Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Brightmoor Nursing Center
(CCN: 34-5140),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-09-512

Decision No. CR2397

Date: July 15, 2011

DECISION

Petitioner Brightmoor Nursing Center challenges the decision of the Centers for Medicare & Medicaid Services (CMS) that it was not in substantial compliance with program participation requirements and challenges also CMS's imposition of civil money penalties (CMPs) of $3550 per day from February 9, 2009 through March 23, 2009 (for a period of alleged immediate jeopardy), and $100 per day from March 24, 2009 through April 13, 2009. CMS found Petitioner back in substantial compliance as of April 14, 2009. In a Ruling dated April 19, 2010, Administrative Law Judge Alfonso J. Montaño determined that Petitioner was out of substantial compliance with participation requirements from February 9 through March 23, 2009, and found that its noncompliance constituted immediate jeopardy to Petitioner's residents through February 16, 2009. Judge Montaño also determined that Petitioner had not appealed the noncompliance finding at 42 C.F.R. § 483.10(b)(11) (Tag F157), which noncompliance was cited at a level of non-immediate jeopardy, and that due to that noncompliance alone Petitioner remained out of substantial compliance with participation requirements through March 23, 2009. Judge Montaño ruled, however, that on the motions for summary judgment then before him he could not decide whether Petitioner was out of substantial compliance with the participation requirement at 42 C.F.R. § 483.25 (Tag F309) from February 17 through March 23, 2009, or decide whether, if he found noncompliance with that

participation requirement, the noncompliance constituted immediate jeopardy during the period February 17 through March 23, 2009. Judge Montaño also deferred ruling on whether the remedies imposed were reasonable.

The case was reassigned to me when Judge Montaño left his position at the Department of Health and Human Services. I adopt all findings made in Judge Montaño's April 19, 2010 Ruling. I find that Petitioner's noncompliance constituted immediate jeopardy during the period February 17 through March 23, 2009. I further find that the $3550 per day CMP from February 9 through March 23, 2009 is reasonable, as is the $100 per day CMP imposed from March 24, 2009 through April 13, 2009.

I. Background

Petitioner is a nursing home located in Salisbury, North Carolina. On March 24, 2009, the Nursing Home Licensure and Certification Section of the Division of Health Service Regulation, North Carolina Department of Health and Human Services (state agency), completed a complaint investigation survey at Petitioner's facility. By letter dated April 13, 2009, CMS notified Petitioner that it had been found out of substantial compliance with participation requirements, that conditions in the facility constituted immediate jeopardy to resident health and safety from February 9, 2009 until March 24, 2009, and that while immediate jeopardy had been removed as of March 24, 2009, Petitioner still remained out of substantial compliance with participation requirements. CMS stated that it was imposing remedies including: a CMP of $3550 per day effective February 9, 2009 through March 23, 2009, and then $100 per day effective March 24, 2009, until Petitioner achieved substantial compliance or was terminated; denial of payment for new admissions (DPNA) effective April 28, 2009, if Petitioner was still out of substantial compliance on that date; mandatory termination on August 26, 2009, if Petitioner was still out of substantial compliance on that date; and loss of its nurse aide training program (NATCEP) due to the extended survey. CMS also notified Petitioner that its noncompliance constituted substandard quality of care. CMS Exhibit (Ex.) 2. By letter dated May 21, 2009, CMS notified Petitioner that as a result of a May 12, 2009 revisit survey it had been found back in substantial compliance as of April 14, 2009. CMS Ex. 3. Thus, the DPNA and termination remedies never went into effect.

Petitioner requested a hearing by letter dated May 26, 2009. The case was assigned to Judge Montaño for hearing and decision on June 18, 2009. CMS filed a motion for summary judgment and Petitioner filed a motion for partial summary judgment. By Ruling and Order (Ruling) dated April 19, 2010, as noted above, Judge Montaño determined that Petitioner was out of substantial compliance with participation requirements and that CMS's determination that immediate jeopardy existed was not clearly erroneous from February 9 through 16, 2009. Judge Montaño also determined that because Petitioner did not appeal the alleged deficiency at 42 C.F.R. § 483.10(b)(11) (Tag F157) from the March 24, 2009 survey, Petitioner remained out of substantial

compliance with participation requirements at a level of non-immediate jeopardy through April 14, 2009. Judge Montaño determined that there was a genuine dispute of material fact regarding whether Petitioner was in substantial compliance with the participation requirement at 42 C.F.R. § 483.25 (Tag F309) during the time period February 17, 2009 through March 23, 2009, and whether any noncompliance, if found, constituted immediate jeopardy.

