**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

BGI Retirement, LLC
d/b/a Crossbreeze Care Center
(CCN: 10-5774),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-163

Decision No. CR3295

Date: July 15, 2014

# DECISION

Following a survey between June 25 and June 29, 2012, the Florida Agency for Health Care Administration (state agency) found that BGI Retirement, LLC, operating as Crossbreeze Care Center (Petitioner), was not in substantial compliance with the Life Safety Code, a publication issued by the National Fire Protection Association (NFPA) (Publication NFPA 101®), and incorporated by reference in 42 C.F.R. § 483.70(a)(1). The state agency found that four light fixtures in Petitioner's facility obstructed four sprinkler heads. A subsequent revisit survey determined that Petitioner returned to substantial compliance on August 29, 2012. The Centers for Medicare & Medicaid Services (CMS) accepted the state agency's findings and imposed a $200 per day civil money penalty (CMP) against Petitioner from June 25, 2012 through August 28, 2012 (65 days). Petitioner appealed.

For the reasons set forth below, I find that Petitioner was not in substantial compliance with the Life Safety Code (and, thus, also with 42 C.F.R. § 483.70(a)(1)) during the period cited and the enforcement remedy imposed is reasonable in amount and duration.

Therefore, I affirm the state agencies and CMS's noncompliance determination as well as the $200 CMP for 65 days.

## I. Background and Procedural History

Petitioner is a long-term care facility in Sarasota, Florida that participates in the Medicare and Medicaid programs. It is undisputed that Petitioner's facility is a "Type V (111)" building that has an automatic sprinkler system. *See* CMS Ex. 1, at 1; NFPA 101, Table 19.1.6.2.[1] On June 25, 2012, the state agency conducted a Life Safety Code survey of Petitioner's facility. The surveyor cited several deficiencies with the Life Safety Code, and referred to those deficiencies using "Tag" numbers. Among the deficiencies cited was "Tag K062," which refers to the requirement that all automatic sprinkler systems are continuously maintained in reliable operating condition. *See* CMS Ex. 1, at 5. The statement of deficiencies stated in relevant part:

> This STANDARD is not met as evidenced by:
>
> Based on an observation and staff interview conducted during the survey on 06/25/12 it was determined that the fire sprinkler system failed to be completely maintained. This condition could place the lives of the occupants at risk should a fire occur and the fire sprinkler system failed to respond.
>
> The findings include:
>
> On 6/25/12 at 11:45 a.m. during the tour of the facility with the administrator and director of maintenance sprinkler heads were observed located next to surface mounted light fixtures. This was noticed near the nurses station near the memory unit. The sprinkler head was approximately 4 inches away from a 2 X 4 light fixture. This situation was noted at a couple of other light fixtures in the same area.

CMS Ex. 1, at 5. The statement of deficiencies cited generally to "NFPA 101 (2000 edition)" and "NFPA 13 (1999 edition)."[2] CMS Ex. 1, at 5.

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[1] All citations are to the 2000 edition of the NFPA 101 (Life Safety Code) unless otherwise noted. There is some discrepancy about which edition of the NFPA 101 the surveyor referred to in this case, which will be addressed in the analysis section of this decision, below.

[2] The NFPA 13 is a separate publication titled "Standard for the Installation of Sprinkler Systems," and, as its title suggests, addresses specific requirements for sprinkler systems such as the one installed in Petitioner's facility.

On July 12, 2012, Petitioner submitted its plan of correction and, with regard to Tag K062, pointed out that it offered to show the surveyor a copy of "blue prints of the facility that clearly shows the lights were installed in 1960 and were allowed to remain in place and after the 1995 renovations (see HRS N514)." P. Ex. 3. Petitioner disputed the deficiency finding but noted that "[s]hould it become necessary to remove the surface mounted lights, plans will be sent to the [O]ffice of Plans and [C]onstruction for determination of appropriate lighting to be installed." P. Ex. 3. On August 10, 2012, a Field Office Manager from the state agency sent an email to Petitioner's owner, which stated, "Thank you . . . . The [plan of correction] is accepted." P. Ex. 8.

Three days later, on August 13, 2012, the state agency conducted a revisit survey and determined Petitioner had achieved compliance with the previously-cited Life Safety Code provisions except one: Tag K062. The statement of deficiencies stated, in relevant part:

> During the tour of the facility with the administrator and director of maintenance at 11:05 a.m., it was observed that the sprinkler heads are located next to surface mounted light fixtures. The bottom of the sprinkler heads is above the bottom of the light fixture. This condition was observed at four different light fixtures. This was noticed near the nurses station near the memory unit. The sprinkler head is approximately 4 inches away from a 2 X 4 light fixture. This situation was noted at a couple of other light fixtures in the same area. Near room 403 at 10:05 a.m., the same situation was observed concerning the sprinkler head discharge being obstructed by the light fixture. This was all verified by a health surveyor.

CMS Ex. 2, at 2-3. The statement of deficiencies again included a general citation to "NFPA 101 (2000 edition)" and "NFPA 13 (1999 edition)."[3] CMS Ex. 2, at 3.

Petitioner continued to dispute that a deficiency existed. After an email exchange between Petitioner and the state agency, two inspectors from the state agency's Office of Planning and Construction (OPC) visited Petitioner's facility on August 24, 2012, to resolve whether the sprinkler heads cited in the two prior surveys actually violated the Life Safety Code. CMS Ex. 5. The inspectors looked at sprinkler heads "by the nurses station adjacent to the dining room's corridor." CMS Ex. 5, at 2. They determined that at four locations, "the sprinkler heads were found to be within one foot of the light

[3] The original statement of deficiencies issued on August 13, 2012, cited "NFPA 101 (*2009* edition)" and "NFPA 13 (*2007* edition)." P. Ex. 9, at 2-3 (emphases added). The state agency issued a revised version of the August 13, 2012 statement of deficiencies on September 20, 2012. *See* CMS Ex. 2.

fixture," and that "the sprinkler head deflectors are above the bottom of the fixture." CMS Ex. 5, at 2. The team cited to NFPA 13, 2007 edition, Table 8.6.5.1.2, drew a diagram of the sprinkler head and light fixture locations and instructed that "[d]eflectors must be extended below bottom of fixtures." CMS Ex. 5, at 2-3.

