Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Crawford Healthcare and Rehabilitation
Docket No. A-16-39
Decision No. 2738
September 22, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Crawford Healthcare and Rehabilitation (Crawford), an Arkansas skilled nursing facility (SNF), has appealed the November 25, 2015 decision by an administrative law judge (ALJ), *Crawford Healthcare and Rehabilitation,* DAB CR4466 (2015) (ALJ Decision). In her decision, the ALJ addressed three main issues arising from a Medicare compliance survey of Crawford: (1) As of March 20, 2014, was Crawford out of substantial compliance with 42 C.F.R. § 483.25(h), which requires a SNF to minimize the risk of accidents involving its residents? (2) If there was such noncompliance, did it place Crawford residents in "immediate jeopardy"? and (3) Did the Centers for Medicare & Medicaid Services (CMS) impose "reasonable" civil money penalties (CMPs) for the noncompliance that it found? On all three issues, the ALJ granted summary judgment to CMS.

Crawford now contends that disputes of material fact precluded summary judgment on each of these issues. We disagree and affirm the ALJ Decision.

Legal Background

To participate in the Medicare program, a SNF must be in "substantial compliance" with the participation requirements in 42 C.F.R. Part 483, subpart B. 42 C.F.R. § 483.1. Compliance with those requirements is verified through onsite surveys performed by state health agencies. *Id.* § 488.10(a), 488.11. A state survey agency reports any "deficiency" (failure to meet a participation requirement) it finds in a Statement of Deficiencies. *Id.* §§ 488.325(f)(1), 488.331(a).

A SNF is not in substantial compliance when it has one or more deficiencies that have the potential for causing more than minimal harm to residents. *Id.* § 488.301 (defining "substantial compliance"). The term "noncompliance," as used in the applicable regulations, is synonymous with lack of substantial compliance. *Id.* (defining "noncompliance").

CMS may impose enforcement "remedies," including CMPs, on a SNF that is found to be not in substantial compliance. *See id.* §§ 488.400, 488.402(b), (c), 488.406. When CMS elects to impose a CMP, it sets the CMP amount based on, among other factors, the "seriousness" of the SNF's noncompliance. *Id.* §§ 488.404(b), 488.438(f). "Seriousness" is a function of the noncompliance's scope (whether it is "isolated," constitutes a "pattern," or is "widespread") and severity (whether it has created a "potential for harm," resulted in "actual harm," or placed residents in "immediate jeopardy"). *Id.* § 488.404(b). The most serious noncompliance is that which puts one or more residents in "immediate jeopardy." *See id.* § 488.438(a) (authorizing the highest CMPs for immediate jeopardy-level noncompliance); *Woodland Oaks Healthcare Facility*, DAB No. 2355, at 2 (2010) (citing authorities).

A SNF may appeal a CMS determination of noncompliance that has resulted in the imposition of a CMP or other enforcement remedy. 42 C.F.R. §§ 488.408(g)(1), 498.3(b)(13), 498.5(b). During a hearing in such an appeal, a SNF may challenge the reasonableness of the amount of any CMP imposed. *Lutheran Home at Trinity Oaks*, DAB No. 2111, at 21 (2007).

Case Background

From April 28 through May 2, 2014, the Arkansas Department of Human Services (DHS) conducted a Medicare recertification survey of Crawford. CMS Ex. 1; CMS Ex. 36, ¶ 2. As a result of that survey, DHS issued six deficiency citations, one of which alleged noncompliance with 42 C.F.R. § 483.25(h), which requires a facility to "ensure that the resident environment remains as free of accident hazards as is possible" and that "each resident receives adequate supervision and assistance devices to prevent accidents." CMS Ex. 1. A concurrent survey, focused on fire safety requirements, resulted in four additional deficiency citations. CMS Ex. 5. (For simplicity we refer to the two surveys collectively as the "May 2014 survey.")

The section 483.25(h) citation stemmed from DHS's investigation of three instances during March 2014 in which a resident spilled hot coffee that came into contact with the resident's skin. *See* CMS Ex. 1, at 3-16. The first spill occurred on March 1st and involved Resident 14, who suffered a burn requiring antibiotic treatment. *Id.* at 9. The second occurred on March 20th and involved Resident 3, who sustained second-degree burns requiring lengthy treatment. *Id.* at 4-6. The third spill occurred on March 27th and again involved Resident 14; that spill caused only temporary skin redness. *Id.* at 10.

Examining the circumstances surrounding these incidents and Crawford's response to them, DHS determined that Crawford was noncompliant with section 483.25(h). *Id.* at 4. DHS also determined that Crawford's noncompliance with section 483.25(h) was at the

immediate jeopardy level as of March 20, 2014 (the date of the spill involving Resident 3). *Id.* In addition, DHS found that Crawford had "removed the immediate jeopardy" as of April 8, 2014 but remained noncompliant with section 483.25(h) and other requirements at a lower severity level. *Id.*; P. Ex. 12, at 1.

In late June 2014, DHS performed a "revisit" (or follow-up) survey to determine if Crawford had corrected the deficiencies found during the May 2014 survey. DHS determined that Crawford was back in substantial compliance with all Medicare requirements as of June 4, 2014. CMS Ex. 3, at 1.

As noted, the May 2014 survey resulted in ten deficiency citations, including the finding of noncompliance with section 483.25(h). *See* CMS Ex. 2, at 1. Based on those citations, and the results of the revisit survey, CMS imposed the following remedies on Crawford: (1) a $6,050 per-day CMP from March 20 through April 7, 2014 (the period of immediate jeopardy); and (2) a $600 per-day CMP from April 8 through June 3, 2014. CMS Ex. 3, at 1. The total accrued penalty equals $149,150.[1] *Id.*

Crawford appealed CMS's action by requesting a hearing before the ALJ, stating that it was challenging four deficiency citations, including the section 483.25(h) citation. *See* July 14, 2014 Request for Hearing. CMS responded with a motion for summary judgment on the four citations identified in Crawford's hearing request. Crawford filed a response to the motion in which it addressed the section 483.25(h) citation but expressly waived its opportunity to contest any of the other citations stemming from the May 2014 survey. *See* Crawford's Jan. 15, 2015 Pre-Hearing Brief and Response to Motion for Summary Judgment at 1 n.1.

Finding no dispute of material fact regarding the sole contested deficiency citation, the ALJ concluded that, as of March 20, 2014, Crawford was not in substantial compliance with section 483.25(h) because it had failed to "address foreseeable risks of harm from accidents involving hot liquids spills." ALJ Decision at 10-14. The ALJ also found that CMS's immediate jeopardy determination was "not clearly erroneous." *Id.* at 14-17. Finally, she concluded that the CMPs imposed by CMS were "reasonable as to amount and duration." *Id.* at 17-19.

Discussion

We review de novo an ALJ's decision to grant summary judgment. *Southpark Meadows Nursing & Rehab. Center*, DAB No. 2703, at 5 (2016). "Summary judgment is appropriate when the record shows there is no genuine issue as to any material fact, and

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[1] CMS also imposed a denial of payment for new admissions (DPNA), effective May 30 through June 3, 2014. CMS Ex. 3, at 1. Crawford does not contend that CMS lacked a basis to impose a DPNA for that five-day period.

the moving party is entitled to judgment as a matter of law." *Id.* "The applicable substantive law will identify which facts are material, and only disputes over facts that might affect the outcome of the [case] under the governing law will properly preclude the entry of summary judgment." *Id.* (internal quotation marks omitted). In deciding whether there is a genuine dispute of material fact, we "view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." *Avalon Place Kirbyville*, DAB No. 2569, at 7 (2014) (internal quotation marks omitted).

