

## Preauthorization: Items Added To CMS Medicare List.

The US Centers for Medicare & Medicaid Services (CMS) has added two types of power wheelchairs to the list of durable medical equipment for which prior authorization is required for payment under Medicare.

CMS's announcement in the Federal Register for December 21, 2016 is on our website at <http://www.nursinglaw.com/CMS122116.pdf>

This short but complicated document indicates that preauthorization for the two new items will be phased in in different time frames in different areas of the US.

The existing list published December 15, 2015 of items for which preauthorization is required is available from our website at <http://www.nursinglaw.com/CMSMasterList.pdf>

Items are selected by CMS for the preauthorization list because they cost more than \$1,000 for outright purchase or cost more than \$100 per month for rental, and are considered at risk for unnecessary utilization.

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## Preauthorization: Grounds For Lawsuit.

The lawsuit claimed the physician at a rural health clinic promised the father and pregnant mother that she, the physician, would contact their insurance for preauthorization for a medical-evacuation flight from Alaska to Seattle (\$69,000) and hospitalization in Seattle (\$23,000) for anticipated obstetric complications the rural clinic was not able to handle. The physician never followed through on her promise.

The Supreme Court of Alaska ruled the physician had no contractual obligation or fiduciary duty as a healthcare provider to solve her patient's insurance issues.

Nevertheless the Court was concerned that the physician's promise to the mother and father might have stopped them from pursuing insurance preauthorization on their own, right before the trip to Seattle and admission to a hospital there or within seventy-two hours as required by their insurance plan.

Thus, in the Court's judgment, the physician's promise to seek preauthorization, with no follow-through, could be grounds for a lawsuit. **Thomas v. Archer**, \_\_ P.3d \_\_, 2016 WL 7030289 (Alaska, December 2, 2016).

## Fall Prevention: Court Sees Distinction Between Assistive Devices And Restraints.

The nursing facility was sued by the family after an elderly resident fell forward on her own out of her wheelchair and sustained a closed head injury from which she died.

The fall happened as a caregiver turned away for a moment to pick up the resident's shoe that had come off.

The Court of Appeals of Texas approved a \$200,000 verdict.

The family's expert witnesses were the medical director of a hospice and a certified gerontological nurse.

The nursing facility did not bring in an expert. Its only legal defense was a failed attempt to get the Texas Department of Aging and Disability Services investigative report into evidence, which was overruled because it is hearsay and because the facility could not substantiate its factual foundation.

***Use of restraints is not favored for fall prevention.***

***Many believe use of restraints actually increases fall risk.***

***Restraints include bars, belts and methods of tying a resident to a wheelchair.***

***Assistive devices, on the other hand, can be used to reduce fall risk.***

***Assistive devices include pommel cushions, foam wedges, reclining wheelchairs and geri chairs.***

COURT OF APPEALS OF TEXAS  
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The family's experts testified that restraints were inappropriate for this patient. They testified further that the items that should have been used as fall risk interventions were not restraints.

Specifically, a pommel cushion, foam wedge, reclining wheelchair or geri chair is an assistive device, not a restraint.

The facility argued that those devices still cannot be used without a physician's order. The family's experts disputed whether an order was required.

Either way, the Court said that nursing and rehabilitative professionals at a nursing facility must proactively communicate their recommendations and obtain orders from residents' physicians for assistive devices needed for fall-risk mitigation. **Azle v. Patterson**, \_\_ S.W. 3d \_\_, 2016 WL 7405794 (Tex. App., December 22, 2016).