Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Donelson Place Care and Rehabilitation Center
(CCN: 44-5148),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-08-535

Decision No. CR2155

Date: June 15, 2010

DECISION

Petitioner, Donelson Place Care and Rehabilitation Center, was not in substantial compliance with program participation requirements from April 10 through April 30, 2008. Petitioner failed to show that the determination that its noncompliance posed immediate jeopardy to its residents from April 10 through April 24, 2008 was clearly erroneous. A civil money penalty (CMP) of $5,750 per day from April 10 through April 24, 2008, is not reasonable in this case. A reasonable CMP is $3,050 per day from April 10 through April 24, 2008, and $250 per day from April 25 through April 30, 2008, a total CMP of $47,250. A denial of payment for new admissions (DPNA) from April 24 through April 30, 2008, is also reasonable.

I. Background

Petitioner, located in Nashville, Tennessee, is authorized to participate in the federal Medicare program as a skilled nursing facility (SNF) and the Tennessee Medicaid program as a nursing facility (NF). Petitioner was subject to a Life Safety Code® (LSC) survey, a complaint investigation, and a recertification survey by the Tennessee Department of Health, Middle Tennessee Regional Office of Health Care Facilities (state agency), all completed on April 10, 2008. The Centers for Medicare and Medicaid

Services (CMS) notified Petitioner by letter dated April 22, 2008, that Petitioner was not in substantial compliance and that the surveyors had found immediate jeopardy and substandard quality of care. CMS advised Petitioner that: it was imposing a CMP of $5,750 per day effective April 10, 2008, continuing until the immediate jeopardy was removed or Petitioner's participation in Medicare was terminated; the amount of the CMP per day would be reduced if immediate jeopardy was removed but noncompliance continued; CMS was imposing a discretionary DPNA effective April 24, 2008, if Petitioner did not return to substantial compliance before that date; Petitioner's provider agreement and participation in Medicare would be terminated on May 3, 2008, if Petitioner did not remove the immediate jeopardy before that date; and the state was required not to approve or to withdraw any prior approval of a nurse aide training and evaluation program (NATCEP) that Petitioner conducted.[1]

CMS notified Petitioner by letter dated May 7, 2008, that a LSC revisit survey completed on May 1, 2008, determined that Petitioner had removed the immediate jeopardy that the LSC deficiencies under Tags K012, K025, K062, and K067 posed. CMS also advised, however, that Petitioner was not found to have returned to substantial compliance. Based upon the revisit survey, CMS decreased the CMP to $600 per day, beginning on April 25, 2008, until Petitioner returned to substantial compliance or was terminated. CMS further advised Petitioner that the DPNA continued and that CMS would not terminate Petitioner's provider agreement on May 3, 2008. However, CMS noted that Petitioner was subject to mandatory termination if it did not return to substantial compliance by October 10, 2008.

CMS notified Petitioner by letter dated June 17, 2008, that a revisit survey by the state agency on May 29, 2008, found that Petitioner had corrected all LSC violations as of May 1, 2008, but that three health related deficiencies remained. CMS advised Petitioner that it was modifying the enforcement remedies and imposing the following: a CMP of $5,750 per day effective April 10 through April 24, 2008, reduced to $250 per day from April 25, 2008, until Petitioner returned to substantial compliance or its participation was terminated; the other remedies remained unchanged. Joint Stipulation (Jt. Stip.); CMS Exhibit (CMS Ex.) 9 at 4-8, 9-11, and 12-14. The parties stipulated that both the DPNA and CMP ended on April 30, 2008. Jt. Stip. ¶¶ 6, 8. The parties also agreed that the state agency and CMS concluded that immediate jeopardy existed from April 10 through April 24, 2008. Jt. Stip. ¶ 8.

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[1] Petitioner advised me at hearing that it did not conduct a NATCEP. Therefore, the withdrawal of authority to conduct a NATCEP is not an issue in this case. Tr. 30-31.

Petitioner requested a hearing by letter dated June 18, 2008. The case was assigned to me for hearing and decision on June 20, 2008. I convened a hearing in Nashville, Tennessee, on January 22 and 23, 2009, the substance of which is recorded in a 483-page transcript (Tr.). CMS offered and I admitted CMS Exs. 1, 3, and 5 through 10. Tr. 40. Petitioner offered Petitioner's Exhibits (P. Exs.) 1 through 7 and 9, and P. Exs. 1 through 6 and 9 were admitted at hearing. Tr. 41-50, 371-73. P. Ex. 7 was submitted post-hearing at my direction (Tr. 471-72), with no objection by CMS, and consists of pictures of a fire damper that was viewed at the hearing. P. Ex. 7 is admitted and considered as evidence. CMS elicited testimony from surveyor Jerry Humphrey, a state agency Fire Safety Specialist Supervisor, and Debra Verna, a state agency Regional Administrator and surveyor. Petitioner elicited testimony from: Mark Miller, its Administrator at the time of the surveys in question; Mitch Abrams, the Vice President of Plant Operations for Petitioner's owner; and Steve Leake of Energy Command Corporation, an expert witness on the function and installation of dampers. The parties submitted post-hearing briefs (CMS and P. Brief, respectively) and reply briefs (CMS and P. Reply, respectively).

II. Discussion

A. Issues

The issues in this case are:

> Whether there is a basis for the imposition of an enforcement remedy; and
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> Whether the remedy imposed is reasonable.

B. Applicable Law

The statutory and regulatory requirements for a long-term care facility's participation in Medicare (SNF) and Medicaid (NF) are found at sections 1819 and 1919 of the Act, respectively, and at 42 C.F.R. Part 483. Section 1819(h)(2) of the Act vests the Secretary of Health and Human Services (Secretary) with authority to impose enforcement remedies against a SNF for failure to comply substantially with the federal participation requirements that sections 1819(b), (c), and (d) of the Act established.[2] Pursuant to section 1819(h)(2)(C), the Secretary may continue Medicare payments to a SNF not

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[2] Section 1919(h)(2) of the Act gives similar enforcement authority to the states to ensure that NFs comply with the participation requirements that sections 1919(b), (c), and (d) of the Act established.

longer than six months after the date the facility is first found not in compliance with participation requirements. Pursuant to section 1819(h)(2)(D), if a SNF does not return to compliance with participation requirements within three months, the Secretary must deny payments for all individuals admitted to the facility after that date – commonly referred to as the mandatory or statutory DPNA. In addition to the authority to terminate a noncompliant SNF's participation in Medicare, the Act grants the Secretary authority to impose other enforcement remedies, including a discretionary DPNA, CMPs, appointment of temporary management, and other remedies, such as a directed plan of correction. Act
§ 1819(h)(2)(B).

