

FORUM

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ABUSE OF NURSING FACILITY RESIDENTS

PART I: The Regulatory Requirements and Criminal Liability Issues

By: Edward G. Cherry, Esquire

This article is the first in a two-part series dealing with the issues raised by allegations of abuse of nursing home residents. In this issue of FORUM, we will discuss regulatory and reporting requirements and criminal liability issues. Part II will address civil liability and human resources issues.

Abuse of a nursing facility resident by an employee or another resident has become a pervasive issue in the long-term care industry. A facility must develop and implement guidelines for the prompt reporting and investigation of any allegations of abuse in order to comply with statutory and regulatory requirements. These guidelines must incorporate applicable provisions of the Older Adults Protective Services Act, state licensure requirements, and Medicare and Medicaid certification requirements.

At the outset, a facility must realize that the concept of abuse is broadly defined by statute. Some examples of conduct that fit within this concept are verbal abuse, physical abuse, involuntary seclusion, neglect and misappropriation of resident property. Any allegations of abuse which fit into this broad definition trigger reporting requirements.

A facility must begin by promptly reporting any allegations to the appropriate field office of the Department of Health, Division of Nursing Care Facilities. Under Pennsylvania licensing requirements, even mere allegations of abuse must be reported immediately in writing, regardless of whether the allegations have been confirmed. If the facility has formed a "reasonable suspicion" that abuse has occurred, then under the Older Adults Protective Services Act, the facility must immediately make an oral report to Protective Services. If the reasonable suspicion involves acts of sexual abuse, serious physical injury, serious bodily injury or a suspicious death, the facility must also report orally to law enforcement officials. In either instance, the facility must also file a written report within 48 hours of the oral report. If the accused person is a nurse aide, the conclusions of the facility's investigation may result in an entry of neglect or abuse in the Nurse Aide Registry against the accused nurse aide.

After complying with the applicable initial reporting requirements, the facility must perform a complete investigation of the allegations of abuse. A facility is required to have standing policies and procedures relating to investigations. At the minimum, these procedures should include witness interviews, statements, and documentation of any physical evidence. There is a trap for the unwary: under the provider bulletin relating to abuse, the facility is permitted to submit a report within five days of the completion of the *investigation*. However, federal certification regulations, which have been incorporated into the licensure regulations, actually require the facility to report results within five working days of the *incident*.

If the abuse results in a significant change in the resident's physical, mental, or psychosocial status, then the facility must consult with the resident's physician, and if known, notify the resident's legal representative or an interested family member. It may be prudent to involve an interested family member or legal representative in any case. The facility must also implement interventions to prevent further abuse while the investigation is in progress. In the case of resident-to-resident abuse, interventions may include close supervision of the accused resident.

(See **ABUSE**, p.4)

WORKERS' COMPENSATION UPDATE: AFTER-ACQUIRED PSYCHIATRIC INJURIES

By: Christine L. Sudlow, Esquire

Until recently, one of the most challenging and costly aspects of workers' compensation litigation was the after-acquired psychological injury. In a typical case, a claimant would sustain a work-related physical injury. The employer would accept liability for the injury and detail the injury in a Notice of Compensation Payable ("NCP"). At some later point, the claimant would allege an additional, after-acquired psychological injury. Under prior case law, the employer would be required to demonstrate that the claimant recovered from both the physical injury and from the psychological injury, despite the fact that the employer never accepted responsibility for the psychological injury. Sustaining the burden of proof on the psychological element was virtually impossible in many cases because the claimants were never treated for psychological conditions prior to the work accident, leaving the claimants' medical histories devoid of a baseline indicator of normality. However, in Commercial Credit Claims v. W.C.A.B. (Lancaster), the Pennsylvania Supreme Court rendered an opinion that some observers believe has leveled the field regarding after-acquired psychological injuries.

In Commercial, the claimant, John Lancaster, suffered injuries to his neck and shoulder as a result of a twenty-eight foot fall from a catwalk while performing his job as a photographer. The employer, Commercial Credit Claims, accepted liability for the injury and began paying the claimant total disability benefits. Approximately three years after the date of injury, Commercial filed a Petition to Terminate Lancaster's benefits alleging that the work-related injury had completely resolved. Commercial presented the testimony of a neurologist who concluded that Lancaster's continuing complaints of pain could not have been a result of the work-related accident, and that Lancaster's main problem was psychiatric in nature. When asked if this psychiatric problem was related to the work accident, the neurologist testified that this could not be determined be-

cause there was no psychiatric record predating the work accident. Based upon this testimony, the Workers' Compensation Judge ("WCJ") denied Commercial's Termination Petition, finding that the neurologist did not rule out the connection between Lancaster's work injury and the disabling condition.

The Pennsylvania Supreme Court came to the opposite conclusion. The Court reasoned that the Workers' Compensation Act requires an employer to promptly investigate each injury reported to the employer and to commence the payment of compensation pursuant to an NCP, which is binding unless modified or set aside. Therefore, unless the original NCP was set aside or modified to include an after-acquired injury (psychiatric or otherwise) the employer had not accepted liability for that additional injury.