We also "view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby*, 477 U.S. 247 at 254-55 (1986). Under the substantive law, CMS has the initial burden to make a prima facie case. *Oaks of Mid City Nursing & Rehab. Center*, DAB No. 2375, at 6 (2011). "To make a prima facie case, CMS must com[e] forward with evidence related to disputed findings that is sufficient (together with any undisputed findings and relevant legal authority) to support a decision in its favor absent an effective rebuttal." *Id.* (internal quotation marks omitted). "Once CMS has made a prima facie showing of noncompliance, however, the SNF must carry its ultimate burden of persuasion by showing, by a preponderance of the evidence, on the record as a whole, that it was in substantial compliance during the relevant period." *Id.* (internal quotation marks omitted). Hence, in deciding whether a SNF has defeated an adequately supported motion for summary judgment – a motion that identifies facts sufficient to make out a prima facie case – we consider whether a rational trier of fact, viewing the entire record in the light most favorable to the SNF, and drawing all reasonable inferences in its favor, could find its presentation sufficient to carry its burden of persuasion (to show substantial compliance). *Dumas Nursing & Rehab., L.P.*, DAB No. 2347, at 6 (2010) (stating that, on summary judgment, "it is appropriate for the tribunal to consider whether a rational trier of fact could regard the parties' presentations as sufficient to meet their evidentiary burdens under the relevant substantive law").[2] Where the evaluation of credibility or weighing of competing evidence is required to make that determination, however, summary judgment is not appropriate. *See, e.g., Kingsville Nursing & Rehab. Ctr.,* DAB No. 2234, at 8-9 (2009); *Madison Health Care, Inc.*, DAB No. 1927, at 6 (2004).

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[2] *See also Wade Pediatrics*, DAB No. 2153, at 17 n.7 (2008) ("While the non-moving party does not have to prove its case to avoid summary judgment, the evidentiary burdens borne by the parties under the applicable substantive law are a factor in evaluating whether a rational trier of fact could find in favor of the non-moving party."), *aff'd, Wade Pediatrics v. Dept. of Health & Human Servs.*, 567 F.3d 1202 (10th Cir. 2009); *Guardian Health Care Center*, DAB No. 1943, at 9 (2004) ("[I]f CMS makes a *prima facie* showing of noncompliance – based on either uncontested facts, or on a combination of uncontested facts and evidence concerning contested facts – the facility can avoid summary judgment only if it proffers competent evidence of a genuine factual dispute or demonstrates that the record, viewed in the light most favorable to the facility, might lead a rational trier of fact to conclude that the facility was in substantial compliance."); *Matsushita Elec. Industrial Co. v. Zenith Radio, Ltd.*, 475 U.S. 574, 586-87 (1986) (holding that, when the party moving for summary judgment has carried its burden, there is no "genuine issue for trial" when the record taken as a whole "could not lead a rational trier of fact to find for the non-moving party").

1. *As of March 20, 2016, Crawford was not in substantial compliance with 42 C.F.R. § 483.25(h).*

As noted, the sole participation requirement at issue in this appeal is section 483.25(h). Its stated goal is to prevent "accidents" that might harm a SNF resident. To that end, the regulation requires a SNF "to keep a resident's environment as free of accident hazards as possible" and to afford each resident "adequate supervision and assistance devices."

In its *Guidance to Surveyors for Long Term Care Facilities* (Surveyor Guidance), CMS states that section 483.25(h)'s intent "is to ensure the facility provides an environment that is free from accident hazards over which the facility has control and provides supervision and assistive devices to each resident to prevent avoidable accidents." P. Ex. 15, at 2.[3] According to the Surveyor Guidance, a SNF is expected to prevent accidents by: (1) "[i]dentifying hazard(s) and risk(s)"; (2) "[e]valuating and analyzing hazard(s) and risk(s)"; (3) "[i]mplementing interventions to reduce hazard(s) and risk(s)"; and (4) "[m]onitoring for effectiveness and modifying interventions when necessary." *Id.*

Consistent with that guidance, the Board has said that section 483.25(h): (1) "come[s] into play when there are conditions in a facility that pose a known or foreseeable risk of accidental harm"[4]; (2) requires a SNF to "identify[ ] and remov[e] hazards, where possible, or where the hazard is unavoidable because of other resident needs, manag[e] the hazard by reducing the risk of accident to the extent possible"[5]; and (3) requires a SNF to provide the supervision and "assistive devices" necessary to "meet [a] resident's assessed needs" and to "reduce known or foreseeable accident risks to the highest practicable degree, consistent with accepted standards of nursing practice."[6] In general, a SNF must take "all reasonable steps" to mitigate foreseeable risks of harm.[7]

As noted in the background, the challenged deficiency citation stems from the state survey agency's investigation of three hot liquid spills, involving Resident 14 and Resident 3, during March 2014. The record reveals the following undisputed facts about the two residents, the spills, and Crawford's response to the incidents.

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[3] The Guidance to Surveyors for Long Term Care Facilities is Appendix PP to CMS's State Operations Manual (CMS Pub. 100-07). Appendix PP is available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_pp_guidelines_ltcf.pdf). In addition, relevant portions of Appendix PP (as last revised on December 12, 2014) were submitted by Crawford as Petitioner's Exhibit 15.

[4] *Meridian Nursing Ctr.*, DAB No. 2265, at 9 (2009)*, aff'd, Fal-Meridian, Inc. v. U.S. Dep't of Health & Human Servs.*, 604 F.3d 445 (7th Cir. 2010).

[5] *Maine Veterans' Home – Scarborough,* DAB No. 1975, at 10 (2005).

[6] *Century Care of Crystal Coast*, DAB No. 2076, at 6-7 (2007), *aff'd, Century Care of the Crystal Coast v. Leavitt*, 281 F. App'x 180 (4th Cir. 2008).

[7] *Del Rosa Villa,* DAB No. 2458, at 18 (2012); *Golden Living Center – Foley*, DAB No. 2510, at 8 (2013).

Resident 14 was 91 years old during March 2014. P. Ex. 7, at 1. She had diagnoses of dementia (with "psychosis"), anxiety, and "chronic pain." *Id.* at 14, 20. A physician's note characterized her dementia as "end-stage." *Id.* at 23. Although a nursing record (a January 2014 "Care Plan Conference Summary") states that Resident 14 "feeds self,"[8] *id.* at 20, Crawford's assessment of the resident (a Minimum Data Set (MDS) assessment[9] performed in January 2014) found that she required a "[o]ne person physical assist" when eating, *id.* at 14. *See also* CMS Ex. 1, at 8 (stating that Resident 14 "required limited assistance of one person for eating"). The assessment also found that Resident 14 had a Brief Interview for Mental Status (BIMS)[10] score of five, indicating severe cognitive impairment, and had "highly impaired" vision. P. Ex. 7, at 12. According to the assessment, Resident 14 received anti-psychotic medication and anti-anxiety medication during each day of the seven-day assessment period and did not display signs of delirium such as inattention, disorganized thinking, altered level of consciousness, or psychomotor retardation. *Id.* at 12-13, 15.

