

# Resident Elopements, Assaults: Court Finds Noncompliance With Medicare/Medicaid Regulations, Allows Civil Penalty To Stand.

The US Circuit Court of Appeals for the Sixth Circuit, in an opinion that will not be officially published in the Federal Reporter, agreed with US Department of Health and Human Services inspectors and with inspectors from the State of Ohio, that a state of immediate jeopardy to residents existed at a skilled nursing facility and approved imposition of a daily penalty of \$3,050 for an eleven-day period.

## State of Immediate Jeopardy

State of immediate jeopardy is the term used for the most serious level of deficiency that can be found at a Medicare/Medicaid-participating facility.

A daily civil monetary penalty of \$3,050 – \$10,000 can be imposed on a facility for the time during which inspectors determine a state of immediate jeopardy exists or existed.

## Resident Elopements / Assaults

The skilled nursing facility housed forty-three persons, two-thirds of whom displayed behavioral signs of dementia. More than half were diagnosed with Alzheimer's, advanced Parkinson's, organic brain syndrome, alcohol dependency, schizophrenia, mood disorders, etc.

Acting on a complaint from an employee, state and Federal inspectors visited the facility over a two-week period while resident elopements and assaults occurred.

The inspectors faulted the facility in many respects.

An Alzheimer's patient with an alarm bracelet got out of the building several times. A surveillance camera was installed and pointed at the fence he would climb as he fled, but still he got off the premises and wandered in the cold without a coat or shoes. Apparently the staff were not trained to know how the alarm and surveillance equipment worked.

Another resident with organic brain disorder and a history of assaults assaulted his roommate. They tried to alter his medication, but he received no psychological attention, was put back in with the same resident and assaulted him again.

**Federal regulations for skilled nursing facilities state that each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychological well-being in accordance with the comprehensive assessment and plan of care.**

**Each resident must receive adequate supervision and assistance devices to prevent accidents.**

**Resident elopement and resident assaults upon other residents are considered accidents for purposes of the Federal regulations for skilled nursing facilities.**

**A deficiency exists, for which civil monetary penalties can be imposed, when such accidents are permitted to occur.**

**It is not appropriate to split hairs whether an intentional act by a resident can be considered an accident, or whether what would be intentional for one person would not be intentional for a cognitively impaired dementia patient.**

UNITED STATES COURT OF APPEALS  
SIXTH CIRCUIT  
November 17, 2003

An individual, now an Alzheimer's patient at the facility, had previously often visited her husband there. Another visitor, who recognized her as a visitor, courteously opened the front door for her and she walked away as no staff were looking.

Two other residents, one with Alzheimer's and one with advanced Parkinson's and schizophrenia, did not receive adequate monitoring of their medication levels. Each became agitated and combative. One broke a window and eloped. The other went on a rampage attacking other residents, then tried to hang himself in his room and had to be discharged to the VA psych ward.

## Deficiencies Found to Exist

By law a deficiency exists when a facility provides care that is substandard, that is, care that falls beneath the Medicare/Medicaid participation requirements.

In this case the court agreed that the facility was required to provide security precautions such as closer supervision of residents that were known to be at risk for flight or violence and more effective electronic and premises perimeter security measures.

The residents were entitled to better physical and chemical restraints for their own safety, including better psychological and psychiatric evaluation and treatment and closer monitoring of the effectiveness of their medication regimens.

Nursing homes are often able successfully to defend common-law negligence lawsuits when residents are injured eloping and then sue or have family members sue on their behalf. However, the court pointed out the administrative standards for Medicare/Medicaid compliance are much stricter than the common-law negligence standard. The case precedents from the common law are not applicable. **Woodstock Care Center v. Thompson, 2003 WL 22718244 (6th Cir., November 17, 2003).**

## STANDARDS AND CERTIFICATION REQUIREMENTS FOR LONG TERM CARE FACILITIES (TITLE 42 CODE OF FEDERAL REGULATIONS, CHAPTER IV, SUBCHAPTER G, PART 483 – CURRENT 11/21/03) (No copyright as to US Govt. works.)

### 42 C.F.R. § 483.25 Quality of care.

Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

(a) Activities of daily living. Based on the comprehensive assessment of a resident, the facility must ensure that--

(1) A resident's abilities in activities of daily living do not diminish unless circumstances of the individual's clinical condition demonstrate that diminution was unavoidable. This includes the resident's ability to--

- (i) Bathe, dress, and groom;
- (ii) Transfer and ambulate;
- (iii) Toilet;
- (iv) Eat; and

(v) Use speech, language, or other functional communication systems.