In the Commercial case, Lancaster did not seek to modify or set aside the NCP. Thus, the Court held that Commercial only had to show that Lancaster's physical injuries had been resolved. In so holding, the Court stated that they would not "strain the humanitarian goals underlying the Workmen's Compensation Act by holding that employees may remain perpetually eligible for compensation merely by alleging [a] psychiatric injury at the eleventh hour and waiting to see whether the employer can adduce the requisite expert testimony to disprove a causal nexus."

While this decision from the Pennsylvania Supreme Court establishes a precedent for all lower courts and tribunals, an employer must be aware that this decision does not leave a claimant without recourse. A claimant may still file a Petition for Review seeking to amend the original NCP to include psychiatric injuries. If the claimant does pursue this alternative, the claimant must show that he or she suffered a work-related mental disability as a result of the work-related physical injury for which the employer accepted liability.



INDIVIDUALS MAY BE LIABLE UNDER PHRA

By: Glenn R. Davis, Esquire

In Santarelli v. National Book Company, Judge Minora of the Lackawanna County Court of Common Pleas ruled that individuals may be sued for discriminatory employment practices under the Pennsylvania Human Relations Act. The key to the Court's decision is based upon Section 955(e) of the Act. Under that section, an individual supervisory employee can now be held liable for his own direct acts of discrimination or for his failure to take action to prevent further discrimination. In this case of first impression, the Court stated that, "... in order to hold an individual liable, the Plaintiff's Complaint must allege that the Defendant aided, abetted, incited, compelled or coerced a discriminatory practice."

The Court recognized that previous case law has generally followed the long-established tenet that individuals cannot be responsible for violations of Title VII of the Civil Rights Act of 1964. However, the Court's interpretation is based upon the fact that the Act, although similar to Title VII, differs from its federal counterpart by providing that it is against the law for "any person, employer, employment agency or labor organization or employee to aid, abet, incite, compel, or coerce discriminatory practices."

This case places added responsibility on an employer's supervisory personnel to assure that their individual actions in the workplace comply with the company's established policies and law. Along with last summer's United States Supreme Court cases pertaining to sexual harassment, this case now requires supervisors to become active participants in all aspects of their subordinates' workplace conditions. As a result of this holding, all employers should review their policies and practices regarding sexual harassment and other discrimination.



SORTING OUT HOSPITAL AND SNF BILLING RESPONSIBILITIES

By: David C. Marshall, Esquire

One of the complications created by the implementation of the Medicare Prospective Payment System ("PPS") for skilled nursing facilities ("SNFs") relates to the division of billing responsibilities between SNFs and hospitals that arises when a SNF resident is sent to the hospital. For example, a SNF resident may be sent to the local emergency room via ambulance for treatment, receive numerous tests, supplies and procedures while there, and return via ambulance later that same day to the SNF. Which entity is responsible for billing Medicare? Similarly, which entity bears the burden for submitting claims for payment for blood transfusions, osteopathic and other services provided to SNF residents? These questions raise significant compliance and economic concerns to both SNFs and hospitals following the implementation of PPS.

Under Medicare's PPS and Consolidated Billing Regulations, SNFs are responsible for billing Medicare for services provided to SNF residents. A SNF's responsibility to bill Medicare for its residents ends only when: (1) a resident is admitted as an inpatient to a Medicare-participating hospital or a Critical Access Hospital ("CAH"), or as a resident of another SNF; (2) the resident receives services from a Medicare-participating home health agency under a plan of care; (3) the resident receives outpatient services from a Medicare-participating hospital or CAH that are not furnished pursuant to the resident's comprehensive care plan; or (4) the resident is discharged from the SNF, unless the resident is readmitted to that or another SNF within 24 hours.

While HCFA has attempted to clarify these billing obligations, SNFs have found that, in practice, many hospital billing personnel are unaware of the changes mandated by PPS. As a result, many hospitals are billing for services that are the responsibility of the SNF. This creates the potential for double-billings and other compliance violations that could be significant both to the SNF and to the hospital. In order to address and prevent the compliance risks associated with inappropriate billing, SNFs should take some or all of the following steps:

- Clarify billing responsibilities in all contracts with hospitals;
- Coordinate and develop educational sessions with the hospitals;
- Ensure physician awareness of PPS through training sessions; and
- Monitor HCFA Pronouncements.

Today, the ultimate responsibility for submitting a correct bill for a SNF resident lies with the SNF. While this list is by no means exhaustive, taking some or all of these steps will help lessen a SNF's risk of inappropriate billing and should strengthen its relationship with the local hospitals. ■

INSIDE THE FIRM



The Firm and their families enjoyed spending time together at a picnic at HersheyPark on July 24, 1999.

