



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

In the Matter of



DECISION

WFC/160143

The attached proposed decision of the hearing examiner dated September 19, 2014 is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed August 21, 2014, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on September 16, 2014, at Eau Claire, Wisconsin.

The issue for determination is whether the petitioner's funeral home is entitled to reimbursement for a burial vault as a cemetery expense if that vault is required and the cemetery does not provide it.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: Angela Stanford
Division of Health Care Access and Accountability
Madison, WI

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) was a resident of Eau Claire County. She died on July 4, 2014.
2. Lenmark, Gomsrud, Linn Funeral and Cremation Services handled the petitioner's funeral and burial arrangements.
3. The petitioner was buried in a 38-acre cemetery within the Eau Claire city limits. Eau Claire has over 65,000 residents.
4. The cemetery the petitioner is buried in requires but does not provide burial vaults.
5. The burial vault cost \$1,075.
6. The cemetery opened and closed the petitioner's grave. It charged \$750 for this service, which Lenmark paid.
7. Lenmark's total charge for its services was \$5,575, including the \$1,075 charge for the burial vault. The petitioner's estate paid for \$3,825 of this.
8. Lenmark seeks reimbursement for \$1,500 in burial costs and \$1,000 in cemetery costs. The Department reimbursed the Lenmark \$750 for the cost of opening and closing the petitioner's grave, but did not provide any other reimbursement.

DISCUSSION

Wisconsin law requires the Department to pay up to \$1,500 of the funeral and burial expenses and up to \$1,000 of the cemetery expenses of certain indigent recipients of public benefits. Wis. Stat. § 49.785(1). The law is fairly simple. It lists the categories of aid that make a person eligible for the program. Wis. Stat. § 49.785(1c). In addition it indicates that the Department does not have to pay for cemetery expenses if the total amount of those expenses exceeds \$3,500, does not have to pay for funeral and burial expenses if the total amount of those expenses exceeds \$4,500, and does not have to provide any reimbursement if the claim is not submitted within one year. Wis. Stat. § 49.785 (1m). The law says nothing about what constitutes a cemetery expense and what constitutes a funeral and burial expense, indicating only that payments under the program shall be made "to persons designated by the department."

Lenmark, Gomsrud, Linn Funeral and Cremation Services provided the petitioner's funeral services. Neither party disputes that she qualified for the program. The total cost of her funeral was \$6,325. Lenmark submitted a claim to the Funeral and Cemetery Aids Program indicating that \$4,500 of this was for funeral expenses and \$1,825 was for cemetery expenses. The cemetery expenses claimed were \$750 for opening and closing the grave site, a service the cemetery provided, and \$1,075 for the burial vault, which Lenmark provided because the cemetery required but did not provide that item itself. (A representative of the cemetery testified that a local ordinance requires burial vaults. I have not seen the ordinance but will assume that he is correct.) The program determined that the burial vault was a funeral expense because Lenmark is a funeral home and not a cemetery or crematory. It reimbursed Lenmark for the \$750 cost of opening and closing the grave. Once it counted the cost of the vault as a funeral expense, those expenses exceeded \$4,500. As a result, the program did not reimburse Lenmark for any funeral costs. Lenmark seeks \$1,500 from the program for burial expenses and \$1,000 for cemetery expenses.

The program relies upon an attorney general's opinion and its own program manual for its decision. In 1990, Wisconsin'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 and burial expense if provided by a funeral home 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 along with the 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 funeral home (including cremation), consider the expense to be a funeral expense. If the good/service is provided by a cemetery or crematory, consider the WFC/160143 expense to be a cemetery expense. If a good/service is provided by an entity other than a funeral home, cemetery, or crematory and cash advanced by the funeral home, apply the cash advance policy in 2.5.4.

Exception: There is one exception to this policy. Many small, rural cemeteries rely on a funeral home 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 funeral home. 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.

