

Long-Term Care Survey Alert

READER QUESTION: Survey civil monetary penalties

Q: How long should a per diem civil monetary penalty be allowed to run in the following situation? A facility gets cited with a second G-level deficiency within a year and corrects that deficiency within two days. But the facility does not correct all of the lower D-level deficiencies for another 45 days.

A: The Departmental Appeals Board has, in many cases, held that the **Centers for Medicare & Medicaid Services** can impose a "per diem" civil monetary penalty from the date of noncompliance (at severity/ scope "D" or higher) until the date that the state survey agency (or CMS) finds that the facility is back in substantial compliance.

CMS does not need to show that non compliance actually persisted on each day before that date. And neither the state survey agency nor CMS is bound to accept the facility's representations regarding when it regained compliance (in the facility's plan of correction or otherwise).

CMS may but is not required to adjust the per diem CMP up or down, accordingly, if it finds that the number of uncorrected deficiencies, or their scope and severity, increases or decreases before the facility achieves substantial compliance. (CMS is, however, required to lower CMPs where the facility abates immediate jeopardy, e.g., from the IJ level of \$3050 or more a day to the non-IJ of \$50 to \$3,000 a day range.) CMS sometimes applies its per diem CMP rule very harshly. And it will keep the CMP running far longer than warranted, even if one or more of the deficiencies (whether or not "double G") warrant some CMP. Since an appeal addresses the remedy (i.e., a CMP), facilities can appeal this. But be careful how you frame the appeal. In order to stop a CMP from continuing to run, a facility may present evidence during an appeal that it was back in substantial compliance earlier than CMS says it was. In several cases, administrative law judges have accepted such evidence and arguments.

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Editor's Note: Do you have a pressing survey or clinical question you'd like an expert to answer? Please e-mail it to KarenL@EliResearch.com.