The case was transferred to me when Judge Montaño left the Department of Health and Human Services. I held a hearing in the case on January 27, 2011, in Greensboro, North Carolina, to address the issues identified but unresolved by Judge Montaño in his Ruling. A 175-page transcript (Tr.) was prepared. Testifying were: Janeth Osabel, R.N., state agency surveyor; Cathy Perry, L.P.N., the administrative L.P.N. at Petitioner's facility; Cynthia Scott, an L.P.N. and licensed nursing home administrator who was Petitioner's administrator at the relevant time; and Linda Howard, R.N., a licensed nursing home administrator and Petitioner's owner. CMS offered, and I admitted, CMS Exhibits (CMS Exs.) 1-8. Petitioner offered, and I admitted, Petitioner's Exhibits (P. Exs.) 1-27.[1]

II. Issues

1. Whether Petitioner was out of substantial compliance with the participation requirement at 42 C.F.R. § 483.25, from February 17 through March 23, 2009;

2. If Petitioner was out of substantial compliance, whether the noncompliance constituted immediate jeopardy;

3. If the noncompliance constituted immediate jeopardy, for how long did the immediate jeopardy last; and,

4. Whether the remedies imposed are reasonable.

III. Applicable Law

Sections 1819 and 1919 of the Social Security Act (Act) and the regulations at 42 C.F.R. Part 483 govern Petitioner's participation in Medicare and Medicaid. Sections 1819 and 1919 of the Act provide the Secretary of Health and Human Services (Secretary) with authority to impose remedies, including CMPs and PICMPs, against long-term care facilities for failure to comply with participation requirements.

[1] I repeat here my oral comment at the conclusion of the hearing: this case has been tried with considerable skill by both sides. Before Judge Montaño and before me, both sides have presented their positions clearly and concisely, and in a spirit of genuine professionalism. Tr. at 174-75.

Regulations define the term "substantial compliance" to mean:

> [A] level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.

42 C.F.R. § 488.301.

The Secretary has delegated to CMS and the states the authority to impose remedies against long-term care facilities not complying substantially with federal participation requirements. The applicable regulations at 42 C.F.R. Part 488 provide that state survey agencies, on behalf of CMS, may survey facilities participating in Medicare and Medicaid to ascertain whether the facilities are complying with participation requirements. 42 C.F.R. §§ 488.10-488.28. The regulations contain special survey conditions for long-term care facilities. 42 C.F.R. §§ 488.300-488.335. Under Part 488, a state or CMS may impose a CMP against a long-term care facility if a state survey agency ascertains that the facility is not complying substantially with participation requirements. 42 C.F.R. §§ 488.406, 488.408, and 488.430. The CMP may begin to accrue as early as the date that the facility was first substantially out of compliance, and may continue to accrue until the date the facility achieves substantial compliance or until CMS terminates the facility's provider agreement. 42 C.F.R. § 488.440.

The regulations specify that if a CMP is imposed against a facility based on an instance of noncompliance, the CMP will be in the range of $1000 to $10,000 per instance. 42 C.F.R. § 488.438(a)(2). When a CMP is imposed against a facility on a per-day basis, it must fall into one of two broad ranges of penalties. 42 C.F.R. §§ 488.408, 488.438. The upper range of CMP, from $3050 per day to $10,000 per day, is reserved for deficiencies that constitute immediate jeopardy to a facility's residents and, in some circumstances, for repeated deficiencies. 42 C.F.R. § 488.438(a)(1)(i), (d)(2). The lower range of CMP, from $50 per day to $3000 per day, is reserved for deficiencies that do not constitute immediate jeopardy, but either cause actual harm to residents or cause no actual harm, but have the potential for causing more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii). "Immediate jeopardy" is defined as:

> [A] situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.

