

Skilled Nursing: Court Finds Immediate Jeopardy Existed To Health And Safety Of Ventilator-Dependent Residents, Upholds Substantial Civil Penalty Imposed By CMS.

A respirator patient died in a skilled nursing facility after an episode of respiratory distress. Two respiratory therapists responded to the incident. One of them turned off the ventilator because the alarm was sounding. Then they directly oxygenated the patient. When they left the room, however, they neglected to turn the ventilator back on.

Two months after the incident the facility wrote up a new policy for nursing assessment of ventilator patients after they are stabilized following an episode of respiratory distress.

The policy stated the patient's nurse will check the patient and chart q 15 minutes x 4 for a total of one hour, encompassing the following: vital signs, respiratory status, oxygen saturation, lung sounds, ventilator settings, level of consciousness, odor, color and consistency of secretions and comfort level.

During the first six weeks the new policy was in effect five respiratory-distress episodes occurred. One more resident died shortly after the first episode and another died three weeks after the second.

The state department of public health surveyed the facility nine weeks after the new policy went into effect. The survey concluded that a state of immediate jeopardy to the health and safety of residents had existed for a period of 105 days. A civil monetary penalty of \$3050 per day was imposed for that period. A state of less serious jeopardy existed from the time of the survey until the department was satisfied that compliance had been achieved. A penalty of \$50 per day was imposed for that period.

The total civil monetary penalty was in excess of \$320,000. The US Court of Appeals for the Seventh Circuit upheld the penalty as appropriate under the circumstances.

Skilled nursing facilities can be assessed civil monetary penalties for violations of Medicare regulations.

A penalty of \$3050 to \$10,000 per day can be imposed for deficiencies that constitute immediate jeopardy to a resident or for repeated deficiencies.

A penalty of \$50 to \$3000 per day can be imposed for deficiencies that do not constitute immediate jeopardy but either caused actual harm or have the potential for causing more than minimal harm.

Section 483.25(k) says in general that residents with special needs must receive proper treatment and care for certain special services such as tracheostomy care, tracheal suctioning and respiratory care.

The state surveyors were correct to require a policy be implemented for comprehensive follow-up nursing assessment of ventilator patients after episodes of respiratory distress.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT
August 15, 2002

Centers for Medicare & Medicaid Services (formerly Healthcare Financing Administration) regulations at 42 CFR Section 483.25 contain general statements about the quality of care in long-term care facilities. Sub-section 483.25(k) pertains to residents with special needs.

Policy For Nursing Assessment After Respiratory Distress

The court ruled the Illinois Department of Public Health was correct to interpret the regulations to require a skilled nursing facility to have a policy mandating close, comprehensive nursing assessment of ventilator patients following episodes of respiratory distress.

The facility was deficient for not having such a policy before the first resident's death, and for not following the policy after it was written, leading to two more deaths and three more close calls before the state survey team intervened.

The court also found fault with the facility for not seeing to physician follow-up for signs of respiratory or systemic infection and for failure to require sterile technique when a trachea is cleaned or replaced by skilled nursing staff following an episode of distress.

Potential versus Actual Harm

Although the last three episodes did not involve actual harm to the residents, the court nevertheless sided with the state surveyors' judgment call that these incidents were evidence of an overall state of actual, immediate jeopardy to the health and safety of the facility's residents, and upheld the imposition of the higher-level penalty for the whole time from the first death to the state survey. **Fairfax Nursing Home, Inc. v. US Dept. of Health & Human Services**, __ F. 3d __, 2002 WL 1869592 (7th Cir., August 15, 2002).