code §§DHS 107.11, 107.113 and 107.12, "including respiratory care, intermittent and private duty nursing." *See Addendum X, Section B, paragraph 10.* Wis. Admin. Code §DHS 107.11 is discussed above. Wis. Admin. Code §107.113 covers respiratory care for ventilator-assisted recipients.

The Department's on-line provider Handbook¹ describes what is required to receive Private Duty Nursing services under Wis. Admin. Code §DHS 107.12:

To determine if a member receives eight or more hours of direct skilled nursing services, add up the total hours of direct skilled nursing care provided by all caregivers, including home health agencies, independent nurses, and skilled cares provided by family or friends. If the total time

¹<https://www.forwardhealth.wi.gov/WIPortal/Online%20Handbooks/Display/tabid/152/Default.aspx?i a=1&p=1&sa=29&s=2&c=365>

required daily for these cares is equivalent to eight or more hours, the member is eligible for PDN. The POC is required to include the actual amount of time to be spent on medically necessary direct cares that **require the skills of a licensed nurse**.

For this purpose, Medicaid-covered skilled nursing services may include, but are not limited to, the following:

- Injections.
- Intravenous feedings.
- Gastrostomy feedings (include the time needed to begin, disconnect, and flush — not the entire time the feeding is dispensing).
- Nasopharyngeal and tracheostomy suctioning.
- Insertion and sterile irrigation of catheters.
- Application of dressings involving prescription medications and aseptic techniques.
- Treatment of extensive decubitus ulcers or other widespread skin disorders.

Emphasis added

DHS 107.12 Private duty nursing services. (1) COVERED SERVICES.

- (a) **Private duty nursing is skilled nursing care** available for recipients with medical conditions requiring more continuous skilled care than can be provided on a part-time, intermittent basis. Only a recipient who requires 8 or more hours of skilled nursing care and is authorized to receive these services in the home setting may make use of the approved hours outside of that setting during those hours when normal life activities take him or her outside of that setting. Private duty nursing may be provided according to the requirements under ss. DHS 105.16 and 105.19 when the written plan of care specifies the medical necessity for this type of service.
- (i) Private duty nursing services provided by a certified registered nurse in independent practice are those services prescribed by a physician which comprise the practice of professional nursing as described under s. 441.001 (4), Stats., and s. N 6.03. Private duty nursing services provided by a certified licensed practical nurse are those services which comprise the practice of practical nursing under s. 441.001 (3), Stats., and s. N 6.04. An LPN may provide private duty nursing services delegated by a registered nurse as delegated nursing acts under the requirements of ch. N 6 and guidelines established by the state board of nursing.
- (ii) Services may be provided only when prescribed by a physician and the prescription calls for a level of care which the nurse is licensed and competent to provide.

“Skilled Nursing Services” are defined in Wis. Admin. Code §DHS101.03(163):

“Skilled nursing services” means those professional nursing services furnished pursuant to a physician’s orders which require the skills of a registered nurse or licensed practical nurse and which are provided either directly by or under the supervision of the registered nurse or licensed practical nurse.

Note: Examples of services which would qualify as skilled nursing services are:

- (a) Intravenous, intramuscular, or subcutaneous injections and hypodermoclysis or intravenous feeding;
- (b) Levin tube and gastrostomy feedings;
- (c) Nasopharyngeal and tracheotomy aspiration;
- (d) Insertion and sterile irrigation and replacement of catheters;
- (e) Application of dressings involving prescription medications and aseptic techniques;
- (f) Treatment of extensive decubitus ulcers or other widespread skin disorder;
- (g) Heat treatments which have been specifically ordered by a physician as part of active treatment and which require observation by nurses to adequately evaluate the patient’s progress;
- (h) Initial phases of a regimen involving administration of medical gases; and

- (i) Rehabilitation nursing procedures, including the related teachings and adaptive aspects of nursing that are part of active treatment, e.g., the institution and supervision of bowel and bladder training programs.