On August 29, 2012, Petitioner submitted a plan of correction, stating that it had attempted to contact OPC but never received a response. Petitioner also stated that it "replaced the light fixtures in question on 8/29/2012 with smaller and shallower fixtures." P. Ex. 9, at 2.

By letter dated October 9, 2012, CMS notified Petitioner that it was imposing various enforcement remedies based on Petitioner's noncompliance with the Life Safety Code, specifically the standard cited under Tag K062, which remained the only deficiency after the August 13, 2012 revisit survey. CMS Ex. 3. CMS imposed a $200 per day CMP beginning June 25, 2012, the first day of the first survey. CMS Ex. 3, at 3. CMS also warned that it would impose a discretionary denial of payment for new admissions if Petitioner did not achieve substantial compliance by October 24, 2012, and would be required to terminate Petitioner's Medicare agreement if it did not achieve substantial compliance by December 29, 2012. CMS Ex. 3, at 2; *see also* 42 C.F.R. § 488.412.

On October 17, 2012, the state agency conducted a second revisit survey. By letter dated December 6, 2012, CMS notified Petitioner that it returned to substantial compliance on August 29, 2012. CMS Ex. 6. The $200 per day CMP ended on August 28, 2012, and all other proposed enforcement remedies were rescinded. CMS Ex. 6.

On December 3, 2012, Petitioner filed a hearing request to appeal the CMP. Prior to hearing, CMS filed a prehearing brief and 11 proposed exhibits (CMS Exs. 1-11). Petitioner also submitted a prehearing brief as well as 13 proposed exhibits (P. Exs. 1-13). On July 17, 2013, I held a prehearing conference by telephone pursuant to 42 C.F.R. §§ 498.47 − 498.50. The parties agreed that the only deficiency at issue was that cited under Tag K062 (42 C.F.R. § 483.70(a)(1)(i)) as that was only deficiency upon which CMS based its enforcement remedy. *See* CMS Ex. 3. Petitioner did not object to the admission of CMS's proposed exhibits, so I admitted CMS Exs. 1-11. CMS objected to P. Exs. 5-7 as being irrelevant, but I overruled that objection and admitted P. Exs. 1-13. The parties agreed to a one-day hearing to cross-examine three witnesses. On September 11, 2013, I convened a hearing by video teleconference with Petitioner's counsel and witness in Miami, Florida, and CMS's counsel and witnesses in Sarasota, Florida. Testifying were: the state agency surveyor, an inspector with the state agency's Office of Planning and Construction, and Petitioner's owner. I permitted the surveyor to testify by telephone rather than video teleconference over the objection of Petitioner. A transcript (Tr.) of the hearing has been incorporated into the record. Following the hearing, each party submitted a post-hearing brief (CMS Br.; P. Br.) as well as a post-hearing reply brief (CMS Reply; P. Reply).

## II. Issues Presented

This case presents the following issues:

1. Whether Petitioner was in substantial compliance with the Life Safety Code, incorporated by reference in 42 C.F.R. § 483.70(a)(1), between June 25, 2012 and August 29, 2012; and

2. If Petitioner was not in substantial compliance, whether the $200 per-day CMP that CMS imposed is reasonable.

## III. The Life Safety Code Requirements

The Social Security Act (Act) authorizes the Secretary of Health and Human Services to issue regulations "as may be necessary to carry out the administration" of the Medicare program. Act § 1871(a)(1) (42 U.S.C. § 1395hh(a)(1)). Pursuant to that authority, the Secretary has routinely promulgated regulations that require long-term care facilities to comply with the Life Safety Code, beginning with the 1967 edition. *See* 42 C.F.R. § 483.70(a)(1); *see also* 68 Fed. Reg. 1374, 1374-75 (Jan. 10, 2003) (discussing lengthy history of requiring that long-term care facilities comply with the Life Safety Code). The applicable regulation currently incorporates the 2000 edition of the Life Safety Code:

> (a) *Life Safety from fire*. (1) Except as otherwise provided in this section—
>
> > (i) The facility must meet the applicable provisions of the 2000 edition of the Life Safety Code of the National Fire Protection Association. The Director of the Office of the Federal Register has approved the NFPA 101® 2000 edition of the Life Safety Code, issued January 14, 2000, for incorporation by reference in accordance with 5 U.S.C. [§] 552(a) and 1 CFR part 51. A copy of the [Life Safety] Code is available for inspection at the CMS Information Resource Center, 7500 Security Boulevard, Baltimore, MD or at the National Archives and Records Administration . . . . Copies may be obtained from the National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02269. If any changes in this edition are incorporated by reference, CMS will publish notice in the FEDERAL REGISTER to announce the changes.

42 C.F.R. § 483.70(a)(1)(i).

The Life Safety Code addresses fire safety measures in a wide range of building structures, which has resulted in a complex document that routinely provides cross-

references to other sections of the Life Safety Code and even to other publications of the NFPA. Discussed below are only those sections that apply directly to this case and is only a small cross-section of the Life Safety Code requirements for health care facilities.

The Life Safety Code requires one-story health care facilities that are "Type V (111)," such as Petitioner's facility, to have an automatic sprinkler system. NFPA 101, Table 19.1.6.2. The system must be an "approved, supervised automatic sprinkler system in accordance with Section 9.7." NFPA 101, § 19.3.5.1. Section 9.7 addresses "Automatic Sprinklers and Other Extinguishing Equipment," and requires, among other things, that "[e]ach automatic sprinkler system required by another section of this *Code* shall be in accordance with NFPA 13, *Standard for the Installation of Sprinkler Systems*."[4] NFPA 101, § 9.7.1.1 (italics in original).