INDEPENDENT CONTRACTOR OR EMPLOYEE: CLARIFYING WHAT CAN BE A BLURRY LINE

By: Steven M. Montresor, Esquire

A recent trend in the employment market is the replacement of traditional employees with independent contractors. The benefits of utilizing independent contractors are substantial. However, the parties must be careful to create and carry out the employer-independent contractor relationship so that it is not construed as an employer-employee relationship. Caution needs to be in abundance since improper classification may result in significant liability for back wages and taxes.

At the outset of the relationship, employers should explicitly define the intent of the parties as well as minimize the extent to which they appear to exert both behavioral and financial control over the independent contractor. This can be initially addressed by entering into a written agreement memorializing these key issues.

The actual conduct of the parties is just as important as this written agreement. For example, IRS Form 1099 should be utilized to pay an independent contractor, rather than a W-2 Form. Independent contractors should not be included in benefits plans. Employers should not be able to terminate the relationship with the independent contractor for reasons other than the non-performance of the contract. An employer or contractor's retention of absolute discretion to terminate this relationship is evidence of an "at-will" employment.

An additional area of inquiry is the extent to which an employer exerts behavioral control over the independent contractor. Does the employer direct how specific tasks are to be performed and the order in which they are to be performed? Does the employer directly provide periodic or ongoing training or subsidize training of the independent contractor by a third party? Does the employer establish working hours and the amount of hours worked per week? If so, the relationship may be construed as an employer-employee relationship. Of course, it is necessary to direct and control the work process and product of both independent contractors and employees. However, the extent to which an employer exercises control may determine the worker's status.

Another significant area of inquiry is the degree of financial control the employer has over the independent contractor. Is the contractor able to turn a profit or suffer a loss? Do workers purchase, rent, or lease their own equipment and office space, or do workers have equipment and office space provided by the employer? Are the workers compensated at a flat rate to complete the assigned work, or are they paid hourly, daily, or weekly? Can the worker perform tasks for a number of firms at the same time? The answers to these questions may determine whether the worker will be considered an employee or an independent contractor.

In light of the foregoing, it is essential for employers to establish the nature of the relationship of the parties at the outset by written agreement. The parties should then act consistently with the terms of that agreement to maintain the existence of an independent contractor relationship. ■




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✓ **MARK YOUR CALENDARS!**

**Our Long-Term Care Compliance Compendium,
Fall 1999, will be held:**

- November 9, 1999** - Sheraton Inn Pittsburgh North, Mars
- November 11, 1999** - West Shore Country Club, Camp Hill
- November 12, 1999** - Hilton Valley Forge, King of Prussia

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|  | September 9, 1999 - Kimber Latsha and Glenn Davis, along with Jamie Campbell, the Administrator at Tremont Health & Rehab Center, will be co-presenting at PHCA's Annual Conference. The session is entitled, "Issues Raised by the Violent Nursing Facility Resident". |
| | September 26, 1999 - Kimber Latsha will be presenting at AHCA's Annual Conference. The session is entitled, "Managed Care Momentum". |
| | October 8, 1999 - Kimber Latsha will be presenting at the Kendal Corporation and Widener University's 120-hour Nursing Home Administrator course. Mr. Latsha's portion of the course is entitled, "Overview of Government Agencies Involved in Health Policy Relating to Nursing Homes". |
| | October 26, 1999 - Kimber Latsha and Douglas Yohe will be co-presenting at AAHSA's Annual Conference. The session is entitled, "Affiliations, Consolidations and Mergers: The Next Wave for Providers". |
| | October 26, 1999 - Glenn Davis will be presenting at AAHSA's Annual Conference. The session is entitled, "Recent Developments in Employment Law: Including Sexual Harrassment". |

(ABUSE, cont'd. from p.1)

Any person who abuses a resident may be found criminally liable under the Pennsylvania Crimes Code. Additionally, administrators and employees can be held criminally liable under the Neglect of Care-Dependent Persons Act. Under the Act, a nursing home administrator, owner, operator, manager or employee will be held criminally liable if he or she "[I]ntentionally or knowingly uses a physical restraint or chemical restraint or medication on a care-dependent person, or isolates a care-dependent person contrary to law or regulation, such that bodily injury results." For example, if an employee raises a resident's side rail without medical justification as required by regulation, and the resident gets caught in the side rail and consequently suffers bodily injury, then the employee arguably is criminally liable for using a physical restraint contrary to regulation.

A nursing home administrator, owner, operator, manager or employee may also be held criminally liable if he or she "intentionally, knowingly or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom [he or she] is responsible." The most significant aspect of this provision is that intent to harm the resident is not required. As such, an employee could arguably be held criminally liable if a resident develops serious and avoidable pressure sores when the employee had knowledge of the resident's risk for pressure sores.

Concerns surrounding allegations of abuse do not end with regulatory and criminal issues. Interventions to prevent abuse may raise numerous employment issues. Exposure to civil liability is one possibility. These employment issues will be addressed in Part II of this series. ■→