Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: April 12, 2010
Golden Living Center - Riverchase	
Petitioner,	Civil Remedies CR2012 App. Div. Docket No. A-10-25
	Decision No. 2314
- v. -	
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Respondent Centers for Medicare & Medicaid Services (CMS) appeals the September 30, 2009 decision of Administrative Law Judge (ALJ) Keith Sickendick, Golden Living Center - Riverchase, DAB CR2012 (2009) (ALJ Decision). The ALJ concluded that Golden Living Center - Riverchase (Petitioner) was not in substantial compliance with 42 C.F.R. § 483.25(h)(2)(F-tag 324), a federal requirement for Medicare long-term care facilities, based on his finding that staff did not use the mechanical lift required by Resident (R.) 8's care plan when transferring her on February 26, 2007, resulting in R. 8's being dropped or lowered to the floor and sustaining injuries. However, the ALJ rejected CMS's determinations of two additional instances of noncompliance with section 483.25(h)(2), an alleged inadequately supervised transfer of R. 9 and an alleged failure to prevent R. 4 from leaving the facility unsupervised. The ALJ also concluded that Petitioner was in substantial compliance with 42 C.F.R.

§ 483.13(b)(F-tag 223) and (c)(F-tags 225 and 226), rejecting CMS's determinations that staff failed to immediately report and investigate verbal abuse of R. 8 and failed to report alleged misappropriation of resident property to the State of Alabama. In addition, the ALJ concluded that CMS's determination that the noncompliance with 483.25(h)(2) constituted immediate jeopardy was clearly erroneous and, based on this conclusion, found the $3,050 per day CMP imposed by CMS for the period January 9 through March 2, 2007 unreasonable. The ALJ determined that a $500 per day CMP for the period January 9 through April 19, 2007 (91 days) was reasonable based on unappealed findings of noncompliance with multiple requirements, Petitioner's failure to be in substantial compliance with section 483.25(h)(2) and application of the factors in 42 C.F.R. § 488.438(f). Petitioner did not appeal any of the ALJ's findings of fact (FFs) or conclusions of law (CLs).

In its Request for Review and Notice of Appeal (RR), CMS appeals the ALJ's conclusion that Petitioner was in substantial compliance with section 483.25(h)(2) with respect to R. 9. CMS also appeals the ALJ's conclusion that Petitioner was in substantial compliance with section 483.13(c)(F-tags 225 and 226), but appeals that conclusion only with respect to the alleged verbal abuse of R. 8, not the alleged misappropriation of resident property. CMS also appeals the ALJ's conclusion that CMS's determination that Petitioner's noncompliance with section 483.25(h)(2) constituted immediate jeopardy was clearly erroneous, as that conclusion pertains to the period February 17, 2007 (the date of R. 9's fall) through March 2, 2007 (the day before the jeopardy was abated).[1] CMS asks the Board to affirm the ALJ's finding that the $500 per day CMP was reasonable as that finding relates to the periods January 9 through February 16, 2007 and March 3 through April 19, 2007 but to reverse that finding as it relates to the period February 17 through March 2, 2007 and to reinstate the $3,050 per-day CMP for that period.

We affirm without discussion the ALJ's unappealed conclusion that Petitioner was not in substantial compliance with section 483.25(h)(2) but reverse his appealed conclusion that Petitioner's noncompliance with that requirement did not include

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[1] CMS does not appeal the ALJ's rejection of the elopement allegations for R. 4. The alleged elopement occurred on January 9, 2007. Accordingly, CMS's appeal of the ALJ's conclusion that the immediate jeopardy determination was clearly erroneous does not extend to the period January 9 through February 16, 2007.

a failure to provide adequate supervision to R. 9 during the assisted transfer on February 17, 2007. The ALJ's conclusion on that issue is erroneous because the circumstances surrounding R. 9's fall establish a prima facie case that Petitioner was not in substantial compliance, and Petitioner, which has the ultimate burden of persuasion on the compliance issue, did not rebut CMS's case. We also reverse the ALJ's conclusion that CMS's immediate jeopardy determination was clearly erroneous. The record does not support the ALJ's finding that CMS based the immediate jeopardy determination only on the alleged inadequate supervision of R. 4; instead, the record is replete with evidence that CMS's determination was also based on the incidents involving R. 8 and R. 9 and that Petitioner understood this.

Since we conclude that immediate jeopardy existed during the period February 17 through March 2, 2007, we reinstate the $3,050 per-day CMP that the ALJ overturned for that period. Since neither party appealed the ALJ's finding that a $500 per-day CMP is reasonable for the noncompliance that is not at the immediate jeopardy level, we uphold that finding as it pertains to the periods January 9, 2007 through February 16, 2007 and March 3 through April 19, 2007. We do not reach the issue of whether the ALJ erred in concluding that Petitioner was in substantial compliance with section 483.13(c). That conclusion affects neither our decision that Petitioner was not in substantial compliance for the period January 9 through April 19, 2007 nor our conclusion that Petitioner's noncompliance constituted immediate jeopardy for the period February 17 through March 2, 2007. It also does not affect our decision as to the reasonableness of the CMP amounts.

Applicable Law

Long-term care facilities participating in the Medicare and Medicaid programs are subject to the survey and enforcement procedures set out in 42 C.F.R. Part 488, subpart E, to determine if they are in substantial compliance with applicable program requirements which appear at 42 C.F.R. Part 483, subpart B. "Substantial compliance" means a level of compliance 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. "Noncompliance," in turn, is defined as "any deficiency that causes a facility to not be in substantial compliance." Id. Survey findings are reported in a Statement of Deficiencies (SOD). The SOD identifies each "deficiency" under its regulatory requirement, citing both the

regulation at issue and the corresponding "tag" number used by surveyors for organizational purposes.

A long-term care facility found not to be in substantial compliance is subject to various enforcement remedies, including CMPs. 42 C.F.R. §§ 488.402(c), 488.406, 488.408. CMS has the option to impose either a per-instance or per-day CMP whenever a facility is not in substantial compliance. 42 C.F.R. § 488.408(d)(3)(i). A per-day CMP may accrue from the date the facility was first out of compliance until the date it is determined to have achieved substantial compliance. 42 C.F.R. § 488.440(a)(1),(b). For noncompliance determined to pose immediate jeopardy, CMS may impose per-day CMPs in amounts ranging from $3,050-$10,000 per day. 42 C.F.R. § 488.408(e)(2)(i),(ii). For noncompliance at less than the immediate jeopardy level, CMS may impose per-day CMPs in amounts ranging from $50-3,000 per day. 42 C.F.R. § 488.408(d)(1)(iii). The regulations set out a number of factors that CMS considers in determining the amount of a CMP. 42 C.F.R. §§ 488.438(f), 488.404. "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.