NPFA 13 states, in relevant part, that sprinklers "shall be positioned in accordance with the minimum distances and special exceptions of Sections 5-6 through 5-11 so that they are located sufficiently away from obstructions such as truss webs and chords, pipes, columns, and fixtures." NFPA 13, § 5-5.5.2.2. Section 5-6 requires that sprinklers "shall be arranged to comply with 5-5.5.2, Table 5-6.5.1.2, and Figure 5-6.5.1.2(a)." NFPA 13, § 5-6.5.1.2.

Table 5-6.5.1.2 of NFPA 13 establishes the "Maximum Allowable Distance of Deflector above Bottom of Obstruction" in inches. If the distance from the sprinkler to the side of an obstruction ("such as . . . pipes, columns, and fixtures") is less than one foot, the maximum allowable distance of the deflector above the bottom of the obstruction is zero inches. NFPA 13, Table 5-6.5.1.2. Stated another way, if the distance of the sprinkler to the obstruction is less than one foot, the deflector, *i.e.*, the bottom of a ceiling-mounted sprinkler, must be even with or below the bottom of the obstruction. *See* NFPA 13, Table 5-6.5.1.2.

[4] At the time of the survey at issue in this case (June 2012), compliance with NFPA 13 was required only by reference through the Life Safety Code. Although rare, certain health care facilities were not necessarily required to have an automatic sprinkler system in place under the Life Safety Code, and therefore NFPA 13 did not apply. *See* 73 Fed. Reg. 47,075 (Aug. 13, 2008). As of August 2013, however, all long-term care facilities must have a supervised automatic sprinkler system installed in compliance with NFPA 13, 1999 edition. 42 C.F.R. § 483.70(a)(8).

## IV. Findings of Fact, Conclusions of Law, and Analysis

### 1. *Surface-mounted light fixtures illegally obstructed four sprinkler heads in Petitioner's facility.*

The surveyor stated in his written direct testimony that four sprinkler heads "were being obstructed by surface mounted lights." CMS Ex. 9, at 2 ¶ 4. He concluded during his first survey of Petitioner's facility that the sprinkler heads near the nurses' station were "approximately 4 inches" from surface-mounted light fixtures. CMS Ex. 1, at 5. Following a revisit survey, the surveyor noted that the "bottom of the sprinkler head is above the bottom of the light fixture" in four locations. CMS Ex. 2, at 2. To reach that conclusion, he "got on a ladder and I got to eye level with the light fixture . . . I was looking at the relationship of the deflector of the sprinkler heads in relationship to the light fixture." Tr. 21. He also wrote that "the surface mounted lights significantly reduced the sprinkling effectiveness of the sprinkler heads." CMS Ex. 9, at 2 ¶ 4. An OPC inspector stated in his written direct testimony that he visited Petitioner's facility on August 24, 2012, and "found that at four locations in a corridor, the sprinkler head deflectors were obstructed by surface mounted light fixtures." CMS Ex. 10, at 3 ¶ 8. A memorandum summarizing the inspection stated that the sprinkler heads were "within one foot of the light fixture" at the four locations near the nurses' station and that "the sprinkler head deflectors are above the bottom of the fixture." CMS Ex. 5, at 2. One inspector (not a witness in this case) drew a diagram of where the light fixtures and sprinkler heads were located within Petitioner's facility. CMS Ex. 5, at 3. The other inspector took photographs of the sprinkler heads and used crossing yardsticks to indicate the difference in height between the bottom of the sprinkler head and bottom of the light fixture. CMS Ex. 10, at 3 ¶ 12. Black and white copies of four photographs have been admitted as evidence in this case. CMS Ex. 5, at 4-7.

In one photograph, a horizontal yardstick establishes a plane at the bottom of the surface mounted light fixture and meets the edge of the light fixture at a measurement of 20 inches and the sprinkler head between a measurement of 13 and 14 inches, demonstrating that the light fixture is approximately 6 to 7 inches from the sprinkler head. CMS Ex. 5, at 4; Tr. 113. The other yardstick is vertical, perpendicular to the first, and extends straight down from the bottom of the sprinkler head. The measurement where the second yardstick intersects the first is 1¼ inches, which shows that the bottom of the sprinkler head is approximately 1¼ higher than plane established at the bottom of the nearby light fixture. CMS Ex. 5, at 4; CMS Ex. 10, at 3 ¶ 12. The remaining three photographs are blurry but each depicts a vertical yardstick extending straight down from the bottom of a sprinkler head. The inspector asserted that each picture depicts a separate sprinkler head. *See* CMS Ex. 10, at 4 ¶ 12. The vertical yardstick in each photograph intersects with a horizontal yardstick, presumably one that establishes a plane at the bottom of a nearby light fixture. In one photograph, the measurement where the vertical yardstick intersects with the horizontal yardstick is about one quarter of an inch. CMS Ex. 5, at 5. In the

next photograph, the measurement where the vertical yardstick intersects with the horizontal yardstick is slightly under one quarter of an inch. CMS Ex. 5, at 6. In the final photograph, the vertical yardstick intersects with the horizontal yardstick at one eighth of an inch. CMS Ex. 5, at 7.

The surveyor's testimony, the OPC inspector's testimony, the site visit memorandum and diagram following a visit to Petitioner's facility, and the photographs of sprinkler heads in relation to the bottom of light fixtures all demonstrate that four sprinkler heads in Petitioner's facility were within one foot of light fixtures and that the bottoms of the sprinkler heads were above the bottoms of the light fixtures. Based on this evidence, I find that light fixtures impermissibly obstructed four sprinkler heads in Petitioner's facility. *See* NFPA 13, Table 8.6.5.1.2; NFPA 101, 9.7.1.