The Secretary has delegated to CMS and the states the authority to impose remedies against a long-term care facility that is not complying substantially with federal participation requirements. "*Substantial compliance* 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." 42 C.F.R. § 488.301 (emphasis in original).[3] A deficiency is a violation of a participation requirement established by sections 1819(b), (c), and (d) of the Act or the Secretary's regulations at 42 C.F.R. Part 483, Subpart B. Facilities that participate in Medicare may be surveyed on behalf of CMS by state survey agencies to determine whether the facilities are complying with federal participation requirements. 42 C.F.R. §§ 488.10-.28, 488.300-.335. The regulations specify the enforcement remedies that CMS may impose if a facility is not in substantial compliance with Medicare requirements. 42 C.F.R. § 488.406.

The regulations specify that 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 a facility's residents and, in some circumstances, for repeated deficiencies. 42 C.F.R. §§ 488.438(a)(1)(i), (d)(2). "*Immediate jeopardy* means 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 (emphasis in original). The lower range of a CMP, $50 per day to $3,000 per day, is reserved for deficiencies that do not constitute immediate jeopardy, but either cause actual harm to residents or cause no actual harm but have the potential for causing more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii).

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[3] References are to the 2007 version of the Code of Federal Regulations (C.F.R.), unless otherwise indicated.

The Act and regulations make a hearing before an ALJ available to a long-term care facility against which CMS has determined to impose an enforcement remedy. Act §§ 1128A(c)(2), 1866(h); 42 C.F.R. §§ 488.408(g), 498.3(b)(13). The hearing before an ALJ is a de novo proceeding. *Residence at Salem Woods*, DAB No. 2052 (2006); *Cal Turner Extended Care Pavilion*, DAB No. 2030 (2006)*; Beechwood Sanitarium*, DAB No. 1906 (2004); *Emerald Oaks*, DAB No. 1800 (2001); *Anesthesiologists Affiliated*, DAB CR65 (1990), *aff'd*, 941 F.2d 678 (8th Cir. 1991). A facility has a right to appeal a "certification of noncompliance leading to an enforcement remedy." 42 C.F.R. §§ 488.408(g)(1), 488.330(e), 498.3. However, CMS's choice of remedies, or the factors CMS considered when choosing remedies, is not subject to review. 42 C.F.R. § 488.408(g)(2). A facility may only challenge the scope and severity level of noncompliance that CMS finds if a successful challenge would affect the range of the CMP that CMS could impose or impact the facility's authority to conduct a NATCEP. 42 C.F.R. §§ 498.3(b)(14), (d)(10)(i). CMS's determination as to the level of noncompliance, including the finding of immediate jeopardy, "must be upheld unless it is clearly erroneous." 42 C.F.R. § 498.60(c)(2); *Woodstock Care Ctr.*, DAB No. 1726 at 9, 38 (2000), *aff'd*, 363 F.3d 583 (6th Cir. 2003). The Departmental Appeals Board (Board) has long held that the net effect of the regulations is that a provider has no right to challenge the scope and severity level assigned to a noncompliance finding, except where that finding was the basis for an immediate jeopardy determination. *See, e.g*., *Ridge Terrace*, DAB No. 1834 (2002); *Koester Pavilion*, DAB No. 1750 (2000). ALJ review of a CMP is subject to 42 C.F.R. § 488.438(e).

The standard of proof or quantum of evidence required is a preponderance of the evidence. CMS has the burden of coming forward with the evidence and making a prima facie showing of a basis for imposing an enforcement remedy. Petitioner bears the burden of persuasion to show by a preponderance of the evidence that it was in substantial compliance with participation requirements or any affirmative defense. *See Batavia Nursing & Convalescent Inn*, DAB No. 1911 (2004); *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 F. App'x. 181 (6th Cir. 2005); *Emerald Oaks*, DAB No. 1800; *Cross Creek Health Care Ctr.*, DAB No. 1665 (1998); *Hillman Rehab. Ctr.*, DAB No. 1611 (1997), *aff'd Hillman Rehab. Ctr. v. U.S. Dep't of Health and Human Servs.*, No. 98-3789, 1999 WL 34813783 (D.N.J. May 13, 1999).

C. Findings of Fact, Conclusions of Law, and Analysis

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

The state agency conducted an annual recertification survey and the investigation of several complaints at Petitioner's facility from April 7 through 10, 2008. The results of the survey and investigation are reported in the statement of deficiencies (SOD) dated April 10, 2008. CMS Ex. 2. In conjunction with the annual recertification survey the

state agency also conducted a LSC survey at Petitioner's facility from April 8 through April 10, 2008, the results of which are reported in a SOD dated April 10, 2008. CMS Ex. 1.

Petitioner requested a hearing seeking review of the deficiencies from the LSC cited under Tags K012, K025, K062, and K067, all of which allegedly posed immediate jeopardy, and the alleged deficiencies from the health survey that alleged actual harm to residents, specifically those cited as F157, F281, F309, and F490.[4] CMS Ex. 8. Petitioner stipulated at hearing that it no longer disputed the deficiency findings from the complaint and health recertification surveys that concluded on April 10, 2008. Petitioner stipulated that it continued to dispute, and would present evidence at hearing related to, the alleged deficiencies from the LSC survey completed on April 10, 2008, which allegedly posed immediate jeopardy to Petitioner's residents, specifically those cited under Tags K012, K025, K062, and K067. Petitioner also stipulated that it disputed the reasonableness of the CMP that CMS proposed. Petitioner stated that it was not contesting the DPNA and withdrawal of authority to conduct a NATCEP. The parties agreed that the CMP, which CMS proposed and subject to my review, is $5,750 per day from April 10 through April 24, 2008, and $250 per day from April 25, 2008 through April 30, 2008. Tr. 27-34. I conclude that Petitioner has also preserved an issue as to whether it returned to substantial compliance with program participation requirements before May 1, 2008, the date CMS identified.

