

Patient Safety: SNF Did Not Enforce Its Own Smoking Rules, Civil Monetary Penalty Imposed.

The US Court of Appeals for the Fourth Circuit recently upheld a civil monetary penalty against a skilled nursing facility in North Carolina of \$3050 per day for 52 days the facility was not in compliance with Federal patient-safety regulations.

Staff regularly and flagrantly violated the facility's own safety policy for resident smoking. The policy, on its face fully compliant with CMS standards, was that patients were not to have cigarettes or lighters on their persons or in their rooms and could only smoke outside on the fenced patio with stand-by staff supervision.

Resident #1

One resident, a chronic heavy smoker, had some mild dementia along with COPD. His dementia tended to get worse and he got confused when he went without his O₂ which he usually took off to smoke. He was caught smoking in his room twice but still was allowed to keep his cigarettes and his lighter. He lit a cigarette in his room at 2:00 a.m. with his O₂ on, was badly burned and had to be rushed to the E.R.

Resident #2

Another heavy smoker typically did follow the rules by smoking only on the outdoor fenced-in patio that was designated as the smoking area. However, since he smoked so often during the day he usually went outside with no staff supervision. One day the gate was unlocked and the alarm was turned off. He wandered away and was found smoking at a picnic table that was the staff smoking area behind a nearby medical office complex.

Systemic Problem

Most Severe Penalty Imposed by CMS

State survey inspectors, called in after the first resident burned himself, found a pattern of staff informally designating certain residents as "safe" smokers and letting them keep their cigarettes and lighters and smoke by themselves when and where they wanted, a clear violation of the facility's own policy and, as such, a violation of Federal regulations. **Century Care v. Leavitt**, 2008 WL 2385505 (4th Cir., June 11, 2008).

CMS regulations found at 42 CFR § 482.25 <http://www.nursinglaw.com/qualityofcare.pdf> require skilled nursing facilities to take reasonable steps to prevent accidents and to maintain residents' physical, mental and psychosocial well-being.

Violations are classified on a spectrum ranging from "no actual harm with a potential for minimal harm" all the way to "immediate jeopardy to resident health or safety."

The seriousness of the violation determines the amount of the civil monetary penalty assessed.

Residents informally designated as "safe" smokers could keep their cigarettes and lighters and smoke by themselves when and where they wanted.

One resident was burned smoking alone in his room with his O₂ going. Another resident eloped from the outdoor smoking area through an unlocked gate.

These were systemic rather than isolated or episodic deficiencies in patient safety and they have to be classified as the most serious violations possible.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT
June 11, 2008