It should be noted that, “a member’s condition may be such that a service that would ordinarily be considered unskilled may be considered a skilled nursing service, because the service can only be safely and effectively provided by a nurse.” *Topic #2150 of the On-Line Provider Handbook*

C. Personal Care Services

Personal care services are defined in Wis. Admin. Code §107.112. According to Wis. Admin. Code §DHS 107.112(1)(b) the following are covered personal care services:

1. Assistance with bathing;
2. Assistance with getting in and out of bed;
3. Teeth, mouth, denture and hair care;
4. Assistance with mobility and ambulation including use of walker, cane or crutches;
5. Changing the recipient's bed and laundering the bed linens and the recipient's personal clothing;
6. Skin care excluding wound care;
7. Care of eyeglasses and hearing aids;
8. Assistance with dressing and undressing;
9. Toileting, including use and care of bedpan, urinal, commode or toilet;
10. Light cleaning in essential areas of the home used during personal care service activities;
11. Meal preparation, food purchasing and meal serving;
12. Simple transfers including bed to chair or wheelchair and reverse; and
13. Accompanying the recipient to obtain medical diagnosis and treatment.

In addition, medical assistance will pay for a personal care worker to assist a patient with medically oriented tasks (MOTs), such as administering medications that are normally self-administered, when the tasks are delegated by a registered nurse, the personal care worker (PCW) is trained and supervised by the provider and the MA recipient, parent or responsible person is permitted to participate in the training and supervision of the PCW. §DHS 107.112(2)(b)

It should be noted that under Wis. Admin. Code §DHS 107.112(4), it specifically states under “non-covered services” that personal care workers may not be paid to provide skilled nursing services, including insertion and sterile irrigation of catheters, giving of injections; application of dressings involving prescription medication and use of aseptic techniques and administration of medication that is not usually self-administered. In addition, personal care workers cannot be paid to perform homemaking services and cleaning of areas not used during personal care service activities. Wis. Admin. Code §DHS 107.112(4)

D. Supportive Home Care Services

The administrative code does not have a specific definition for supportive home care services, but Addendum X, Benefit Package Service Definitions in the 2014 contract between the Department of Health Service and Care Maintenance Organizations defines supportive home cares as:

- a. Hands-on assistance with activities of daily living such as dressing/undressing, bathing, feeding toileting, assistance with ambulation (including the use of a walker, cane, etc.), care of hair and care of teeth or dentures. This can also include preparation and cleaning of areas used during personal care activities such as the bathroom and kitchen.

- b. Observation of the participant to assure safety, oversight direction of the participant to complete activities of daily living, instrumental activities of daily living, or companionship for the participant (excluding hands on care).
- c. Routine housecleaning and housekeeping activities performed for a participant consisting of tasks that take place on a daily, weekly, or other regular basis, including: washing dishes, laundry, dusting, vacuuming, meal preparation and shopping for food and similar activities that do not involve hands-on care of the participant.
- d. Intermittent major household tasks that must be performed seasonally or in response to some natural or other periodic event. They include: outdoor activities such as yard work and snow shoveling; indoor activities such as window washing, cleaning of attics and basements, cleaning of carpets, rugs and drapery, and refrigerator/freezer defrosting; and the necessary cleaning of vehicles, wheelchairs and other adaptive equipment and home modifications such as ramps.

<http://www.dhs.wisconsin.gov/lc/lcstatefedreqs/cy2014mcocontract.pdf>

It appears that the link to the 2014 contract is not working at this time. However, the link to the 2015 contract does function and the 2015 contract is similar, under Addendum X, Section A, paragraph 24:

24. **Supportive home care (SHC)** is the provision of services to directly assist people with daily living activities and personal needs and to assure adequate functioning and safety in their home and community. Services include:
- a. Hands-on assistance with activities of daily living such as dressing/undressing, bathing, feeding, managing medications and treatments that are normally self-administered, toileting, assistance with ambulation (including the use of a walker, cane, etc.), carrying out professional therapeutic treatment plans, grooming such as care of hair, teeth or dentures. This may also include preparation and cleaning of areas used during provision of personal assistance such as the bathroom and kitchen.
 - b. Direct assistance with instrumental activities of daily living, as well as observation or cueing of the member to safely and appropriately complete activities of daily living and instrumental activities of daily living. Providing supervision necessary for member safety at home and in the community. This may include observation to assure appropriate self-administration of medications, assistance with bill paying and other aspects of money management, assistance with communication, arranging and using transportation and personal assistance at a job site and in non-employment related community activities.
 - c. Routine housekeeping and cleaning activities performed for a member consisting of tasks that take place on a daily, weekly or other regular basis. These may include: washing dishes, laundry, dusting, vacuuming, meal preparation, shopping and similar activities that do not involve hands-on care of the member.
 - d. Intermittent major household tasks that must be performed seasonally or in response to some natural or other periodic event for reasons of health and safety or the need to assure the member's continued community living. These may include: outdoor activities such as yard work and snow removal; indoor activities such as window washing; cleaning of attics and basements; cleaning of carpets, rugs and drapery; refrigerator/freezer defrosting; the necessary cleaning of vehicles, wheelchairs and other adaptive equipment and home modifications such as ramps. This also may include assistance

with packing/unpacking and household cleaning/organizing when a member moves.

An unrelated live-in caregiver may provide any or all of the types of supportive home care services. Services by a related live-in caregiver are subject to the requirements in Article VIII.P.2.

<https://www.dhs.wisconsin.gov/familycare/mcos/cy2015mcocontract-original.pdf>

The Merits of Petitioner's Appeal

Discerning the complaints of Petitioner's guardian has been very difficult. Looking at her affidavit in Exhibit 12, it appears that Petitioner's guardian has complaints about the quality of the personal care / supportive home care/ home health care that was provided to Petitioner and that she is seeking a finding that the Petitioner required 24/7 skilled nursing services to treat Petitioner's sacral / decubitus ulcer. (See also Exhibit 11) As part of the claim for "24/7" services, Petitioner's guardian seeks reimbursement for:

- 1) Certified Nursing Assistants that she hired to care for Petitioner
- 2) Skilled nursing services that she performed for the Petitioner
- 3) Medical supplies that she purchased to care for the ulcer
- 4) Services rendered by her son/Petitioner's nephew who acted as Petitioner's "attendant care" / supportive home care worker.

A. The Request for 24/7 Services

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. State v. Hanson, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). In a case involving the request for new or additional services, the burden of proof falls upon the Petitioner to show that the requested services meet the approval criteria.

This case was made more difficult to review because ██████████ Family Care does not adhere to the terms and definitions used in the MCO contract or in the Administrative Code.

For example, in its February 26, 2015 response (Exhibit 10) ██████████ Family Care referred to "personal care" services as "medically oriented tasks i.e. tube feeding, suctioning, ostomy care, medication administration, complex transfers". While some medically oriented tasks can be considered personal care services under Wis. Admin. Code §DHS107.112, if they can be safely delegated to a personal care worker by a registered nurse, Wis. Admin. Code §DHS101.03(163), indicates that tube feeding is considered a skilled nursing task as is suctioning that must be performed nasally or through a tracheostomy site.

In Exhibit 10, ██████████ Family Care referred to something called "attendant care" which it defined as, "hands on, non-skilled nursing tasks, i.e. bathing, dressing, grooming, incontinence, simple transfers / repositioning", but Wis. Admin. Code §DHS107.112 considers these tasks to be personal care services.

The only task ██████████ Family Care considered a skilled nursing service was wound care, which was actually correct; under the Administrative Code, treatment of extensive decubitus ulcers would be a skilled nursing service.

In any event, according to Exhibit 10, ██████████ Family Care ultimately approved three hours per week (1 hour per day, three days per week) of skilled nursing services to address wound care.

The preponderance of the credible evidence does not support approval of 24/7 skilled nursing services to address wound care.

The letter dated December 15, 2014 from Petitioner's physician states that Petitioner needs 24 hour nursing care, "especially for frequent turning". (See Exhibit 12, attachment C) However, turning or positioning is not a skilled nursing service, under the Administrative Code cited above. There is nothing in the record that supports a finding that Petitioner's bed sore required attention 24 hours per day, seven days per week.