CMS objected to proceeding on the alleged LSC violations that were not alleged to have posed immediate jeopardy on grounds that Petitioner's request for hearing only challenged the LSC violations that were specifically listed in its request for hearing, i.e.,

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[4] "F157" and "K012" are both examples of "Tags." The F "Tag" designation is used in CMS Publication 100-07, State Operations Manual (SOM), app. PP – Guidance to Surveyors for Long Term Care Facilities, http://www.cms.hhs.gov/Manuals/IOM/list.asp, which sets forth CMS policy related to health surveys. The "Tag" designation relates to the specific part of the SOM app. PP that sets forth the specific regulatory provision allegedly violated and CMS's guidance to surveyors related to the regulation. The K "Tag" designation is used for LSC surveys under SOM app. I, § II, Task 5, and the K Tag refers to the specific data tag on the Fire Safety Survey Report used by the surveyor. Although the SOM does not have the force and effect of law, the provisions of the Act and regulations interpreted clearly do have such force and effect. *State of Indiana by the Indiana Dep't of Pub. Welfare v. Sullivan*, 934 F.2d 853 (7th Cir. 1991); *Northwest Tissue Ctr. v. Shalala*, 1 F.3d 522 (7th Cir. 1993). Thus, while the Secretary may not seek to enforce the provisions of the SOM, she may seek to enforce the provisions of the Act or regulations as the SOM interprets.

those that allegedly posed immediate jeopardy. Petitioner argued that it did not intend to waive a challenge to any of the alleged LSC violations, which the survey that ended on April 10, 2008 cited. Tr. 34-36. I agree with CMS that Petitioner did not specifically challenge supposed LSC violations not alleged to have posed immediate jeopardy. However, Petitioner did generally deny the validity of the surveyors' findings and conclusions as to all cited deficiencies and specifically stated in its request for hearing its position that "at all relevant times, it was in substantial compliance with the provisions of 42 C.F.R. 483 and other applicable law." Request for Hearing at 1. I conclude that the Request for Hearing (CMS Ex. 8) and Petitioner's Prehearing Brief, pages 20 and 21, provided CMS adequate notice of the specific issues in this case. I also conclude that CMS suffers no prejudice by any lack of clarity of the request for hearing given my decision in this case.

1. Petitioner violated 42 C.F.R. § 483.70(a).

2. Petitioner has not shown that CMS's determination that the violation of 42 C.F.R. § 483.70(a) posed immediate jeopardy is clearly erroneous.

Petitioner is obligated to ensure that its physical environment is "designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public." 42 C.F.R. § 483.70(a). The regulation requires that Petitioner meet the requirements of the 2000 edition of the LSC that the National Fire Protection Association (NFPA) published, except as otherwise provided by the regulation. 42 C.F.R. § 483.70(a)(1).

> The LSC is a set of fire protection requirements designed to provide a reasonable degree of safety from fire. It covers construction, protection, and operational features designed to provide safety from fire, smoke, and panic.

SOM, ch. 2, § 2470 (Rev. 1, 05-21-04).

Petitioner had a census of 112 residents at the time of the survey. Six residents were bedfast all or most of the time; eighty-eight residents were in wheelchairs all or most of the time; eleven residents required some type of assistance or other assistive devices with ambulation; fifty-eight residents suffered from dementia; two suffered from mental retardation; ten residents were receiving respiratory treatment; nine were physically restrained; and only one was considered to be independently ambulatory. CMS Ex. 5 at 1. Given the profile of Petitioner's resident population, I infer that Petitioner's residents were at high risk in the event of an uncontrolled fire. Petitioner also conceded that a fire in a nursing home can result in serious harm to residents. P. Brief at 12.

The LSC survey was completed by Jerry Humphrey on April 8, 9, and 10, 2008. Surveyor Humphrey alleged fourteen separate violations. and he alleged that four violations cited under Tags K012, K025, K062, and K067 posed immediate jeopardy. CMS Ex. 1. The SOD lists the findings or observations Surveyor Humphrey made during his inspection of the facility. The four alleged immediate jeopardy violations are based upon the following findings: ceiling dampers were contaminated with sprayed ceiling texture material; a ceiling damper in the dinning room was tied open with a plastic zip tie; some ceiling openings, supply and exhaust ducts, did not have dampers; numerous attic sprinklers in four of four fire zones were covered with blown insulation and roll insulation; and fire and smoke partitions had missing wall board and penetrations around wiring, duct work, and sprinkler piping that passed between adjacent smoke compartments. CMS Ex. 1 at 2, 6, 12, 14. He also observed that four of nine sprinkler heads in the kitchen had paint on their fusible links. CMS Ex. 1 at 12. Based on his findings, Surveyor Humphrey cited Petitioner for violations under Tags K012, K025, K062, and K067.

a. K012

Petitioner's facility is wood frame construction with brick veneer walls with a sprinkler system throughout, including in the attic. CMS Ex. 1 at 1; Tr. 98. The standard listed on the SOD under Tag K012 is that "[b]uilding construction type and height meets one of the following: 19.1.6.2; 19.1.6.3; 19.1.6.4; and 19.3.5.1." CMS Ex. 1 at 1. LSC Subsection 19.1.6.2 provides that use of a building for health care occupancies is limited to certain types of buildings, and, for a Type V(111) building, such as that occupied by Petitioner, the building may be no more than two stories in height and must be protected by an automatic sprinkler as subsection 19.3.5.1 specifies. LSC § 19.1.6.3 has no application in this case, as it applies only to Type I and II construction. LSC § 19.1.6.4 requires that every exterior wall of frame construction and all interior stud partition walls have fire-stops of at least 2 inch thick wood or some noncombustible material in all concealed draft openings, both horizontal and vertical. LSC § 19.1.6.4 is not at issue in this case, as there is no allegation that the walls in Petitioner's facility were not properly fire-stopped. LSC § 19.3.5.1 requires that when an automatic sprinkler system is required for a facility, as it was for Petitioner's facility, the system must meet the requirements of LSC § 9.7.

No dispute exists that Petitioner had the required sprinkler system, but it is alleged that Petitioner failed to properly maintain the system. CMS Ex. 1 at 11-12. The SOD states that the basis for the violation under Tag K012 was Petitioner's failure to "provide proper protection for construction of the Type V (111) building placing the facility residents at potential risk of injury or death in the event of fire resulting in Immediate Jeopardy." CMS Ex. 1 at 1-2. Surveyor Humphrey explained at hearing that he cited Petitioner under Tag K012 due to his findings related to dampers, the sprinklers in the attic, and the smoke barriers in the attic that were also individually cited as deficiencies under Tags

K025, K062, and K067. Surveyor Humphrey explained that, due to the defects he observed, Petitioner's facility and its residents were not protected from fire as the LSC requires for the type construction of Petitioner's facility. Tr. 98. CMS alleges that the defects that Surveyor Humphrey found, when considered collectively, rendered ineffective the fire protection of Petitioner's facility resulting in an immediate jeopardy situation. CMS Brief at 18.