42 C.F.R. § 488.301.

Sections 1819(f)(2)(B) and 1919(f)(2)(B) of the Act prohibit approval of a nurse aide training and/or competency evaluation program (NATCEP) if within the last two years the facility has been subject to, among other things, an extended or partial extended

survey; imposition of a CMP of not less than $5000; or imposition of a denial of payment for new admissions.

A facility may challenge the scope and severity that CMS cites only if a successful challenge would affect the range of CMP amounts that CMS imposed or would affect the facility's NATCEP. 42 C.F.R. § 498.3(b)(14), (d)(10)(i). CMS's determination as to the scope and severity of noncompliance "must be upheld unless it is clearly erroneous." 42 C.F.R. § 498.60(c)(2). This includes CMS's finding of immediate jeopardy. *Woodstock Care Center*, DAB No. 1726, at 9 (2000), *aff'd, Woodstock Care Center v. U.S. Department of Health and Human Services,* 363 F.3d 583 (6th Cir. 2003).

The Departmental Appeals Board (Board) has long held that the net effect of these regulations is that a provider has no right to challenge the scope and severity assigned to a noncompliance finding except in the situation where that finding is the basis for an immediate jeopardy determination. *See, e.g., Ridge Terrace,* DAB No. 1834 (2002); *Koester Pavilion,* DAB No. 1750 (2000).

IV. Analysis

My findings of fact and conclusions of law are set forth in bold and italics and are followed by my analysis.[2]

1. Petitioner was out of substantial compliance with the participation requirement at 42 C.F.R. § 483.25 (Tag F309) at a level of immediate jeopardy from February 9 through March 23, 2009.

The participation requirement at 42 C.F.R. § 483.25 requires that:

> Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

[2] I have reviewed the entire record, including all the exhibits and testimony. Because the Federal Rules of Evidence do not control the admission of evidence in proceedings of this kind (*see* 42 C.F.R. § 498.61), I may admit evidence and determine later, upon a review of the record as a whole, what weight, if any, I should accord that evidence or testimony. To the extent that any contention, evidence, or testimony is not explicitly addressed or mentioned, it is not because I have not considered the contentions. Rather, it is because I find that the contentions are not supported by the weight of the evidence or by credible evidence or testimony.

In a statement of deficiencies (SOD) dated March 24, 2009, the state agency alleged that Petitioner "failed to report an incident and a change in condition to a nurse/supervisor which resulted in a delay of assessment and medical treatment" for one resident. CMS Ex. 1, at 4-5.

The deficiency in this case involves Petitioner's care of Resident 1. Judge Montaño's Ruling relates that on February 9, 2009, Resident 1 suffered a fall or accident while a certified nurse's assistant (C.N.A.) was showering him. As a result, he fractured his right hip. Several of Petitioner's employees failed to report the incident, the resident was not adequately assessed, and the resident was not taken to the hospital until the following day when the hip fracture was diagnosed. Judge Montaño specifically found that two C.N.A.s failed to report the incident in the shower room and that an L.P.N. failed to timely assess the resident. Judge Montaño further found that it was Petitioner's responsibility to ensure proper reporting and assessment of injuries. While examining the evidence in the context of summary judgment he accepted that Petitioner trained its appropriately credentialed staff and that staff's actions did not comport with Petitioner's policies and procedures, but he found that Petitioner had singularly failed to explain how such a global failure, involving so many of Petitioner's staff, occurred. Accordingly, Judge Montaño found Petitioner noncompliant with the participation requirement. Judge Montaño also found that the fracture alone caused serious injury to Resident 1, was thus correctly assessed to be actual harm, and substantiated a finding of immediate jeopardy.[3] Judge Montaño ruled also that until Petitioner corrected the conditions that led to the immediate jeopardy, noncompliance at an immediate jeopardy level continued. ALJ Montaño Ruling (Ruling) at 6-7, 9-12.

