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FORUM

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ABUSE OF NURSING FACILITY RESIDENTS

PART II: Human Resource and Civil Liability Issues

By: Glenn R. Davis, Esq.

This article is the second in a two-part series dealing with issues raised by allegations of abuse in a nursing facility.

Each evening during the nightly news we hear, and each morning in the morning paper we read, about incidents of disgruntled employees or customers bringing violence into the workplace. We also hear about lawsuits brought by residents of nursing facilities for injuries suffered while in the care of the nursing facility. These incidents of violence cause huge expenditures to employers and can have severe repercussions on the operation and profitability of a business. As employees become more litigious in all aspects of the employment relationship, the employer needs to become more vigilant in the prevention of workplace violence.

Negligence claims are the most common type of action facing a nursing facility. An employer has a duty to provide a safe workplace for its employees and a safe living environment for its residents. Pennsylvania law requires that all establishments shall be operated and conducted so as to provide reasonable and adequate protection for life, limb, health, safety and morals of all persons employed therein. Under Pennsylvania law, the owner of the land owes a duty to "business invitees" to protect them from foreseeable harm from dangerous conditions. Thus, a nursing facility employer has a duty to provide business invitees, vendors, resident guests and others an environment safe from foreseeable harm and dangerous conditions.

A negligence action could be in the form of a claim for the negligent admission of a resident, negligent hiring of staff, negligent retention of a resident or staff, the negligent supervision of a resident or staff, or the negligent undertaking to provide security.

A cause for negligent admission may arise where it is known or should be known prior to admission that a facility is unequipped or underequipped to provide the care which a resident requires. This highlights the importance of preadmission investigation to determine a resident's background and condition. Once a resident has been identified as being violent or unfit for the resources of a particular nursing home facility, or if the facility fails to take further action to accommodate the specific needs of the violent resident or seek discharge, a cause of action may arise if an employee, another resident or an invitee is injured.

Criminal acts of employees generally do not render a facility liable, as these acts are usually outside the scope of employment. However, a facility may be found liable for acts of an employee or resident whom it negligently supervised. In these situations the critical question is not whether the employee or resident was acting appropriately but rather what the facility's conduct or lack of action was under the circumstances. Not unexpectedly, mental capacity of the resident is often a key element.

Similarly, a facility could be found to be liable if it fails to provide adequate security to employees, residents or invitees. A facility owner is under a legal duty to exercise reasonable care to maintain its property in a safe condition under the circumstances. That duty includes taking precautions to prevent violent conduct by third parties and residents whom the employer knows, or should realize, are dangerous. Whether a facility is found to be liable depends upon the circumstances, such as a history of violence of the resident or the employee or other historical factors at the facility.

Pursuant to the Occupational Safety and Health Act ("Act"), employers have a legal duty to furnish a safe and healthful working environment for their employees.

*(See **ABUSE,** p.2)*

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

In response to growing workplace violence, the Occupational Safety and Health Agency ("OSHA") has undertaken several projects, including preparation of workplace violence guidelines for the healthcare setting.

In their regulations, OSHA has focused on training, adequate staffing levels and better communication with regard to potential workplace violence.

The Act also provides that an employer may be cited for unsafe working conditions if criminal activities endanger workers. Anti-retaliation provisions of the Act prohibit discharge, retaliation or other discrimination against employees who exercise their rights.

Preventative Measures

In order to best protect yourself from liability attributable to acts of violence, a facility should publish a written policy and communicate it to all employees and residents. The policy should define and forbid abuse, including violence and the threat of violence to persons and property. The policy should also set forth the consequences of any violations. The policy should be communicated to all employees and should be included in any statement of rules of conduct for the facility which is provided to applicants/residents and made a condition of admittance.

The employer should establish procedures by which all employees including supervisors understand their role in dealing with abuse of or by residents. Employers should warn employees of potential hazards, such as potentially violent residents. The employer should take care in the assignment of employees to certain types of residents, being careful to avoid placing novice employees with potentially violent residents without appropriate training. Open communication must be established and maintained concerning potentially violent residents. Any such policy must be founded upon the principles of fairness and consistency. Establish an investigatory procedure wherein complaints or reports of violence are investigated and appropriate action taken. Preadmission policies must enable a facility to identify violent residents. Finally, in-service training of employees will help equip them to handle violent residents.