Under K012, Surveyor Humphrey cited that a ceiling damper in the dining room was tied open with a zip tie. Surveyor Humphrey testified that he saw a ceiling damper in the dining room that was tied open with a plastic zip tie, and he opined that the damper would not have closed due to heat until the zip tie melted. He further opined that, because the damper was tied open, fire could enter the attic through the duct before the tie melted. Tr. 109-10. Surveyor Humphrey testified that the fact that the duct was tied open with a plastic zip tie did not pose immediate jeopardy by itself. Rather, his determination that immediate jeopardy existed was based on the totality of the problems he found with dampers. Tr. 135-36. Petitioner's heating, ventilation, and air conditioning (HVAC) contractor, Steve Leake, opined, consistent with Surveyor Humphrey's opinion, that a fire would melt the zip tie and then the damper could operate as designed. Tr. 232-33. Although the two experts agree that the zip tie would melt in a fire and the damper could then operate properly, clearly the manufacturer did not intend that the damper was to be held open by a zip tie. Further, the evidence does not establish that the damper would operate when it was intended to, due to the need for the fire to melt the zip tie. Thus, the evidence does not show that the damper could provide intended protection from the spread of smoke or fire. I conclude that use of the zip tie to tie open the damper, which is not disputed to have been installed as a fire protection device, amounted to a violation, as it affected the effectiveness of the device.

I further conclude, as discussed hereafter, that Petitioner violated the standards under Tag K025, due to penetrations through smoke barriers, and Tag K067, due to missing fire dampers in ceiling ducts. I further conclude that those violations collectively constituted a violation of the standard under K012.

b. K025

The LSC requires that buildings, such as those used for long-term care facilities, be divided into compartments to limit the spread of fire and to restrict the movement of smoke. LSC § 8.3.1. The standard stated under Tag K025 in the SOD is that smoke barriers required by LSC § 8.3 must be constructed to provide at least one-half hour of fire resistance. CMS Ex. 1 at 2. Surveyor Humphrey alleged in the SOD that Petitioner failed to maintain the integrity of smoke barriers in the attic, because he observed penetrations around wiring, sprinkler piping, and ducts that passed through the smoke barrier and "portions of the attic stop and smoke partition were missing or knocked out." CMS Ex. 1 at 6.

LSC § 8.3.1 requires that building spaces be subdivided by smoke barriers to restrict the movement of smoke. Subsection 8.3.6.1 requires that the space between items that penetrate a smoke barrier and the smoke barrier, be filled with material capable of maintaining the smoke resistance of the smoke barrier or by an approved device designed to maintain the smoke resistance. LSC §§ 8.2.3.2.4 and 8.2.4.4.1 establish similar requirements for smoke partitions and fire barriers.

Surveyor Humphrey testified that he has an Associate of Science degree in Fire Science from Tennessee State University and a Bachelor of Professional Studies with a concentration in Fire Prevention Technology from the University of Memphis. He is also a Certified Fire Inspector in Tennessee, a certified Medical Gas Inspector, a member of the NFPA, and he has thirty-five years of experience in fire safety. He is employed as a Fire Safety Specialist Supervisor by the state agency. Tr. 85-87. Petitioner did not object to my acceptance of Surveyor Humphrey as an expert in fire and life safety, or to my permitting him to testify regarding his opinions about fire and life safety. Tr. 88. Surveyor Humphrey testified that this case is the first in which he cited immediate jeopardy for LSC violations. Tr. 89. He testified that he recognized the seriousness of the deficiencies and that combined they posed immediate jeopardy to Petitioner's residents. Tr. 92-97.

Surveyor Humphrey testified that he observed that a piece of gypsum board, approximately eighteen inches by six inches, was missing from a one side of a smoke wall near the attic floor. He testified that the attic stop was only required to have gypsum board on one side. He testified in response to my questioning that, even with gypsum board missing on one side, the smoke wall would have been effective to stop the movement of smoke, if one did not consider the gaps around wires, conduits, ducts, and pipes. But he testified that the missing gypsum board would have reduced the fire rating of the smoke barrier. He testified that he observed gaps around wires, conduits, ducts, and pipes where they passed through smoke barriers in the attic spaces. Tr. 110-13, 148-51, 189-95. Surveyor Humphrey testified that the missing gypsum board did not pose immediate jeopardy, but the penetrations of the smoke walls that would allow smoke to spread between compartments posed immediate jeopardy. Tr. 136, 151. Surveyor Humphrey admitted on cross-examination that, during the survey that concluded on April 10, 2008, he did not completely enter the attic space, that he entered only to his waist and observed the attic space. Tr. 164-65, 188. Surveyor Humphrey testified that people generally die by smoke rather than fire. Tr. 206.

Petitioner does not deny that its staff found gaps around pipes, wires, ducts, and other services where they passed through attic smoke barriers. The gaps were caused by old fillers or seals that had dried up, pulled away, and/or fallen out. Tr. 345-46, 348-49; P. Brief at 17; P. Reply at 5. Petitioner asserts, based upon the testimony of Administrator Miller, that the gaps Petitioner's staff filled were small areas. Petitioner argues that this testimony supports a conclusion that "smoke would have been restricted from passage,

although admittedly not as completely as it would be after penetrations were filled with new material." P. Brief at 17. The evidence shows, and Petitioner concedes, that the gaps were large enough to permit smoke to pass between compartments, which can only mean that the smoke barrier was not effective, contrary to the requirements of the LSC. The amount of smoke that could pass through the gaps is not the issue. LSC § 8.3.6.1 provides:

> 8.3.6.1 Pipes, conduits, bus ducts, cables, wires, air ducts, pneumatic tubes and ducts, and similar building service equipment that pass through floors and smoke barriers shall be protected as follows:
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> (1) The space between the penetrating item and the smoke barrier shall meet one of the following conditions:
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> a. It shall be filled with a material that is capable of maintaining the smoke resistance of the smoke barrier.

Petitioner has not shown that the gaps it admits existed did not degrade the effectiveness of the smoke barriers, because it did not prove that the gaps were filled with a material capable of maintaining the smoke resistance of the smoke barrier. Petitioner admits that "fillers and seals had dried and pulled away." P. Brief at 17; *see* Tr. 348-49. Petitioner admits that smoke would not have been as completely restricted from passage as it would be after the gaps were filled with new material. P. Brief at 17.

Mitch Abrams, Vice President of Plant Operations for Petitioner's owner, testified that whether the gaps in the smoke walls around wires, pipes, and ducts posed a danger to Petitioner's residents depended upon the size of the gaps. He opined that the gaps would need to be severe and extend to multiple compartments for there to be a potential for harm due to smoke. He did not believe that the missing gypsum board posed any danger. Tr. 436-42. Mr. Abrams did not testify that the gaps that Surveyor Humphrey found and that staff corrected did not degrade the effectiveness of the smoke walls in Petitioner's attic or pose a risk for serious injury or death to Petitioner's residents in the event of fire. If Mr. Abrams' testimony was interpreted to be that the gaps in the smoke walls did not render the walls ineffective, his testimony would not be credible, as he never observed the gaps.