Standard of Review

The Board's standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. The Board's standard of review on a disputed finding of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting A Provider's Participation In the Medicare and Medicaid Programs, http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html; Batavia Nursing and Convalescent Inn, DAB No. 1911, at 7 (2004), aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson, 143 F. App'x 664 (6th Cir. 2005).

Case Background

A. Survey History

Petitioner, located in Birmingham, Alabama, participated in Medicare as a skilled nursing facility (SNF) and in Medicaid as a nursing facility (NF). ALJ Decision at 1. The Alabama Department of Public Health, the state survey agency, completed a survey of Petitioner's facility on March 4, 2007. Id., citing

Joint Stipulations. On April 11, 2007, CMS notified Petitioner by letter that as remedies for noncompliance found during the March survey, CMS was imposing a CMP of $3,050 per day for the period January 7, 2007 through March 2, 2007 and $500 per day beginning March 3, 2007 and continuing until Petitioner returned to substantial compliance.[2] Id. at 2. A revisit survey completed on April 20, 2007 found that Petitioner had achieved substantial compliance on that date. Id. at 2. Petitioner filed a timely hearing request, and the ALJ held a hearing on January 24 and 25, 2008. Id. at 2. Although CMS found noncompliance with multiple regulatory requirements, Petitioner appealed only the alleged noncompliance with section 483.13, cited at a scope and severity level of "I" (widespread harm that was not immediate jeopardy), and 483.25(h)(2), cited at a scope and severity of "J" (isolated immediate jeopardy).[3] Id. at 5-6. At the hearing, CMS informed the ALJ that it would not proceed upon example 2 under section 483.13 (Tag F225).[4] Id. at 6.

B. ALJ's findings of fact regarding R. 9

R. 9 was an 85-year-old female resident of Petitioner's facility whose medical diagnoses included dementia, congestive heart failure, a history of cerebrovascular accident or stroke and

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[2] The same letter notified Petitioner of a potential termination of its provider agreement and imposition of a mandatory DPNA, but these remedies never took effect because the facility returned to substantial compliance before their effective dates.

[3] The uncontested noncompliance involved the regulatory requirements at 42 C.F.R. §§ 483.20(d), 483.20(k)(1), 483.20(k)(3)(ii), 483.25(c), 483.25(k), 483.25(n), 483.60(a)-(b), 483.60(b),(d),(e) and 483.75(m)(2). Id. at 6.

[4] At the hearing CMS also proffered, and the ALJ admitted, CMS Exhibit 51, a January 4, 2008 letter from CMS to Petitioner stating that CMS rejected changes the State made to some deficiency findings following informal dispute resolution (IDR). Tr. at 15; ALJ Decision at 6 n.5. Since Petitioner neither objected to the admission of this exhibit nor appealed the ALJ's ruling or decision, we need not address Petitioner's speculation here that "[i]t is unclear whether CMS's late reversal of the IDR results is acceptable," Petitioner Response (P. Response) at 6 n.1. In any event, the IDR resulted in no change to the findings of noncompliance with section 483.25(h)(2) that we address in our decision.

osteoporosis. Id. at 31, citing CMS Ex. 9, at 22 (1/11/07 Admission Assessment). R. 9 suffered mobility deficits due to limitation in movement in her feet and legs, and limited range of motion in her right hip and was assessed as requiring extensive assistance for bed mobility, transfers, dressing, toileting, and personal hygiene. Id., citing CMS Ex. 9, at 23-29 (1/11/07 Admission Assessment). R. 9 suffered impaired safety awareness and judgment and tended to fidget while being given care. Id., citing CMS Ex. 9, at 8-9 (nurse's notes and Change In Condition report).[5] On February 17, 2007, a CNA was transferring R. 9 from her wheelchair to her bed using a stand-up lift when, according to the CNA, R. 9 wiggled so that she slid out the wheelchair onto the floor. Id., citing CMS Ex. 9, at 7 (facility investigation report). The resident's right arm had to be dislodged from the wheelchair, and a subsequent x-ray (done on February 18, 2007) showed a mildly displaced fracture of the ulnar styloid of the right wrist. Id., citing CMS Ex. 9, at 6, 20. The resident also suffered a skin tear on her right thigh, which was cleaned and bandaged. Id., citing CMS Ex. 9, at 6 (facility fall investigation report). A nurse's note indicates that the charge nurse was called to the resident's room by a nurse from the previous shift and saw R. 9 sitting on the floor but partially on the footrest of her wheelchair with her right arm caught in the right arm of the wheelchair. Id., citing CMS Ex. 9, at 18. The note also states that after several attempts, the CNA was able to dislodge the resident's right arm, and she was moved to bed and assessed; her doctor and family were then notified. Id. The ALJ found that the CNA reported that the resident "slid to the floor during the transfer due to fidgeting."[6] Id.

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[5] The nurse's note cited is recorded on a facility form titled "IPN" (Interdisciplinary Progress Note). Some other notes by nurses in the record are on forms labeled simply "Progress Notes". While the ALJ Decision and the parties' briefs may sometimes refer to these documents by the title on the form, we use the term "nurse's notes" to more clearly indicate their substance.

[6] The cited investigation report itself contains the following statement by the CNA: "I was helping [R. 9] to the bed with the stand-up lift. She wiggled until she slid out of the wheelchair on the floor." CMS Ex. 9, at 7.

C. ALJ's relevant findings of fact regarding R. 8.

The ALJ found that R. 8 was more than 83 years old and had multiple medical conditions that compromised her health: congestive heart failure with severe renal stenosis, neuropathy, atrial fibrillation, insulin-dependent diabetes mellitus, depression and renal insufficiency. ALJ Decision at 7, citing P. Ex. 1, at 1; CMS Ex. 8, at 20, 30-54. The ALJ also found that R. 8's care plan required staff to use a mechanical lift for transferring her. ALJ Decision at 7, 33. He concluded that R. 8 was "dropped or lowered to the floor on February 26, 2007, when two CNAs attempted to transfer her without using a lift" and that this was a "fall [that] resulted from a failure to use the care planned assistance device." Id. at 33. The ALJ also found that R. 8 suffered actual harm as a result of the accident, abrasions on her buttocks that bled and required dressing by a nurse. Id. at 33-34.