At about 12:20 p.m. on March 1, 2014, Resident 14 spilled hot coffee on her chest while in bed. CMS Ex. 1, at 9; CMS Ex. 18, at 19; P. Ex. 7, at 22. The spill caused "reddened skin" (without blistering), which the nursing staff, under a physician's order, treated with triple antibiotic ointment twice daily for the next week. CMS Ex. 1, at 9; P. Ex. 3, ¶ 7. The temperature of coffee served at the March 1st lunch meal was 169 degrees Fahrenheit, according to Crawford's log. CMS Ex. 23, at 2. An "Incident and Accident Report" on the spill indicates that, in order to prevent further spills and potential injury, the nursing staff planned to give Resident 14 a "lap and shirt protector" and a "spill proof lid." P. Ex. 7, at 22.

After the incident, but also on March 1st, Crawford's Director of Nursing completed a preprinted form titled "Hot Liquids Safety Evaluation." CMS Ex. 18, at 20; CMS Ex. 1, at 11; P. Ex. 7, at 26. The form asks the staff to indicate whether a resident has one or more of seven risk factors that included a BIMS score less than eight, variable mood, impulsive behavior, tremors, and upper extremity weakness. CMS Ex. 18, at 20.

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[8] Also, a nursing note written the day after the resident's first spill of hot coffee dated "3/2/14" observed that the Resident "Fed self . . ." during dinner. P. Ex. 7, at 3.

[9] The MDS is a standardized data-collection tool to assess a resident's health status and physical, psychological and psychosocial functioning. The MDS is the foundation of the "comprehensive assessment" that is required for all residents of long-term care facilities that participate in the Medicare program. *See* 42 U.S.C. § 1395i-3(b)(3); 42 C.F.R. § 483.20(b)*; Oaks of Mid City Nursing & Rehab. Center* at 19.

[10] The Brief Interview for Mental Status is a tool to assess a person's cognitive functioning. *See* Centers for Medicare & Medicaid Services, Long-Term Care Facility Resident Assessment Instrument 3.0 User's Manual (RAI Manual), Chapter 3, Section 3, ¶ C0200 (available at https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/Downloads/MDS-30-RAI-Manual-V113.pdf). A BIMS score of zero to seven indicates "severe impairment." *Id.*, ¶ C0500.

According to the form, the presence of two or more risk factors indicates a resident "at risk for injuries from spills of hot liquids." *Id.*

In her March 1st entry for Resident 14 on the Hot Liquids Safety Evaluation form, the Director of Nursing noted that Resident 14 had a "total" of "1" risk factor, even though it appears that she checked two factors – a BIMS score less than eight (which is consistent with her score on the MDS assessment); and varied mood or being "easily agitated." *Id.* During the survey, DHS interviewed the Director of Nursing about the apparent discrepancy. CMS Ex. 1, at 11. According to the Statement of Deficiencies, the Director of Nursing stated in her interview that Resident 14 had two risk factors and that she had mistakenly entered "1" as the total risk score on the Hot Liquids Safety Evaluation form. *Id.* at 11-12. (Crawford did not proffer written testimony from the individual who served as its Director of Nursing during the time period relevant to this case.)

On March 10, 2014, nine days after Resident 14's coffee spill, Crawford's nursing staff attended an "in-service" (education or training) meeting. P. Ex. 1, ¶ 5. The Director of Nursing conducted the meeting, and topics included "spillage of hot liquids." *Id.*; P. Ex. 9, at 2. The Director of Nursing advised the participants "that when coffee was served to residents, lids had to be available to be placed on coffee cups, if the individual resident's needs required it." P. Ex. 1, ¶ 5. The Director of Nursing also "emphasized that when food was brought to residents' rooms, lids to coffee cups had to be included on the food carts for use by residents eating in their rooms." *Id.; see also* P. Ex. 3, ¶ 8.

The second spill-related accident involved Resident 3, who was then 92 years old. P. Ex. 6, at 1. Resident 3 had Alzheimer's disease and fragile skin that made her susceptible to skin tears, bruising, and bleeding. *Id.* at 1, 9. A February 2014 MDS assessment found that she had a BIMS score of three, indicating severe cognitive impairment, and needed "setup help" – along with "supervision" in the form of "oversight, encouragement or cueing" – for her meals. *Id.* at 2-4. Nursing notes, a Care Plan Conference Summary and social services records (from January, February, and early-to-mid March 2014) state that Resident 3 fed herself. *Id.* at 9, 11, 12, 14, 36. She displayed no signs of delirium during the February 2014 MDS assessment but exhibited defects in reporting and recall skills. *Id.* at 2-3.

At about 4:45 p.m. on March 20, 2014, Resident 3 was in the dining room when she spilled hot coffee on her upper legs. CMS Ex. 1, at 5; P. Ex. 6, at 16, 32. The temperature of the coffee served at the dinner meal on March 20th was 165 degrees Fahrenheit, according to Crawford's log. CMS Ex. 23, at 2. As a result of the spill, Resident 3 sustained second-degree burns on her right and left thighs. CMS Ex. 1, at 5-6; CMS Ex. 17, at 22, 125, 126, 129. After the spill, Crawford instructed its staff to give Resident 3 her coffee in a cup with a lid. P. Ex. 6, at 32.

On March 21, 2014, a member of the nursing staff completed the Hot Liquids Safety Evaluation form for Resident 3. As completed on that date, the form indicated that Resident 3 had one risk factor (a BIMS score less than 8) for injuries due to hot liquid spills and that she would be served coffee in a "cup [with] lid [and] temperature of liquids not to exceed 138-140 degrees." CMS Ex. 1, at 6; CMS Ex. 17, at 35.

On March 24, 2010, the Director of Nursing conducted a "special in-service" meeting, attended by staff on the hall where Resident 3 lived. P. Ex. 1, ¶ 6. Several topics were covered, including the service of hot liquids. P. Ex. 9, at 5 (item 7). The Director of Nursing emphasized to the attendees that "Resident 3 must only receive her coffee in a cup with a lid, that she must wear protective clothing when she consumed coffee, and that her hot liquids must be cooled." P. Ex. 1, ¶ 6; *see also* P. Ex. 9, at 10.

At approximately 7:00 a.m. on March 27, 2014, Resident 14, who had spilled coffee on her chest while in bed on March 1, 2014, again spilled coffee on her chest while in bed. CMS Ex. 18, at 21; CMS Ex. 1, at 10. She was wearing a "clothes protector" when the spill occurred. CMS Ex. 1, at 10. A reddened area was noted on her chest after the spill, but the resident denied any pain, and the nursing staff found that the skin redness had disappeared after one hour. *Id.* Crawford's report on the March 27th incident does not say that the cup from which Resident 14 was drinking had a lid or that any staff member was present in her room when the spill occurred. CMS Ex. 18, at 21. The incident report does say, in the section designated for identifying measures to "prevent further injury," that Resident 14 "is to have a lid on coffee cup." *Id.* According to Crawford's log, the temperature of coffee served at the breakfast meal on March 27th was 171 degrees Fahrenheit. CMS Ex. 23, at 2.