(2) A resident is given the appropriate treatment and services to maintain or improve his or her abilities specified in paragraph (a)(1) of this section; and

(3) A resident who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, grooming, and personal and oral hygiene.

(b) Vision and hearing. To ensure that residents receive proper treatment and assistive devices to maintain vision and hearing abilities, the facility must, if necessary, assist the resident --

(1) In making appointments, and

(2) By arranging for transportation to and from the office of a practitioner specializing in the treatment of vision or hearing impairment or the office of a professional specializing in the provision of vision or hearing assistive devices.

(c) Pressure sores. Based on the comprehensive assessment of a resident, the facility must ensure that--

(1) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and

(2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

(d) Urinary Incontinence. Based on the resident's comprehensive assessment, the facility must ensure that--

(1) A resident who enters the facility without an indwelling catheter is not catheterized unless the resident's clinical condition demonstrates that catheterization was necessary and

(2) A resident who is incontinent of bladder receives appropriate treatment and services to prevent urinary tract infections and to restore as much normal bladder function as possible.

(e) Range of motion. Based on the comprehensive assessment of a resident, the facility must ensure that--

(1) A resident who enters the facility without a limited range of motion does not experience reduction in range of motion unless the resident's clinical condition demonstrates that a reduction in range of motion is unavoidable; and

(2) A resident with a limited range of motion receives appropriate treatment and services to increase range of motion and/or to prevent further decrease in range of motion.

(f) Mental and Psychosocial functioning. Based on the comprehensive assessment of a resident, the facility must ensure that--

(1) A resident who displays mental or psychosocial adjustment difficulty, receives appropriate treatment and services to correct the assessed problem, and

(2) A resident whose assessment did not reveal a mental or psychosocial adjustment difficulty does not display a pattern of decreased social interaction and/or increased withdrawn, angry, or depressive behaviors, unless the resident's clinical condition demonstrates that such a pattern was unavoidable.

(g) Naso-gastric tubes. Based on the comprehensive assessment of a resident, the facility must ensure that--

(1) A resident who has been able to eat enough alone or with assistance is not fed by naso-gastric tube unless the resident's clinical condition demonstrates that use of a naso-gastric tube was unavoidable; and

(2) A resident who is fed by a naso-gastric or gastrostomy tube receives the appropriate treatment and services to prevent aspiration pneumonia, diarrhea, vomiting, dehydration, metabolic abnormalities, and nasal-pharyngeal ulcers and to restore, if possible, normal eating skills.

(h) Accidents. The facility must ensure that--

(1) The resident environment remains as free of accident hazards as is possible; and

(2) Each resident receives adequate supervision and assistance devices to prevent accidents.

(i) Nutrition. Based on a resident's comprehensive assessment, the facility must ensure that a resident--

(1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and

(2) Receives a therapeutic diet when there is a nutritional problem.

(j) Hydration. The facility must provide each resident with sufficient fluid intake to maintain proper hydration and health.

(k) Special needs. The facility must ensure that residents receive proper treatment and care for the following special services:

- (1) Injections;
- (2) Parenteral and enteral fluids;
- (3) Colostomy, ureterostomy, or ileostomy care;
- (4) Tracheostomy care;
- (5) Tracheal suctioning;
- (6) Respiratory care;
- (7) Foot care; and
- (8) Prostheses.

(l) Unnecessary drugs--

(1) General. Each resident's drug regimen must be free from unnecessary drugs. An unnecessary drug is any drug when used:

- (i) In excessive dose (including duplicate drug therapy); or
- (ii) For excessive duration; or
- (iii) Without adequate monitoring; or
- (iv) Without adequate indications for its use;

or

(v) In the presence of adverse consequences which indicate the dose should be reduced or discontinued; or

(vi) Any combinations of the reasons above.

(2) Antipsychotic Drugs. Based on a comprehensive assessment of a resident, the facility must ensure that--

(i) Residents who have not used antipsychotic drugs are not given these drugs unless antipsychotic drug therapy is necessary to treat a specific condition as diagnosed and documented in the clinical record; and

(ii) Residents who use antipsychotic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue these drugs.

(m) Medication Errors--The facility must ensure that--

(1) It is free of medication error rates of five percent or greater; and

(2) Residents are free of any significant medication errors.