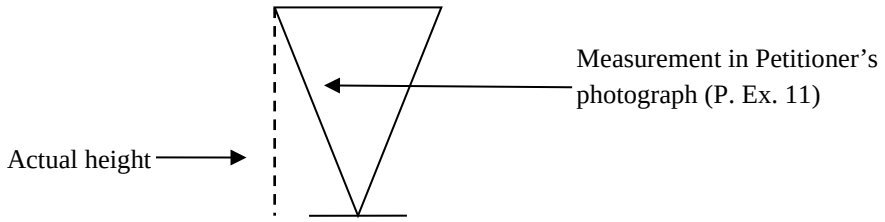
In reaching this finding, I place significant weight on the testimony of the surveyor and OPC inspector, as well as on the memorandum drafted following the OPC inspection of Petitioner's facility. The surveyor is a former firefighter with nearly eight years of experience inspecting buildings as part of Life Safety Code surveys with the state agency. CMS Ex. 9, at 1 ¶ 1. The surveyor has also been a "certified fire inspector" since 1983 and served as a deputy chief fire inspector for 15 years in a Florida fire department. CMS Ex. 9, at 1-2 ¶ 2. While I note below the ineffective notice of operative facts that the surveyor provided in the statement of deficiencies issued after the June 2012 survey, his shortcoming in drafting a particular statement of deficiencies does not bear on the overall weight I place on his ability, based on his significant experience, to observe and recognize deficiencies in a sprinkler system. In addition, the OPC inspector has been an architect since 1989 and has a "broad background primarily in the design and construction of health care facilities and schools." CMS Ex. 10, at 1 ¶ 2. He has been a surveyor of hospitals and nursing homes for 16 years. Tr. 67. These two individuals have substantial experience in reviewing and identifying problems with sprinkler systems, and I accept their testimony with regard to the spatial relationship of the sprinkler heads and light fixtures in Petitioner's facility. *See* Tr. 44, 67.

In addition, I place some, although not a significant amount of weight on three of the four photographs taken by the investigator during his visit of Petitioner's facility. CMS Ex 5, at 5-7; Tr. 113-14. As stated above, the photographs are blurry, and without clarifying testimony from the OPC inspector, it is a challenge to decipher what is depicted in them. The spatial relationship between the sprinkler head depicted and the nearest light fixture is unclear in the photographs. The inspector asserted that he took the photographs of different locations in the facility, though on cross-examination he could not recall which photograph depicted which particular sprinkler head. *See* CMS Ex. 10, at 3-4 ¶12; Tr. 74-76. Indeed, the varying measurements shown in the photographs corroborates that each photograph is of a different sprinkler head, although it remains unclear which particular sprinkler head is in each photograph. CMS Ex. 5, at 5-7. The inspector also testified that he used the horizontal yardstick as a plane at the bottom of various light

fixtures and that in four locations the sprinkler head was above that horizontal plane, which is depicted in the photographs. Tr. 113-14. Nevertheless, I cannot place a significant amount of weight on these photographs or rely solely on them to establish a finding regarding the three sprinkler heads depicted, although the testimony of the OPC inspector clarifies their more troublesome aspects. Certainly, the photographs have some evidentiary value.

The remaining picture, CMS Ex. 5, at 4, clearly shows what the investigator asserts it does, *i.e.*, the yardstick establishing a horizontal plane from the bottom of a light fixture, the distance from the light fixture to the sprinkler head, and the height of one in relation to the other. That photograph is worthy of substantial weight in this decision, and corroborates the investigator's testimony as well as the findings in the investigators' memorandum. CMS Ex. 5, at 2-4; CMS Ex. 10, at 3 ¶ 12; *see also* Tr. 113-15.

Petitioner argues that the photographs taken by the OPC inspector were taken from deceptive angles and are generally unreliable. P. Br. at 5-12. Petitioner submitted its own photographs that purport to be the same sprinkler heads at issue. Petitioner suggests that its own photographs demonstrate that the bottom of the sprinkler heads were in fact even with or below the bottom of the light fixtures and thus compliant with NFPA 13. *See* P. Exs. 11-12. However, compared to the little weight I put on three of CMS's photographs, I place even less weight on Petitioner's photographs. Petitioner claims that the inspector took photographs at deceptive angles, *i.e.*, from below the sprinkler head, but a cursory glance at Petitioner's photographs shows similar, if not more deceptive methods in Petitioner's own photographs. For example, in one photograph, a measuring tape is depicted next to a sprinkler head. P. Ex. 11, at 1. The sprinkler head generally forms an isosceles triangle pointing down from the ceiling. The top of the tape measure touches the wide area of the sprinkler head that is flush with the ceiling. The tape measure also touches the much smaller bottom area (deflector) of the sprinkler head. P. Ex. 11, at 1. In order for the tape measure to touch the wider portion of the sprinkler head that is against the ceiling as well as the narrower deflector at the bottom of the sprinkler head, the tape measure must be held at an angle, rather than straight down from the ceiling. Therefore, the measurement that is depicted, three and three-quarters of an inch, is not an accurate measurement of how far the bottom of the sprinkler head actually is from the ceiling. The measurement in Petitioner's photograph is along the hypotenuse of the general triangular shape of the sprinkler head, which is necessarily longer than the actual height of that triangle:



Therefore, Petitioner's photograph of the sprinkler head and measuring tape provides a deceptively longer measurement of how far down the sprinkler head extends from the ceiling. Moreover, Petitioner's measurement is faulty for the same reason it blames the surveyor; the pictures are taken from below the sprinkler head or above the bottom of the sprinkler head. Petitioner's photographs are even less reliable because they do not have any type of method to establish a horizontal plane between the light fixture and sprinkler head. *See* Tr. 115 (testimony of the OPC inspector, stating that "taking a picture by itself without any other tools, you couldn't make any determination. But trying to . . . establish this plane or this line, that gave us our references"). In two pictures, P. Ex. 12, at 1-2, the photographs are taken from above the sprinkler head deflector, with the photograph angled slightly down towards the nearest light fixture. I find this angle is deceiving especially considering that there is nothing to establish a level plane in the picture. *Compare* P. Ex. 11 (providing photographs of a sprinkler head and light fixture without a horizontal plane established between the two) *with* CMS Ex. 5, at 4-7 (providing photographs of sprinkler heads and a light fixture using a yardstick to establish a horizontal plane at the bottom of the light fixture). Thus, I do not give any weight to Petitioner's photographs of the sprinkler heads.