CMS argued before Judge Montaño that Petitioner's noncompliance continued at the immediate jeopardy level until March 23, 2009, because the shower monitoring form (shower form) it developed to assist staff in reporting changes in condition found while showering a resident was not instituted until March 19, 2009, the compliance date identified in Petitioner's PoC. CMS also argued that it was not until March 27, 2009, according to the PoC, that all residents were: assessed for use of shower chairs or gurneys; information on the use of the devices was placed in residents' care plan assignment reports; and the charge nurse was made responsible for reporting changes in the devices used.[4] Ruling at 12.

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[3] Resident 1 died on February 11, 2009, at the hospital. CMS Ex. 1, at 11. I agree with Judge Montaño that the fact the Resident died, and the manner of his death (i.e., whether or not it was related to his fall or to his hip fracture), does not affect the posture of this case. This case concerns the care provided to Resident 1 by Petitioner from February 9 through 10, 2009, and the corrective actions taken by Petitioner afterwards.

[4] CMS did not explain why, if this was so, it found immediate jeopardy abated as of March 24, 2009. While I note this, it does not affect my decision.

Petitioner argued before Judge Montaño that immediate jeopardy did not exist after February 16, 2009. Petitioner listed 17 interventions it undertook as of February 16, 2009, to show that it had removed immediate jeopardy. It asserted that no resident was injured after February 16, 2009. It also asserted that the shower form was duplicative of an existing facility procedure, use of an acute episode form (acute form). Ruling at 13.

In his Ruling, Judge Montaño found that genuine disputes of material fact existed precluding resolution of the case by summary disposition. The disputes he identified were: 1) the equivalence of the shower form[5] Petitioner developed as part of its PoC with Petitioner's acute form[6]; and, 2) whether Petitioner was still evaluating its residents for the use of shower chairs or gurneys during the period February 16 through March 23, 2009. Ruling at 13.

As noted above, I adopt Judge Montaño's finding that Petitioner was out of substantial compliance with participation requirements through February 16, 2009, and that the immediate jeopardy citation was not clearly erroneous through that date. I find, as discussed below, that Petitioner has not shown it was in compliance at a date earlier than the dates contemplated in its plan of correction (PoC), and I find that as both a matter of fact it was not, and that as a matter of law it could not have been. Moreover, Petitioner's interventions required on-site verification, and that process did not happen until the survey on March 24, 2009.

In *Greenbrier Nursing and Rehabilitation Center*, DAB No. 2335, at 15 (2010), the Board held that whether a facility can establish substantial compliance with participation requirements earlier than it states in a PoC depends on "whether it completed the corrective measures listed in its plan of correction by the alleged earlier date." Where a facility admits it did not complete those measures the facility "cannot claim that steps short of that goal should nevertheless be accepted as adequate to require lifting the

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[5] The shower form is found at P. Ex. 15. It is headed "SHOWER MONITORING for INCIDENT/OCCURANCE (sic)" and requires a C.N.A. bath team member to sign and date the form. It then requests the name of the resident, the time of the shower, and whether there were "Occurrences Reportable to Nurse Y/N" and asks "if yes please explain what was reported and to whom." A nurse is to sign the form also and it is noted for the nurse that "your signature states you have reviewed this sheet and addressed concerns as written." P. Ex. 15; CMS Ex. 8.

[6] The acute form is not limited to the shower. It is headed "ACUTE EPISODES/24 HOUR REPORT." It asks that the person noting the report state the date and census, the name of the resident, any acute episode documentation and what shift the episode occurred on. It also asks for information on admissions and discharges, and asks whether the resident used a personal body alarm. It also asks for residents under the acronym "FSBS" and notes times as 6:30 a.m. or 4:30 p.m. P. Ex. 17.

remedies imposed." *Id*., citing *Cal Turner Extended Care Pavilion,* DAB No. 2030, at 19 (2006); *accord Meridian Nursing Center*, DAB No. 2265, at 20-21 (2009); *Lake Mary Health Care*, DAB No. 2081, at 29 (2007). Here, I examine the corrective actions in Petitioner's PoC in light of the Board's discussion in *Greenbrier* and find Petitioner has not shown that it completed all the corrective actions identified at a date earlier than that stated in its PoC.

