

Elder Justice: What “No Harm” Really Means for Residents

December 2017

Background

The Centers for Medicare & Medicaid Services (CMS) works with State Survey Agencies to inspect nursing homes. Surveyors conduct inspections annually (on a 9 to 15 month cycle) and when a complaint has been made against a nursing home. Nursing homes that participate in Medicare and/or Medicaid must always adhere to the Requirements of Participation, which specify the standards of care required by federal regulations.

When inspecting nursing homes, surveyors must determine whether nursing homes have met the standards of care. Nursing homes that have not met the required standards of care are cited for deficiencies. Deficiencies are cited based on a requirement’s corresponding F-Tag. For instance, the standards of care for pressure ulcers is cited as F-686;¹ a substandard nursing home in this requirement would be cited for an F-314 deficiency. All of a nursing home’s deficiencies are listed in the Statement of Deficiencies for that inspection, which the public can access by going to [Nursing Home Compare](#).

Substandard nursing homes are also cited based on the scope and the severity of a deficiency. The scope of a deficiency can range from isolated, pattern, or widespread. The severity of a deficiency can range from “no actual harm with potential for minimal harm” (A-C) and “no actual harm with potential for more than minimal harm” (D-F) to “actual harm that is not immediate” (G-I) and “immediate jeopardy to resident health or safety” (L-J).

CMS may impose various remedies on nursing homes based on the scope and severity of a deficiency. These remedies include plans of correction, federal fines, payment denials, and no longer being able to participate in Medicare and

Medicaid. For “no harm” deficiencies (A-F), CMS rarely imposes federal fines or payment denials.

A report by the Long Term Care Community Coalition indicates that states only identify resident harm about five percent of the time in which a health violation is identified.² Unfortunately, the lack of accountability for abuse often results in resident harm without the nursing home being cited for actual harm and without financial penalties.

CMS’s weak enforcement of the government’s own standards of care puts residents at risk of real harm, regardless of any “no harm” label. The following section, taken from Statements of Deficiencies, illustrates real stories of residents who have been harmed by nursing homes across the country. Surveyors classified all of them as “no harm.” This review includes health deficiencies from the latest, most complete survey month listed on [data.medicare.gov](#) at the time of publication.

Quick Facts (September 2017):

- Surveyors inspected 7,715 nursing homes in the first half of 2017
- Surveyors cited 6,822 deficiencies in September
- 6,527—95.6 percent—were cited as “no harm” (A-F)

Watsonstown Rehabilitation and Nursing Center, Pennsylvania

Number of deficiencies found: 4

Watsonstown Rehabilitation and Nursing Center’s survey date was September 29, 2017.³ State surveyors cited the nursing home for an F-309 deficiency (42 C.F.R. § 483.25)—“[p]rovide

necessary care and services to maintain the highest well-being of each resident.”⁴

The facility’s policy regarding pain management provided that residents receive management through an interdisciplinary team evaluation.⁵ The policy also required that a resident’s physician must be notified if the resident continues to experience pain, despite medication or non-pharmacological interventions.⁶

The resident in this case was admitted to the nursing home on April 8, 2017.⁷ On September 6th, a nurse documented that the resident had developed “softening and breakdown of skin resulting from prolonged exposure to moisture.”⁸ The resident’s left and right buttocks were the affected regions.⁹

While reviewing the resident’s records, surveyors saw that the physician had ordered, in part, that the resident get sleep and 650mg of Tylenol arthritis every 12 hours.¹⁰ The resident told surveyors that “[i]t’s like pulling teeth to get something for pain around here. My bottom hurts terribly.”¹¹ During the interview, surveyors observed the resident grimacing when repositioning herself.¹² When the surveyors interviewed the DON, it became clear to them that the facility had no evidence that it contacted the resident’s physician about her “uncontrolled” pain.¹³

The surveyors cited the nursing home for the deficiency. In fact, the surveyors noted that “the facility failed to provide the highest practicable care regarding pain . . . management”¹⁴ Despite the resident’s uncontrolled pain, surveyors cited the deficiency as “no harm” (E) instead of actual harm or immediate jeopardy.

Cedar Ridge Inn, New Mexico

Number of health deficiencies found: 13

Cedar Ridge Inn’s survey date was September 29, 2017.¹⁵ State surveyors cited the nursing home for an F-225 deficiency (42 C.F.R. § 483.12(a))—“1) Hire only people with no legal history of abusing,

neglecting or mistreating residents; or 2) report and investigate any acts or reports of abuse, neglect or mistreatment of residents.”¹⁶

Registered nurses (RNs) were called to a resident’s room when the resident began choking.¹⁷ The resident was able to pass air but was unable to cough out the obstructing object.¹⁸ One of the RNs suctioned the resident’s throat and a piece of peach came out.¹⁹ The resident then stated that she felt better and wanted to lie down.²⁰

After thirty minutes, the RNs were called to the resident’s room after she stopped responding to her daughter.²¹ The RN again suctioned the resident’s throat and more fluid was pulled out of her throat.²² The resident regained consciousness but her oxygen levels were too low; she was given oxygen.²³ One of the RNs called the medical director, who said that it was okay to send the resident to the hospital.²⁴

When state surveyors interviewed the first RN, she confirmed that the resident was placed on an all puree diet.²⁵ However, the RN stated that she saw the resident’s daughter feeding peaches to the resident.²⁶ The RN told surveyors that she did not try to stop the resident’s daughter from feeding the resident because it was the daughter’s choice and she was not the primary nurse.²⁷ The RN further stated that she did not report the incident to the administrator or director of nursing (DON).²⁸ Upon an inspection of the RN’s employee records, surveyors found six disciplinary write-ups.²⁹

During the surveyors’ interview of the DON and the administrator, the DON stated that the first RN should have intervened when she saw the daughter feeding the resident and should have taken away the item.³⁰ The DON provided that the RN should have educated the daughter on the resident’s care.³¹ The administrator stated that, based on her reading of the regulations, she did not notify the State Survey

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Agency because she thought the incident was an accident and not a case of resident neglect.³²

The surveyors cited the facility for the deficiency. The surveyors even emphasized that “if a facility does not report and investigate allegations/incidents [of abuse or neglect], they are likely unable to protect residents from further harm.”³³ Nevertheless, the surveyors cited the deficiency as “no harm” (E).

Timberview Care Center, Oregon

Number of deficiencies found: 2

Timberview Care Center’s complaint inspection date was September 18, 2017.³⁴ State surveyors cited the nursing home for an F-327 deficiency (42 C.F.R. §483.25(g)(2))—“[g]ive each resident enough fluids to keep them healthy and prevent dehydration.”³⁵

The resident was admitted to the nursing home in May 2017.³⁶ On May 29, an assessment showed that the resident needed 2,400 milliliters (81 ounces) of fluids per day.³⁷ The resident’s record indicated that, between June 1st and June 15th, the resident had been taking in an average of 253 milliliters (8 ounces) of fluids per day.³⁸

The surveyors found no evidence of the nursing home assessing the resident’s risk of dehydration or intervening when the resident did not meet his or her hydration needs.³⁹ However, one progress note stated that the resident “did not drink much for several days.”⁴⁰ Another progress note added that the resident “refused liquids, was lethargic, and was becoming more incontinent.”⁴¹

Surveyors found additional records which showed that the resident was taken to the hospital because, in part, the resident’s lab results revealed worsened kidney function.⁴² The hospital report identified blood work indicating dehydration and that the resident’s face and mouth were “cracked which was consistent with a pretty severe dehydration.”⁴³ When

interviewed, the licensed practical nurse (LPN) told surveyors that he tried to get the resident to drink and go to the hospital.⁴⁴ Nonetheless, the LPN’s intervention and the resident’s refusal were not recorded.⁴⁵

The surveyors cited the nursing home for the deficiency. They documented that the nursing home’s failure to assess the resident, intervene, or timely identify the signs of dehydration put the resident “at risk for unaddressed hydration needs.”⁴⁶ Surveyors still categorized the deficiency as “no harm” (D).

Harmony River Living Center, Minnesota

Number of deficiencies found: 6

Harmony River Living Center’s survey date was September 14, 2017.⁴⁷ State surveyors cited the nursing home for an F-411 deficiency (42 C.F.R. § 483.55(a))—“[p]rovide routine and 24-hour emergency dental care for each resident.”⁴⁸

During the inspection, one resident told surveyors that he was suffering from dental problems that were not being adequately addressed by the staff.⁴⁹ The resident then showed the surveyors a missing tooth and pointed to a tooth that bothered his tongue.⁵⁰ The resident noted that no one from the nursing home came to him about his concerns.⁵¹

In reviewing the resident’s records, the surveyors found the resident’s prior oral examination, which indicated “[m]outh or facial pain, [and] discomfort or difficulty chewing”⁵² The nursing home staff noted that the tooth the resident complained about was sharp as result of a filling having fallen out of place.⁵³ The staff further stated that the resident’s family would be notified the next morning to make a dental appointment.⁵⁴

When surveyors spoke with the resident’s family member, the family member stated that she was not

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aware of the resident’s dental problems and that the staff had not reported it to her; she added that the resident could see a dentist.⁵⁵ During a subsequent interview with an RN, the RN stated that she wrote directions to call the resident’s family and that the medication cart nurse or the clinical care coordinator should have contacted the family.⁵⁶ A second RN added that “dental concerns should be addressed timely because they can follow into larger and greater health concerns including compromise and infections.”⁵⁷

The surveyors cited the nursing home for the deficiency. The surveyors noted that the nursing home “failed to ensure dental concerns were addressed”⁵⁸ The surveyors determined that there was “no harm” (D).

Casa De Modesto, California

Number of deficiencies found: 7

Casa De Modesto’s survey date was September 14, 2017.⁵⁹ State surveyors cited the nursing home for an F-248 deficiency (42 C.F.R. § 483.24(c)(1))— “[p]rovide activities to meet the interest and needs of each resident.”⁶⁰

During the inspection, surveyors observed a resident sitting in bed and staring at a wall; surveyors highlighted that the room did not have a television, radio, or reading materials.⁶¹ The resident told surveyors that he could not leave his room because he was placed on isolation.⁶² Additionally, the resident stated that “no one visits me except when they feed me.”⁶³

When the surveyors interviewed the social service assistant (SSA), she explained that the resident was placed on isolation as a preventive measure related to infection control.⁶⁴ However, the SSA did acknowledge that activities should have been provided to the resident.⁶⁵ Surveyors also interviewed the registered nurse supervisor (RNS), who

confirmed that the resident would benefit from activities in his room.⁶⁶

Unfortunately, when surveyors observed the resident again later that day, the resident was without activities.⁶⁷ The resident explained that no one had visited him but that he would like to have someone read the news to him or have a television.⁶⁸ A review of the resident’s record showed that “current events/news, family/friend visits, reading, walk/wheelchair outdoors . . . music, religious activity, social/parties, animal visits, [and] exercises were important to him.”⁶⁹ The Director of Activities (DA) told surveyors that, after he was placed on isolation, the resident’s “nursing care plan and activities recommendations were not followed.”⁷⁰

The surveyors cited the nursing home for the deficiency. Specifically, the surveyors highlighted that the failure had the potential to impact the resident’s mental well-being.⁷¹ Despite the isolation, surveyors still cited the deficiency as “no harm” (D).