In "late March and early April" 2014, Crawford's Executive Director (or Administrator) and Director of Nursing "began discussions on effective ways to prevent hot liquid spills." P. Ex. 1, ¶ 7. They "developed several steps to take that might reduce problems with spills, including additional in-service training for staff, reducing the temperature of coffee served to residents, additional monitoring of coffee temperature, and monitoring individual residents to determine whether a resident need[s] a lid on a coffee cup." *Id.* On April 3, the Director of Nursing compiled a list of Crawford's "goals" in this area, and on April 3, the Executive Director "directed . . . the dietary services manager to lower the temperature of coffee served to residents." *Id.*, ¶¶ 7-8.

On April 7, 2014, the Director of Nursing "conducted an in-service meeting of all staff" concerning the "prevention of spillage of hot liquids." *Id.*, ¶ 9; P. Ex. 9, at 12. During that meeting, nursing and dietary staff members were instructed "to place lids on hot liquids, use clothing protectors when available, [and] use ice/cool water to cool liquids above 140 [degrees] before serving them to residents." CMS Ex. 12, at 4. In addition, the Director of Nursing discussed the "need for nursing staff to monitor those residents who needed lids when drinking hot liquids." P. Ex. 3, ¶ 9.

On April 16, 2014, Crawford provided in-service training to a group of staff members concerning the service of hot liquids. P. Ex. 9, at 17. The following instructions were given: "Temperature of coffee coming from kitchen is [160 degrees]; serve hot liquids [with] lids on cup; let dietary manager and nurse managers [know] of residents [who are] noncompliant with lids; make sure hot coffee is cooled by adding ice; residents to wear clothing protector/lap protector; residents are to be assisted with all hot liquids; read policy and procedures on classifications of burns." *Id.*

On May 1, 2014, as part of its plan of correction for the deficiencies identified during the May 2014 survey, Crawford assessed each resident's ability to handle hot liquids using its Hot Liquids Safety Evaluation form. CMS Ex. 1, at 12; CMS Ex. 12, at 4. That exercise identified residents at risk of injury from hot liquid spills. CMS Ex. 1, at 12.

The foregoing undisputed facts show that, throughout March 2014, Crawford had a practice of serving coffee to some residents in unlidded cups and at temperatures exceeding 160 degrees Fahrenheit.[11] The threshold issue is whether that practice posed a foreseeable risk of accidental harm to Crawford's residents, or at least to residents having certain impairments, such as severe defects in cognition. The ALJ found that the March 1st accident involving Resident 14 put Crawford "on specific notice of a foreseeable risk of harm from hot liquid spills," that is, an accident hazard under section 483.25(h). ALJ Decision at 14. We agree.

CMS's Surveyor Guidance makes it clear that under the regulations, the danger to nursing home residents from burns due to scalding must be treated as a serious matter:

> Many residents in long-term care facilities have conditions that may put them at increased risk for burns caused by scalding. These conditions include: decreased skin thickness, decreased skin sensitivity, peripheral neuropathy, decreased agility (reduced reaction time), decreased cognition or dementia, decreased mobility, and decreased ability to communicate.

P. Ex. 15, at 13. The Surveyor Guidance also notes that only seconds of exposure to hot water may be sufficient to cause third-degree burns: for 140-degree water, only five seconds of exposure are required to cause such injury; and for water at 148 and 155 degrees, the exposure time is one to two seconds. *Id.* As noted, Crawford's temperature log shows that coffee was served to residents at temperatures that often exceeded 160 degrees Fahrenheit during March 2014. CMS Ex. 23, at 2.

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[11] The undisputed facts suggest that this was facility-wide practice but we do not need to resolve that issue.

At its March 10, 2014 in-service meeting, held ten days after Resident 14's first accident, Crawford's Director of Nursing instructed staff to make cup lids available to residents who needed them and also to residents who ate in their rooms. P. Ex. 1, ¶ 5. Those instructions indicate Crawford's awareness that residents in addition to Resident 14 were at risk of harm from spilling hot liquids. Moreover, even if that danger was not apparent to Crawford in the immediate wake of the March 1st accident, then it should have been obvious by March 20, 2014, the date that Resident 3 was burned after spilling hot coffee.

Crawford points to documents it says shows that "both residents were individually assessed and found capable of feeding themselves." RR at 2-3. Crawford inaccurately describes all but one of those documents.[12] Crawford cites a page from Resident 3's MDS. That page does state, as Crawford says, "Setup help only" in the category "Eating: support provided," but it also states "Supervision – oversight, encouragement or cueing" in the category "Eating: self-performance." P. Ex. 6, at 4. Crawford states that "The care plan for Resident 3 . . . noted that Resident 3 was able to feed herself without assistance." RR at 3, citing P. Ex. 6, at 9. However, the document cited is not a Care Plan (and does not identify the date of the Care Plan being discussed) but, rather, notes summarizing a February 18, 2014 discussion of a Care Plan at a conference involving facility staff and the resident's representative.[13] Crawford cites a document it describes as "an assessment by Resident 14's physician on January 14, 2014, [that] Resident 14 was able to feed herself." *Id.*, citing P. Ex. 7, at 20. However, the document cited is not an "assessment" *per se* but, once again, notes summarizing a care plan conference. Moreover, while the "Attending Physician" signed the document, there is no indication he was present at the conference or wrote the notes in the summary. *Id.*

But even accepting for summary judgment purposes that these documents (or the record as a whole) support Crawford's claim that it assessed Residents 3 and 14 and found them capable of <u>feeding</u> themselves independently prior to March 2014, that fact in isolation does not establish the absence of a foreseeable accident risk of the hot coffee spills that occurred here. Resident 14's spill on March 1st notified Crawford that even residents physically capable of feeding themselves to the extent of moving food from a plate to their mouths without help might have conditions (such as severe cognitive impairment, disruptive behaviors, or vision problems) that prevented them from drinking or handling hot liquids in a safe manner.[14] Indeed, the MDS for each of the residents directly at issue

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[12] Crawford accurately described the final cited document, a February 15, 2014 nursing note. RR at 3, citing P. Ex. 6, at 12.

[13] The only care plan in this exhibit is one with dates in April 2014. *See* P. Ex. 6, at 39-49.

[14] Crawford's argument seems to assume that the ability to manipulate food for purposes of eating independently is the same as the ability to manipulate a cup filled with hot liquids for purposes of drinking without assistance or supervision, but the record contains no evidence to that effect.

here indicated other medical issues (*e.g.* cognitive impairment for both residents and "highly impaired" vision for Resident 14) that reasonably viewed would pose a foreseeable danger when drinking hot liquids. The facility itself recognized on the Hot Liquid Safety Evaluation forms completed for Residents 3 and 14 after their respective hot coffee spills, CMS Ex. 18, at 39; CMS Ex. 17, at 35, that other medical or psychological issues could affect a resident's ability to drink hot liquids safely.[15] Even if the risk of harm from a hot liquid spill was not foreseeable before Resident 14's first spill, as Crawford suggests, that risk was clearly foreseeable and, indeed, recognized by Crawford after that spill.

In light of the foreseeable (and recognized) risk of harm, section 483.25(h) required Crawford to examine its practices regarding the service of hot liquids; assess the danger posed by those practices to individual residents; identify and implement reasonable precautions to minimize any identified risk; and monitor the effectiveness of its safety measures. P. Ex. 15, at 2 (Surveyor Guidance); *Woodstock Care Center v. Thompson*, 363 F.3d 583, 590 (6th Cir. 2003) (a SNF must take "all reasonable precautions against residents' accidents"). The undisputed evidence shows that Crawford had not met (or not fully met) those obligations as of March 20, 2014, the starting date of the noncompliance period identified by CMS.