Analysis

A. The ALJ erred in concluding that R. 9's fall did not result from a failure to provide adequate supervision and that Petitioner, therefore, was in substantial compliance with section 483.25(h)(2) with respect to this resident.

As indicated above, the ALJ concluded that Petitioner was not in substantial compliance with 42 C.F.R. § 483.25(h)(2) based on R. 8's fall but rejected CMS's additional finding of noncompliance with that regulation based on R. 9's fall. Since the ALJ's conclusion with respect to R. 8 has not been appealed to the Board, we affirm it summarily. However, for the reasons explained below, we reverse the ALJ's conclusion with respect to R. 9.

1. Under prior Board decisions, the undisputed evidence surrounding R. 9's unexplained fall, including R. 9's extensive dependence on staff for transfers and her other assessed needs, establishes a prima facie case of inadequate supervision under section 483.25(h)(2).

The regulation at section 483.25(h)(2) requires facilities like Petitioner to "ensure that . . . each resident receives adequate supervision and assistance devices to prevent accidents." As the ALJ noted, the Board has addressed this requirement in numerous cases. ALJ Decision at 23 (citations omitted). These cases establish that while section 483.25(h)(2) does not make a facility strictly liable for accidents that occur, it does require the facility to take all reasonable steps to ensure that

a resident receives supervision and assistance devices that meet his or her assessed needs and mitigate foreseeable risks of harm from accidents. E.g., Golden Age Skilled Nursing and Rehabilitation Center, DAB No. 2026, at 11 (2006), citing Woodstock Care Ctr. v. Thompson, 363 F.3d at 590 (6th Cir. 2003)(affirming Woodstock Care Center, DAB No. 1726, at 28 (2000) and holding, inter alia, that a SNF must take "all reasonable precautions against residents' accidents"). A facility is permitted the flexibility to choose the methods of supervision it uses to prevent accidents, but the chosen methods must be adequate under the circumstances. Id. Whether supervision is "adequate" depends on the resident's ability to protect himself or herself from harm. Id.

A facility must prove by the preponderance of the evidence that it is in substantial compliance. Batavia Nursing and Convalescent Center, DAB No. 1904 (2004), aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson, 129 F. App'x 181 (6th Cir. 2005). To put the facility to its proof, CMS must initially present a prima facie case of noncompliance with Medicare participation requirements, providing evidence on any factual issue that the facility disputes that is "[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted." Alden Town Manor Rehabilitation and Health Care Center, DAB No. 2054, at 4 (2006), citing ALJ Decision at 6, quoting Black's Law Dictionary 1228 (8th ed. 2004). Once CMS has made such a showing as to any disputed facts, the burden of proof shifts to the facility to show at the hearing that it is more likely than not that the facility was in substantial compliance. Alden Town Manor, DAB No. 2054, at 4-5; see generally Evergreene Nursing Care Center, DAB No. 2069 at 7-8 (2007)(discussing the "well-established framework for allocating the burden of proof on the issue of whether [a] SNF was out of substantial compliance").

For purposes of this decision, we accept the ALJ's findings of fact, which are summarized in the background section of this decision and which the parties do not dispute in any material respect. The analytical framework of the ALJ's conclusion regarding R. 9 is not clear from his decision insofar as burden of proof issues are concerned. However, the ALJ Decision does not state a finding or conclusion that CMS did not present a prima facie case of noncompliance, and the fact that the ALJ went on to weigh the parties' evidence suggests that he concluded that CMS had successfully crossed this threshold. In any event, applying holdings in prior Board decisions to the ALJ's findings of fact, it is clear that those facts suffice to make CMS's prima facie case of noncompliance.

The facts found by the ALJ establish the circumstances surrounding R. 9's fall. He found that there was an "accident," that is, that R. 9 fell while a CNA in Petitioner's employ was assisting her to transfer from her wheelchair to her bed. We agree with Petitioner (see Response (R.) at 19-20) that the mere occurrence of an accident does not, by itself, prove that a facility provided inadequate supervision, just as the absence of an accident does not necessarily establish that a facility provided adequate supervision. See e.g., Lake Park Nursing and Rehabilitation Center, DAB No. 2035, at 8 (2006), citing Beechwood Sanitarium, DAB No. 1906 (2004), modified on other grounds, Beechwood v. Thompson, 494 F.Supp.2d 181 (W.D.N.Y. 2007). However, "[w]hen an accident does occur, the circumstances surrounding an accident . . . may support an inference that the facility's supervision of a resident was inadequate." Lake Park, DAB No. 2035, at 8, citing St. Catherine's Care Center of Findlay, Inc., DAB No. 1964 (2005); accord Alden Town Manor, DAB No. 2054, at 5. In Lake Park, the Board held that a prima facie case of inadequate supervision could be inferred from undisputed facts showing that a resident at risk for elopement and falls and needing close supervision at all times was found sitting on a table in the facility's lobby with unexplained scrapes and abrasions, and without her merry walker. In Alden Town Manor, the Board concluded that the ALJ had erred in finding that CMS had not made a prima facie case of noncompliance with section 483.25(h)(1) or (2) where that case could reasonably be inferred from evidence that a hazardous product was left unattended within reach of a vulnerable resident. In Windsor Health Care Center, DAB No. 1902 (2003), the Board upheld the ALJ's conclusion that a prima facie case of inadequate supervision could be inferred from undisputed facts showing that a severely debilitated resident at high risk for falls and needing assistance with bathing fell off a shower chair while a CNA helping her was present. In Windsor, the Board also stated that "inferring a lack of adequate supervision from certain outcomes is, under appropriate circumstances, consistent with legislative intent and with the facility's overarching duty, under section 483.25, to provide a resident with 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.'" Windsor, DAB No. 1902, at 16 (emphasis in original).