Policies are meant to interpret and carry out the law. When they do not accurately reflect the purpose of the law they are interpreting, they must be modified. They should also be modified if a literal interpretation of the policy leads to a result that is at odds with the intent of the policy. Lenmark contends that the exception in § 2.4.1. should apply here because its situation is the same as the situation of funeral homes in rural areas: the cemetery requires the funeral home to provide the vault but does not pay for it. Its argument depends upon whether that argument is consistent with the purpose of the statute and the purpose behind the exception in § 2.4.1.

Lenmark is mistaken. The City-owned and operated cemetery within the City of Eau Claire where the petitioner is buried is clearly not a rural cemetery, to which the exception might apply. The purpose of the exception in the policy is to recognize that small, rural cemeteries may not have the financial means to purchase and/or provide some goods or services prior to reimbursement, and allows for these goods and services to be provided by the funeral home instead. In this case, the city-owned cemetery would be capable of supplying the required burial vault; it simply chooses not to do so. The exception is not thereby invoked, and therefore pursuant to the Policy Manual the burial vault is a funeral expense.

Although § 2.4.1 states that a ‘rural cemetery’ is the only circumstance for exception to this policy rule, another does exist in the policy manual. Policy Manual § 5.1, section 4, states that “If the funeral home indicates on the ‘Statement’ that it provided a good or service because the good or service is not sold by the cemetery, (e.g. outer burial vault, opening/closing of the grave, etc.) count the good or service as a cemetery expense, not a funeral expense.” Lenmark did refer to the purchase of the vault on its invoice accompanying its reimbursement request as a ‘vault cemetery requirement’, but this is insufficient to invoke this exception and thus it remains a funeral and burial expense, not a cemetery expense.

This is consistent with the underlying purpose of the funeral program, which, as Deputy Secretary Kevin Moore pointed out in *Final Decision No. WFC/155821*, issued on May 29, 2014, is to “reimburse funeral homes for providing basic funerals for the indigent.”

In *WFC/155821*, the matter concerned reimbursement to a funeral home for a cremation certificate that is required by law to cremate a decedent. The program agreed to reimburse the funeral home for the cost of

the actual cremation as a cemetery expense, but held that the cremation certificate was a cash advance that was not reimbursable because it was obtained from a third party. The Final Decision overturned this, holding that the cremation certificate was a necessary part of the cremation process itself, and since the program agreed that the actual cremation was an allowable cemetery expense, the cremation certificate must be treated similarly.

In this matter, the program agreed to reimburse the funeral director for the cost of opening and closing the grave, claimed as a cemetery expense; that act was accomplished by the cemetery and is appropriately a cemetery expense. In contrast, the burial vault is required by the cemetery but not provided by the cemetery, so it was procured and provided by Lenmark. The program recognizes the burial vault as a compensable expense. The vault is required by the City, by ordinance, for burial in its cemeteries. Pursuant to program policy, however, this expense is counted as a funeral and burial expense because the funeral home provided it. This result is consistent with the Attorney General's Opinion noted above.

Lenmark was aware of the statutory limit for program reimbursement for funeral and burial expenses, clearly seen in its request for reimbursement, and it exceeded that limit. Because the total amount of the funeral and burial expenses exceed the statutory cap for reimbursement, Lenmark is not entitled to any further reimbursement from the program.

CONCLUSIONS OF LAW

1. The vault Lenmark provided for the petitioner is a reimbursable expense.
2. Lenmark's funeral expenses provided on the petitioner's behalf exceed \$4,500.
3. The cemetery expenses provided on the petitioner's behalf do not exceed \$3,500.
4. Lenmark is entitled to \$750 in reimbursement for the cemetery expenses it expended on behalf of the petitioner. It is not entitled to any reimbursement for the funeral expenses it expended on behalf of the petitioner because it exceeded the statutory allowable expense limit for funeral and burial costs.

THEREFORE, it is

ORDERED

That the appeal herein should be, and hereby 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, WI, 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 request (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 13 day
of January, 2015.

Kevin E. Moore
Kevin E. Moore, Deputy Secretary
Department of Health Services



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



PROPOSED DECISION

WFC/160143

PRELIMINARY RECITALS

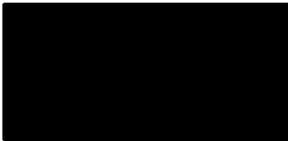
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expense to be a cemetery expense. If a good/service is provided by an entity other than a funeral home, cemetery, or crematory and cash advanced by the funeral home, apply the cash advance policy in 2.5.4.

Exception: There is one exception to this policy. Many small, rural cemeteries rely on a funeral home 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 funeral home. 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.

Policies are meant to interpret and carry out the law. When they do not accurately reflect the purpose of the law they are interpreting, they must be modified. They should also be modified if a literal interpretation of the policy leads to a result that is at odds with the intent of the policy. Lenmark contends that the exception in § 2.4.1. should apply here because its situation is the same as the situation of funeral homes in rural areas: the cemetery requires the funeral home to provide the vault but does not pay for it. Its argument depends upon whether that argument is consistent with the purpose of the statute and the purpose behind the exception in § 2.4.1.

The manner in which funeral homes and cemeteries divide services varies throughout the state. When drafting § 2.4.2, the Department apparently assumed that cemeteries outside of small, rural areas would pay for items such as a vault. But—in Eau Claire at least—this assumption is wrong. As noted, although the cemetery in Eau Claire does not provide vaults, it does require them, which means that Lenmark could handle the petitioner’s funeral arrangements only if it paid for the burial vault. Under these circumstances, to deny reimbursement to funeral homes in Eau Claire but allow it for funeral homes in more remote locations implies that the purpose of the exception is to allow extra reimbursement to the remote funeral homes simply because they are remote. Nothing in the law suggests that remote funeral homes should be favored in this way. A more plausible explanation of the purpose of exception is that its purpose is 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 places, the funeral home must provide the service. This interpretation is consistent not only with the reasoning behind the exception but also with the underlying purpose of the funeral program, which, as Deputy Secretary Kevin Moe pointed out in *Final Decision No. WFC/155821*, issued on May 29, 2014, is to “reimburse funeral homes for providing basic funerals for the indigent.”

Like the matter now before me, the matter reviewed in the final decision involved the funeral home’s payment of a mandatory expense not covered by anyone else. The logic there is consistent with the logic of reimbursing Lenmark for paying for the vault. The funeral program had denied reimbursement for a cremation certificate required by state law but which the funeral home had to pay for. The program considered the expense a cash advance, and its policy barred payments for cash advances. The decision overturned that interpretation and determined that although the certificate was paid for with cash advanced by the funeral home, it was a covered expense. Deputy Secretary Moe distinguished between mandatory services and those that, while desirable (pallbearers, flowers, and obituaries), go beyond what is required for a basic funeral. The cremation certificate was covered because it was required by law. A burial vault in Eau Claire is also required by law. I find that it is consistent with program’s purpose, as well as the intent of the exception to § 2.4.1. to reimburse Lenmark, the entity providing that service.

CONCLUSIONS OF LAW

1. The vault Lenmark provided for the petitioner is a reimbursable cemetery expense.
2. Lenmark’s funeral expenses provided on the petitioner’s behalf do not exceed \$4,500.
3. The total cemetery expenses provided on the petitioner’s behalf do not exceed \$3,500.

4. Lenmark is entitled to \$1,000 in reimbursement for all of the cemetery expenses it expended on behalf of the petitioner, including her funeral vault. It is entitled to \$1,500 in reimbursement for all of the funeral expenses it expended on behalf of the petitioner

THEREFORE, it is

ORDERED

That if this proposed decision is upheld by the Secretary or her designee, the Department is ordered within 10 days of when the decision takes effect to reimburse the petitioner's funeral director \$1,000 for cemetery expenses and \$1,500 in funeral expenses.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH. If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as 'PARTIES IN INTEREST.'

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 19th day of September, 2014

Michael D. O'Brien /kcc

Michael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals