

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Kindred Transitional Care and Rehab-Greenfield,  
(CCN: 15-5188),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-16-387

Decision No. CR4659

Date: July 12, 2016

**DECISION**

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to impose civil money penalties against Petitioner in the amount of \$3550 per day for each day of a period that began on September 18, 2015 and that ran through September 20, 2015. I do not sustain additional civil money penalties because I find that Petitioner's noncompliance ended after September 20, 2015.

I ground my decision sustaining the \$3550 daily penalty amount on my finding that CMS's determination of immediate jeopardy level noncompliance is not clearly erroneous. A consequence of the immediate jeopardy level noncompliance is that Petitioner loses its authority to conduct a nurse aide training and/or competency evaluation program for a period of two years.

**I. Background**

Petitioner, a skilled nursing facility, filed hearing requests to challenge CMS's remedy determinations. I consolidated the requests into a single case. CMS moved for summary judgment. Petitioner opposed CMS's motion and cross-moved for summary judgment.

With its motion CMS filed 14 proposed exhibits that it identified as CMS Ex. 1-CMS Ex. 14. With its opposition and cross motion Petitioner filed three proposed exhibits that it identified as P. Ex. 1-P. Ex. 3. I receive all of the parties' exhibits into the record.

Although there are no disputed facts in this case, I do not find it necessary to adjudicate it using the criteria for summary judgment. Neither side has requested an in-person hearing; and, consequently, I decide the case based on the parties' written exchanges.

## **II. Issues, Findings of Fact and Conclusions of Law**

### **A. Issues**

The issues are whether:

- Petitioner failed to comply substantially with Medicare participation requirements;
- CMS's determination of immediate jeopardy level noncompliance is clearly erroneous; and
- CMS's remedy determinations are reasonable.

### **B. Findings of Fact and Conclusions of Law**

There are no disputed facts in this case. It is undisputed that a certified nursing assistant (CNA) employed by Petitioner sexually abused or attempted to sexually abuse two of Petitioner's residents and engaged in sex with a third, cognitively impaired resident. Nor is there any dispute that these acts and attempted acts constituted "abuse" within the meaning of governing regulations. 42 C.F.R. § 488.301 ("abuse" is defined as the willful infliction of injury with resulting physical harm, pain, or mental anguish). Beginning around September 17 or 18, 2015, a male CNA fondled a female resident, exposed himself to her, and briefly climbed on top of her. CMS Ex. 2 at 2-3; CMS Ex. 3 at 12. During that same time period the CNA exposed himself to a second female resident. CMS Ex. 2 at 4; CMS Ex. 3 at 2. Also, the same CNA had multiple sexual encounters with a male, cognitively impaired resident. CMS Ex. 2 at 7-8. The CNA subsequently admitted his abusive conduct. CMS Br. at 7; CMS Ex. 10; P. Br. at 6 n.3.

There is no evidence that other abusive acts were committed by this CNA or by other individuals at Petitioner's facility. Nor is there evidence that Petitioner's management knew or should have known that the CNA in question had the propensity to engage in sexual abuse. Petitioner hired this individual on July 28, 2015. CMS Ex. 5 at 32. Petitioner conducted a criminal background check of the CNA prior to hiring him. The background check turned up some minor traffic citations but no evidence of a history of sexual offenses. CMS Ex. 7 at 1-4. There were no reports of sexual abuse or attempted sexual abuse by this CNA during his employment at Petitioner's facility from July 28, 2015 through September 19, 2015. *Id.* at ¶ 14.

The undisputed facts establish also that Petitioner has in place extensive anti-abuse policies. CMS Ex. 8 at 76. Petitioner has identified procedures to identify abuse that include pre-employment screening of prospective employees, training of employees on how to recognize and report abuse, and advising residents as to how to report allegations of abuse. *Id.* at 76-78.

CMS asserts that these facts establish that Petitioner contravened two regulations governing skilled nursing facilities' participation in Medicare. These regulations are 42 C.F.R. §§ 483.13(b) and 483.13(c)(1)(i). The first of these regulations provides that residents of a skilled nursing facility have the right to be free from verbal, sexual, physical and mental abuse, among other things. The second regulation requires a skilled nursing facility to develop and implement policies and procedures that prohibit mistreatment, neglect, and abuse of residents. It provides also that a facility must not engage in verbal, mental, sexual or physical abuse, among other things.

The undisputed facts establish persuasively that Petitioner failed to comply with these regulations' proscriptions against abuse of residents. In fact, there were multiple incidents of sexual abuse of residents at Petitioner's facility during the period from September 18 through September 20, 2015. I do not find that Petitioner failed to implement its anti-abuse policies. The undisputed facts establish that Petitioner established and implemented these policies. However, the incidents of abuse by themselves are sufficient to establish noncompliance with 42 C.F.R. §§ 483.13(b) and 483.13(c)(1)(i).