Here, too, the circumstances surrounding R. 9's fall support an inference of inadequate supervision that suffices to establish CMS's prima facie case. R. 9's fall risk was reasonably foreseeable since Petitioner's own assessments, as the ALJ found, documented that she had limited mobility and range of

motion in her lower extremities and needed extensive assistance with tranfers. See St. Catherine's Care Center, DAB No. 1964, at 13 (citing foreseeability of risk as a factor considered in determining whether the circumstances surrounding an accident show inadequate supervision). A fall risk was also reasonably foreseeable in this case because of R. 9's impaired cognition, poor safety awareness and judgment and a known propensity to fidget during care, all of which were documented in Petitioner's records. See also CMS Ex. 9, at 52 (January 20, 2007 care plan entry stating, "At Risk For initial and/or Additional Falls . . . .") R. 9's diagnosed osteoporosis also presented a foreseeable risk that she would suffer serious harm - a broken bone for example - if she did fall.

Given R. 9's foreseeable risk for falls (and for serious harm if she did fall), the question is what steps, if any, Petitioner, and more particularly the CNA doing the transfer, took to try to ensure a safe transfer of R. 9. The ALJ noted that "Petitioner's documentation related to the fall and admitted as evidence is cursory." ALJ Decision at 31. In fact, although the ALJ did not discuss this, the evidence presented contains no information whatsoever about what the CNA transferring the resident did to assure a safe transfer or any evidence that the facility tried to obtain such information. Although evidence of record shows that Petitioner conducted some investigation of R. 9's fall, which included interviewing the CNA, the investigation report merely confirms that R. 9 fell during a transfer being assisted by the CNA and indicates the resident's position after the fall. The report gives no indication that the facility attempted to ascertain from the CNA what she did to secure the resident for and during the transfer. The CNA's only explanation was that R. 9 "wiggled until she slid out of the wheelchair on the floor." CMS Ex. 9, at 7. It is undisputed that Petitioner knew the resident's propensity to fidget during care.[7] Given this knowledge, the CNA's statement raises questions about whether the CNA did anything to address potential fidgeting or wiggling by the resident during the transfer process, and, in particular, what, if anything, she did to secure the resident before beginning the transfer and after the resident began wiggling during the transfer process.[8] The

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[7] A Change In Condition Report - PostFall/Trauma, one of the facility documents on which the ALJ relied, states that the resident "[f]idgets often while being given care . . . ." CMS Ex. 9 at 9.

[8] The ALJ concluded that R. 9 slipped down the front of her (Continued. . .)

record reveals no evidence, furthermore, that the CNA took any steps to protect or secure R. 9 when she began wiggling. The CNA's statement suggests some time had elapsed between the onset of the wiggling "until she slid out of the wheelchair on the floor." CMS Ex. 9, at 7 (emphasis added). This, in turn, suggests that the CNA could have made an effort to prevent or arrest the fall during that interlude. In this respect, we note that in Windsor, the Board concluded that the inference of inadequate supervision was reasonable even though undisputed evidence also showed that the CNA tried to secure the resident when she began to fall but fell to the floor with her.

In summary, we conclude that the undisputed circumstances surrounding R. 9's fall during an assisted transfer suffice to support a prima facie case that Petitioner did not adequately supervise R. 9 during the attempted transfer.

2. Substantial evidence does not support the ALJ's apparent conclusion that Petitioner rebutted CMS's prima facie case.

Since CMS, as we have concluded, established a prima facie case of inadequate supervision as a matter of law, the question properly before the ALJ was whether Petitioner effectively rebutted that case by a preponderance of the evidence. Since the ALJ, after weighing the evidence, concluded that the facility was in substantial compliance with respect to R. 9, he appears to have concluded that Petitioner did effectively rebut CMS's case. However, we find no substantial evidence in the record to support such a conclusion. Here as in Lake Park, Windsor and Alden Town Manor, Petitioner essentially has presented no evidence to rebut CMS's prima facie case of noncompliance. Since it has presented no such evidence, it could not possibly meet a preponderance of the evidence standard. In particular, as indicated above, Petitioner has not

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(Continued. . .)

wheelchair while "being prepared for transfer from [the] wheelchair." ALJ Decision at 32. However, there is nothing in his decision that suggests that he found that "being prepared for transfer" was not part of the transfer process or that the fall did not occur during an assisted transfer. He only concluded that R. 9 did not fall from the mechanical lift. Under these circumstances, it is reasonable to view the CNA's preparations of the resident for transfer as part of an ongoing transfer process.

presented any evidence as to what techniques or processes the CNA employed during the transfer, much less evidence that she employed techniques or processes that were reasonable in light of the resident's assessed needs. Instead, Petitioner argues, and the ALJ appeared to agree, that CMS was obliged to present evidence that the CNA was doing something wrong during the transfer.

> CMS seemed to allege . . . that the CNA must have been using improper technique when transferring the Resident, but the only evidence CMS offered to support this theory was a supposed concession to that effect by Trevina Wilson, R.N., one of Petitioners nurses who participated in the investigation of the matter, to Surveyor Elizabeth McGraw.[9]

P. Response at 20, citing Tr. at 157, 161. See also P. Response at 20 ("CMS has never said exactly what Petitioner's staff even did wrong that caused the Resident's accident, much less how any such acts or omissions violated the "accident hazards" regulation . . . .").

The Board rejected a similar argument in Lake Park. Lake Park had argued that to make its prima facie case of noncompliance with section 438.25(h)(2), CMS was required to offer proof of the cause of the accident and that failure to do so resulted in the facility's being held to a strict liability standard. Lake Park, DAB No. 2035, at 11. The Board rejected that contention, holding that the regulation requires neither proof that an

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[9] Surveyor McGraw testified that Nurse Wilson told her during the survey of her assessment that the CNA used the mechanical lift incorrectly. Tr. at 157. At the hearing, Nurse Wilson continued to assert that the CNA used the lift and that the resident fell back into the wheelchair when she let go of a bar on the lift but testified that she found no evidence that the CNA was using the mechanical lift improperly. Tr. at 315-316. The ALJ found Nurse Wilson's testimony that the mechanical lift was used inconsistent with what he found to be the "only credible evidence," based on Petitioner's contemporaneous records, that R. 9 "fidgeted and fell from her wheelchair." ALJ Decision at 33. The ALJ did not discuss the discrepancies between Nurse Wilson's testimony and what she reportedly told Ms. McGraw during the survey. Id. Since neither Nurse Wilson's statements nor the ALJ's determination that the mechanical lift was not in use is material to our decision, we need not discuss this further.

accident occurred nor that the inadequate supervision caused an accident, only that the facility failed to ensure that a resident received adequate supervision. Id. The Board concluded that the legal standard in section 483.25(h)(2) was correctly applied when the ALJ "found that the circumstances surrounding the injuries and Lake Park's inability to explain how Resident 3 sustained them were evidence of the nursing staff's failure to provide Resident 3 with adequate supervision." Id. at 12; see also Windsor, DAB No. 1902 at 15 (rejecting the petitioner's argument that CMS had failed to prove that a one-person assist for a shower violated 483.25(h)(2) when the petitioner proffered no evidence about the aide involved, how the shower was actually conducted or the techniques or devices used to maintain the resident's stability in the shower).