Petitioner also argues that the photographs taken by the OPC inspector did not comply with the procedures set forth in a CMS-issued guidance document titled "Some Basic Principles of Using Photography During the Survey." P. Br. at 5. Regardless of whether the photographs presented as evidence in this case were taken in accordance with a guideline that CMS issued to state survey agencies, that fact, even if true, does not diminish the weight I accord to those photographs in this case. CMS has offered the testimony of the inspector who took the photographs and who has authenticated the photographs and provided a description of what is depicted in each photograph. CMS Ex. 10, at 3-4 ¶ 12. I have assigned an appropriate amount of weight depending on the clarity of the picture. Petitioner has not argued, let alone demonstrated, that the photographs placed in evidence as CMS Ex. 5, at 4-7 were tampered with or depicted something other than what the OPC inspector (the photographer) said. Moreover, the cover letter to the CMS guidance document that Petitioner relies on, issued by the CMS Director of Survey and Certification, states that "we wish to share some basic principles that the [state agencies] can use to incorporate photographic evidence into their survey process. As photographs are optional, *these principles are a tool and may be used at a State's discretion.*" CMS Memorandum S&C-06-33 (Sept. 29, 2006), *available at* http://www.cms.gov/Medicare/ Provider-Enrollment-and-Certification/ SurveyCertificationGenInfo/downloads/ SCLetter06-33.pdf (emphasis added). I am unwilling to reduce the weight accorded to authenticated photographs simply because the OPC inspector did not strictly comply with *discretionary* principles for taking photographs.

Petitioner has also offered blueprints of its facility, which it claims demonstrate that the sprinkler heads and light fixtures were intended to be next to one another and that the

state approved those plans as compliant with NFPA 13. *See* P. Ex. 1. However, the blueprints do not provide exact distances between the sprinkler heads and light fixtures or the height of either and, as the OPC inspector points out, on-site inspections may show deficiencies while planning documents may not. CMS Ex. 10, at 2 ¶ 5. When the surveyor and inspector observed the sprinkler heads in person, each determined that the sprinkler heads were too close to the light fixtures and that the bottoms of the light fixtures were below the bottoms of the sprinkler heads. The observations of what was actually installed in Petitioner's facility have more weight than mere planning documents that do not include any clear requirements of how far apart the light fixtures and sprinkler heads must be or how far below the ceiling they were intended to be.

Finally, Petitioner offered the testimony of its owner who testified that following the first survey Petitioner's staff measured the light fixtures and sprinkler heads and determined that "the sprinkler heads were level to or below the surface-mounted lights and we were in compliance." Tr. 141-42; P. Ex. 2. However, the measurements that Petitioner's owner obtained were apparently reflected in the photographs Petitioner submitted as evidence (P. Ex. 2, at 3 ¶ 15), which I have already assigned no weight because of the inaccurate measuring technique used. Therefore, I also assign no weight to the owner's ultimate conclusion that Petitioner was actually in substantial compliance.

**2. *From June 25, 2012 to August 29, 2012, Petitioner was not in substantial compliance with the 2000 edition of the Life Safety Code, as incorporated by 42 C.F.R. § 483.70(a)(1).***

The regulations require Petitioner to comply with the 2000 edition of the Life Safety Code. 42 C.F.R. § 483.70(a)(1)(i). As outlined above, in order to comply with the Life Safety Code, Petitioner's sprinkler system must comply with the requirements set forth in the 1999 edition of NFPA 13. Table 5-6.5.1.2 of NFPA 13 (1999 edition) requires the bottom (deflector) of a ceiling-mounted sprinkler to be even with or below the bottom of the obstruction (*e.g.* a light fixture) if the distance of the sprinkler to the obstruction is less than one foot. In Petitioner's facility the bottom of four sprinkler heads were above the bottom of light fixtures that were within one foot. Therefore, Petitioner did not comply with Table 5-6.5.1.2 of the 1999 edition of NFPA 13, which means it did not comply with the 2000 edition of the Life Safety Code, which, in turn, means it was not in substantial compliance with 42 C.F.R. § 483.70(a)(1)(i).

i. *Petitioner has not established by a preponderance of the evidence that it was substantial compliance.*

Petitioner argues that CMS has not established a prima facie case. However, once both parties have presented evidence and argument about the cited deficiencies, the analysis of whether CMS has established a prima facie case is not applicable. Rather, as the Board recently explained:

> [O]nce both parties have presented their evidence, the issue before the ALJ [administrative law judge] "is whether the petitioner showed substantial compliance by a preponderance of the evidence." An ALJ might at that point (depending on the record as a whole) conclude that the evidence supporting CMS's allegations was so weak that, even apart from the provider's rebuttals, no deficiency was established. On the other hand, an ALJ does not err by proceeding to the ultimate question of whether a preponderance of the evidence on the record as a whole when both sides have completed their presentations shows the provider to be in substantial compliance.

*Hanover Hill Health Care Ctr.*, DAB No. 2507, at 7 (2013) (quoting *Oxford Manor*, DAB No. 2167, at 2-3 (2008)). Therefore, the relevant question in this case at this point is not whether CMS has established a prima facie case of noncompliance, but whether a preponderance of the evidence on the record as a whole establishes Petitioner was in substantial compliance with the Life Safety Code. As explained above, the evidence in the record demonstrates that four of Petitioner's sprinkler heads were within one foot of light fixtures and that the bottom of the sprinkler heads were above the bottom of the light fixtures. Petitioner has offered no credible evidence establishing that the bottom of its sprinkler heads were below the bottom of the light fixture as NFPA 13 requires.

