



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

In the Matter of



**PROPOSED DECISION
ON MOTION FOR COSTS**

Case #: CCWA - 208558

PRELIMINARY RECITALS

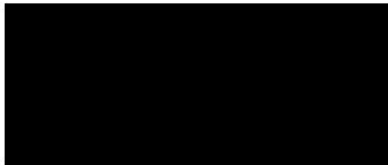
Pursuant to a petition filed on May 5, 2023, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support regarding Medical Assistance (MA), specifically the IRIS program, a hearing was held on June 27, 2023, by telephone. On July 26, 2023 a Decision was issued dismissing the appeal. On August 8, 2023 the petitioner requested a rehearing. On August 30, 2023 the rehearing was granted. As the record was complete from the June 27, 2023 hearing, no additional hearing was held. On September 5, 2023 a Decision on Rehearing was issued remanding the matter to the agency for action in accordance with the Order. On September 19, 2023 petitioner's attorney filed a request regarding implementation of that Order. On September 26, 2023 an Amended Decision on Rehearing was issued pursuant to Wis. Admin. Code § HA 3.10(1) for purposes of clarifying the Order. On September 27, 2023 petitioner's attorney filed a motion for fees and costs. The Department of Health Services attorney filed a response to the cost motion on October 27, 2023. Several other unsolicited submittals were made by the parties thereafter, concluding on January 4, 2024.

The issue for determination is whether the petitioner is entitled to attorney costs and/or fees.

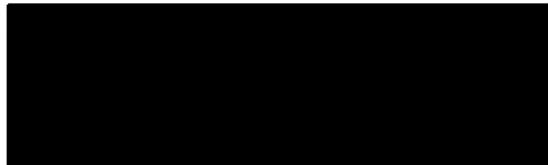
There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By: Attorney Vanessa Kuettel
Bureau of Long-Term Support
PO Box 7851
Madison, WI 53707-7851

ADMINISTRATIVE LAW JUDGE:
Kelly Cochran
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of ██████████ County and has earned less than \$150,000 in each of the last three years.
2. Petitioner was an individual who was ultimately the prevailing party in an administrative hearing (Case No. CWA- 208558) held on Tuesday, June 27, 2023. On July 26, 2023 a Decision was issued dismissing the appeal. On August 8, 2023 the petitioner requested a rehearing. On August 30, 2023 the rehearing was granted. As the record was complete from the June 27, 2023 hearing, no additional hearing was held. On September 5, 2023 a Decision on Rehearing was issued remanding the matter to the agency for action in accordance with the Order. On September 19, 2023 petitioner's attorney filed a request regarding implementation of that Order. On September 26, 2023 an Amended Decision on Rehearing was issued pursuant to Wis. Admin. Code § HA 3.10(1) for purposes of clarifying the Order (Decision).
3. The issue in Case No. CWA – 208558 was whether the agency correctly denied petitioner's budget amendment (BA) request for an increased daily rate for supportive home care (SHC) hours that he receives from ██████████. The BA was made on July 21, 2022. On April 27, 2023, the agency issued a letter to petitioner stating that the BA request was denied and that he could request an independent review. On May 5, 2023 petitioner appealed to the Division of Hearings and Appeals. On May 9, 2023, the agency issued a Notice of Action indicating that the BA request was denied due to insufficient documentation to justify the request. The ultimate Decision in Case No. CWA – 208558 found that the agency failed to establish that it correctly denied petitioner's BA request for an increased daily rate for SHC.
4. On September 27, 2023 the petitioner's attorney, Attorney Lori Kornblum , submitted a timely motion for costs that were incurred in connection with Case No. CWA- 208558 to the Division of Hearings and Appeals (DHA). This motion was submitted with a detailed, itemized statement of attorney fees and costs, in the amount of \$11,582.62, which indicated the actual time expended and hourly fee pursuant to Wis. Stats. § 227.485(5). The total amount requested was separated between \$1741.25 for payment to Marilyn Services LLC as well as attorney fees in the amount of \$9841.37.