Conclusion

Emboldened by the Trump Administration, the nursing home industry is undertaking a deregulation campaign both nationally and at the state level. Most recently, CMS announced that eight standards of care will not be fully enforced for the next 18 months in order to “educate” deficient nursing homes across the country; this was the direct result of the nursing home industry’s push against the revised Requirements of Participation.⁷² CMS’s decision will put residents at an even greater risk of harm, given that deficiencies for these eight requirements will only be remedied by directed plans of correction or in-service training.⁷³ As this newsletter emphasizes, these remedies, which are most often used for “no harm” deficiencies, rarely result in real improvements to resident care.

At the state level, the nursing home industry is campaigning against increased enforcement against

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deficient nursing homes across the country. One state about which we have seen alarming developments recently is Kansas. Reports indicate that, based on citation rates this year, one in three residents of a Kansas nursing home is at risk of harm or immediate jeopardy.⁷⁴ The nursing home industry is arguing that the Kansas Department for Aging and Disability Services (KDADS) is overzealously enforcing the Requirements.⁷⁵ According to one industry group, the number of immediate jeopardy citations rose from nine in 2012 to 134 in 2016, and there has been a 9,000 percent increase in federal fines.⁷⁶

Nevertheless, reports over the last decade have shown that State Survey Agencies are under-citing deficient nursing homes. In fact, a 2008 report by the Government Accountability Office (GAO) illustrates this problem:

GAO reports since 1998 have demonstrated that state surveyors, who evaluate the quality of nursing home care on behalf of CMS, sometimes understate the extent of serious care problems in homes because they miss deficiencies . . . A substantial proportion of federal comparative surveys identify missed deficiencies at the potential for more than minimal harm level or above.⁷⁷

More recently, a September 2017 report by the HHS Office of the Inspector General (OIG) clarified that,

¹ A new survey process was implemented on November 28, 2017. This resulted in a completely new F-tag scheme. All F-tags in the resident stories section of this newsletter refer to the previous system because the surveys were completed prior to the November 28th implementation date. A crosswalk that links the old F-tags to new the F-tags is available at, http://theconsumervoice.org/uploads/files/issues/SC17-36.02.LTC_FTtags_Phase_2_Crosswalk.pdf.

² Richard J. Mollot & Rediet Demissie, *The Identification of Resident Harm in Nursing Home Deficiencies: Observations & Insights*, NursingHome411.Org,

in 2014, KDADS “did not conduct required standard surveys within 15 months of the previous standard surveys for 35 of 79 nursing homes in [calendar year] 2014.”⁷⁸ The report also found that KDADS “could not provide sufficient evidence that corrective actions had been taken by nursing homes for 13 percent of the deficiencies identified during surveys. . . .”⁷⁹

As these reports indicate, the increase in enforcement against deficient nursing homes in Kansas is not overzealous enforcement; it is a more accurate representation of what enforcement should look like when CMS and States hold nursing homes accountable for resident harm. Unfortunately, CMS recently issued new guidance to KDADS that may lead to fewer citations.⁸⁰ Mitzi McFatrach, the Executive Director of [Kansas Advocates for Better Care](#), explained that industry pushback in Kansas has become “a full-frontal attack on the health and safety of frail elderly that are in nursing facilities.”⁸¹

<http://nursinghome411.org/identification-of-resident-harm-in-nursing-home-citations/>.

³ Statement of Deficiencies for Watsontown Rehabilitation and Nursing Center, CMS (Sept. 29, 2017), <https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=395825&SURVEYDATE=09/29/2017&INSPTYPE=STD&profTab=1&state=PA&lat=0&lng=0&name=WATSONTOWN%2520REHABILITATION%2520AND%2520NURSING%2520CENTER&Distn=0.0>.