WORKERS' COMPENSATION UPDATE: Use Discretion When Accepting Liability

By: Christine L. Sudlow, Esq.

Recently, in County of Delaware v. WCAB (Stallworth), the Commonwealth Court rendered a decision favorable to employers in workers' compensation cases. In that case, the claimant, Stallworth, worked as a prison guard at the Delaware County Prison. While on the job, Stallworth slipped and fell down 28 steps, suffering a severe closed-head trauma.

The employer accepted liability and listed the injuries on the Notice of Compensation Payable ("NCP") as "contusion—head, back, neck." The employer then began payments for full disability benefits. Approximately six months after the accident, Stallworth filed a Penalty Petition against the employer asserting that the employer had failed to pay $18,841.05 worth of medical expenses for treatments relating to his left knee and a psychiatric disorder. Stallworth alleged these injuries and expenses to be related to the work injury.

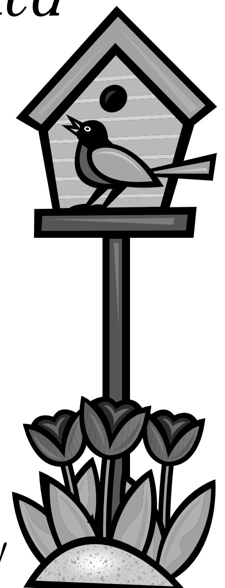
The Court held that an employer is not required to pay medical bills for physical or psychiatric injuries when the original NCP does not specify them among the original enumerated injuries. The implications of this decision for employers are twofold. First, employers must be specific and accurate in the descriptions of the injuries accepted on the NCP. Employers must avoid the careless mistake of referencing a right knee injury as "right leg," or they may unintentionally accept liability for right ankle or hip injuries as well. Second, employers should avoid paying medical bills for injuries which are unrelated to those specified on the NCP. Paying medical bills for injuries beyond an employer's liability is unnecessary and costly, and even worse, may be construed as evidence that the employer has accepted liability for those injuries.

The seminars will be held:

April 3, 2001
Sheraton Inn Pittsburgh North, Mars

April 5, 2001
West Shore Country Club, Camp Hill

April 6, 2001
Sheraton Great Valley Hotel, Frazer



Please note this change of date on your 2001 calendar!

The ABCs of IDRs and POCs

By: Barbara G. Graybill, Esq.

As the survey process continues to be tweaked by changes in the State Operations Manual and by surveyors accustoming themselves to the new Quality Indicators, providers should review their options for Informal Dispute Resolution ("IDR"), and change the focus of their Plans of Correction ("POCs") accordingly.

Informal Dispute Resolution allows providers one opportunity to refute cited deficiencies after an unfavorable survey. IDR is most aptly characterized as the opportunity to dispute the factual findings of the surveyors. If undisputed, the deficiencies become the facts upon which the law is applied and any penalties are assessed. Facilities may not use the IDR process to delay the formal imposition of remedies or to challenge any other aspect of the survey process, including the classification of deficiencies (scope and severity); remedy(ies) imposed by the enforcing agency; failure of the survey team to comply with a requirement of the survey process; inconsistency of the survey team in citing deficiencies among facilities; or inadequacy or inaccuracy of the IDR process.

Notice of the opportunity to utilize IDR will be transmitted with the Statement of Deficiencies (HCFA Form 2567). Of particular importance, the time frame for filing the IDR runs for 10 days concurrently with the time for filing the POC. The letter accompanying the Statement of Deficiencies should set forth the time frame for response, the name of the person to contact regarding IDR, and how the IDR will be handled. Pennsylvania only generally accepts submission of a request for IDR in writing.