Even if I considered whether CMS established a prima facie case, I would find that it has done so. It has presented credible and reliable testimony from the surveyor and OSC inspector who have first-hand knowledge of the sprinkler heads and light fixtures in Petitioner's facility, a memorandum completed shortly after the OSC inspection, and photographs of the sprinkler heads, all of which confirm that the sprinkler heads and light fixtures were within one foot of each other and the bottom of the sprinkler heads were above the bottom of the light fixtures, even if only slightly so. *See* CMS Exs. 5, 9, 10. Taken together, this evidence establishes a prima facie violation of the Life Safety Code.

Petitioner also claims that CMS was required to provide exact measurements of the sprinkler heads at issue in this case before the noncompliance determination can be sustained. P. Br. at 3-5. CMS presented photographic evidence that depicts actual measurements and shows the sprinkler heads were between one-eighth and one and one-quarter inches above the bottom of the light fixtures. CMS Ex. 5, at 4-7. Petitioner's position also ignores the assessment by two highly-trained and credible witnesses that determined a problem in the spatial relationship between the sprinkler heads and light fixtures in Petitioner's facility. The observations of both of these individuals would be sufficient to establish a prima facie case, which Petitioner could have simply rebutted by providing its own reliable measurements showing it was actually in substantial compliance, but it did not do so.

ii. *The state agency made a "determination" of noncompliance when it issued the statement of deficiencies after the June 2012 survey*.

Petitioner argues that the state agency and CMS failed to make a "determination" of noncompliance until August 28, 2012, when the findings of the OPC inspectors were provided to Petitioner, and thus noncompliance is not enforceable before that date. P. Br. at 14 (citing 42 C.F.R. § 488.440(a)(1)). However, the original statement of deficiencies following the June 2012 survey listed all of the deficiencies the state agency found at Petitioner's facility, including under Tag K062 at a scope and severity level "F," meaning widespread potential for more than minimal harm. CMS Ex. 1, at 5. Noncompliance occurs when there is "any deficiency that causes a facility to not be in substantial compliance." 42 C.F.R. § 488.301. Substantial compliance, in turn, means "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." *Id.* Therefore, when the state agency issued its first statement of deficiencies in this case, it made a noncompliance "determination" because it found that the deficiency cited under Tag K062 posed a potential for more than minimal harm. Petitioner's position offers an unreasonably strict reading of the OPC inspector's testimony, wherein he stated that he went to Petitioner's facility on August 24, 2012, "to make a determination whether there was an obstruction or not." Tr. 111; P. Br. 15. It is unlikely – and I do not accept – that the witness was attempting to make a legal conclusion about the scope of his assignment on August 24, 2012. Moreover, even if the OPC inspector was aware that the word "determination" had regulatory significance (42 C.F.R. § 488.440), I am not bound to follow his legal interpretations. The most reasonable understanding of the August 24, 2012 OPC inspection is that it *confirmed* the findings of the two previous surveys. *See* Tr. 87 (testimony of OPC inspector, stating that "we were out there to determine if [the surveyor] had made a correct decision or correct citation").

Petitioner's refusal to even acknowledge a deficiency finding following the June 2012 and August 13, 2012 surveys prompted the state agency to provide a second opinion through the OPC inspector. CMS Ex. 5; Tr. 111. Finally, once the OPC inspectors confirmed the surveyor's original findings, Petitioner promptly corrected the light fixtures. P. Ex. 9. However, despite Petitioner's position to the contrary, a "determination" as to the date when Petitioner was not in substantial compliance is not premised upon the date when *Petitioner* is satisfied that a deficiency actually exists.

iii. *Citation to the wrong editions of the Life Safety Code and NFPA 13 is not relevant to whether Petitioner was in substantial compliance with the correct edition, and, even if relevant, Petitioner was not prejudiced by the incorrect citations*.

Petitioner notes that CMS and the surveyor repeatedly cited the wrong editions of the Life Safety Code and NFPA 13 in its reports, briefs, and other documentary evidence. P.

Br. at 2-3. However, these errors are not relevant to the issue here, which is whether the operative facts support a finding of noncompliance. While the citation to a wrong regulatory standard may be relevant if it resulted in CMS's application of the wrong standard, that is not what happened here. Petitioner has not argued, let alone demonstrated that the relevant sections of the Life Safety Code and NFPA 13 editions that CMS cited were in any way different than the 2000 edition of the Life Safety Code and 1999 edition of NFPA 13. It is certainly important that CMS and the state agency carefully cite to the correct editions of the Life Safety Code and NFPA 13 as the carelessness in citing to the wrong editions may mislead a petitioner into defending an entirely different standard than what actually applies. The improper citations here, however, are not a basis to reverse the noncompliance finding because review of the language and tables in the later editions of the Life Safety Code and NFPA 13 that CMS cited are substantively the same as the earlier editions that apply in this case. *Compare* NFPA 13, Table 5-6.5.1.2 (2007 edition) (reprinted in CMS Ex. 7) *with* NFPA 13, Table 5-6.5.1.2 (2000 edition) (reprinted as an attachment to CMS Reply). Therefore, Petitioner was on notice of the relevant facts and the correct legal standard that CMS applied when making its noncompliance determination. *See Oak Lawn Pavilion, Inc.*, DAB No. 1638, at 12 (1997) ("Oak Lawn cannot reasonably argue that it was misled by the reference to the incorrect subsection when the nature of the alleged violations together with the citation to the quality of care requirement clearly notified Oak Lawn of the deficiency."); *see also Ill. Knights Templar Home*, DAB No. 2369, at 2 n.2 (2011). Petitioner has had ample opportunity to defend itself using the correct legal standards and, as a result, incurred no prejudice from CMS's citation to later, but substantively same editions of the Life Safety Code and NFPA 13. Regardless of the Life Safety Code and NFPA 13 editions that CMS cited, Petitioner should have known the correct edition that applied because long-term care facilities participating in the Medicare program are "presumed to be on notice of program requirements through the applicable regulations." *Oak Lawn*, DAB No. 2369, at 12.

iv. *Petitioner has not demonstrated that the dates of noncompliance CMS cited were incorrect*.