Petitioner makes two arguments to support its assertion that it did not contravene regulatory requirements. First, it characterizes the abuse that I have documented as being an isolated incident or collection of incidents attributable to one individual. It contends that CMS seeks to impose an impermissible strict liability standard on Petitioner for these allegedly isolated incidents, especially given Petitioner's vigorous anti-abuse policy, the pre-employment screening that it did of the CNA whose conduct is at issue, and that employee's benign work history prior to September 19, 2015. Second, Petitioner contends that the allegations of noncompliance were carefully reviewed at the state level during a process of independent dispute resolution (IDR) and that it was held blameless after that review. It asserts that it would be arbitrary and an abuse of discretion to now hold it liable.

I do not find these arguments to be persuasive. First, I do not find the incidents of abuse to be so isolated as Petitioner contends. There was a pattern of abuse committed by the CNA. The CNA in question sexually assaulted two female residents and engaged in sex with a third and cognitively impaired resident. That said, I would find a violation here if there had been only a single episode of sexual abuse. The governing regulations make it plain that a facility is liable for *any* sexual abuse committed by a member of its staff.

In arguing that CMS is imposing a “strict liability” standard, Petitioner is analogizing this case to a civil tort proceeding. But, that is not what this case is about. The regulations governing skilled nursing facilities do not incorporate civil tort liability law into their prohibitions against abuse. To the contrary, they make a facility liable for any abuse committed by it or its agents.

Here, the CNA, employed by Petitioner, was an integral part of Petitioner’s provision of care. Indeed, it would be impossible for Petitioner or any skilled nursing facility to render the care required by governing regulations without the efforts of their employees. Consequently, the act of any employee performed while he or she is on duty at Petitioner’s facility becomes the act of the facility. Sexual abuse committed by an employee thus is attributable to a facility even if it is isolated and even if it runs contrary to facility policy.

Any other holding would strip the anti-abuse regulations of their force and effect. A resident of a skilled nursing facility has a right to be free of any abuse. 42 C.F.R. §§ 483.13(b), (c)(1)(i). There is no qualifying language in these regulations suggesting that only abuse committed under limited circumstances is proscribed. There is certainly nothing in these regulations that limits a facility’s liability for abuse to the circumstance where it is negligent in hiring or supervising an abusive employee or where its management is indifferent to abuse committed by its staff.

Appellate panels of the Departmental Appeals Board have considered and rejected essentially the same argument as made by Petitioner on several occasions. *Springhill Senior Residence*, DAB No. 2513 (2013); *North Carolina State Veterans Nursing Home*, DAB No. 2256 (2009); *Life Care of Gwinnet*, DAB No. 2240 (2009). In each of these cases the facility held that it could not be held accountable for actions by its employees if the facility itself was not negligent or indifferent to the care provided by its staff and in each case the panel rejected that argument.

I find no merit to Petitioner’s assertion that CMS’s determination is unlawful in light of the decision made at IDR. CMS is not bound by an IDR determination because it has ultimate authority to determine whether or not to impose remedies in a case involving a skilled nursing facility or a dually participating facility (one that participates in Medicare and Medicaid). 42 C.F.R. §§ 488.431(a), 488.452(a)(2).

I do not find CMS’s determination of immediate jeopardy level noncompliance to be clearly erroneous. There was a likelihood of severe psychological injury to those residents who were sexually assaulted. These are frail, elderly, highly vulnerable individuals, dependent on Petitioner and its staff for their care. They were in no position to defend themselves when the CNA assaulted them. That neither of them sustained physical injury was fortuitous, but that does not gainsay the shock that they certainly experienced.

CMS imposed a civil money penalty of \$3550 per day for the three days of immediate jeopardy level noncompliance. I find that to be reasonable. It is close to the minimum amount that may be imposed for an immediate jeopardy level deficiency. 42 C.F.R. § 488.438(a)(1)(i).

CMS asserts that Petitioner's noncompliance continued after September 21, 2015 – until October 29, 2015 – and asserts that I should sustain a civil money penalty of \$250 for each day of that period. I find no basis to do so. The penalty cannot be based on continuing abuse at Petitioner's facility. Petitioner terminated the employment of the offending CNA on September 22, 2015 and the record is devoid of any evidence to show that there was continuing abusive behavior after that date. The only conceivable basis for imposition of additional penalties would be alleged failure by Petitioner to implement its anti-abuse policies. However, and as I have discussed, the record does not support a finding that Petitioner failed to implement these policies.

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/s/  
Steven T. Kessel  
Administrative Law Judge