At the March 10, 2014 in-service meeting, the Director of Nursing instructed staff to make coffee lids "available" for use by any resident whose "needs required it." P. Ex. 1, ¶ 5. Crawford proffered no evidence that this precaution was fully implemented during March 2014. It also does not claim that Resident 14 was drinking from a cup with a spill-proof lid when her second accident occurred, and the Incident and Accident Report for that accident did not mention that she was using a spill-proof lid.

Crawford asserts, and the record shows, that some residents, including Resident 14, disliked and removed lids. *See* RR at 3; P. Ex. 7, at 8; CMS Ex. 36, ¶ 3(b). But that means that Crawford needed to devise and implement other, more effective measures to ensure residents' safety. Crawford proffered no evidence that it promptly implemented safety measures for at-risk residents who disliked or removed lids. And Crawford's Executive Director admitted that it was not until "late March or early April" 2014 that she and Crawford's Director of Nursing even began to *discuss* (much less implement) additional measures – such as staff training, monitoring, and reducing coffee temperature – to ensure residents' safety. P. Ex. 1, ¶ 7.

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[15] There is no evidence in the record, and Crawford does not claim, that this evaluation form was used prior to the residents' accidents. Indeed, as we discuss later, Crawford claims that it did not need a separate hot liquids evaluation form because the ability to handle hot liquids safety would be encompassed by properly performed admission and MDS assessments.

Other evidence of noncompliance is the undisputed fact that none of the three spills during March 2014 was witnessed (or documented as having been witnessed) by staff, even though both residents' MDS assessments indicated that they required some level of supervision during meals (Resident 1 required a "one person physical assist" when eating, and Resident 3 needed "supervision" in the form of "oversight, encouragement or cueing"). *See* CMS Ex. 1, at 9-10; P. Ex. 6, at 2-4, 16, 32; P. Ex. 7, at 2, 6, 22. Surveyor Rhode testified that these residents' health conditions and functional limitations (*e.g.*, dementia or Alzheimer's disease, impaired vision, use of antipsychotic and narcotic drugs, lack of coordination and muscle weakness) made them prone to accidental spills, necessitating "interventions" – such as staff supervision – to keep them safe. CMS Ex. 36, ¶¶ 8, 12. Crawford's affiants did not rebut that testimony, and Crawford did not proffer evidence that Resident 14 and Resident 3 were receiving the type or intensity of supervision called for in their MDS assessments and plans of care when the spills occurred.[16]

Crawford submits that it introduced evidence – namely, the affidavit of a nurse consultant who stated that, prior to March 2014, all residents (including Resident 14 and Resident 3) were assessed for their ability to handle hot liquids as part of their admission and Minimum Data Set (MDS) assessments. RR at 6 (citing P. Ex. 4). The nurse consultant's statements, we note, appear inconsistent with what surveyors reported they learned during the survey from Crawford staff. According to Freda Kay Rohde, R.N., a DHS surveyor who participated in the May 2014 survey, when asked about Crawford's policy or practice for assessing residents' ability to handle hot liquids, the Director of Nursing responded that the nursing staff "[did] not do hot liquid assessments on any resident unless there ha[d] been a spillage." *Id.*, ¶ 11 (internal quotation marks omitted). Surveyor Rhode stated that Crawford's Administrator and Assistant Director of Nursing made essentially the same admission in their survey interviews. *Id.*, ¶¶ 3(b), 24. (Crawford submitted declarations from the Administrator (Executive Director) and Assistant Director of Nursing; neither denied making the admission attributed to them by Surveyor Rhode. *See* P. Ex. 1; P. Ex. 3.)

Nonetheless, for purposes of summary judgment, we accept as true the nurse consultant's statements regarding the assessments but conclude that her statements do not create a genuine dispute of fact because even assuming Crawford had performed hot liquid assessments prior to March 2014, as the nurse consultant claimed, there is no

[16] In its reply brief, Crawford asserts that it "followed the MDS and plan[s] of care" for Resident 14 and Resident 3 "in all respects." Reply Br. at 4 (citing P. Ex. 7, at 14, 20). But Crawford did not proffer the plans of care that were in effect for these residents during March 2014. *See* P. Ex. 6; P. Ex. 7. Nor did it present evidence that it provided a "one-person physical assist" to Resident 14 during meals – the type of help that her MDS indicated she needed. *See* P. Ex. 7, at 14.

evidence that the assessments were used to develop residents' care plans or informed the nursing staff's practices regarding the service of hot liquids. Furthermore, as we have explained, undisputed facts show that the nursing staff did not provide Resident 14 and Resident 3 with the supervision that their assessments indicated they needed.

Crawford suggests that CMS's noncompliance determination amounts to an imposition of "strict liability" for the three spills that occurred in March 2014. RR at 4. We disagree. As our analysis demonstrates, CMS's determination is based, not on the fortuity of those accidents, but on Crawford's insufficient response to a foreseeable risk of harm. *Cf. Glenoaks Nursing Center*, DAB No. 2522, at 13 (2013) (rejecting a claim that the administrative law judge had applied a strict liability standard by noting that the judge had "correctly focused on whether the facility had taken all reasonable measures to mitigate the foreseeable risk of resident elopement").

Viewed in the light most favorable to Crawford, the record shows that its nursing staff recognized, and took some steps to address, the safety risk posed by its coffee service practices during March 2014. After Resident 14's first hot coffee spill on March 1st and Resident 3's hot coffee spill 19 days later, Crawford ordered that these residents be given protective clothing to use during meals. It also instructed staff on March 10th "that when coffee was served to residents, lids had to be available to be placed on coffee cups, if the individual resident's needs required it." P. Ex. 1, ¶ 5. Despite these instructions, however, there is no evidence that, prior to May 1, 2014, Crawford identified which residents (other than Resident 14 and, later, Resident 3 after her March 20th accident) needed lids on their coffee cups or instructed its staff about how to determine which residents needed them.

There also is no dispute that Crawford staff failed to provide the supervision while eating that its own MDS assessments identified as necessary for Resident 14 and Resident 3. Furthermore, Crawford does not dispute that staff did not provide a lid for the coffee cup Resident 14 was using at the time of his second spill, even though it had instructed staff to do this after his first spill. Nor is there any dispute that, although Crawford assessed Residents 3 and 14 specifically for the ability to drink coffee safely <u>after</u> their spills, Crawford made an error on Resident 14's assessment form; it is self-evident that the assessment's usefulness is diminished if its results are not accurately reported and understood by the nursing staff. Finally, Crawford's Executive Director admitted during this proceeding that truly "effective" measures to minimize the safety risk of hot liquid spills had not yet been implemented by late March 2014. P. Ex. 1, ¶ 7. Under all of these circumstances, we conclude that no rational trier of fact, viewing the record most favorably to Crawford, could find that Crawford was, as of March 20, 2014, in substantial compliance with its obligation to take *all reasonable measures* to reduce the risk of injury from hot coffee spills. CMS is therefore entitled to summary judgment that Crawford was not in substantial compliance with section 483.25(h) as of March 20, 2014.