Some consideration was given to whether Petitioner's case warranted an amount of skilled nursing services for wound care that fell between 3 hours per week and 24 hours per day, since there was some documented deterioration in the condition of Petitioner's ulcer.

According to the May 2014, Supportive Home Care Assessment, the Petitioner had a stage 2 ulcer in her coccyx area. (Exhibit 7, pg. 19), but Petitioner's medical records from July 8, 2014, indicate that Petitioner's sacral pressure ulcer had progressed to stage III, possibly stage IV. (Exhibit 5, pg. 6; Exhibit 12, attachment A)

However, the record is unclear regarding the cause of the progression, so it is difficult to know whether three hours per week of skilled nursing services was not enough. I note that on October 8, 2014, Petitioner's interdisciplinary team went to Petitioner's home to do a post-hospital visit; the Petitioner had been in the hospital two weeks prior to that date. (Exhibit 7, pg. 38) It was noted at that visit that no nurse had been providing wound care, because Petitioner's guardian did not like the wording in the authorization for services from the nursing agency and would not sign the document. (Id.) So, it is possible that something other than a lack of skilled nursing contributed to the deterioration of Petitioner's ulcer.

Petitioner's medical records from a hospitalization that occurred between September 19, 2014, and October 3, 2014, indicate that the Petitioner's ulcer was healing slowly and there was "no acute infection associated with the ulcer". (See Exhibit 5, pgs. 6 and 9) The ulcer was examined by a wound specialist. (Exhibit 5, pg. 14) It was noted to have, "good wound and barrier dressing. The ulcer looked good. It is very clean, good granulation tissue. No purulence, mild odor. It is healing as expected. Dressing changes and towels were every 2 hours per nurses." (Id.) So, her ulcer was getting better by September 2014.

Further, on October 23, 2014, a physician prescribed a collagen dressing to be applied every 72 hours. (Exhibit 5, attachment E – 3 of 3) I also note that it appears that Petitioner's ulcer continued to be stable, because Petitioner's medical records show that as of December 19, 2014, Petitioner's sacral ulcer was healing with no source of underlying infection. (Exhibit 4, pg. 3) All of this supports [REDACTED] Family care's assertion that 3 hours per week of skilled nursing services for wound care was sufficient.

Based upon the foregoing, it is found that [REDACTED] Family Care correctly denied the Petitioner's request for 24/7 skilled nursing services to treat Petitioner's sacral ulcer.

B. Reimbursement Requests

As discussed above, as part of the request for "24/7" services, Petitioner's guardian seeks reimbursement for:

- 1) Certified Nursing Assistants that she hired to care for Petitioner
- 2) Skilled nursing services that she performed for the Petitioner
- 3) Medical supplies that she purchased to care for the ulcer
- 4) Services rendered by Mr. [REDACTED] her son/Petitioner's nephew, who acted as Petitioner's "attendant care" / supportive home care worker, through [REDACTED] Network / [REDACTED]

With regard to reimbursement for the Certified Nursing Assistants, it is unclear who these individuals were and exactly what services they were performing. In addition, Petitioner's guardian has not provided

any evidence, such as billing statements or time sheets, of the hours they worked, nor the rate at which they were being paid. It is also unclear whether they were individually certified to be Medicaid providers, or if they worked for a home health agency, whether that agency was a certified Medicaid provider. As such, reimbursement for these services may not be approved. (See Wis. Stats. Ch. 441; Wis. Admin. Code §DHS 105.01)

Even under the self-directed supports program, providers need to be employed by one of the agencies under contract with ██████████ Family care or its CMU. See: <http://mychoicefamilycare.com/self-directed-supports/> Indeed, under the MCO contract, ██████████ Family Care is required to, “provide members with high-quality long-term care and health care services that are from appropriate and qualified providers.” See *Article VII, paragraph A 1. Of the 2015 MCO contract*. Without evidence that any of the CNAs in question were employed with an agency under contract with ██████████ Family Care or one of its CMUs, reimbursement for such services cannot be approved.

