

LEGAL EAGLE EYE NEWSLETTER

November 2008

For the Nursing Profession Volume 16 Number 11

Medicare/Medicaid: SNF Was Not Treated Fairly, Court Nixes Civil Monetary Penalty.

The official published opinion of the US Court of Appeals for the Eleventh Circuit appears to have important implications going beyond the specific facts of the case.

A complaint prompted a mid-summer inspection of a skilled nursing facility (SNF) in Florida which verified that a bedridden patient had been stung 40+ times by fire ants.

Inspectors found the facility to be in non-compliance with Federal regulations that require an effective pest control program and assessed a civil monetary penalty of \$10,000 per day for 12 days while immediate jeopardy was believed to exist for the health and safety of the patient population.

The Court overturned the penalty on the grounds that the facility was not treated fairly in the process.

Specific Guidance Was Lacking Facility Was Treated Unfairly

The Federal government offered no guidance ahead of time as to the criteria that would be used to assess the effectiveness of the facility's efforts to comply with regulatory standards.

Federal regulations require an "effective" pest control program in every long-term care facility.

Only two prior recorded decisions of the Centers for Medicare and Medicaid Services (CMS) Appeals Board



In the absence of any prior detailed elaboration of the regulatory requirements it is appropriate to assess the facility's non-compliance only in light of what the facility would have reasonably expected it was supposed to do.

When it happened before the inspectors just suggested something ought to be done.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
October 22, 2008

had dealt with pest control, but neither of those decisions even vaguely defined what the word "effective" actually means, the court said.

The only government document on the subject the court could find, a guide-book for survey inspectors, offers at best only a circular definition of an effective pest control program as measures to eradicate and control common household pests.

More importantly, the court pointed out, CMS survey inspectors had never before cited this facility over pest-control issues or even suggested any specific changes in what was already being done despite incidents with ants on-site.

The facility was expressly determined not to be in violation of Federal standards just the previous summer for an incident involving a resident stung by fire ants.

Following that incident the facility was not told its pest-control program was not effective or ordered to change what it was already doing in any respect.

Only after the most recent incident were certain specific expectations spelled out.

Once the facility was expressly told what it was supposed to do the facility made the changes it was ordered to make as fully and as quickly as it could. ***Emerald Shores v. US Dept. of Health & Human Services***, ___ F. 3d ___, 2008 WL 4648374 (11th Cir., October 22, 2008).

Inside this month's
issue...

November 2008

New Subscriptions
See Page 3

Dilaudid O.D./Death/Nurse Charged - Infection/Nursing Negligence
Patient Falls/No Nursing Negligence - Psychiatric Medications
L&D/Charts/Strips/Spoilation Of The Evidence - Heparin/Death
Disability Discrimination - Age Discrimination - Drug Dependency
Operating Room/Chart Review - L&D/Fetal Monitoring
Medicare/Medicaid Accreditation - Patient vs Patient Assault
Psychiatric Patient Elopes - Slip And Fall - Home Health/Charting
Emergency Room/Premature Discharge/Motor Vehicle Accident