I conclude that the gaps around pipes, wires, conduits, ducts, and/or other services that passed through attic smoke barriers violated LSC § 8.3.6.1 and the regulation. However, based upon the testimony of Surveyor Humphrey and Petitioner's witnesses, I conclude that the piece of gypsum board, missing from only one side of an attic smoke barrier, did not degrade the effectiveness of the smoke barrier to stop the spread of smoke.

Therefore, the missing piece of gypsum board did not amount to a violation of the LSC or the regulation.[5]

Mark Miller, Petitioner's Administrator, testified that the missing piece of gypsum board on one side of a smoke wall, approximate dimensions eighteen or twenty-four inches by twelve inches, was replaced, and all penetrations were sealed with caulk or sheet rock mud. He testified that, based upon the plan of correction (CMS Ex. 1 at 3), the repairs and his final inspection were complete on April 25, 2008. Tr. 345-51. I conclude, based upon Administrator Miller's testimony and the plan of correction, that Petitioner corrected the deficiency on April 25, 2008. My conclusion is consistent with the findings recorded in the SOD for the revisit survey completed on May 1, 2008. CMS Ex. 3 at 3.

c. K062

The LSC § 19.3.5.1 requires that a building, such as Petitioner's, have an automatic sprinkler system that meets the requirements of LSC § 9.7. The standard stated under Tag K062 of the SOD is that required automatic sprinkler systems must be maintained in reliable operating condition and that they be inspected and tested regularly. CMS Ex. 1 at 11. The SOD alleges that the standard was violated, because Petitioner failed to maintain the sprinkler system. Surveyor Humphrey alleged in the SOD that he determined that four of nine sprinkler heads in the kitchen had paint on their fusible links and that sprinkler heads in the attic were covered and restricted with blown and rolled insulation. CMS Ex. 1 at 12.

Surveyor Humphrey testified that Petitioner's facility had four fire zones. He testified that he discovered problems with the sprinkler heads in the attic in each of the four fire zones, but he did not count how many were affected. He testified, however, that, when he observed a problem, he had Petitioner's maintenance director with him, and the maintenance director went into the attic. Tr. 99. Surveyor Humphrey testified that he estimated that twenty-five percent of the sprinkler heads in each of the four fire zones were obstructed by either blown or rolled insulation. He testified that the number of sprinkler heads obstructed was, in his opinion, sufficient to prevent the sprinkler system from being effective to stop a fire. He testified that some sprinkler heads were covered by blown insulation, or had blown insulation hanging from the sprinkler head, and that other sprinkler heads were blocked by rolled insulation that was hanging loose from the

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[5] No dispute exists that the piece of gypsum board missing from the attic smoke barrier may have reduced the fire resistance rating of the smoke barrier. However, no deficiency is cited based upon an allegation that the particular smoke barrier did not have the required one-half hour fire resistance rating. LSC § 19.3.7.3.

underside of the roof. He described the obstructions as being sufficient to prevent the sprinkler heads from spraying a complete 360 degree pattern, which would prevent full-coverage of the attic. He also opined that the presence of the insulation on the sprinkler heads might delay their activation by increasing the temperature necessary for their discharge. Tr. 100-08. He testified that he concluded that the obstruction of the sprinkler heads by insulation posed immediate jeopardy. Tr. 135, 137.

Surveyor Humphrey told Petitioner's Administrator, and stated in his testimony, that paint on the sprinkler heads in the kitchen did not pose immediate jeopardy. Tr. 153, 376-77. CMS stipulated that the four sprinkler heads in the kitchen with paint on them were not a deficiency or the basis for the determination of immediate jeopardy in this case. Tr. 376-77.

According to manufacturer's specifications, sprinkler heads must be kept clean and free of materials, and modified sprinklers need to be replaced. Failure to replace damaged or modified sprinkler heads might impair their performance. P. Ex. 3 at 2, 9.

Administrator Miller testified that Petitioner used two companies to service its sprinkler and fire alarm systems. He testified that that the systems were inspected in February 2008, and no issues were identified. Tr. 319-20. He testified that, when Surveyor Humphrey advised him on April 10, 2008, that there were problems, he contacted both companies. He testified: the sprinkler heads in the kitchen were replaced, and they tested one of the kitchen sprinklers that had paint on it to see if it worked, prior to April 15, 2008 (P. Ex. 3 at 1; P. Ex. 4 at 2); the sprinkler system was checked; and they did a 100 percent audit of the sprinkler heads in the attic. Tr. 321-27. He testified that he personally examined all of the 315 sprinkler heads in the attic with the assistance of the maintenance director, Ron Jones. P. Ex. 4 at 13 He testified that all the sprinkler heads in the attic are the riser or upright type, rather than the pendent type.[6] He also testified that no insulation bats are installed between the rafters that could hang down, contrary to the testimony of Surveyor Humphrey. He testified that some rolled insulation had been laid on the floor of the attic spaces. He testified that no insulation was blown into the attic after the building was acquired by his company in 2003. He testified that no sprinkler head is closer to the attic floor than eighteen inches, and it is improbable that a bat or roll of insulation laid on the floor would have interfered with a sprinkler head. He testified that they found four sprinkler heads that had a small amount of dust or blown insulation that was brushed off with a paint brush and that they found no sprinkler head that was totally obstructed by rolled or blown insulation. He testified that the main sprinkler line that supplied the sprinklers in the living space had some rolled insulation

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[6] The illustrations on page 3 of Plaintiff's Exhibit 3 reflect that the head of the pendant type sprinkler points down, while the head of the upright type points up.

over it, but the main line does not have any sprinkler heads in it. Administrator Miller could not recall the date when he and the maintenance director finished their work in the attic. Tr. 329-44. However, he testified that, based upon the plan of correction (CMS Ex. 1 at 3), they finished cleaning the sprinkler heads in the attic on April 14, 2008. Tr. 351.

Mr. Abrams testified that it was unlikely that the blown insulation in the attic would impede a sprinkler head, as they discharge at 100 pounds per square inch of pressure (psi). He acknowledged, however, that the presence of insulation on a sprinkler head might change the temperature at which it discharges. Tr. 445-47.