There are some practical pointers that every provider should consider upon receipt of the Statement of Deficiencies:

1. Save the envelope in which your Statement of Deficiencies was mailed. Some providers have received letters containing their Statement of Deficiencies with a mailing date predating the postmark by several days. These providers had a severe reduction of their response time frame because the 10-day time period began to run at the typed date of mailing, not the postmark. However, evidence of the delay in actual mailing must be produced to argue this issue.
2. Read the details of the letter carefully. When does the 10-day time period begin to run, and is it calculated by business or calendar days?
3. A decision to request IDR should be made concurrently with the development of the POC. This simplifies the gathering of documents and streamlines the valuable effort of staff. Much of the documentation required to write an effective POC is the same documentation required to effect a request for IDR.
4. Neither the POC nor the request for IDR is a platform to defend your practices. Focus on the "root" problem for the POC, and on supplying additional or overlooked information through IDR. Lack of knowledge of a requirement is not a valid basis to challenge a deficiency.
5. What you assume the reader of your IDR request knows, the reader may assume you don't know. Your IDR submission should be a complete document in and of itself, so that a disinterested person with no knowledge of long-term care could read and understand your point. Moreover, do not presume that the person reading your document understands your abbreviations, filing systems, or policies.
6. Clearly caption the letter which you submit to request IDR. Your reference line should clearly state "Request for Informal Dispute Resolution" and should contain your provider number and the last date of your survey.
7. State the F-tag, the regulation, and the language of the deficiency in question. Specify why you dispute the finding (e.g., the findings are inaccurate and unsupported by the documentation; the facts do not warrant the imposition of the penalty, etc.). Be brief. If you can't explain it in less than one-half page, excluding exhibits, you aren't concise enough.
8. Add exhibits, but make sure they are legible, easy to find, and that the appropriate information is highlighted for the ease of the reader. Translate any medical terminology that a lay person would not know.
9. State clearly what it is you would like to have occur (e.g. the deficiency removed, rewritten, cited under a more appropriate F-tag, or removed because it is cited under two F-tags).
10. Do not dispute every deficiency, and be realistic. Target the deficiencies with the maximum impact. The Department is not a fairy godmother and will not grant all of your requests, so prioritize and make your arguments accordingly. Disputing a deficiency which is rightfully imposed makes no sense and reduces your credibility.
11. The POC must identify the *systemic changes* necessary to correct the deficiency as cited in the F-tag. This is a change which refocuses the POC from being resident-specific to being process-specific. It is critical that the person and process for monitoring compliance (the effectiveness) of the systemic change be clearly identified.

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

(**ABCs,** *cont'd. from p. 3)*

12. Although the POC should be regarded primarily as a document designed to help you maximize the quality of care given, it does have legal implications, particularly if a negligence case should ever rear its ugly head. Drafting a POC which states the facility will provide training to nurses on the proper administration of medication implies that they've never been trained before. Restating the POC to read "a refresher course on medication administration will be provided to all nurses " is a preferable statement.
13. Contact your attorney early if you are seeking IDR or if you need assistance with your POC. You can save staff time and tension by organizing the process with the attorney as soon as possible. To maximize the effectiveness of your attorney, notify him at the time of the surveyors' entrance; and confirm for him the time of the exit interview. After the exit interview, let your attorney know the nature of the findings. If it appears there may be a problem, the attorney can be alert for time frames and plan his or her availability accordingly.

It is critical to realize that your POC still must address the systemic problem noted by the deficiency, even if you are disputing the deficiency. Furthermore, filing IDR will not delay the effective date of any enforcement action. Providers may wish to utilize a disclaimer on their POC noting that the POC is not an admission of guilt.

IDR can be time consuming and costly, but failing to file IDR can be costly where a deficiency is cited because of a misunderstanding of the documentation, processes, or follow-up. Before deciding to undertake IDR, you may want to seriously consider the scope and severity of the deficiency as well as your performance history. A thorough discussion of all options with staff and counsel can save you both dollars and hours in the long run.

INSIDE THE FIRM

Barbara G. Graybill, Esq.