DISCUSSION

Wis. Stats., § 227.485(3), provides in pertinent part:

In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

“Substantially justified” means having a reasonable basis in law and fact. Wis. Stats. § 227.485(2)(f). The Wisconsin Supreme Court, in considering the issue of “substantial justification” in Sheely v. Wisconsin Department of Health and Social Services, 442 N.W. 2d 1, 150 Wis. 2d 320 (1988), recited the following language from Phil Schmidt and Son v. NLRB, 810 F. 2d 638, 642 (7th Cir. 1987):

To satisfy its burden the government must demonstrate 1) a reasonable basis in truth for the facts alleged; 2) a reasonable basis in fact for the theory propounded; and 3) a reasonable connection between the facts alleged and the legal theory advanced.

Sheely also cites the federal Equal Access to Justice Act decision in Pierce v. Underwood, 108 S.Ct. 2541 (1988). In that case, the United States Supreme Court discussed the concept of “substantial justification” as follows:

We are of the view, therefore, that as between the two commonly used connotations of the word “substantially,” the one most naturally conveyed by the phrase before us here is not “justified to a high degree,” but rather “justified in substance or in the main” - that is, justified to a degree that could satisfy a reasonable person. That is no different from the “reasonable basis in law and fact” formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue... [cites omitted].

Pierce, 108 S.Ct. at 2550. This approach was followed in U.S. v. Paisley, 957 F.2d 1161 (4th Cir. 1992) and Johnson v. U.S. Dept. of Housing & Urban Dev., 939 F.2d 586 (8th Cir. 1991). Thus, the question is not whether the agency was actually correct but whether a reasonable person could think that the action by the agency was properly taken and correct, *i.e.*, whether a person could find at the time of the action, a reasonable basis in law for the theory propounded, a reasonable basis in truth for the facts alleged, and a reasonable connection between the two.

The agency concedes that petitioner is entitled to an award of costs under Wis. Stat. § 227.485; however, the agency argues that his request for \$1,741.25 in costs to his service provider, Marilyn Services, LLC, is not an allowable cost under the Wisconsin Equal Access to Justice Act (WEAJA; or Wis. Stat. §§ 227.485 and 814.245) and should be denied. The agency further argues that his request for \$9,841.37 in attorney fees is unreasonable and should be reduced. I will address each request separately.

1. Are costs to [REDACTED] allowable?

Petitioner argues that the service provider, [REDACTED] is a small business that incurred excess costs in gathering information for the petitioner and attending the hearing, and therefore should be recoverable. The agency argues that petitioner may only recover costs explicitly authorized by Wis. Stat. § 227.485(5) and that the request for payment of costs to [REDACTED] should be denied as the requested costs are not recoverable under Wis. Stat. § 227.485(5).

Wis. Stat. § 227.485(5) directs a hearing examiner to “determine the amount of costs using the criteria specified in s. 814.245(5)”. Under Wis. Stat. § 814.245(5), an award of costs shall include the following, if applicable,

- (a) The reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the case and reasonable attorney or agent fees. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that:

1. No expert witness may be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency which is the losing party.
 2. Attorney or agent fees may not be awarded in excess of \$150 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee.
- (b) Any other allowable cost specified under s. 814.04 (2).

Wis. Stats. § 814.04(2) provides:

DISBURSEMENTS. All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process or other papers in an action when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff's fee for the same service; amounts actually paid out for certified and other copies of papers and records in any public office; postage, photocopying, telephoning, electronic communications, facsimile transmissions, and express or overnight delivery; depositions including copies; plats and photographs, not exceeding \$100 for each item; an expert witness fee not exceeding \$300 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.

First, I find that *petitioner* is the prevailing party in this matter. Petitioner concedes this in his motion. He requests costs on behalf of [REDACTED] is SHC service provider, to compensate the entity for its employees' time. As [REDACTED] is not the prevailing party, nor even admitted as a party to the action, I find they are not entitled to costs. Further, I find that the time spent by a service provider is not an allowable cost specified under the WEAJA. Moreover, [REDACTED] neither served as an expert witness nor agent in this matter. Accordingly, those costs are denied.