⁴ *Id.*

⁵ *Id.*

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⁶ *Id.*
⁷ *Id.*
⁸ *Id.*
⁹ *Id.*
¹⁰ *Id.*
¹¹ *Id.*
¹² *Id.*
¹³ *Id.*
¹⁴ *Id.*
¹⁵ Statement of Deficiencies for Cedar Ridge Inn, CMS (Sept. 29, 2017), <https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=325113&SURVEYDATE=09/29/2017&INSPTYPE=STD&profTab=1&state=NM&lat=0&lng=0&name=CEDAR%2520RIDGE%2520INN&Distn=0.0>.
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³¹ *Id.*
³² *Id.*
³³ *Id.*
³⁴ Statement of Deficiencies for Timberview Care Center, CMS (Sept. 14, 2017), <https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=385107&SURVEYDATE=09/18/2017&INSPTYPE=CMPL&profTab=1&state=OR&lat=0&lng=0&name=TIMBERVIEW%2520CARE%2520CENTER&Distn=0.0>.
³⁵ *Id.*
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⁴² *Id.*
⁴³ *Id.*
⁴⁴ *Id.*
⁴⁵ *Id.*

⁴⁶ *Id.*
⁴⁷ Statement of Deficiencies for Harmony River Living Center, CMS (Sept. 14, 2017), <https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=245114&SURVEYDATE=09/14/2017&INSPTYPE=STD&profTab=1&state=MN&lat=0&lng=0&name=HARMONY%2520RIVER%2520LIVING%2520CENTER&Distn=0.0>
⁴⁸ *Id.*
⁴⁹ *Id.*
⁵⁰ *Id.*
⁵¹ *Id.*
⁵² *Id.*
⁵³ *Id.*
⁵⁴ *Id.*
⁵⁵ *Id.*
⁵⁶ *Id.*
⁵⁷ *Id.*
⁵⁸ Statement of Deficiencies for Casa De Modesto, CMS (Sept. 14, 2017), <https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=555898&SURVEYDATE=09/14/2017&INSPTYPE=STD&profTab=1&state=CA&lat=0&lng=0&name=CASA%2520DE%2520MODESTO&Distn=0.0>.
⁵⁹ *Id.*
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⁶¹ *Id.*
⁶² *Id.*
⁶³ *Id.*
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⁶⁶ *Id.*
⁶⁷ *Id.*
⁶⁸ *Id.*
⁶⁹ *Id.*
⁷⁰ *Id.*
⁷¹ *Id.*
⁷² *See Temporary Enforcement Delays for Certain Phase 2 F-Tags and Changes to Nursing Home Compare* (S&C:18-04-NH), CMS (Nov. 24, 2017), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-04.pdf> (outlining the delay); *see also* Jennifer Hilliard, *LeadingAge Calls for Delay, Revision of Nursing Home Requirements of Participation*, *LeadingAge* (Aug. 28, 2017), <https://www.leadingage.org/regulation/leadingage-calls-delay-revision-nursing-home-requirements-participation> (“The final rule on nursing home requirements of participation was issued in haste toward the end of the Obama Administration. It would

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be most productive to delay the effective dates of Phases II and III until a determination can be made on achieving the goals of the regulatory overhaul in a less burdensome and more cost-effective manner.”).

⁷³ *Temporary Enforcement Delays for Certain Phase 2 F-Tags and Changes to Nursing Home Compare* (S&C:18-04-NH), CMS (Nov. 24, 2017), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-04.pdf>.

⁷⁴ Jonathan Shorman, *Fines against Kansas nursing homes up nearly 9,000 percent since 2012*, The Wichita Eagle, <http://www.kansas.com/news/politics-government/article187115848.html>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses*, GAO (May 2008), <https://www.gao.gov/assets/280/275154.pdf>.

⁷⁸ *Kansas Did Not Always Verify Correction of Deficiencies Identified During Surveys of Nursing Homes Participating in Medicare and Medicaid*, HHS OIG (Sept. 2017), <https://oig.hhs.gov/oas/reports/region7/71703218.pdf>.

⁷⁹ *Id.*

⁸⁰ Jonathan Shorman, *Fines against Kansas nursing homes up nearly 9,000 percent since 2012*, The Wichita Eagle, <http://www.kansas.com/news/politics-government/article187115848.html>.

⁸¹ *Id.*

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