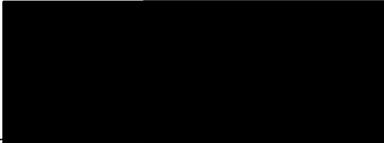




**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of



DECISION

WFC/161692

The attached proposed decision of the hearing examiner dated January 7, 2015, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

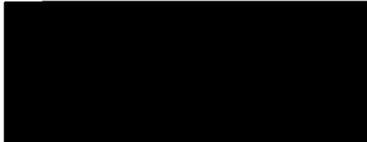
Pursuant to a petition filed October 30, 2014, Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on December 15, 2014, at Chippewa Falls, Wisconsin.

The issue for determination is whether the Division correctly determined that a burial vault paid for by the petitioner's funeral home was a funeral and burial rather than a cemetery expense.

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: Bao Vang

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 Chippewa County. She died on September 23, 2014.
2. Horan Funeral Home, Inc., handled the petitioner's funeral and burial arrangements.
3. The petitioner was buried in Rest Haven Cemetery in the Town of Washington, about a mile south of Eau Claire, just past the intersection of highways 53 and 94. It is not a small cemetery.
4. The cemetery the petitioner is buried in requires but does not provide burial vaults.
5. The burial vault cost \$1,224.
6. The cemetery opened and closed the petitioner's grave. It charged \$700 for this service, which Horan paid.
7. Horan's funeral and burial charges exceeded \$4,500, even without the charge for the burial vault.
8. Horan seeks reimbursement for \$1,000 in cemetery costs. The Department reimbursed Horan \$700 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."

Horan Funeral Home, Inc., provided the petitioner's funeral services. Neither party disputes that she qualified for the program. Horan submitted a claim to the Funeral and Cemetery Aids Program requesting the \$1,000 maximum reimbursement for the cemetery expenses but nothing for funeral and burial expenses because these exceeded \$4,500. The actual cemetery expenses it claimed were \$700 the cemetery charged it for opening and closing the grave and \$1,224 for the vault the cemetery required but did not provide. The program determined that the burial vault was a funeral expense because Horan is a funeral home rather than a cemetery or crematory. (As will be discussed later, the program allows funeral homes to claim this expense if the person is buried in a small, rural cemetery that does not provide burial vaults; it determined that the cemetery the petitioner was buried in did not qualify for this exemption.) It reimbursed Horan only for the \$700 cost of opening and closing the grave. Horan seeks the \$1,000 maximum reimbursement.

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*, [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 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.

The cemetery here is rural because it is outside of Eau Claire's city limits. But the program contends that it is not small because it is more than five acres, has at least 20 new plots per year, and has a trust fund greater than \$100,000. The worker who appeared admitted that none of these requirements are found in any written policy; rather their basis is an email sent to her agency. And the agency submitted no documentation or evidence from someone with first-hand knowledge of the cemetery's acreage, number of plots, or endowment fund. Nevertheless, because I ultimately find that what matters is not the cemetery's location or size but whether it pays for the burial vault, I will assume that it is not a small, rural cemetery, and therefore the noted exception does not apply herein.

There is a possible ambiguity in the Manual regarding payments such as this. The program relies on the Manual § 2.4.1, to deny the requested reimbursement; however, the Manual also contains the following language at Manual § 5.1, Section 4.1:

Section 4 - Reimbursement Request

1. **Total Funeral Charges:** Compare the total funeral charges documented in Section 3 to the total charges indicated in Section 4. Assure that cash advance items are not included in the total unless the funeral charges an additional service fee. Always count cash advances for cemetery goods and services toward total cemetery charges. **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. If this is not indicated on the "Statement," count the good or service as a funeral expense [emphasis added].** Make corrections to total funeral charges as necessary, based on policy and the documentation submitted by the funeral home.

Here, the funeral director clearly states on the Statement, an itemization provided for the reimbursement claim, that the vault is a cemetery requirement but not provided by the cemetery. Additionally, the funeral director provided a letter from the Town of Washington, signed by the Town Administrator, that clearly states that the Town owned and operated cemetery requires but does not provide burial vaults. However, as noted above, this is not a 'small and rural' cemetery, and the exception does not apply.

To avoid an ambiguity, Manual § 5.1, Section 4.1 must be read and understood in the context of the exception found in Manual § 2.4.1. Manual § 2.4.1 requires that the funeral director note on the reimbursement request Statement that the 'small and rural' exception applies, and that the claimed good or service is required but not supplied by the cemetery. Manual § 5.1, Section 4.1 reinforces the requirement that the Statement must include the appropriate language for the exception in Manual § 2.4.1 to be considered. It is not intended as an alternative payment method.

Thus, while the cost of the outer burial vault may validly be claimed for reimbursement, it must be considered a funeral and burial expense, not a cemetery expense. Since the funeral and burial expenses already exceed the upper limit, even without consideration of the cost of the outer burial vault, the petitioner is not entitled to any further reimbursement from the program.

CONCLUSIONS OF LAW

1. The vault Horan provided for the petitioner is a reimbursable expense.
2. The expense of the outer burial vault must be considered a funeral and burial expense because it was provided by the funeral director and the 'small and rural' cemetery exception does not apply.
3. The total funeral and burial expenses provided on the petitioner's behalf exceed \$500.
4. Horan is not entitled to any additional reimbursement for the expense it expended on behalf of the petitioner, for her funeral vault.

THEREFORE, it is

ORDERED

That the matter 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 12 day
of March, 2015.


Thomas J. Engels, Deputy Secretary
Department of Health Service



FH
2102083250

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

In the Matter of



PROPOSED DECISION

WFC/161692

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Division of Hearings and Appeals

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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.

The cemetery here is rural because it is outside of Eau Claire's city limits. But the program contends that it is not small because it is more than five acres, has at least 20 new plots per year, and has a trust fund greater than \$100,000. The worker who appeared admitted that none of these requirements are found in any written policy; rather their basis is an email sent to her agency. And the agency submitted no documentation or evidence from someone with first-hand knowledge of the cemetery's acreage, number of plots, or endowment fund. Nevertheless, because I ultimately find that what matters is not the cemetery's location or size but whether it pays for the burial vault, I will assume that it is not a small, rural cemetery.

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. Horan contends that the exception in § 2.4.1. should apply here because its situation is the same as the situation of funeral homes dealing with small, rural cemeteries: the cemetery requires the funeral home to provide the vault but does not pay for it. Its argument's success 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—near Eau Claire at least—this assumption is wrong. As noted, although the cemetery just outside Eau Claire does not provide vaults, it does require them, which means that Horan could handle the petitioner's funeral arrangements only if it paid for the burial vault. Under these circumstances, to deny reimbursement to funeral homes working with bigger cemeteries just outside 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 Horan 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 (such as pallbearers, flowers, and obituaries), go beyond what is required for a basic funeral. The cremation certificate was covered because it was required by law. It is unclear if the burial vault is required by any law, but it is required by the cemetery, and I

have yet to come across a cemetery around Eau Claire that does not require them. Thus, for all practical purposes, it is a mandatory service. Based upon this, I find that it is consistent with program's purpose, as well as the intent of the exception to § 2.4.1. to reimburse Horan, the entity providing that service.

CONCLUSIONS OF LAW

1. The vault Horan provided for the petitioner is a reimbursable cemetery expense.
2. The total cemetery expenses provided on the petitioner's behalf do not exceed \$3,500.
3. Horan is entitled to \$1,000 in reimbursement for all of the cemetery expenses it expended on behalf of the petitioner, including her funeral vault.

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.

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 7 day of January, 2015

Michael D O'Brien/kec

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