2. Are petitioner's attorney fees reasonable?

Petitioner's attorney argues that her fees are reasonable and are calculated at the rate of \$240.10 with a total of 40.65 hours. Wis. Stats. § 814.245(5)(a)(2) provides that attorney or agent fees may not be awarded in excess of \$150 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee. Petitioner's attorney argues her rate is higher than the statutory rate of \$150 and should be adjusted for cost-of-living increases. Using the relevant information from the Bureau of Labor Statistics, the increase in the cost of living from July 1, 2004 to September 2023 makes \$150 the equivalent of \$242.10, which is higher than the rate she requests. See https://www.bls.gov/data/inflation_calculator.htm.

The agency argues that petitioner's attorney's costs should be reduced to account for vague and inadequately documented time entries. The agency argues that numerous time entries group multiple tasks into one entry (i.e., block-billing) and appear to have been reconstructed by petitioner's attorney.

In response to the agency's response to her motion, the petitioner's attorney submitted an unsolicited response with a revised itemized statement of fees and costs as a response to the block billing allegation. She asserts that based on phone bills, emails and notes, she realized that she substantially underbilled the actual amount of time spent on the case. She requests again the rate of \$240.10, at 65.05 hours, for a total of \$15,618.51. She also argued that the agency had yet to implement the Decision as of October 27, 2023. The Order from the Decision stated:

That this matter is remanded to the respondent to take all administrative steps necessary to rescind the BA denial, review the BA request effective July 21, 2022, and issue a decision letter to the petitioner. These actions shall be completed within 20 days of the date of this Decision. If the agency requires additional information, that is not already part of this record, the agency shall issue a letter to the petitioner specifically stating what is necessary to complete the review, within 10 days of the date of this Decision. The agency shall give the petitioner 14 days to provide the information to the agency. The respondent shall then take all administrative steps necessary to review the BA request with the additional information and issue a decision letter to the petitioner within 30 days of the date of this Decision.

The agency submitted its unsolicited response thereto explaining the background of the complying with the Order in the Decision.

First, there is no evidence to show that the agency did not comply with the Decision. It was ordered to take the administrative steps necessary to correct the denial, and there is no evidence it did not begin to do so pursuant to the Order's terms. The use of the term "take the administrative steps necessary" is used because the process by which the matter would be corrected involved multiple parties and documentation that would only be known to by the local agency actors. The Order did not order the agency to pay "x" amount of dollars to accommodate the BA by a certain date, but rather to set the wheels in motion for that to occur. The agency described how the process to comply was initiated in accordance with the Order by creating the service authorization to accommodate paying [REDACTED] but that it indeed took longer due to issues with the fiscal agent and petitioner agreeing on the amount.

Second, I am not accepting the revised itemized statement. Petitioner's attorney submitted and attested to her "final bill" with the original motion. To later submit a better accounting of the matter undermines the accuracy of the original bill; however, I will consider the costs and fees as attested to in the latter.

The statute provides that reasonable attorney fees are allowable. *See Wis. Stat. § 814.245(5)(a)*. In reviewing the original billing statement, I find no fault with specificity, nor have reservation about the total amount of time requested for the proper presentation of this case by petitioner's attorney. There is nothing grossly inflated with the time spent on preparation for this case. The petitioner's attorney submitted her motion and included an itemized statement stating the actual time expended pursuant to the statutory requirement. *See Wis. Stat. § 227.485(5)*. I find those fees reasonable and allowable in the amount of \$9841.37.

CONCLUSIONS OF LAW

1. The agency did not have substantial justification for its action to deny petitioner's BA request for an increased daily rate for SHC.
2. Petitioner's attorney has properly established that she is entitled to a reimbursement of \$9841.37 in attorney fees as petitioner was the prevailing party.
3. There are no special circumstances in existence that would make the award for attorney fees unjust.

THEREFORE, it is

ORDERED

That, if and only if, this Proposed Decision is adopted by the Secretary of the Wisconsin Department of Health Services (DHS) as the Final Decision in this matter, petitioner's Petition for Attorney Fees and Costs is GRANTED and DHS must, within 10 days of the date of the Final Decision, award attorney's fees to petitioner's attorney in the total amount of \$9841.37.

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, 4822 Madison Yards Way, Madison, WI, 53705. 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 Department of Health Services 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 Milwaukee,
Wisconsin, this 26th day of February, 2024



Kelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals