



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

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

DECISION

WFC/157738

PRELIMINARY RECITALS

Pursuant to a petition filed May 15, 2014, under Wis. Admin. Code § HA 3.03(5), to review a decision by the Division of Health Care Access and Accountability (DHCAA) in regard to a Medical Assistance-related benefit, a hearing was held on August 21, 2014, by telephone. A hearing set for July 8, 2014 was rescheduled at the petitioner's representative's request.

The issue for determination is whether the Division correctly determined the amount of the allowable payment of Wis. Stat. §49.785 funeral expenses for this decedent.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
By: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Sarah Warwick, IM Spec. II
Division of Health Care Access and Accountability
Madison, WI

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Marinette County.

2. The petitioner died on November 29, 2013. Her funeral director requested reimbursement under the Wisconsin Funeral and Cemetery Aid Program for various expenses related to her burial (\$1,500 for funeral/burial costs, and \$1,000 for cemetery costs).
3. The Department issued a written Notice of Decision to the funeral director on April 24, 2014. The Notice stated that it was denying \$250 from the request for \$1,000 in cemetery expenses. *I.e.*, only the \$750 for opening/closing of the grave was approved as a cemetery expense. The \$1,500 burial expense request was denied because the Department included the burial vault charge with the funeral/burial costs, causing those costs to trip the \$4,500 funeral/burial cost cap.
4. The funeral director timely filed an appeal on behalf of the petitioner.
5. The requested cemetery expenses consisted of the following: \$564.00 for a cemetery-required burial vault, and \$750 for the opening/closing of the grave. The Department only reimbursed the \$750 opening closing charge. The [REDACTED] made a cash advance to a third party burial vault company for the vault. No service fees were added for the cash advances. The total identified cemetery cost of \$1,314 was under the statutory cap of \$3,500; if cemetery costs exceed \$3,500, no reimbursement is allowed.
6. The decedent was buried in the [REDACTED] Cemetery, [REDACTED], Marinette, Wisconsin 54143. The cemetery is within the Marinette city limits. The cemetery is in a rural, as opposed to urban, area.

DISCUSSION

The Department will pay some of the funeral and burial expenses of indigent persons who were receiving certain public welfare benefits. Wis. Stat. § 49.785. The petitioner died in November 2013, and her funeral director sought reimbursement under the program for various expenses. The Department approved some of the expenses but denied that portion of the cemetery expenses for the burial vault.

The statute that authorizes this funeral/cemetery cost reimbursement program for public assistance beneficiaries is very brief:

49.785 Funeral expenses.

(1) Except as provided in sub. **(1m)** and subject to s. 49.825, if any recipient specified in sub. **(1c)** dies and the estate of the deceased recipient is insufficient to pay the funeral, burial, and cemetery expenses of the deceased recipient, from the appropriation under s. 20.435 **(4) (br)** the department shall pay, to the person designated by the department, all of the following:

(a) The lesser of \$1,000 or the cemetery expenses that are not paid by the estate of the deceased and other persons.

(b) The lesser of \$1,500 or the funeral and burial expenses not paid by the estate of the deceased and other persons.

(1c) All of the following are eligible recipients under this section:

[N/A – eligibility of the decedent]

(1m)

(a) If the total cemetery expenses for the recipient exceed \$3,500, the department is not required to make a payment for the cemetery expenses under sub. **(1) (a)**.

(b) If the total funeral and burial expenses for the recipient exceed \$4,500, the department is not required to make a payment for funeral and burial expenses under sub. **(1) (b)**.

(c) If a request for payment under sub. (1) is made more than 12 months after the death of the recipient, the department is not required to make a payment for cemetery, funeral, or burial expenses.

Wis. Stat. § 49.785. Funeral, burial, and cemetery expenses are not defined anywhere in Wis. Stat. ch. 49. There appears to be no policy barrier to reimbursing cash advances for cemetery/cremation expenses. *Wisconsin Funeral and Cemetery Aids Program Manual (Manual)*, § 2.5.4., at <http://www.emhandbooks.wisconsin.gov/wfcap/fcap.htm>.

The burial vault was not supplied directly by the [REDACTED]. The Department could have approved the partial vault cost (\$250) if the cemetery had provided the burial vault. However, this small cemetery requires vaults, but does not provide them. The Department denied the partial vault cost as a cemetery expense because the vault was not supplied by the cemetery.