Petitioner's PoC asserts the measures or systemic changes it planned to make to ensure the deficient practice identified here would not recur. The changes include, among other things, that re-training would be conducted for staff regarding reportable findings during a shower, such as discoloration, bruising, skin tears and abrasions. The PoC also states that all residents were to be evaluated for the use of a shower chair or gurney by the minimum data set (MDS) nurse. Residents who used a wheelchair would use a shower chair and residents in geri-chairs would use gurneys. The information was to be placed on the resident care plan assignment report. The charge nurse would be responsible for reporting resident conditions requiring a change in the device used for showers. Petitioner states these changes were to be completed by March 27, 2009. The PoC also recites that in order to monitor corrective actions and to ensure that solutions be achieved and sustained and evaluated for effectiveness that, among other things, the shower form developed on March 19, 2009, was to be used in addition to the acute form reviewed daily by the charge nurse or clinical services coordinator. The shower form (which was to be filled in by the C.N.A.s giving the shower) would assist staff in reporting changes in a resident's condition due to a possible incident, i.e., bruising, skin tears, abrasions or discoloration observed during a shower. The PoC states that completion of the shower form would assist in notification of appropriate licensed staff. The shower form was to be reviewed daily by the quality assurance (Q.A.) nurse or registered nurse (R.N.) manager for a period of four weeks after implementation. CMS Ex. 1, at 14-15.

Before me, CMS argues that Petitioner did not implement these three crucial elements of its PoC prior to the dates of correction set forth in its PoC: 1) the shower form; 2) the shower chair/gurney evaluations; and 3) the change in condition training.[7] I do not discuss two of these elements, as I find Petitioner's failure to show it completed implementation of the shower form alone is continuing noncompliance at the immediate jeopardy level through March 23, 2009.

[7] CMS argues also that Petitioner did not establish that a dedicated two-person shower team was maintained. Surveyor Osabel testified that her interviews with staff indicated that the team was disbanded on or about March 9 or 10, 2009. CMS Ex. 7, at 5; Tr. at 44-47. Administrator Scott and L.P.N. Perry both testified that the team was still performing as of March 9 through 10, 2009. Tr. at 84-85, 113-14. I do not address this contradictory testimony as it is not necessary that I resolve it to determine whether Petitioner was out of substantial compliance with the participation requirement.

CMS notes the facility created the shower form on March 19, 2009, and implemented it "for a period of 4 weeks" thereafter, into mid-April 2009. CMS Ex. 1, at 15.

CMS alleges that the forms Petitioner had in place prior to February 16, 2009 (the acute form (P. Ex. 17), a random shower team review form (P. Ex. 16)[8], and C.N.A. flow sheets (Tr. at 89, 92, 93, 94)), did not provide sufficient monitoring of resident care. The acute form was only used when a serious incident, such as an injury, occurred. It was not used on a daily basis for every shower or used to record observed changes in residents' conditions. The facility did not use the random shower team review form daily for every shower, instead using it only about three times a week for a nurse to observe the C.N.A.s giving showers. Tr. at 92. And, while C.N.A. flow sheets were completed daily by C.N.A.s for every resident, the flow sheets recorded only whether a resident received a shower, not whether there was an injury or change in condition, such as bruising or a skin tear. Tr. at 94.

CMS argues that Resident 1's situation illustrates the "dangerous gap" in reporting at the facility (and hence in the protection of residents) that existed before implementation of the shower form. Two C.N.A.s knew Resident 1 had been injured and an L.P.N. noticed bruising and swelling, but none of them reported this to the charge nurse to document as an acute episode. Tr. at 93, 138.

CMS alleges that Petitioner's own PoC belies Petitioner's assertion that the new shower form was unnecessary, redundant, and did not provide a greater measure of reporting or protection for residents. The PoC notes that the shower form would assist staff in reporting changes in residents' conditions and in notifying appropriate staff to ensure that corrective actions would be "achieved . . . sustained and . . . evaluated for . . . effectiveness." CMS Ex. 1, at 15. CMS asserts that the shower form provided better monitoring and resident care than the measures that were in place prior to February 16, 2009. To-wit: the shower form was used every day for every resident to document acute incidents as well as observations regarding discoloration, bruising, skin tears, or abrasions, regardless of whether the changes in condition occurred during the shower or not. It was completed by the C.N.A.s themselves, who actually gave residents their showers. This is in contrast to the acute form, which was completed by the charge nurse only upon an oral report from a C.N.A., or the random shower team review form which was completed by L.P.Ns. The shower form gave the C.N.A.s a written tool to document