2. *Crawford's noncompliance with 42 C.F.R. § 483.25(h) and other requirements continued from March 20 through June 3, 2014.*

"When a SNF is found to be noncompliant with a Medicare requirement on a particular date" – as Crawford was found to be as of March 20, 2014 – "there is a rebuttable presumption that the SNF remains in a state of noncompliance afterward until sufficient corrective action is taken[.]" *Libertywood Nursing Center*, DAB No. 2433, at 15 (2011), *aff'd, Libertywood Nursing Center v. Sebelius,* No. 12-1077, 2013 WL 729786 (4th Cir. Feb. 28, 2013). In addition, per-day CMPs imposed by CMS for the SNF's noncompliance continue to accrue until "[t]he facility has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit[.]" 42 C.F.R. § 488.454(a). "[A] facility's noncompliance is deemed to be corrected or removed only when the incidents of noncompliance have ceased and the facility has implemented appropriate measures to ensure that similar incidents will not recur." *Libertywood* at 15 (emphasis in original) (quoting *Life Care Center of Elizabethton*, DAB No. 2367, at 16 (2011)); *see also Taos Living Center*, DAB No. 2293, at 20 (2009) (discussing the "presumption of continued noncompliance").

Here, CMS validly determined (for the reasons outlined in the previous section) that Crawford was in a state of noncompliance with section 483.25(h) as of March 20, 2014. CMS found that Crawford did not abate its noncompliance with section 483.25(h) and other participation requirements until June 4, 2014. *See* CMS Ex. 3. Crawford does not allege that it achieved substantial compliance any earlier than that date. Accordingly, we hold that Crawford was not in substantial compliance with Medicare participation requirements from March 20 through June 3, 2014.

We turn next to Crawford's challenge to CMS's finding of immediate jeopardy.

3. *CMS's immediate jeopardy determination is not clearly erroneous.*

The term "immediate jeopardy" refers to "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. CMS determined that Crawford's noncompliance with section 483.25(h) was at the immediate jeopardy level as of March 20, 2014. The regulations make clear that, to overturn a CMS determination about the "level" of noncompliance, when it is subject to challenge at all (as when it affects the applicable range of CMP), a facility is required to show that "it is clearly erroneous." 42 C.F.R. § 498.60(c)(2). The facility thus bears the

"heavy burden to demonstrate clear error" in CMS's immediate jeopardy determination, which "is presumed to be correct." *Liberty Health & Rehab of Indianola, LLC*, DAB No. 2434, at 13 (2011); *see also Dumas Nursing and Rehabilitation, L.P.* at 18.[17]

None of the contentions raised about CMS's immediate jeopardy determination in Crawford's appeal briefs shows that CMS made a clear error in determining that Crawford's noncompliance with section 483.25(h) put its residents in immediate jeopardy. Crawford asserts that its nurse consultant's affidavit "calls into question whether Crawford's [resident assessment] polices were 'likely to cause' serious harm." RR at 6-7. While Crawford claims that the affidavit somehow "calls into question" the likelihood of serious harm, Crawford does not explain how any specific statements in the nurse consultant's affidavit demonstrate clear error in CMS's determination. Moreover, as we have found above, even if the admission and MDS assessments were performed correctly, it is undisputed that the resulting recommendations were not followed. Those lapses, including the failure to ensure that the two identified residents had the supervision levels called for by their assessments and used the planned-for lids, resulted in injuries to both residents. The fact that such injuries occurred at least three times in a short period as a result of the failure to implement the facility's own assessments demonstrated that serious injury was likely to occur to these or other residents if the noncompliance was not quickly and effectively remedied.

Crawford further contends that the burns suffered by Resident 3 as a result of the March 20th spill were not "serious" enough actual harm to justify an immediate jeopardy finding. RR at 5-6. To support this evaluation of the seriousness of harm, Crawford relies on guidelines which CMS provides to surveyors to assist them in determining the "severity" of a SNF's noncompliance with section 483.25(h). *See* RR at 5-6, *citing* P. Ex. 15, at 28-30. These guidelines advise surveyors to follow a step-by-step approach to "rule out" the existence of the highest levels of severity before considering the next lower level. Thus,

[17] Crawford contends the ALJ erred in applying the "clearly erroneous" standard to the immediate jeopardy issue in a case decided on summary judgment. RR at 5. Crawford cites, and we have found, no authority supporting a claim that the showing a facility must make to overturn an immediate jeopardy determination is anything other than clear error regardless of whether the issue is resolved by summary judgment or after a hearing. The single case Crawford cites, *Crestview Parke Care Center v. Thompson*, 373 F.3d 743, 754 (6th Cir. 2004) does not support it. *Crestview Parke* did not involve review of an immediate jeopardy determination. The Sixth Circuit's discussion of the summary judgment standard applied to its review of the Board's decision to uphold the findings of noncompliance. In a majority opinion, the Sixth Circuit remanded after concluding the Board had not viewed the evidence on those noncompliance findings consistent with the summary judgment standard. In the present case, we need not address the interaction between the showing of clear error required by the regulation and the summary judgment context because the facts which we have found to be undisputed and material in relation to the finding of noncompliance here suffice to show that CMS's immediate jeopardy determination was, as a matter of law, not clearly erroneous. As discussed in the text, Crawford has not identified any material dispute of fact that would alter this conclusion. Moreover, as we noted earlier, deciding a motion for summary judgment does not alter the substantive evidentiary burden. *See Anderson v. Liberty Lobby*, 477 U.S. at 255; *Wade Pediatrics*, DAB No. 2153, at 17 n.7.

the purpose of the guidelines is to advise surveyors not to rule out immediate jeopardy (or "Severity Level 4" noncompliance) if they find certain "examples of negative outcomes" that CMS considers indicative on their face of serious harm. P. Ex. 15, at 28-29. Those negative outcomes include a "3rd degree burn, or a 2nd degree burn covering a large surface area." *Id.* at 29. Absent those particular outcomes, surveyors may still find that circumstances warrant a finding of immediate jeopardy or may proceed to consider whether, instead, the negative outcomes support a finding of "actual harm that is not immediate jeopardy," and so on. Thus, Crawford is mistaken in suggesting that this guidance precludes finding immediate jeopardy where a resident has suffered a second degree burn as Resident 3 did here.

Crawford also appears to view the guidelines as rigid or prescriptive, which they are not. They expressly include "[t]hermal burns from spills/immersion of hot water/liquids" among kinds of injuries to be assessed in evaluating noncompliance with section 483.25. P. Ex. 15, at 28. Surveyors are then to consider both the degree of harm (actual and potential) and the immediacy of the correction needed to prevent serious harm in evaluating the severity of the deficiency. *Id.* In considering the degree of harm the guidelines simply provide examples that "might include" particular negative outcomes that may have "occurred or have the potential to occur." *Id.* at 29. Thus, the examples are clearly not intended to be exhaustive.

In the case of Resident 3, whether or not her initial injury is considered to have covered a large surface area, it is undisputed that the course of her treatment and recovery was extended and complicated. *See* CMS Ex. 17, at 23-24, 38-74 129-30; P. Ex. 6, at 37-38. For CMS to treat such an injury as more serious than a second degree burn that was smaller or required less treatment is not clear error. We agree with the ALJ's description of the undisputed facts in this regard:

> While there is no precise gauge as to whether Resident #3 had burns over a "large surface area," it is clear that this 91-year-old's injury was "serious," in that it required approximately 8 weeks of wound care treatment, along with debridement, antibiotics, topical management, and a complicated course that involved wound infections.