The state agency and CMS determined that Petitioner was not in substantial compliance with the Life Safety Code beginning June 25, 2012, the date when the surveyor first noted a deficiency with the sprinkler heads in Petitioner's facility, and ending August 29, 2012, the date when Petitioner installed shallower light fixtures near the sprinkler heads at issue. Petitioner bears the burden of showing that it returned to substantial compliance earlier that the date cited. *Owensboro Place & Rehab. Ctr.*, DAB No. 2397, at 12 (2011) ("The Board has made it clear that the facility bears the burden of showing that it returned to substantial compliance on a date earlier than that determined by CMS and has rejected the idea that CMS must establish a lack of substantial compliance during each day in which a remedy remains in effect.").

Petitioner argues that the state agency's determination as to the initial date of its noncompliance (June 25, 2012) was improper. Petitioner claims, albeit incorrectly, that CMS only relies on the statement of deficiencies issued after the June 2012 survey as the singular basis for establishing Petitioner's noncompliance beginning June 25, 2012. Petitioner contends that the first statement of deficiencies was so inadequate that there could be no basis for noncompliance based on the facts alleged in it. P. Reply at 2-3. Petitioner goes on to argue that CMS cannot now attempt to remedy a poorly-worded statement of deficiencies and rely on it as support for establishing Petitioner's noncompliance beginning on June 25, 2012. P. Reply at 3.

However, Petitioner misconstrues the purpose of the statement of deficiencies. The Board has explained that the statement of deficiencies "is a notice document, and is not designed to lay out every single detail in support of a finding that a violation has been committed . . . ." *Alden Town Manor Rehab. & HCC*, DAB No. 2054, at 17-18 (2006). While I agree with Petitioner that the first statement of deficiencies did not provide all of the relevant facts to support a deficiency under Tag K062 at that time, subsequent record development prior to hearing sufficiently did so. *See id.* at 18-19 ("Fairness requires that facilities know, going into a hearing, what they are required to answer to. The statement of deficiencies is not, however, the sole possible source of notice. Pre-hearing record development may also provide a fair context to provide such notice."). Also, there is no evidence that Petitioner modified the light fixtures or sprinkler heads in any way between June 25 and August 28, 2012. Thus, the observations of the surveyor during the August 13, 2012 revisit survey and the August 24, 2012 OPC inspection were the same as those of the surveyor during the June 25, 2012 survey. Considering there were no modifications to the sprinkler heads or light fixtures at issue, the later findings by the surveyor and OPC inspector equally applied to the surveyor's first — albeit poorly worded — statement of deficiencies relating back to June 25, 2012. Perhaps more importantly, Petitioner has not met its burden by providing any credible evidence showing it was actually in substantial compliance anytime between June 25 and August 28, 2012.

Petitioner also asserts that it was previously cited in February 2012 for undertaking building modifications without prior OPC approval and was waiting in "good faith" for OPC to approve modifications to the light fixtures in its facility. P. Br. at 18. Petitioner premises its position on the state agency issuing competing citations, one for the facility not receiving permission to make a building modification, and one for the facility not promptly correcting an issue while the request for permission to correct that issue languished while awaiting a decision from the state agency. *See* P. Br. at 16-18. However, I am unwilling to accept that the February 2012 and June 2012 citations were contradictory or otherwise competing citations. The two citations were in separate survey cycles, involved separate issues, and each had a significantly different scope than the other. In the February 2012 citation, it appears that the state agency warned Petitioner not to do something without its prior approval, but Petitioner did so anyway.

P. Ex. 5, at 2 ("During the previous complaint survey, on 1/5/12, the owner and previous administrator were advised by the surveyor that the projects were preparing for renovation needed to be submitted to OPC with a written scope of work . . . ."). Here, the state agency warned Petitioner to correct something, but Petitioner did not do so until over two months later. Therefore, I do not accept that the noncompliance determination in February 2012, which cited Petitioner for not obtaining OPC approval prior to a building modification project, contradicts or is in some way implicated by the June 2012 noncompliance determination.

Moreover, I find that Petitioner's claim that it sought approval and was waiting in "good faith" for a response to be a strained analysis of what was actually sent to OPC after the June 2012 survey. The emails from Petitioner's counsel to OPC show that Petitioner did not seek permission to change the light fixtures, but rather sought clarification about whether the cited deficiency was actually a deficiency. *See* P. Ex. 4. The first email from Petitioner's counsel to OPC stated that "we need a determination as to whether the sprinklers/lights are proper (before we engage in any unnecessary work)." P. Ex. 4, at 3. Thus, Petitioner did not represent to OPC that it was prepared to alter the light fixtures to a shallower type and needed OPC's approval. Rather, it is apparent that Petitioner disagreed with the findings and was seeking a second opinion about the deficiency cited on June 25, 2012. Moreover, it does not appear from the record that Petitioner sent a "formal request" letter requesting approval to change its light fixtures. The OPC inspector testified that if such a letter had been sent, a response would have been made within 10 days. Tr. 103. Petitioner's counsel may have been waiting for a response to his email about his general disagreement with the deficiency finding, but, between the first and revisit surveys, he was certainly not waiting in "good faith" for approval of corrective modifications to the light fixtures.[5] To the extent Petitioner requests that its "good faith" be recognized through a reduction of the period of noncompliance, I am without the equitable authority to do so.

In sum, the evidence establishes that Petitioner was not in substantial compliance with the Life Safety Code, and thus with the requirement in 42 C.F.R. § 483.70(a)(1)(i), beginning June 25, 2012 and ending August 29, 2012.

[5] Petitioner's initial plan of correction, which the state agency approved, said that Petitioner would submit plans to OPC for appropriate lighting "should it become necessary." P. Ex. 3. While Petitioner certainly believed otherwise, it was necessary to change the light fixtures after the first survey, and Petitioner cannot now excuse its noncompliance during that time by relying on its incorrect interpretation of the situation. Moreover, the state agency's approval of Petitioner's plan of correction is not sufficient to establish substantial compliance and does not warrant a modification to the dates of noncompliance cited. *See Sunshine Haven Lordsburg*, DAB No. 2456, at 18 (2012).

v. *There has been no showing that the surveyor was biased against Petitioner*.

Petitioner argues that the surveyor's credibility has been called into question because he was aware of a state investigation into potential harassment and bias against Petitioner by the state agency's Fort Myers Office. P. Reply at 4-5; P. Ex.7. The investigation did not focus on the surveyor or any of his conduct but rather a co-worker and friend of his. Tr. 36. The surveyor's knowledge of an investigation, which found the allegations against the surveyor's co-worker were unsubstantiated, does not reasonably demonstrate that the surveyor was in some way biased against Petitioner. *See* P. Ex. 7, at 4. This case involves the spatial relationship of light fixtures and sprinkler heads, a strictly objective determination, so any bias, even if it existed, would not have caused a different outcome in this case. The surveyor would have been derelict in his duties if he had observed the light fixtures obstructing the sprinkler heads and not cited it as a deficiency.

One thrust of Petitioner's argument is that OPC did not timely respond to Petitioner when Petitioner was questioning the surveyor's deficiency finding, and a substantiated portion of the earlier investigation into the Fort Myers Office was about the unresponsiveness of that office's administrator to inquiries by Petitioner. P. Br. at 16-18; P. Reply at 5. However, whether OPC responded timely, or at all, to Petitioner is not relevant to whether the light fixtures obstructed sprinkler heads in Petitioner's facility. The evidence demonstrates that they did, and Petitioner's allegations do not detract from that deficiency.

**3. *A $200 per day civil money penalty from June 25, 2012 to August 28, 2012 is reasonable*.**

CMS must consider several factors when determining the amount of a CMP, which an administrative law judge considers de novo when evaluating the reasonableness of the CMP that CMS imposed: (1) the facility's history of noncompliance; (2) the facility's financial condition, *i.e.*, its ability to pay the CMP; (3) the severity and scope of the noncompliance; (4) the "relationship of the one deficiency to other deficiencies resulting in noncompliance;" (5) the facility's prior history of noncompliance; and (6) the facility's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort or safety. 42 C.F.R. §§ 488.438(f), 488.404(b), (c).

A CMP that is imposed against a facility on a per day basis will fall into one of two ranges of penalties. 42 C.F.R. §§ 488.408; 488.438. The upper range of a CMP, $3,050 per day to $10,000 per day, is reserved for deficiencies that pose immediate jeopardy to the health and safety of a facility's residents and, in some circumstances, for repeated deficiencies. 42 C.F.R. § 488.438(a)(1)(i); 488.438(d)(2). The lower range of CMP, $50 to $3,000 per day, is reserved for deficiencies that do not pose 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). In assessing the reasonableness of a CMP amount, an administrative law judge looks at the per day amount, rather than the total accrual. *Kenton Healthcare, LLC*, DAB No. 2186, at 28 (2008). The regulations leave the decision regarding the choice of remedy to CMS and the amount of the remedy to CMS and the ALJ, requiring only that the regulatory factors at 42 C.F.R. §§ 488.438(f) and 488.404 be considered when determining the amount of a CMP within a particular range. 42 C.F.R. §§ 488.408; 488.408(g)(2); 498.3(d)(11); *see also* 42 C.F.R. § 488.438(e)(2); *Alexandria Place*, DAB No. 2245, at 27 (2009); *Kenton Healthcare, LLC*, DAB No. 2186, at 28-29.

Unless a facility contends that a particular regulatory factor does not support the CMP amount that CMS imposed, the ALJ must sustain it. *Coquina Ctr.*, DAB No. 1860, at 32 (2002). The $200 per day CMP that CMS imposed in this case is in very low range ($50-$3000) for noncompliance that does not pose immediate jeopardy.

i. *The duration of the CMP is reasonable*.

CMS may impose an enforcement remedy against a facility for as long as the facility is not in substantial compliance with participation requirements. 42 C.F.R. § 488.430(a). Petitioner bears the burden of persuasion regarding the duration of noncompliance. Petitioner has not offered any evidence that the period of noncompliance was for a time other than beginning on June 25, 2012 and ending on August 29, 2012. Accordingly, the duration of the CMP is reasonable.

ii. *The amount of the CMP is reasonable*.

CMS did not offer evidence of Petitioner's history of noncompliance. Petitioner did not offer any evidence regarding its financial condition. The severity of Petitioner's noncompliance is moderate because the obstructions here were by fractions of an inch in some instances, and the overall effect on the sprinkler heads' spray based on such a small obstruction would likely be small as well. The low per day CMP imposed here reflects that Petitioner's noncompliance, while severe enough to warrant a slight increase from the minimum CMP level, is not so severe to support a substantial increase to the per day CMP.

With regard to culpability, Petitioner was responsible for its continued noncompliance, especially after the first and revisit surveys determined that light fixtures were obstructing sprinkler heads in Petitioner's facility. Petitioner elected to challenge the finding informally rather than fix it, and only after a separate inspector reached the same result as the surveyor did Petitioner finally take action to correct the life safety measure. Accordingly, I find that Petitioner was culpable for its ongoing noncompliance, and this culpability supports a small increase to a per day CMP.

Petitioner offers no direct challenge to the amount of the CMP. Indeed, Petitioner tacitly concedes that a $200 per day CMP is reasonable, and asks that such a CMP be imposed, albeit for a shorter duration, if a noncompliance finding is sustained. *See* P. Br. at 18. In light of all of the factors discussed, the very low $200 per day CMP from June 25, 2012 through August 28, 2012 (65 days) is reasonable in amount and duration.

## V. Conclusion

For all of the reasons stated above, I conclude that Petitioner was not in substantial compliance with Medicare participation requirements for the period cited and the CMP imposed is reasonable.

/s/
Joseph Grow
Administrative Law Judge