After consideration of all the evidence of record, I conclude that Surveyor Humphrey's observations related to the attic sprinkler heads, as elaborated upon at hearing, are not credible. Surveyor Humphrey admitted that he only entered the attic to his waist and looked around using his flashlight and the attic lights. Thus, his ability to observe was limited to what was within his field of vision, with his upper body through an access hole in the floor of the attic while standing on a ladder. Surveyor Humphrey did not walk around in any attic space or attempt to observe what may have been under blown insulation at or near the floor of the attic, but he nevertheless opined that some sprinkler heads near the floor of the attic were covered with blown insulation. He testified that there was rolled insulation affixed to the attic rafters under the roof that was loose and hanging down and obstructing sprinkler heads. However, based upon the testimony of Petitioner's Administrator, I find that there was no rolled insulation affixed between the rafters that could hang down. Surveyor Humphrey testified that in some places the blown insulation was piled high enough to actually cover sprinkler heads, but he never entered the attic space and did not testify as to how he could determine there were sprinkler heads that were completely covered. He testified that as many as twenty-five percent of the attic sprinkler heads were obstructed, though he never entered the attic and clearly did not know how many attic sprinkler heads there were. While I have no doubt that Surveyor Humphrey is a credible person, his assertions about his observations of the sprinkler heads in the attic are not credible. Tr. 95, 99, 100, 104-08, 164-65.

Petitioner presented credible testimony of Administrator Miller regarding Petitioner's audit of the facility's attic system. Part of the audit involved Administrator Miller and Petitioner's maintenance director personally inspecting each of the 15 attic compartments and each sprinkler head in the attic. Their audit revealed that only four of 315 sprinkler heads in the attic had dust or other particulate material on them and that the dust or other particulate material could be simply removed by brushing with a paintbrush. Administrator Miller also testified that no insulation had been blown into the facility after he became Administrator on February 21, 2005. He testified that no rolled insulation was attached to the attic roof rafters that could hang down and obstruct a sprinkler head. He testified that no piles of blown insulation were found over sprinkler heads. He testified that the attic sprinkler heads were all of the upright or riser type, hung from the attic rafters, and were eighteen inches above the attic floor. He explained that a sprinkler

supply line that had no sprinkler heads ran along the floor of the attic and that pipe did have rolled insulation on it. Tr. 329-43, 445-47; P. Ex. 4 at 13.

CMS stipulated at hearing that the four kitchen sprinkler heads with paint on them did not amount to a violation of the LSC, and I so conclude. I also conclude that Petitioner has rebutted the SOD's allegation that the condition of the attic sprinkler heads violated the LSC. I do not find any merit to the CMS speculation (CMS Reply at 2-3) that Petitioner's maintenance director, who followed Surveyor Humphrey during the survey, went to the attic compartments and corrected all the problems with the attic sprinklers, before he and Administrator Miller began their attic audit the day after the survey ended. The CMS argument verges on frivolity in the complete absence of any evidence to support the argument other than the fact that Petitioner elected not to call the maintenance director as a witness. I conclude that the four dirty sprinklers that the Administrator found during the audit of the attic would not degrade the effectiveness of the sprinkler system in the attic, based upon: (1) the small number of sprinkler heads involved, even if all four were delayed in their operation; and (2) the small amount of material that was easily removed by brushing with a paint brush -- which I am willing to infer was more likely than not less force than that represented by 100 psi of water pressure.

Accordingly, I find on these facts no violation of the LSC under K062 or K012, no violation of the regulation, and no deficiency.

d. K067

LSC § 19.5.2.1 requires that heating, ventilation, and air conditioning systems comply with LSC § 9.2 and that they be installed in accordance with manufacturer's specifications. Tag K067 on the SOD sets forth this standard. The requirement for fire, smoke, and ceiling dampers is found in NFPA 90A, Standard for the Installation of Air-Conditioning and Ventilating Systems § 5.4 (1999 ed.), and NFPA 90B Standard for the Installation of Warm Air Heating and Air-Conditioning Systems § 4.2.2 (1999 ed.). As a general rule, fire dampers are required for ducts that pass through a floor, wall, or ceiling that is required to have a fire resistance rating.

Surveyor Humphrey alleges in the SOD that Petitioner violated the LSC, because he observed textured ceiling paint on some dampers, which he concluded would negatively affect the operation of the dampers. He also alleged in the SOD that he found ducts without dampers. CMS Ex. 1 at 13-16. A fire or smoke damper is a mechanical device that is activated by heat or a motor to prevent the passage of smoke or fire in a duct that passes through a fire rated assembly. Tr. 109. The dampers in Petitioner's facility, like that portrayed in Plaintiff's Exhibit 7, were not designed to provide an air tight seal to prevent transmission of smoke from a fire. Rather, the dampers were fire dampers. Mitch Abrams testified that the dampers were fire dampers (P. Ex. 7), not smoke dampers, and they were not intended to seal tightly unless the HVAC system was

running. Even if the HVAC system was running and the flaps of the damper were sealed they are intended to stop the flame and not the smoke. The dampers are heat activated and only trip in the presence of fire or extreme heat. Ducts also have smoke detectors that shut off the HVAC when smoke is sensed so that the smoke is not distributed by the HVAC system. Tr. 422-33.

Surveyor Humphrey testified that he found nine ducts with no dampers. Tr. 110, 116. He testified that he found thirteen ceiling dampers that had spray ceiling texture materials on them. Tr. 113-17. Surveyor Humphrey testified that, as a surveyor, he may not test equipment to determine whether it works properly. Tr. 117. However, he testified that he consulted with the manufacturer of the fire dampers and was informed that the operation of the dampers would not be affected by the over-spray of textured ceiling material. Tr. 127-32. He also testified that he learned that the facility had tested one of the dampers that had overspray, and it worked correctly. Tr. 126. Surveyor Humphrey testified that it was the missing dampers that weighed most heavily in his determination that immediate jeopardy existed due to the risk for fire to spread to the attic. Tr. 154. I conclude overspray of textured ceiling materials on the thirteen ceiling dampers did not affect or compromise their performance, and those dampers were not a violation of the LSC or the regulation and did not amount to a deficiency.