[8] This form is in the record as P. Ex. 16. It is titled "RANDOM SHOWER TEAM REVIEW" and requests that the reviewer note who is completing the form, the date, any findings, and whether safety practices are being maintained. It states that the reviewer's observations of the shower team will consist of: proper transfer, dignity, safety maintenance, monitoring of the shower form, proper shower devices, and whether a resident is attended by a C.N.A.. P. Ex. 16.

shower findings instead of orally reporting to an L.P.N. or R.N.. Tr. at 136-37. And what is more, the Q.A. nurse or R.N. manager was to review the shower form daily, an added layer of review and protection that C.N.A. flow sheets lacked. Tr. at 141-44.

Petitioner, as CMS notes, argues that the acute form was in place as of February 17, 2009 to report acute and adverse events occurring during a shower and that the shower form was duplicative of the acute form and C.N.A. flow sheets. The fact that showers were being given or refused without incident was documented daily on the C.N.A. flow sheets which the supervisory charge nurse reviewed. Moreover, Petitioner argues that there is "no evidence to demonstrate that staff members who would fail to report an event to a supervisor would be more likely to record the adverse event or change of condition on the new shower monitoring form." P. Br. at 7. Petitioner argues that writing information down is more burdensome to staff and less likely to benefit residents. According to two of Petitioner's witnesses, reporting an adverse event to a supervisor only orally, Petitioner's policy prior to March 19, 2009, helps ensure appropriate and timely consideration be given a resident who has experienced a change in condition. Tr. at 126, 157.

Petitioner also alleges that prior to February 17, 2009, it had added additional layers of supervision to ensure reporting of acute episodes or changes in condition to protect its residents. Petitioner asserts it: 1) emphasized to staff the importance of reporting events by firing staff that failed to report and made clear the termination was due to the failure to report; 2) "re-inserviced" and repeatedly reiterated its policies and procedures for reporting events and changes in condition, and made one-on-one training available to all staff[9]; 3) audited the shower process daily to determine if there were adverse events to be reported and found no adverse events identified and safety practices maintained; 4) implemented two member bath teams; and 5) changed the shower time to the day shift.

Petitioner argues that the shower form was not necessary to ensure that any identified deficiencies posed a risk of more than minimal harm. While the shower form was included in its PoC, its inclusion does not mean the shower form was required for Petitioner to show that it was in substantial compliance. A facility is not forbidden from adding quality assurance checks that go above and beyond what is required to be in substantial compliance. Petitioner asserts that the adverse effect of having a PoC rejected is so great that a facility may take more steps than is necessary to ensure it is deemed back in substantial compliance.

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[9] In support Petitioner references the affidavits of Administrator Perry and L.P.N. Scott (P. Exs. 1 and 2) and a record of an in-service sign-in sheet on February 17, 2009 regarding review of incident reports and safe working practices, as well as a document titled "INSERVICE – REPORTING RESIDENT CONDITION OR OCCURRENCE (sic), dated February 9 through 15, 2009, which reflects incidents that need to be reported. P. Exs. 11, 12.

Although Petitioner vigorously urges that the forms and processes it utilized by February 17, 2009 were equivalent to the shower form, I do not find them to be equivalent, or the shower form to be duplicative of the forms in use at the facility prior to March 19, 2009. The shower form is unique to the shower experience at the facility, in that it requires a C.N.A. to evaluate a resident during a shower, write an entry on the form if anything untoward happens during the shower, and note any observations about the resident, such as bruising or a skin tear. The C.N.A. then is required to sign the shower form, noting the date and the time of the shower. The C.N.A. is required to explain if anything is reported and to whom a report is made. A nurse is also required to review the sheet and address any concerns raised by the information written on it. Review of the shower form was to be done daily by the Q.A. nurse or an R.N. manager for a four week period after the shower form was implemented, to ensure that the solutions identified in the PoC were sustained and evaluated for effectiveness. In contrast, as noted by CMS, the acute form was only used when a serious incident, such as an accident, occurred. The C.N.A. flow sheets, although completed daily, only recorded whether a resident received a shower. Random shower team reviews were not done daily and it is not clear how many showers the reviewer reviewed. In sum, the shower form closes that "dangerous gap" in reporting illustrated by Resident 1's unfortunate circumstances.

Based on the testimony of its administrator and owner, Petitioner argues that having C.N.A.s write down what happens during a shower will not lead to better reporting; use of the shower form will be burdensome for C.N.A.s to fill out; and reporting an event to a supervisor, instead of utilizing the shower form, ensures better resident care. Tr. at 126, 157. I do not find Petitioner's arguments persuasive, given the global failure of this approach in Resident 1's case. Had the C.N.A.s involved in the incident been tasked with actually writing down what happened during Resident 1's shower, and been required to sign their names to that report, they might have been more likely to report, not less. Moreover, whether or not the approach is better is irrelevant. Although Petitioner argues that despite including the shower form in its PoC, the shower form is not required to show substantial compliance with participation requirements, Petitioner's argument is misplaced and does not survive comparison with the Board's *Greenbrier* decision.

Petitioner did not complete the measures it identified in its PoC regarding the shower form until four weeks after March 19, 2009. And even if Petitioner could show that it came into substantial compliance prior to the date noted in its PoC, it did not do so here. Petitioner did not show how the steps it took were otherwise adequate prior to the March 24, 2009 survey to require lifting the remedies CMS imposed, given the identified need for monitoring and evaluation for four weeks after implementation of the shower form. Given the global failure of its staff with regard to Resident 1's care, the four weeks of monitoring and evaluating use of the shower form after March 19, 2009, is both reasonable and necessary.

Petitioner argues that an administrative law judge's decision in the case of *Carver Living Center*, DAB No. CR1954 (2009) supports its argument that it should be found in substantial compliance as of February 17, 2009. I find the decision in *Carver Living* to be inapposite.

In *Carver Living*, the Administrative Law Judge determined that immediate jeopardy was abated after a new restraint system was put in place on a transportation van following an accident where a resident was harmed, staff was trained to use the new system, and then staff demonstrated their competence in using the system to surveyors. Petitioner argues that here a new system was also in place to alleviate potential issues, as the bath teams had been trained regarding shower safety and the use of chairs versus gurneys and were providing showers in accordance with their training. Moreover, staff had been re-trained on reporting changes of condition and reporting incidents occurring in the shower, and a process was in place to monitor resident safety.

I find, as Surveyor Osabel testified, that a revisit survey was necessary here because the deficiency involved the provision of direct care, which the state agency determined it would have to personally observe to ensure that the immediate jeopardy was corrected. Tr. at 42. This did not happen until the March 24, 2009 survey date. Moreover, until implementation of the shower form on March 19, 2009, and the ensuing period of evaluation and monitoring, CMS and the state agency were not provided documentation "acceptable to CMS or the State agency," showing Petitioner's substantial compliance. 42 C.F.R. § 488.440(h)(1); 488.454(a).

2. The remedies imposed are reasonable.

To determine whether the CMP imposed is reasonable, I apply the factors listed in 42 C.F.R. § 488.438(f), which are: (1) the facility's history of noncompliance; (2) the facility's financial condition; (3) factors specified in 42 C.F.R. § 488.404; and (4) the facility's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort, or safety. The absence of culpability is not a mitigating circumstance in reducing the amount of the penalty. The factors listed in 42 C.F.R. § 488.404 include: (1) the scope and severity of the deficiency; (2) the relationship of the deficiency to other deficiencies resulting in noncompliance; and (3) the facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies.

In reaching a decision on the reasonableness of a CMP, I must consider whether the evidence supports a finding that the amount of the CMP is at a level reasonably related to an effort to produce corrective action by Petitioner with the kind of deficiency found, in light of the above factors. I am neither bound to defer to CMS's factual assertions, nor free to make a wholly independent choice of remedies without regard for CMS's discretion. *Barn Hill Care Center*, DAB No. 1848, at 21 (2002).