With regard to reimbursement for services rendered by Petitioner’s Guardian, it appears from the guardian’s affidavit that she wants to be paid for skilled nursing services that she rendered. However, she cannot legally bill for performing skilled nursing services. She is not a licensed nurse, nor is she a certified Medicaid provider. (See Wis. Stats. Ch. 441; Wis. Admin. Code §DHS 105.01) In addition, it is unclear whether the Petitioner’s Guardian was hired on with an agency under contract with ██████████ Family Care or its CMU. Indeed, the e-mails from October 2014, indicate she stopped working for ██████████ at that time. So, for that reason also, Petitioner’s Guardian cannot be paid for services she provided to the Petitioner.

With regard to reimbursement for medical supplies to treat Petitioner’s ulcer, the Petitioner’s guardian has not provided any receipts for the items that she purchased. Further, there is no indication that Petitioner’s guardian requested reimbursement from ██████████ ██████████ Family care for these items and was denied. As such, the issue is not ripe for adjudication.

With regard to the “attendant care” and supportive home care services that Mr. ██████████ performed, Petitioner was authorized to receive six hours per day of “attendant care” services, or 42 hours per week, plus an additional 5.25 hours to 70 hours per week of supportive home care services. Mr. ██████████’s affidavit indicated that he generally worked between 28 hours per week and 40 hours per week performing these services and the week of Petitioner’s passing, worked at least 33 hours. The four time sheets Mr. ██████████ submitted with his affidavit show hours ranging from 8 hours to 17.15 hours per week. So, it is not clear why he is entitled to additional compensation.

Mr. ██████████ claims that towards the end of Petitioner’s life, someone from ██████████ agreed to pay him twice his hourly rate, because they were short staffed, but there is no documentation to substantiate this claim. Further, the Division of Hearings and Appeals has no jurisdiction over the rate at which a personal care provider pays its employees, nor the number of hours it allows its employees to work. Under Wis. Admin. Code §DHS 10.55(1), the right to fair hearing is limited to disputes concerning an action of the Department of Health Services, a resource center, a county agency, or a CMO. There is no stated right to fair hearing if one’s PCW is not being paid by his/her employer. If the personal care provider for whom Mr. ██████████ worked did not pay him appropriately, he needs to file a claim against that provider in small claims court.

As a side note to the somewhat vague issue of “24/7” services, Petitioner’s guardian should be aware that MCOs are required to have policies addressing circumstances in which a family member may be paid for services. Family members may only pay family members to perform services if all of the following apply:

- a. The service is authorized by the interdisciplinary team;

- b. The member's preference is for the family member to provide the service;
- c. The interdisciplinary team monitors and manages any conflict of interest situation that may occur as a result of the family member providing services;
- d. The family member meets the MCO's standards for its subcontractors or employees providing the same service; and
- e. The family member will either:
 - i. Provide an amount of service that exceeds normal family care giving responsibilities for a person in a similar family relationship who does not have a disability; or
 - ii. Find it necessary to forego paid employment in order to provide the service and is not receiving a pension (including Social Security retirement benefits).

<https://www.dhs.wisconsin.gov/familycare/mcos/cy2015mcocontract-original.pdf> ; Article XII, P 2.

Per [REDACTED] Family care policy, "services that are typically assumed to be the responsibility of persons living in the same household are routine laundry, meal preparation, shopping, usual cleaning, general/non-medical supervision, assisting with mobility, companionship and transportation/escorting. (Exhibit 7, pg. 7) Because Petitioner's guardian lived with Petitioner, she would be expected to perform at least her fair share of housekeeping duties and could not be paid for those services.

CONCLUSIONS OF LAW

- 1) The Petitioner's appeal is timely.
- 2) That [REDACTED] Family Care correctly denied the Petitioner's request for "24/7" services.

THEREFORE, it is

ORDERED

That the petition is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 4th day of March, 2016.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on March 4, 2016.

██████████ Family Care
Office of Family Care Expansion
Health Care Access and Accountability
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