Administrator Miller testified that he did not see any missing dampers himself, but his maintenance crew worked on the dampers. He testified that he was aware of one damper that was closed off with cardboard near the nurse's station, but he could not testify as to whether a damper was supposed to be in that duct. He also relied upon his outside contractor, Energy Command, and Mr. Leake, to ensure all dampers were working properly. Tr. 307-11. Mr. Leake testified that, based on his observations, the engineer probably intended each duct in the facility to have its own damper. Tr. 251. Mr. Leake testified that his staff replaced eight dampers and that all the dampers in the facility then worked. Tr. 229-30. Mr. Leake testified that, as of April 14, 2008, all dampers functioned properly, but the service order shows that the work was actually completed on April 17, 2008. Tr. 234; P. Ex. 1; P. Ex. 2 at 2-3. I infer that the eight dampers that Mr. Leake testified were replaced were placed in ducts with missing dampers and in the duct where the tested damper (P. Ex. 7) had been, as the other dampers were simply tested manually by operating the screw mechanism that opened and closed the flaps of the dampers and were found to be operating. P. Ex. 2 at 3; Tr. 222. Furthermore, the plan of correction lists nine dampers that were replaced and were characterized as "Dampers Missing from Ceiling." CMS Ex. 1 at 2-3, 14.

Mitch Abrams testified that Petitioner's dampers were working properly and correctly. Tr. 432-33. An e-mail from Mitch Abrams dated April 18, 2008, to Surveyor Humphrey and his supervisor, reflects that all testing of the dampers was completed on April 17, 2008. P. Ex. 2 at 1. The evidence is consistent with his assertion being based upon the work by Mr. Leake's company and the report of Administrator Miller.

Surveyor Humphrey testified that he personally observed that nine dampers were missing from ducts. Tr. 116. Administrator Miller admitted that at least one duct did not have a damper and that it had been closed off with cardboard. Mr. Leake's testimony is that eight new dampers were installed and that all the others worked. I find credible Surveyor Humphrey's testimony that some dampers were missing. Mr. Leake's opinion that the engineers likely intended all the ducts in this particular structure to have dampers is also credible. Petitioner has not presented credible evidence that there were no missing dampers or that the missing dampers were not necessary as part of the original engineering design to prevent or control fire. I conclude that the evidence shows that there were missing dampers and that the missing dampers amounted to a violation of the LSC under K067, and a violation of the regulation. The evidence shows that new dampers were installed, and all dampers were tested by April 17, 2008. P. Ex. 2 at 3; CMS Ex. 1 at 2-3, 13-15. However, the plan of correction plainly states that verification and/or final inspection of the corrective action was not done until April 25, 2008. CMS Ex. 1 at 4, 15.

e. Immediate Jeopardy

CMS alleges that Petitioner's violations of the LSC, related to fire and smoke protection, posed immediate jeopardy from April 10 through April 24, 2008. CMS Brief at 1-2, 19. I have concluded that the evidence shows violations under: Tag K025, due to penetrations through smoke barriers; Tag K067, due to missing fire dampers in ceiling ducts; and Tag K012, based on the violations under Tags K025 and K067, as well as the duct in the dining room that was held open with a zip tie.

Petitioner argues that there was no immediate jeopardy. Petitioner acknowledges that 42 C.F.R. § 498.60(c)(2) requires me to uphold the CMS determination of level of noncompliance, unless it is clearly erroneous, and that, pursuant to prior decisions of the Board, it has the burden of making the required showing. P. Brief at 1-5. Petitioner asserts that the declaration of immediate jeopardy regarding the missing gypsum board and the penetrations in the smoke walls was clearly erroneous, because the "scale of the conditions was overstated by CMS." P. Brief at 5. Certainly I have concluded that not all the defects identified by Surveyor Humphrey, and advanced by CMS as a basis for a deficiency finding, are supported by the evidence. Thus, from Petitioner's perspective, CMS may be said to have overstated the conditions that support its determination that immediate jeopardy existed. However, I have found two conditions that the evidence supports and, therefore, Petitioner must bear the burden to show that the declaration of immediate jeopardy based on either or both conditions was clearly erroneous. I conclude that Petitioner has failed to meet that burden.

Petitioner argues that Surveyor Humphrey's conduct was inconsistent with his conclusion that immediate jeopardy existed at Petitioner's facility. Petitioner points out that Surveyor Humphrey's notes indicate that he considered citing the individual standards at

less than immediate jeopardy but that the cumulative effect of the defects he observed caused him to declare immediate jeopardy. Petitioner argues that it has shown that not all the conditions amounted to violations and immediate jeopardy. Petitioner urges me to conclude that immediate jeopardy was, therefore, clearly erroneous. P. Brief at 12. This argument is not persuasive. I have found two conditions that the evidence supports. Petitioner bears the burden to show that the declaration of immediate jeopardy based on either or both conditions was clearly erroneous. I conclude that Petitioner has failed to meet that burden.

Petitioner argues that Surveyor Humphrey told the facility that he had identified immediate jeopardy but than declined to identify for Administrator Miller the specific defects that posed immediate jeopardy so that immediate corrections could be made to abate the risk of serious injury or death of residents. Petitioner argues that I should consider this evidence that Surveyor Humphrey did not correctly identify immediate jeopardy or that he simply did not understand the concept. P. Brief at 12. Administrator Miller testified that he met with Surveyor Humphrey for the exit conference. Surveyor Humphrey was at the facility from April 8 through April 10 and did not mention immediate jeopardy until the exit conference on April 10, 2008. During the exit conference, Surveyor Humphrey identified the penetrations or gaps in the smoke barrier and the missing gypsum board on the smoke wall, the sprinklers, and the dampers as the basis for citing wide-spread immediate jeopardy. Administrator Miller testified that he asked Surveyor Humphrey to show him the defects, but the surveyor refused and told Administrator Miller that he would have to wait for the SOD. Tr. 258-66. I indicated to the parties on the record at hearing that I concluded Surveyor Humphrey was in error in this regard. His action was inconsistent with the guidance to surveyors in SOM, app. Q, VI, C. However, I advised Petitioner at hearing that it was nevertheless burdened to find and correct the defects that posed immediate jeopardy and show that it was in substantial compliance. Tr. 387-91. The fact that Surveyor Humphrey was vague and not particularly helpful in ensuring that the facility was aware of, and working to correct, defects that posed likely risk of serious injury or death is no defense for Petitioner in this case. This was the first instance in his career where Surveyor Humphrey decided to declare immediate jeopardy, and I construe his response to the Administrator to reflect a lack of knowledge of proper procedures to ensure a resident population is protected, rather than deliberate obstructionism or indication that he did not understand what constitutes immediate jeopardy. Petitioner's argument in its post-hearing briefing does not persuade me to change my conclusions on this issue.

Petitioner argues that the gaps around wires, ducts, conduits, and pipes that passed through the smoke barriers did not pose immediate jeopardy. However, Petitioner agrees that a fire in a nursing home can result in serious injury and death of residents. P. Brief at 12. It is also not disputed that more individuals die from smoke inhalation than from fire. Tr. 206. Petitioner does not deny that gaps existed and that staff filled them, as Administrator Miller confirmed in his testimony. Petitioner does not argue that, even

with the penetrations, the barriers were effective. Rather, Petitioner argues that the lack of specificity that Surveyor Humphrey and/or CMS provides as to the location of the penetrations in the attic smoke walls negates immediate jeopardy. P. Brief at 16-17. Petitioner's argument is not persuasive. Petitioner concedes gaps existed that the staff filled and that the gaps would have allowed at least some smoke to pass. Thus, Petitioner concedes that the smoke barrier would not effectively serve the purpose that the LSC required.

Petitioner argues in the alternative that, if immediate jeopardy existed, it was abated by April 15, 2008. P. Brief at 18-21; P. Reply at 4-6. I accept that immediate jeopardy related to the missing dampers was abated when the new or replacement dampers were all installed and verified to be operating correctly on or about April 17, 2008. However, Petitioner's evidence shows that the work on the gaps in the attic smoke barriers was not complete until on or about April 24, 2008. I conclude, based upon Administrator Miller's testimony and the plan of correction, that Petitioner abated immediate jeopardy with the correction of the defective attic smoke barriers on April 25, 2008. Petitioner's argument that some of the worst gaps were corrected as early as April 15, 2008, is insufficient to show that the determination that immediate jeopardy continued after that date was clearly erroneous. Indeed, Petitioner's argument concedes that some gaps remained after that date that required filling and also concedes that some smoke could still pass between smoke compartments contrary to the LSC's requirements.

Petitioner has not shown that CMS's declaration of immediate jeopardy, based upon the gaps in smoke barriers and the missing ducts, was clearly erroneous. Petitioner has not shown that it restored the effectiveness of attic smoke barriers prior to April 25, 2008. Immediate jeopardy is appropriately found when a deficiency has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident. 42 C.F.R. § 488.301. The Board has explained that a presumption exists that CMS's determination is correct, which a petitioner must rebut by showing the determination to be clearly erroneous. *Daughters of Miriam Ctr.*, DAB No. 2067 (2007); *Liberty Commons Nursing and Rehab Ctr. – Johnston*, DAB No. 2031 (2006). The Board has also held that immediate jeopardy exists under either of the following circumstances: the facility's noncompliance has caused death or "serious" harm to one or more residents; or the facility's noncompliance is or was "likely to cause" death or serious harm. *Daughters of Miriam Ctr.*, DAB No. 2067. Given the fragile nature of the resident population, and the fact that the gaps degraded the effectiveness of the smoke barriers, the declaration of immediate jeopardy through April 24, 2008, has not been shown to be clearly erroneous in this case.

3. A CMP of $5,750 per day from April 10 through April 24, 2008, is not reasonable.

4. A reasonable CMP is $3,050 per day from April 10 through April 24, 2008, and $250 per day from April 25 through April 30, 2008, a total CMP of $47,250.

5. A DPNA from April 24 through April 30, 2008, is also reasonable.

I have concluded that Petitioner was in violation of 42 C.F.R. § 483.70(a), based upon violations of the LSC related to missing fire dampers (including one tied open) and defective attic smoke barriers due to gaps around penetrations in those barriers. I have concluded that the violation was corrected as of April 25, 2008. I have concluded that the violation posed immediate jeopardy to Petitioner's residents during the entire period, April 10 through April 24, 2008. Petitioner stipulated at hearing that it no longer disputed the deficiency findings from the complaint and health recertification surveys that concluded on April 10, 2008. Regarding the health and complaint surveys, no dispute exists that Petitioner was found to have returned to substantial compliance on May 1, 2008. Accordingly, I conclude that CMS had a basis to impose enforcement remedies against Petitioner for the period April 10 through April 30, 2008. During the period April 10 through April 24, 2008, there was immediate jeopardy. During the period April 25 through April 30, 2008, Petitioner does not dispute that CMS had a basis to impose a CMP of $250 per day. Petitioner stipulated at hearing that it did not contest the DPNA imposed from April 24 through April 30, 2008. Thus, the issue for me is whether a CMP of $5,750 per day from April 10 through April 24, 2008 is reasonable. If not, I need to determine de novo a reasonable per day CMP.

The regulations authorize imposition of a CMP of from $3,050 to $10,000 per day for deficiencies that constitute immediate jeopardy. 42 C.F.R. § 488.438(a)(1)(i). The lower range of CMP, from $50 per day to $3,000 per day, is reserved for deficiencies that do not constitute immediate jeopardy but either cause actual harm to residents or cause no actual harm but have the potential for causing more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii). I assess de novo the reasonableness of the CMP that CMS proposed based on the factors set forth at 42 C.F.R. § 488.438(f). In determining the amount of the CMP, the following factors specified by 42 C.F.R. § 488.438(f) must be considered: (1) the facility's history of non-compliance, including repeated deficiencies; (2) the facility's financial condition; (3) the seriousness of the deficiencies as set forth at 42 C.F.R. § 488.404 (which includes the scope and severity of the deficiencies, the relationship of one deficiency to other deficiencies resulting in noncompliance, and the facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies); and (4) the facility's degree of culpability.

Petitioner asserted in the request for hearing that the CMP proposed was unreasonable and beyond the facility's ability to pay and that payment would seriously jeopardize the facility's financial stability. Petitioner did not argue any financial impediment in its post-hearing briefs but argued that the proposed CMP of $5,750 per day was unreasonable. P. Brief at 21-23; P. Reply at 6-8. I find no evidence that Petitioner is unable to pay the CMP. I have received no evidence of a history of similar deficiencies or noncompliance. Given the nature of the LSC violations and Petitioner's prompt action to make corrections, I do not consider Petitioner to be very culpable. Nevertheless, the LSC violations are serious given the nature of Petitioner's population and the admitted risk for serious injury or death posed by fire and smoke in a long-term care facility. CMS proposed a $5,750 per day CMP based upon its determination that four LSC violations were present that posed immediate jeopardy, a determination I have found to be in error. Accordingly, I conclude that a $5,750 per day CMP is unreasonable, but that a CMP of $3,050 per day is reasonable. A $3,050 per day CMP is the lowest CMP authorized for a deficiency that poses immediate jeopardy.

III. Conclusion

For the foregoing reasons, I conclude that Petitioner was not in substantial compliance with program participation requirements from April 10 through April 30, 2008. Reasonable enforcement remedies are a CMP of $3,050 per day from April 10 through April 24, 2008 and $250 per day from April 25 through April 30, 2008, a total CMP of $47,250, and a DPNA from April 24 through April 30, 2008.

/s/
Keith W. Sickendick
Administrative Law Judge