CMS imposed a CMP of $3550 per day from February 9, through March 23, 2009, the period of immediate jeopardy, and $100 per day from March 24, 2009 through April 13, 2009. Although Petitioner alleges that it does not have a history of noncompliance, I have no evidence to evaluate its contention and, given the global failure of Petitioner's staff in this instance, and the harm ensuing to Resident 1, even the lack of a history of noncompliance would not alter my decision with regard to whether the CMP is reasonable. Although Petitioner asserts its financial condition demonstrates that the proposed penalty would represent a financial hardship (Tr. at 162-63, 169), Petitioner did not offer an independent, certified financial statement delineating its financial condition. Petitioner did not assert that that it was unable to pay the CMP, noting instead that the CMP would essentially come out of its owner's "pocket." Tr. at 169. Petitioner's owner also indicated that although she had not yet negotiated an alternate schedule for payment of the CMP she "probably will." Tr. at 169. Moreover, Petitioner has not proved that paying the CMP would adversely affect the care it would give its residents or cause it to cease operations. The deficiency here is serious, constituting immediate jeopardy through March 23, 2009. The CMP for the period of immediate jeopardy, however, is on the very low end of the required range of CMP, and I find it to be reasonable. Petitioner has not shown that it came into substantial compliance prior to April 14, 2009. The $100 CMP imposed from March 24 through April 13, 2009, is at the very low end of the minimum daily CMP range for instances of non-immediate jeopardy noncompliance, and I find it to be reasonable.

Petitioner contends that the CMP is excessive and grossly disproportionate to the alleged deficiency. Moreover, Petitioner alleges that the CMP is disproportionate to CMPs imposed in other cases and does not serve a remedial purpose. Petitioner's arguments are unavailing. The CMP here is based on CMS's decision to impose a per-day CMP and is, as noted, at the very low end of the ranges for both immediate jeopardy and non-immediate jeopardy CMPs.[10] With regard to Petitioner's argument that the CMP is disproportionate to CMPs imposed in other cases, the Board has held that in reviewing the factors considered by CMS when imposing a remedy in a given case (at 42 C.F.R. §

[10] Petitioner also contends that the CMP is in violation of the Eighth Amendment of the Constitution, asserting that it is "unconstitutionally excessive." P. Br. at 16. As an administrative law judge my authority is limited and I am bound by applicable statutes and regulations. However, I may consider constitutional claims challenging the manner in which a regulation is interpreted or applied. *Oaks of Mid City Nursing and Rehabilitation Center*, DAB No. 2375, at 30-31 (2011). In this case, I find Petitioner's argument quite unpersuasive. As noted above, in the context of the applicable statutes and regulations, I have found the CMPs imposed to be reasonable and at the low end of their respective allowable range.

488.438(f)), the regulations give CMS considerable discretion in the amount of the CMP it is permitted to impose, and those factors cannot be quantified in order to determine what the appropriate amount of a CMP might be. With regard to whether the CMP serves a remedial purpose, the Board has held that by including CMPs among the remedies CMS may impose, the Secretary has determined that CMPs do serve a remedial purpose. *See Kenton Healthcare, LLC*, DAB No. 2186, at 28-33 (2008).

Sections 1819(f)(2)(B) and 1919(f)(2)(B) of the Act prohibit approval of a NATCEP if, among other things, within the previous two years the facility was subject to an extended or partial extended survey or been assessed a CMP of not less than $5000. CMS notified Petitioner that a NATCEP was to be imposed due to the extended survey. CMS Ex. 2, at 3. I have also upheld a CMP greater than $5000. Thus, Petitioner is prohibited from conducting a NATCEP for the statutory period.

V. Conclusion

For the reasons discussed above, I find that Petitioner's facility was not in substantial compliance with Medicare participation requirements and that its noncompliance posed immediate jeopardy to resident health and safety for the period February 9 through March 23, 2009. I affirm as reasonable the $3550 per day CMP from February 9 through March 23, 2009, and the $100 per day CMP from March 24 through April 13, 2009. I also sustain the prohibition on Petitioner's ability to offer a NATCEP for two years.

/s/
Richard J. Smith
Administrative Law Judge