We reject Petitioner's argument here as well. Petitioner, not CMS, was obligated to provide information about any steps the CNA took to conduct the transfer safely and why those steps were adequate. As the Board stated in Lake Park, "If a resident sustains what appear to be accidental injuries, a reasonable first step to prevent the recurrence of harm would be to inquire about how or why the injuries occurred and to review existing safeguards to ensure their adequacy and implementation." Lake Park, DAB No. 2035, at 11, citing Beechwood Sanitarium at 106-107 (affirming a finding of noncompliance with section 483.25(h)(2) based on the facility's failure to investigate an accident in which a resident sustained a hip injury and its not acting to prevent a recurrence of the injury until after the resident reported it to a doctor). To hold otherwise, we concluded, would enable a facility to "ignore a resident's injuries in the blind hope that they occurred despite all reasonable precautions." Id. at 11.

We recognize that Petitioner, in contrast to the facility in Lake Park, did conduct at least some investigation of R. 9's fall. However, the investigation documents of record (and on which the ALJ relied) give no indication that Petitioner tried to ascertain what procedures the CNA followed during the transfer and the extent to which those procedures, or the lack thereof, may have contributed to the fall. In addition to being important to understanding how and why R. 9's fall occurred, such information was necessary to ensure safe transfers of R. 9 (and perhaps other residents) in the future.

The ALJ did not discuss these omissions in Petitioner's investigation documents or Petitioner's failure to otherwise present evidence as to what it did to provide adequate

supervision during the transfer. Instead, the ALJ, like Petitioner on appeal, appears to have improperly expected CMS to provide the evidence as to what processes or techniques the CNA employed or failed to employ during the transfer. See ALJ Decision at 31 ("It is not clear from the allegations of the SOD what Petitioner did or failed to do to ensure that [R. 9] had adequate and reasonable supervision . . . ."). In effect, the ALJ appears to have construed the absence of evidence about what took place during the transfer process against CMS. This was error. It was Petitioner's duty to fill this evidentiary vacuum to the extent necessary to successfully rebut CMS's prima facie case that Petitioner did not provide adequate supervision when its staff allowed R. 9 to fall in an unexplained manner during a transfer of a highly vulnerable resident requiring extensive assistance.

Putting this duty on Petitioner is appropriate in light of Petitioner's ultimate burden of persuasion on the issue of compliance and also because Petitioner was the party most likely to have control over the information needed to make an effective rebuttal. Petitioner, not CMS, is in the best position to provide evidence about the circumstances surrounding an accident, the nature of any supervision provided in those circumstances, and the conduct and results of any investigation done by the facility. Petitioner's staff was present when the accident occurred and was able to perform a contemporary investigation to collect and preserve evidence of how R. 9 fell and what the CNA did during the transfer. The purpose of the nursing home regulations is to protect vulnerable residents. To allow Petitioner to fail to inquire into precisely what procedures the CNA employed when transferring R. 9 and then fault CMS for not being able to prove exactly what she did, or did not do, before and during the fall is not consistent with this purpose. See Alden Town Manor, DAB No. 2054, at 16 ("[I]t is thus reasonable to expect that Alden would come forward with evidence [of contents of spray bottle involved in resident accident] which it had the opportunity and motivation to preserve and present if it were exculpatory, and unreasonable to expect CMS to prove the dilution level of the contents of a bottle already emptied by the facility before the . . . survey.").

In summary, we conclude that substantial evidence does not support the ALJ's apparent conclusion that Petitioner effectively rebutted CMS's prima facie case of noncompliance with section 483.25(h)(2). We also conclude that it was error to require CMS to put on evidence showing what the CNA did wrong in the course of the transfer, as the ALJ appears to have done.

B. The ALJ erred in concluding that CMS's immediate jeopardy determination was clearly erroneous.

1. The factual premise for the ALJ's conclusion is not supported by substantial evidence.

CMS determined that Petitioner's noncompliance with section 483.25(h)(2) posed immediate jeopardy to Petitioner's residents. "Immediate jeopardy" is "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. An ALJ may overturn CMS's determination of the level of noncompliance, including immediate jeopardy, only if the ALJ determines that it is "clearly erroneous". 42 C.F.R. § 498.60(c)(2). Petitioner has the burden of proving that CMS's determination of the level of noncompliance is "clearly erroneous", and our decisions make it clear this is a heavy burden. See e.g., Liberty Commons Nursing & Rehab Center v. Johnston, DAB No. 2031, at 18-19 (2006), aff'd, Liberty Commons Nursing & Rehab Ctr. - Johnston v. Leavitt, 241 F. App'x. 76 (4th Cir. 2007); Daughters of Miriam Center, DAB No. 2067, at 7 (2007).

The ALJ concluded that CMS's determination of immediate jeopardy was "clearly erroneous" but based this conclusion solely on his finding that CMS's determination was based only on the alleged elopement of R. 4. Since the ALJ found the alleged elopement did not constitute noncompliance with section 483.25(h)(2) (a finding CMS does not appeal), he overturned CMS's immediate jeopardy determination without considering whether the noncompliance involving R. 8, which he upheld, constituted immediate jeopardy. "I have found no deficiency related to the elopement of Resident 4 and, therefore, I must conclude the finding of immediate jeopardy was clearly erroneous." ALJ Decision at 35.