ALJ Decision at 17 (footnote omitted). Nothing in the guidance precludes CMS or its surveyors from considering the course of recovery in evaluating the seriousness of a particular injury. Elsewhere, CMS has made it clear that "distinctions between different levels of noncompliance . . . do not represent mathematical judgments for which there are

clear or objectively measured boundaries." 59 Fed. Reg. 56,116, 56,179 (Nov. 10, 1994). "This inherent imprecision is precisely why CMS's immediate jeopardy determination, a matter of professional judgment and expertise, is entitled to deference." *Daughters of Miriam Center*, DAB No. 2067, at 15 (2007).[18]

In addition, actual serious harm is not necessary to support an immediate jeopardy determination if CMS finds a likelihood that serious harm will occur from the cited conditions absent immediate correction. As discussed, we have found that Resident 3 sustained actual serious harm, and it is undisputed that Resident 14 also sustained actual harm from hot coffee, although Crawford disputes the seriousness of Resident 14's burns. The recurrence of conditions allowing for such spills to occur to residents, even those already assessed as needing protective measures, demonstrates the likelihood of imminent serious harm to other residents who are or may become in need of such protection. CMS argues that 68 additional residents were found to need such protection after performance of a facility-wide hot liquids assessment. CMS Br. at 17, citing ALJ Decision at 15. The figure of 68 vulnerable residents is based on the Statement of Deficiencies report that Crawford's Director of Nursing told the surveyors so on May 2, 2014. CMS Ex. 12, at 4. Crawford's plan of correction confirms that hot liquid assessments were completed on May 1, 2014, and that these assessments identified some number of residents who received "2 or more marks" which, according to statements on the assessment forms, indicates a need for "appropriate interventions," but does not document whether they found 68 vulnerable residents. *Id*. Crawford contends that there is "[n]o evidence in the record that there was [in March 2014] a significant risk of harm for hot liquid spills to 68 residents at Crawford, other than the unsupported statements to that effect" in the Statement of Deficiencies. Reply Br. at 4. However, Crawford did not submit a declaration from its then-Director of Nursing disputing the report in the Statement of Deficiencies. Nor did Crawford dispute that its plan of correction (which is in the record) indicated that the potential for hot liquid spills went beyond the two individuals found to have been burned by hot liquids or include the hot liquid assessments performed as part of that plan (documents presumably in Crawford's possession) in the record to show that the number was other than 68. In any case, the exact number of vulnerable residents is not essential to the conclusion that more than the two residents who suffered actual injuries were endangered by the facility's failure to carry out interventions which its own assessments established to be appropriate to protect residents from hot liquid spills.

[18] Crawford points to "other facts in the record" – including a misstatement in CMS's brief that Resident 14's burn also was a second-degree burn and inaccurate statements in surveyor worksheets that Resident 3 and another resident suffered third-degree burns – which Crawford contends should give us "pause" in reviewing CMS's immediate jeopardy finding. RR at 7; *see also* ALJ Decision at 14-15 n.6. As the ALJ pointed out, the erroneous statements about third-degree burns were not included in the Statement of Deficiencies and hence did not form part of the basis for the immediate jeopardy finding. ALJ Decision at 14. In any case, none of these statements is material to our decision, so we need not discuss them further.

Finally, Crawford alleges that, during the informal dispute resolution process, an "impartial reviewer" found that the severity designation for Crawford's noncompliance should be reduced from immediate jeopardy to actual harm that is not immediate jeopardy. *See* P. Ex 13, at 2. The record does show that a State agency reviewer made this recommendation, but also establishes that it was ultimately rejected by the State agency. P. Ex. 14. In any case, CMS, not the State agency, makes the ultimate determination as to whether noncompliance constitutes immediate jeopardy, and it is CMS's determination that is reviewable before the Board. *Britthaven of Chapel Hill,* DAB No. 2284, at 6-7 (2009). The ALJ and the Board provide independent impartial review at the federal level and are not bound by the outcome of the State's informal dispute resolution process.

For all the foregoing reasons, CMS is entitled to judgment as a matter of law concerning the validity of CMS's immediate jeopardy finding. We therefore hold that Crawford was noncompliant with section 483.25(h) at the immediate jeopardy level beginning on March 20, 2014.

4. *Crawford's noncompliance with 42 C.F.R. § 483.25(h) was at the immediate jeopardy level from March 20 through April 7, 2014.*

CMS found that the immediate jeopardy condition at Crawford lasted from March 20 through April 7, 2014. CMS Ex. 1, at 12; CMS Ex. 2, at 1. The facility also bears the burden of showing clear error in challenging the duration of immediate jeopardy. *Glenoaks Nursing Ctr.* at 18. However, Crawford alleges no error. Specifically, Crawford does not allege that its post-March 20th corrective measures sufficed to abate the immediate jeopardy sooner than April 8, 2014. Accordingly, we hold that Crawford's noncompliance with section 483.25(h) was at the level of immediate jeopardy from March 20 through April 7, 2014.

5. *The CMP amounts were reasonable.*

CMS may impose a per-day CMP for "the number of days a [SNF] is not in substantial compliance with one or more participation requirements . . . ." 42 C.F.R. § 488.430(a). When it imposes a per-day CMP for noncompliance at the immediate jeopardy level, CMS sets the daily penalty amount within the "upper range" of $3,050 to $10,000. *Id.* §§ 488.408(d)(3)(ii), 488.438(a)(1)(i). For noncompliance below the immediate jeopardy level, CMS sets the daily penalty within the "lower range" of $50 to $3,000. *Id.* §§ 488.408(d)(1)(iii), 488.438(a)(1)(ii).

Because CMS validly determined that Crawford's noncompliance was at the immediate jeopardy level from March 20 through April 7, 2014, we must sustain CMS's decision to impose a per-day CMP within the upper range for that period and may not reduce the daily penalty amount below the regulatory minimum of $3,050. *See id.* § 488.438(e);

Life Care Center of Tullahoma, DAB No. 2304, at 64 (2010), *aff'd, Life Care Center Tullahoma v. U.S. Dep't of Health & Human Servs.,* 453 F. App'x 610 (6th Cir. 2011). Likewise, because it is undisputed that Crawford remained out of substantial compliance, at a lower level of seriousness, from April 8 through June 3, 2014, we must sustain CMS's decision to impose a lower-range CMP for that period and may not reduce the daily penalty amount below $50 per day. *Tullahoma,* DAB No. 2304, at 60. Subject to those constraints, we may review the reasonableness of the daily penalty amounts selected for each noncompliance period – $6,050 per day from March 20 through April 7, 2014 (the immediate jeopardy period) and $600 per day from April 8 through June 3, 2014. *Id.*

In deciding whether the CMP amount is reasonable, we may consider only the factors specified in 42 C.F.R. § 488.438(f). *See* 42 C.F.R. § 488.438(e)(3); *Southpark Meadows* at 12. Those factors are: (1) the SNF's history of noncompliance; (2) the SNF's financial condition – that is, its ability to pay the CMP; (3) the "seriousness" of the noncompliance; and (4) the SNF's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort or safety. 42 C.F.R. §§ 488.438(f), 488.404(a)-(c). In addition, we presume that CMS considered the regulatory factors in choosing a CMP amount and that those factors support the penalty imposed. *Coquina Center*, DAB No. 1860, at 32 (2002); *Brenham Nursing & Rehab. Center*, DAB No. 2619, at 18 (2015), *aff'd, Brenham Nursing & Rehab. Center v. U.S. Dept. of Health & Human Servs*., 637 F. App'x 820, 2016 WL 454320 (5th Cir. 2016). "Accordingly, the burden is not on CMS to present evidence bearing on each regulatory factor, but on the SNF to demonstrate, through argument and the submission of evidence addressing the regulatory factors, that a reduction is necessary to make the CMP amount reasonable." *Oaks of Mid City Nursing & Rehab. Center* at 26-27; *see also Brenham Nursing & Rehab Center*, DAB No. 2619, at 18 (holding that it was the SNF's burden to introduce evidence or argument regarding the regulatory factors).