LATSHA DAVIS & YOHE, P.C., is pleased to announce that Barbara G. Graybill, Esq., has become associated with the firm. Prior to joining the firm, Ms. Graybill served as in-house counsel for both Lewisburg United Methodist Homes and Wesley Affiliated Services.

Ms. Graybill is a graduate of Ohio Wesleyan University with a Bachelor of Arts in Human Development, and of the Dickinson School of Law. After her admission to the Pennsylvania Bar in 1983, she served as Executive Director for the Pennsylvania State Public Health & Welfare Committee until 1986. In 1987, Ms. Graybill entered the private practice of law, focusing on licensure and reimbursement issues for long-term care facilities, as well as regulatory and statutory review for trade associations. Ms. Graybill brings with her extensive experience in survey & enforcement, coupled with practical knowledge of the operations of long-term care facilities.

Chadwick O. Bogar, Esq.

Chadwick O. Bogar, Esq. joined the law firm of LATSHA DAVIS & YOHE, P.C., after working for a law firm where he focused on ERISA, employment and labor law matters. Mr. Bogar has designed and implemented employee benefit plans, as well as provided advice to employers regarding their fiduciary duties under ERISA and related federal acts. Mr. Bogar practice also involves litigation in both state and federal courts, as well as before Administrative Agencies.

Mr. Bogar received his Juris Doctorate from Dickinson School of Law of The Pennsylvania State University, and received his Bachelors of Liberal Arts from Washington State's Gonzaga University, where he graduated with honors.

Mr. Bogar is a member of the American Bar Association and the Pennsylvania Bar Association.

Mr. Bogar's practice at LATSHA DAVIS & YOHE, P.C., includes labor law, employment law, ERISA and litigation.

■ ***Please note that the area code for our New Jersey office has changed from 609 to 856*** ■

GOVERNMENT SETTLES FCA CLAIM

By: David C. Marshall, Esq. and Robert E. Slavkin, Esq.

On October 5, 1999, the United States Attorney of the Eastern District of Pennsylvania announced a settlement of a civil False Claims Act lawsuit against a Pennsylvania nursing home management company. The suit, initiated by former employees of the company, triggered an investigation by the United States Attorney's office. The investigation and subsequent settlement signal a shift in the scope of governmental fraud investigation.

The Investigation

Unusual in its nature as a joint effort between the Pennsylvania Department of Public Welfare and the federal government, the investigation focused on the Medicare and Medicaid cost reporting processes. Specifically, the government alleged that certain owners and officers fraudulently inflated the administrative expenses claimed for reimbursement on 1993 to 1996 home office cost reports. Examples of alleged fraud cited by the government include: compensation for owners who spent little or no time engaged in managing the nursing homes; salaries and employee benefit packages for "ghost" employees; personal automobile expenses for vehicles driven by owners' family members; and rent and other expenses for an office where little or no nursing home work was being performed. In addition, the government alleged that certain owners took partnership fees and distributions which impaired the homes' ability to timely pay vendors and taxes. This allegedly resulted in unnecessary late fees and penalties, which were in turn claimed for reimbursement. The management company and the individuals charged denied these allegations.

The Settlement

The company and certain owners and officers are responsible for paying a $2.1 million settlement to the federal and state governments. Varying degrees of additional penalties were imposed on these individuals, including temporary and permanent exclusions from Medicare, Medicaid, and all federal and state health care programs. The settlement agreement also required certain owners and officers to relinquish all control of the management company and its facilities. Certain owners were required to divest their entire interest in the company. Further, the company entered into a corporate integrity agreement with the U.S. Department of Health and Human Services, Office of Inspector General, for a five-year period. Upon the expiration of the integrity agreement, the company has agreed to retain a consulting firm to conduct annual internal audits. The settlement agreement contains no admission of wrongdoing by either the management company or any individual involved.