I will borrow from Administrative Law Judge O'Brien's decision in Decision WFC/157596 (July 24, 2014). He noted that the program relies upon an attorney general's opinion and its manual for its decision. In 1990, our state's attorney general was asked whether a grave liner was a funeral or cemetery expense. The attorney general noted that "[b]oth categories defy precise definition because the statutory language is couched in broad terms" and the goods and services often overlap. *79 Op. Att'y Gen. 164, 164* (1990). Because there is no guidance in the statute and the services overlap, the attorney general found that the most plausible construction of section 49.30 [now § 49.785] is to characterize a good or service a funeral/burial expense if provided by a [REDACTED], and a cemetery expense if provided by a cemetery. *79 Op. Att'y Gen. 164, 165* (1990). The Department's policy reflects this opinion but includes an exception. The policy and exception are found in the *Wisconsin Funeral and Cemetery Aids Program Manual*, § 2.4.1., which states:

If the good/service is provided by a [REDACTED] (including cremation), consider the expense to be a funeral expense. If the good/service is provided by a cemetery or crematory, consider the expense to be a cemetery expense. If a good/service is provided by an entity other than a [REDACTED], cemetery, or crematory and cash advanced by the [REDACTED], apply the cash advance policy in 2.5.4.

Exception: There is one exception to this policy. *Many small, rural cemeteries rely on a [REDACTED] to provide certain goods and services on their behalf (e.g., the outer burial vault, opening and closing of the grave, etc.).* See Example 12.

Under this circumstance, and only this circumstance, count the good or service as a cemetery expense, even though it is provided by a [REDACTED] Funeral homes should document this circumstance on the "Statement of Funeral Goods and Services Selected." If there is no indication that this is indeed the case, do not apply the policy exception and, instead, count the good or service as a funeral expense.

The program's worker offered unrefuted testimony that the cemetery of burial is within the Marinette city limits. Because it was in the city limits, she contends that the petitioner does not qualify for the exception. This interpretation misses the point of the exception. It is meant to ensure that funeral homes can receive some compensation for services that normally would be provided by a cemetery but, because of the way business is done in some of the more isolated areas of the state, the [REDACTED] must provide them. The cemetery in Marinette does not provide vaults but does require them. This means that for the [REDACTED] to handle the petitioner's disposition it had to pay for the burial vault. The cemetery in this matter is within the Marinette city limits, but that does not make it an urban cemetery. It is located in a city of 11,749 persons (census). The nearest larger city, Green Bay, is 55 miles away, per *Mapquest.com*. Funeral directors in [REDACTED]'s position are precisely whom the exception is meant to cover. Based upon this, I find that the vault that [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] indirectly provided to the petitioner is a reimbursable cemetery expense and that is entitled to be reimbursed \$1,000 for its cemetery expenses.

As an aside, I note that the restriction on cemetery vault reimbursement as a cemetery expense to “rural” area burials has been challenged in a proposed decision written by Judge O’Brien, which is pending before the Secretary. *See*, Proposed Decision WFC/160143. Because I have decided that Marinette is in a rural area of the state, rather than an urban one, I have issued this decision without waiting on the result in #160143. However, I feel compelled to point out that the Attorney General Opinion was not dealing with cash advances to a third party vendor who is neither a [REDACTED] or a cemetery. The situation before us does not fall within the ambit of the Opinion. Further, the statute does not contain any rural versus urban distinction. A failure to pay a third-party cemetery expense, which a burial vault is (*i.e.*, it can only be used in a cemetery), seems contrary to the statute.

CONCLUSIONS OF LAW

1. The vault provided for the petitioner is a reimbursable cemetery expense.
2. [REDACTED] [REDACTED] [REDACTED] [REDACTED] is entitled to a total \$1,000 in reimbursement for all of its cemetery expenses expended on behalf of the petitioner, including her burial vault.

THEREFORE, it is

ORDERED

That this matter is remanded to the Division of Health Care Access and Accountability with instructions to (1) take all necessary steps to take all steps necessary to ensure that [REDACTED] [REDACTED] [REDACTED] [REDACTED] is reimbursed a total of \$1,000 for cemetery expenses it has expended on behalf of the petitioner, and (2) review its determination of reimbursable funeral/burial costs. This action shall be taken within 10 days of the date of this decision.

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 Madison,
Wisconsin, this 28th day of November, 2014

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on November 28, 2014.

Division of Health Care Access and Accountability
Wisconsin Funeral and Cemetery Aids Program - DHS