Substantial evidence on the record as a whole does not support the ALJ's factual premise that CMS based its determination of immediate jeopardy only on the incident involving R. 4. The ALJ relied on certain statements on the SOD for his factual premise, but his analysis of those statements overlooks language and context that undercuts his premise. The ALJ relied, in part, on a statement within the SOD discussion of R. 4 that the noncompliance "placed [R. 4] in jeopardy for potential harm" and further noted that there was no comparable statement for R. 8 and R. 9 although CMS based the finding of noncompliance with section 483.25(h)(2) on their falls as well as R. 4's alleged elopement. ALJ Decision at 34, citing P. Ex. 1, at 33, 32-48.

The ALJ was correct about the absence of a comparable statement in the discussion for R. 8 and R. 9. However, that absence is immaterial because the beginning of the SOD's discussion of the section 483.25(h)(2) noncompliance as a whole, which includes the incidents involving R. 8 and R. 9 as well as R. 4, clearly states that the scope and severity of that noncompliance is immediate jeopardy. See P. Ex. 1, at 32 ("F 324 483.25(h)(2) ACCIDENTS SS=J"). This statement of immediate jeopardy level noncompliance evidenced CMS's intent, and provided notice of same to Petitioner, that the immediate jeopardy citation applied to all of the incidents discussed under section 483.25(h)(2), not just to the alleged elopement of R. 4.

The ALJ also relied for his conclusion on two paragraphs on the SOD in which the surveyors discussed the facility's credible allegation of compliance addressing the jeopardy situation. Those paragraphs, as quoted by the ALJ, read as follows:

> The facility presented a credible allegation of compliance to address the jeopardy situation on 03/03/07. [Resident 4] was transferred to another facility on 01/26/07. According to the credible allegation the following measures were implemented, inservicing was started on 03/03/07 and all staff will be inserviced on elopement policy and procedure before being allowed to work. Nursing staff will be inserviced on the lift policy and procedure prior to working. Elopement drills will be conducted daily by the facility.
>
> The jeopardy was abated on 03/03/07 and the scope and severity level was lowered to a G, due to the harm sustained by [Resident 8] and [Resident 9], to allow the facility time to implement all corrective actions and to monitor to ensure the problems do not recur.

ALJ Decision at 34-35, citing P. Ex. 1, at 33-34. Based on these statements, the ALJ concluded, "The foregoing quotation from the SOD also establishes that the surveyors' finding of immediate jeopardy was based upon the alleged elopement of Resident 4 rather than the other four examples cited under Tag F324 . . . [and] also indicates that the surveyors considered that the alleged deficiencies related to Residents 8 and 9 were isolated incidents of actual harm that was not immediate jeopardy." Id. at 35.

The ALJ's conclusions reflect an incomplete and inaccurate reading of the paragraphs and of the SOD as a whole. The first paragraph does not discuss only Petitioner's plans for

addressing the elopement issue; it specifically states, "Nursing staff will be inserviced on the lift policy and procedure prior to working." This is clearly a corrective action taken to address falls during transfers, such as those suffered by R. 8 and R. 9, not elopement. We also note that the section "Corrective Action by the Facility" on the SOD contains discussion of Petitioner's credible allegations that the ALJ Decision does not cite and that tend to undercut his premise. P. Ex. 1, at 40-42. Credible allegation "2" under that discussion refers explicitly to R. 8, and to inservicing on the use of mechanical lifts with respect to all residents assessed for use of such lifts, and credible allegation "4" refers to assessments "for need of the use of a mechanical lift to identify who may be at risk . . . . ." P. Ex. 1, at 41. The ALJ Decision also does not address CMS Exhibit 33, the letter in which Petitioner made the credible allegations that are the source for the paragraphs on the SOD. As CMS points out, the credible allegations in this letter pertain to the noncompliance involving R. 8 and R. 9 as well as R. 4. RR at 17.

In addition, the mere fact that the second paragraph mentions the harm to R. 8 and R. 9 as a reason for finding continuing noncompliance at a non-jeopardy level after the jeopardy was abated does not mean that the finding of immediate jeopardy on the SOD did not also pertain to R. 8 and R. 9 before the jeopardy was abated. It simply means that the surveyors did not find that abatement of the jeopardy eliminated Petitioner's noncompliance. The ALJ's reading of the second paragraph also overlooks the fact that the paragraph gives the following additional reasons for continuing the finding of noncompliance at level G: "to allow the facility time to implement all corrective actions and to monitor to ensure the problems do not recur." P. Ex. 1, at 34. The phrase "all corrective actions" refers to those actions targeting elopement as well as falls, thus undercutting the ALJ's apparent conclusion that this paragraph relates only to R. 8 and R. 9, and not R. 4.

Thus, we conclude that the SOD statements the ALJ relied on are not substantial evidence that CMS based its immediate jeopardy citation for section 483.25(h)(2) only on its findings of noncompliance involving R. 4 and, in fact, provide evidence that it was based on CMS's findings of noncompliance involving R. 8 and R. 9 as well. The record as a whole contains additional substantial evidence, not discussed by the ALJ, that CMS based its immediate jeopardy determination on all of the incidents discussed on the SOD under section 483.25(h)(2) and that Petitioner understood this. See e.g., CMS Ex. 34, at 7-8 (Petitioner's IDR request stating, inter alia, that the

"surveyors advised the facility . . . on 3/3/07 that they were in an immediate jeopardy situation related to an alleged elopement and failure to properly use the lift . . ."); CMS Ex. 35, at 16-17 (repeating the IDR request statements in Petitioner's plan of correction); Joint Stipulation (Stip.) of Facts, Stip. ¶ 4 (stipulating that the SOD alleged that Petitioner was not in compliance with section 483.25(h)(2) at scope and severity "J" with respect to R. 4, R. 8 and R. 9); CMS Pre-Hearing Brief at 6 (stating that Petitioner's noncompliance with section 483.25(h)(2) placed R. 4, R. 8 and R. 9 "at immediate jeopardy of serious harm and injuries"). Golden's pleadings before the ALJ further suggest Golden itself was well aware that all three incidents were included in the basis for CMS's immediate jeopardy determination. Golden Pre-hearing Brief at 3 (repeating the statement from the Joint Stipulation); Golden Post-hearing Brief at 9, 29-30 (discussing why Petitioner thought there was no immediate jeopardy for each of the three residents - R. 4, R. 8 and R. 9 - to whom the immediate jeopardy determination pertained). When reviewing for substantial evidence, the Board reviews the whole record, considering both what supports the ALJ's decision and what undercuts it. Sunbridge Care and Rehabilitation for Pembroke, DAB No. 2170 (2008), aff'd, Sunbridge Care & Rehab v. Leavitt, No. 08-1603, 2009 WL 2189776 (4th Cir. July 22, 2009), citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Here, the record as a whole substantially contradicts the ALJ's finding that CMS based its immediate jeopardy determination solely on R. 4's alleged elopement.

Given the substantial evidence cited above, we find no support for Petitioner's statement that "CMS certainly never indicated in any of its pleadings, or at the hearing, that if its case with respect to Resident # 4 failed, it would rely on some other allegation to support an enhanced penalty." P. Response at 25. Although CMS may never have made this precise statement, its pleadings leave no doubt that CMS relied for its immediate jeopardy determination on its findings of noncompliance involving all three residents, and Petitioner's pleadings below leave no doubt that it understood this. We note that Petitioner does not dispute any of the specific evidence CMS cites that undercuts the ALJ's premise for finding the immediate jeopardy determination "clearly erroneous".

2. Petitioner's noncompliance, discussed above, establishes immediate jeopardy.

Having concluded that the ALJ's premise for finding CMS's immediate jeopardy determination "clearly erroneous" is not

supported by substantial evidence, the question remains whether Petitioner has shown that immediate jeopardy was not present with respect to R. 8 and R. 9. We conclude that it has not.[10]

In its response to CMS's Request for Review, Petitioner makes no argument at all as to why R. 9's fall did not pose immediate jeopardy except to argue generally that every fall does not necessarily constitute immediate jeopardy. P. Response at 28. The general argument is correct; as we indicated earlier, every fall does not even necessarily result in a finding of noncompliance. However, that is not the issue. The issue is whether having found noncompliance based on the inadequate supervision provided to R. 8 and R. 9, CMS clearly erred when it determined that the lack of supervision "caused, or [was] likely to cause, serious injury, harm, impairment, or death . . . ." 42 C.F.R. § 488.301. The likelihood of serious injury to R. 9 if staff did not adequately supervise her during transfers was implicit in Petitioner's own assessments of R. 9. According to these assessments, R. 9 was an 85-year-old woman with osteoporosis and multiple mobility deficits that required staff to give her extensive assistance with transfers and other care. She also had poor safety awareness and judgment and tended to fidget during care. Petitioner does not discuss these assessments or try to explain why R. 9's deficits and vulnerability did not pose a likelihood of serious injury or harm if she was transferred without adequate supervision. Instead, Petitioner chooses to rely on the ALJ's conclusion, which we have reversed, that CMS did not even show noncompliance for this resident. See P. Response at 28 (stating parenthetically, "CMS's arguments about 'immediate jeopardy' in the case of [R. 9] obviously require a threshold finding that the Resident's injury was caused by a regulatory violation."). Accordingly, Petitioner has not raised any question that the noncompliance now determined to exist constituted immediate jeopardy.

Our conclusion that immediate jeopardy existed with respect to R. 9 is sufficient to support an immediate jeopardy period beginning February 17, 2007, the date of R. 9's fall, and

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[10] The regulations permit the Board to "either issue a decision or remand the case to an ALJ for a hearing and decision or a recommended decision for final decision by the Board." 42 C.F.R. § 498.88(a). In this case, we choose to issue a decision rather than remand, largely because the evidence of record is undisputed in any material respect, and no additional fact-finding is required to resolve the immediate jeopardy issue.

continuing through March 2, 2007, the day before the jeopardy was abated. There is no dispute that to the extent the immediate jeopardy existed - as we have concluded it did - it was abated on March 3, 2007. See, e.g., P. Ex. 1, at 34. Nonetheless, we also conclude that Petitioner's failure to use the mechanical lift required by R. 8's care plan on February 26, 2007 constituted immediate jeopardy.

Petitioner does not appeal the ALJ's findings that R. 8 fell and that this occurred when two CNAs tried to transfer her without using the mechanical lift required by her care plan. See P. Response at 7 (stating that while it "remains skeptical that [R. 8] actually fell at all, Petitioner does not appeal that finding."); P. Response at 7; P. Response at 29 ("At worst, two CNAs may have taken a shortcut while providing care to [R. 8] - i.e., failed to take the time to fetch the nearby lift to transfer her - which resulted in a fall.").[11] The ALJ did not reach the issue of whether the actual harm R. 8 suffered in the fall (abrasions to her buttocks that bled and required dressing) was serious harm, as would be required to find immediate jeopardy based on actual harm. However, we need not decide whether the actual harm sustained by R. 8 was serious because Petitioner's own assessments of R. 8 support finding immediate jeopardy based on a likelihood that the resident would sustain serious injury or harm if she was transferred without the mechanical lift.

The ALJ found, and it is undisputed, that R. 8 was more than 83 years old and had multiple medical conditions that compromised her health, including several heart and kidney problems, neuropathy and insulin-dependent diabetes. Other evidence of record, submitted by Petitioner, shows that R. 8 was wholly dependent on staff for transfers, could not stand on her own and weighed 177 pounds when her ideal body weight was 110. P. Ex. 23 at 3, P. Ex. 25 at 1. Petitioner's care plan directed staff to use a mechanical lift when transferring R. 8, a directive not followed by the CNAs on February 26, 2007. These documented assessments of R. 8's infirmities, excessive weight, complete dependence on staff for transfers and the need to use a mechanical lift for her transfers reflect Petitioner's own assessment, at least absent any evidence to the contrary, that transferring this resident manually would entail a likelihood of

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[11] Petitioner misstates the ALJ's conclusion, asserting that he determined that the fall was "without injury," P. Response at 27-28, whereas the ALJ Decision, as we discuss, clearly shows that he did conclude that R. 8 was injured.

serious harm that supports a determination of immediate jeopardy.

Petitioner has provided no evidence that would support a contrary determination based on its own assessments of this resident's vulnerability. Instead, Petitioner makes unsupported assertions that attempt to minimize the likelihood of serious harm. Petitioner asserts that while transferring R. 8 manually instead of using the mechanical lift was "inadequate resident care to be sure . . .," it did not create a "likelihood of death or serious harm . . . where two CNAs are at hand, and where, at worst, the Resident may have been lowered to the floor during the transfer." P. Response at 29. We note at the outset that this statement mischaracterizes the ALJ's finding. The ALJ did not find that "at worst" R. 8 was lowered to the floor. In his discussion, he stated, alternatively, that she was "dropped or lowered to floor" or "fell or was lowered to the floor." ALJ Decision at 33-34. Either way, the ALJ concluded that the event was a "fall [that] resulted from a failure to use the care planned assistance device," and, as noted above, Petitioner did not appeal that finding.[12] ALJ Decision at 33. Furthermore, the issue in the immediate jeopardy analysis is not whether a fall was foreseeable but, rather, whether the inadequate supervision, presented a likelihood of serious injury or harm, whether through a fall or some other accident.

Petitioner fails to explain how the mere presence of the two CNAs would eliminate the likelihood of serious harm, especially since those CNAs did not even follow the requirement in R. 8's care plan that they use a mechanical lift. Since the CNAs were so inattentive to their obligations as caregivers that they did not even follow this basic directive, we see no basis for finding that their presence would eliminate the likelihood of serious harm. Furthermore, Petitioner has submitted no evidence that the CNAs even performed the impermissible manual lift in a

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[12] We also note that CMS, without objection, put into evidence a document that CMS indicates states Petitioner's definition of a "fall". The document defines a "fall" as "a sudden and unexplained change in position, usually involving the floor" and includes "finding a resident on the floor" and "lowering of a person to the floor." CM Ex. 27 (untitled document described on CMS Exhibit List as "Petitioner's Statement Regarding Falls"); Tr. at 12-13 (Petitioner's counsel stating that he has no objection to the admission of any of CMS's exhibits). Thus, under Petitioner's own definition, R. 8 did fall.

manner calculated to eliminate the likelihood of serious injury or harm or that they did anything to stop the fall once it began. In short, Petitioner has submitted no evidence that even casts doubt on CMS's determination of immediate jeopardy.

C. The ALJ erred in finding $500 per day a reasonable CMP to the extent he applied that finding to the period during which we have concluded Petitioner's noncompliance constituted immediate jeopardy, but we affirm the ALJ's finding as it relates to the remaining periods of noncompliance.

The ALJ found that Petitioner was not in substantial compliance, at less than an immediate jeopardy level, for the period January 9 through April 19, 2007 and that a $500 per day CMP was reasonable for that period. The ALJ based his finding on the fact that CMS had found noncompliance with multiple requirements that Petitioner did not appeal, his conclusion that Petitioner was not in substantial compliance with section 483.25(h)(2) and application of the factors in 42 C.F.R. § 488.438(f). Petitioner did not appeal the ALJ's determination as to the duration of its noncompliance or the reasonableness of a $500 per day CMP for that period. CMS appeals the ALJ's determination only with respect to the period February 17 through March 2, 2007. CMS argues that since immediate jeopardy existed during that period, the $3,050 per-day CMP imposed for that period, which is the lowest per-day CMP CMS can impose for immediate jeopardy, was reasonable.[13] RR at 31.

CMS is correct that $3,050 is the lowest per-day CMP amount it can impose for immediate jeopardy. 42 C.F.R. § 488.438(a)(1)(i). Therefore, we reinstate the $3,050 CMP for the period February 17, 2007, the date of R. 9's fall and the start of the immediate jeopardy, through March 2, 2007, the day before the immediate jeopardy was abated. With respect to the remaining period of noncompliance at less than the jeopardy level, January 9 through February 16, 2007 and March 3 through April 19, 2007, we summarily affirm the ALJ's determination that $500 per day is a reasonable amount since neither party appeals it.

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[13] Since CMS does not appeal the ALJ's determination that R. 4's alleged elopement on January 9, 2007 was not noncompliance and, therefore, could not constitute immediate jeopardy, CMS also does not contend on appeal, as it did below, that the immediate jeopardy period began on January 9, 2007.

Conclusion

For the reasons stated above, we affirm without discussion the ALJ's conclusion that Petitioner was not in substantial compliance with section 483.25(h)(2) with respect to R. 8 and reverse his conclusion that Petitioner was in substantial compliance with respect to R. 9. We also reverse the ALJ's conclusion that CMS's determination that Petitioner's noncompliance with section 483.25(h)(2) constituted immediate jeopardy was "clearly erroneous" and conclude, instead, that immediate jeopardy was present. Finally, we reverse the ALJ's finding that a $500 per-day CMP was reasonable for the period February 17 through March 2, 2007, and find that a $3,050 per day CMP is reasonable for that period, but affirm the ALJ's finding that a $500 per-day CMP is reasonable for the periods January 9 through February 16, 2007 and March 3 through April 19, 2007. We do not reach the issue of whether the ALJ erred in concluding that Petitioner was in substantial compliance with section 483.13(b) and (c) since resolution of that issue is not necessary to our decision. We also do not address the ALJ's FFs/CLs "C.9" and "C.10", which relate to burden of proof and due process issues raised by Petitioner below, since Petitioner did not appeal those FFs/CLs.

Based on the foregoing, we revise the FFs/CLs in the ALJ Decision as follows:

1. We strike FF/CL "C.4d." on page 30 of the ALJ Decision and replace it with the following FF/CL: "Resident 9's fall resulted from a failure to provide adequate and reasonable supervision or assistance devices."[14]

2. We strike FF/CL "C.5." on page 34 and replace it with the following FF/CL: "Petitioner's noncompliance with section 483.25(h)(2) posed immediate jeopardy for R. 8 and R. 9."

3. We strike FF/CLs "C.7." and "C.8." on page 35 and replace them with the following FF/CL: "A CMP of

[14] The ALJ Decision contains, on page 33, another FF/CL labeled "d.". That FF/CL states the ALJ's conclusion, which we have affirmed without discussion, that "[R.] 8's fall resulted from a failure to use the care planned assistance device." This should have been labeled "e." to distinguish it from FF/CL "d." on page 33. We mention this to avoid confusion in our decision.

$3,050 per day for the period February 17 through March 2, 2007 is reasonable, and a $500 per-day CMP for the periods January 9, through February 16, 2007 and March 3 through April 19, 2007 is reasonable."

/s/
Leslie A. Sussan

/s/
Stephen M. Godek

/s/
Sheila Ann Hegy
Presiding Board Member