Implications

The U.S. Attorney's Office in Philadelphia, the Pennsylvania Attorney General's Office and DPW have all increased their scrutiny of possible Medicaid fraud, particularly in the claims submission and cost reporting processes. It is expected that these joint investigations will become more prevalent; in fact, these agencies are currently reviewing Pennsylvania Medical Assistance audit appeals to determine if fraudulent claims have been raised through appeals filed with DPW. There are some "red flag" scenarios which may draw governmental scrutiny. These include appealing audit adjustments (1) which have no actual reimbursement impact, and (2) prior to determining whether a good faith argument can be made to challenge that specific adjustment. Providers should examine their outstanding appeals and their procedure for identification of appeal issues moving forward in light of this recent initiative.

CORPORATE AND FICTITIOUS NAME ALERT: Continuation Filings May Be Required

By: Jonathan M. Crist, Esq.

A little-known provision of the Pennsylvania Business Corporation Law requires all domestic and foreign, for-profit and nonprofit corporations, limited partnerships and fictitious nameholders to file during the year 2000 a report of continued existence called a "Decennial Filing." The law requires an update of the Pennsylvania Corporation Bureau records by the end of the year 2000 and every ten (10) years thereafter.

Who Must File

No Decennial Filing will be required for corporations or organizations which have made any new or amended filing with the Corporation Bureau from January 1, 1990 up through and including December 31, 1999. The Corporation Bureau has indicated that it will attempt to notify registrants who need to make a Decennial Filing in the year 2000, but failure by the Corporation Bureau to give notice does not excuse noncompliance with the law. If an organization is required to file, the report must be mailed no later than December 31, 2000.

Consequences of Nonfiling

If a corporation required to file a Decennial Filing does not do so prior to January 1, 2001, it will no longer have the exclusive use of its registered name. The name will be released and become available for any other corporation, limited partnership or association desiring to use it within the Commonwealth of Pennsylvania. Any corporation or association which misses the filing deadline for the Decennial Filing may file at a later time. A late filing will reinstate the corporate name unless is has been appropriated by someone else during the period of delinquency.

For those with registered fictitious names, the consequences are more severe. If an entity having a registered fictitious name which is required to file a Decennial Filing does not do so by January 1, 2001, it will no longer be deemed to be a registered fictitious name. At that point the business may be subject to the penalties for doing business under an unregistered fictitious name, which can include being barred from access to the courts and potential monetary penalties.

SEMINARS

December 3, 1999 - Kimber Latsha presented at PANPHA's Finance Seminar. The session was entitled, "Legal Aspects of Collections - Nursing Home Issues."

December 14, 1999 - Kimber Latsha presented at the PA Society of Health Care Attorneys seminar. The session was entitled, "Financially Distressed Health Care Providers."

February 3, 2000 - Kimber Latsha presented at the American Health Lawyers Association Conference, Long-Term Care and the Law Section. The session was entitled, "Admission/Agreements/Collections."

March 3, 2000 - Kimber Latsha presented at Millersville University. The session was entitled, "Role of Government in Health Policy, Regulations and Reimbursement."

March 16, 2000 - Kimber Latsha presented at the Pennsylvania Bar Institute's 6th Annual Health Law Institute. The session was entitled, "Analysis of Recent Changes in the Survey and Enforcement Process."

March 31, 2000 - Kimber Latsha co-presented with Lawrence Wilson of HCFA at the American Health Lawyers Association Medicare/Medicaid Institute. The session was entitled, "Reimbursement for Long-Term Care Facilities."

May 2, 2000 - Kimber Latsha will be presenting at NJANPHA's Annual Conference. The session is entitled, "Responding to Negative Surveys."

May 5, 2000 - Jonathan Crist will be presenting for the National Business Institute. The session is entitled, "Section 1031 Exchanges of Real Estate and Investment Properties."

May 18, 2000 - Kimber Latsha and Barbara Graybill will co-present at PANPHA/MANPHA's Annual Conference. The session is entitled, "Update of the Federal Certification and State Licensure Survey Process."

May 23, 2000 - Barbara Graybill will be presenting at Penn State University. The session is entitled, "Legal Update on Long-Term Care."

June 9, 2000 - Barbara Graybill will be presenting at Millersville University. The session is entitled, "Strategic Planning and Marketing."