Whether a CMP amount is reasonable is a legal, not a factual, issue. *Cedar Lake Nursing Home*, DAB No. 2344, at 12 (2010). To defeat a motion for summary judgment on that issue, the SNF must proffer evidence sufficient to create a genuine dispute about facts affecting our assessment of the relevant regulatory factors. *See id.*; *Madison Health Care, Inc.* at 27 ("a factual dispute material to the factors justifying the reasonableness of the amount of a CMP may preclude summary judgment").

Here, Crawford's appeal briefs mention only one regulatory factor: culpability. Crawford submits that its "degree of culpability in this matter is slight." Reply Br. at 5. In support of that contention, Crawford points (again) to its nurse consultant's faffidavit, asserting that it is "undisputed" that its nursing staff evaluated residents' ability to handle hot liquids during their initial and MDS assessments. *Id.* However, the relevant regulation required Crawford to do more than evaluate a resident's capacity to handle hot liquids safety. It required Crawford to act on the results of the evaluation to minimize the

risk of harm to the resident. However, as discussed above, Crawford did not meet the latter responsibility, for reasons that included failing to provide Residents 3 and 14 with the level of supervision called for by their MDS assessments. We therefore do not agree that Crawford's culpability was "slight."

Crawford makes only one other statement regarding culpability: "that when Resident 14 spilled coffee on herself" on March 1, 2014, the nursing staff "responded by taking remedial measures that eliminated injury of any kind following [the] subsequent accident" on March 27th. Reply Br. at 5. This statement ignores the fact that while Crawford gave Resident 14 a clothing protector, it did not, according to the incident accident report for her second spill, implement another remedial measure that it developed for this resident, use of a spill-proof lid on her hot beverage cup. Moreover, even though the burn sustained by Resident 14 on March 27th, unlike her first burn, was not serious enough to require treatment, that fact does not significantly diminish Crawford's culpability. Crawford was responsible not only for preventing further harm to Resident 14 but for taking prompt action to safeguard other residents who were, by Crawford's own accounting, at risk of injury from hot liquid spills. Although it knew or should have known in early March 2014 that its coffee service practices posed a risk of injury to residents, it waited several days after the initial accident – and until a second resident (Resident 3) was injured – before taking concerted action to address the problem.

In short, we find insufficient cause to reduce the CMPs based on Crawford's degree of culpability. Crawford has not identified a genuine dispute of material fact relating to any of the other regulatory factors or claimed those factors justify a reduction in the daily penalty amounts.

Crawford raises two other issues regarding the CMPs, but neither warrants relief. First, Crawford asserts that the total accrued penalty ($149,150) is excessive under the circumstances. However, in reviewing a CMP's reasonableness, "we look at the per day amount, not at the total amount of the CMP." *Century Care of Crystal Coast*, DAB No. 2076, at 26 (2007), *aff'd, Century Care of the Crystal Coast v. Leavitt*, 281 F. App'x 180 (4th Cir. 2008). "Stating that the total CMP amount is 'not reasonable' does not raise a clear dispute about the reasonableness of the per-day CMP amounts." *Golden Living Center – Frankfort*, DAB No. 2296, at 22 (2009), *aff'd*, *Golden Living Center – Frankfort v. Sec. of Health & Human Servs.*, 656 F.3d 421 (6th Cir. 2011).[19]

[19] The total accrued penalty is equal to the daily penalty amount multiplied by the number of days of noncompliance. In this case, the number of days of noncompliance is a fixed factor, Crawford having alleged no error in CMS's determination about the duration of the periods of noncompliance and immediate jeopardy.

Second, Crawford compares its penalty to the one levied in *St. Joseph Villa*, DAB CR2288 (2010). That case involved a SNF sanctioned for failing to provide four residents with supervision and assistive devices to prevent injury from hot liquid spills. Crawford asserts that, like the SNF in *St. Joseph Villa*, it "took [action] to protect its residents against hot-liquid spills *before* the state survey agency began [the survey] in this matter," yet its total accrued penalty is much larger than the CMP imposed in *St. Joseph Villa*. RR at 8 (italics in original).

We reject the suggestion that the CMP amounts here should be reduced based on a comparison of a penalty amount imposed in another case which Crawford alleges involved similar circumstances. The Board has emphasized that CMS has "considerable discretion" under the regulations to determine, on a case-by-case basis, the appropriate penalty to impose based on the regulatory factors, *Alexandria Place,* DAB No. 2245, at 31 (2009), and that "allegations of disparate treatment, even if true, do not prohibit an agency of this Department from exercising its responsibility to enforce statutory requirements," *Mountain View Manor*, DAB No. 1913, at 14 (2004) (citing cases). Administrative review of a CMP's reasonableness must be based solely on the previously mentioned regulatory factors as they apply to the facts of each case. 42 C.F.R. § 488.438(e)(3). Those factors do not require CMS to compare the facts of one case to another case in determining the amount of a CMP.

In any event, "[i]t would be almost impossible to make any true comparisons of different cases since the underlying facts of noncompliance vary considerably, as do the other factors."[20] *Alexandria Place* at 31; *see also Western Care Mgmt. Corp.*, DAB No. 1921, at 94 (2004) ("[c]ase-to-case comparisons generally have little value given the unique circumstances of each case and the myriad factors that must be considered"). In addition, the element that, according to Crawford, its case and *St. Joseph Villa* share – pre-survey efforts to correct deficiencies – is not a relevant factor in assessing the reasonableness of a CMP amount. "Although a facility's prompt institution of corrective measures is certainly desirable, the Secretary of Health and Human Services has not made doing so a basis for reducing a CMP amount." *Brian Center Health & Rehab./Goldsboro*, DAB No. 2336, at 13 (2010) (citing 42 C.F.R. § 488.438(f)).

For all the reasons just stated, we decline to reduce the daily CMP amounts imposed by CMS for Crawford's noncompliance between March 20 and June 3, 2014.

[20] Crawford omits to mention that CMS imposed a different *type* of CMP in each case: a per-instance CMP in *St. Joseph Villa*; and a per-day CMP in this case. *See* DAB CR2288, at 1. "CMS's decision to impose a per day CMP, as opposed to another type of remedy, such as a per instance CMP, is a choice committed to CMS's discretion by the regulations and is not subject to review." *Alexandria Place* at 25 n.8.

Conclusion

We uphold the ALJ's determination that Crawford was not in substantial compliance with Medicare participation requirements (including 42 C.F.R. § 483.25(h)) from March 20 through June 3, 2014 and that its noncompliance was at the immediate jeopardy-level of severity from March 20 through April 7, 2014. We further uphold hold the ALJ's determination that CMS's civil money penalties for Crawford's noncompliance – $6,050 per day from March 20 through April 7, 2014, and $600 per day from April 8 through June 3, 2014 – are reasonable.

/s/
Christopher S. Randolph

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member