



DATE: June 25, 2014

SUBJECT: Long Term Care Provider Bulletin No. 49
Department Access to Records at Nursing Homes Pursuant to 35 P. S. §448.813

TO: Nursing Home Administrators

FROM: Susan Y Williamson, Director *SYW*
Division of Nursing Care Facilities
Bureau of Quality Assurance

THIS INFORMATION SHOULD BE SHARED WITH ALL FACILITY STAFF AND MANAGEMENT.

During a complaint investigation to determine facility action on numerous repeated resident injuries (skin tears, bruises, fractures of unknown origin), survey staff were denied access to the incident and accident reports maintained by the facility, even though facility personnel upon interview repeatedly referred to these documents as evidence that all incidents were properly investigated.

Subsequently, the licensed facility not only refused to turn over the records, for which a \$500 per day fine was ordered, but removed the records from the facility to the corporate office. As a result of the latter action, the department filed a Complaint in Equity and a Motion for Preliminary Injunction in Commonwealth Court to restrain further violation of the Health Care Facilities Act. After a full evidentiary hearing, Senior Judge Eunice Ross issued the injunction. After an unsuccessful appeal for reconsideration and an emergency application to the Supreme Court to stay, the injunction was denied, the records were turned over to the department, and the full fine for \$5,000 was paid. The entire matter lasted ten days. The department was fully prepared to seek Civil Contempt sanctions if the court order was not complied with in a timely fashion.

The facility maintained that incident and accident reports are quality assurance records and part of their quality assurance programs. They further alleged that the records cannot be turned over to the Commonwealth because to do so would violate confidentiality mandates of federal law. The administrator/operator of the facility maintained that the incident and accident reports fall into the category of quality assurance records of its Quality Assessment and Assurance Committee established in accordance with 42 V.S.C. §1395 i 3 (b)(1)(B). The committee meets quarterly to identify issues with respect to which quality assessment and assurance activities are necessary, and develops and implements plans of action to correct identified quality deficiencies.

The department's position in this situation is that no federal statute or rule mandates that incident and accident reports are part of a quality assurance file. In the Briarcliff situation, following surveyor review of other pertinent medical records and files which did not provide conclusive evidence of adequate facility action with reference to the identification of cause of resident injury, and repeated reference by facility staff that the cause of resident injury is recorded on the incident and accident reports, the surveyor requested access to the reports. The department acted pursuant to the authority in the Health Care Facilities Act which allows any authorized agent of the Department of Health to "enter, visit, and inspect. ...any health care facility licensed...under this act and shall have full and

free access to the records of the facility and to the patients and employees therein and their records and shall have full opportunity to interview, impact, and examine such employer." See 35 P.S. 3448.813.

A copy of the opinion and orders in Commonwealth of Pennsylvania Department of Health v Penn Med Consultants, Inc.; Briarcliff Nursing Home Associates & Richard Slazinski, NHA, (Docket No. 423 M.D. 97, May 9, 1997) is available upon request from this office.

Questions regarding the legal issues involved should be addressed to the Office of Legal Counsel; Department of Health; Room 825, Health & Welfare Building, 625 Forster Street; Harrisburg, Pennsylvania 17120-0701; telephone (717) 783-2500.

Attachment

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF HEALTH,
Plaintiff

v,

No. 423 M.D. 1997

RI.CHARD SLAZINSKI, N.H.A., AND
BRIARCLIFF NURSING CENTER
ASSOCIATES, A PENNSYLVANIA
LIKITED PARTNERSHIP, D/B/A
BRIARCLIFF PAVILION FOR
SPECIALIZED CARZ, AND PENN
MED CONSULTANTS, INC.,

HEARD: MAY 7 & 8, 1997

Defendants

BEFORE: HONORABLE EUNICE ROSS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE ROSS

9. 1997

FILED: MAY

Plaintiff, the Commonwealth of Pennsylvania,
Department of Health, moves for the issuance of a preliminary
injunction against defendants, Richard Slazinski, N.H.A.,
Briarcliff Pavilion for Specialized Care, Briarcliff Nursing Center
Associates, a Pennsylvania limited partnership doing business as

Pennsylvania Department of Health
Division of Nursing Care Facilities
Implemented: June 16, 1997

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Department Access to Records at Nursing Homes

Reviewed: December 29, 2005
Reviewed: June 18, 2009
Reviewed: June 19, 2012
Reviewed: May 28, 2013
Reviewed: June 25, 2014

Briarcliff Pavilion for Specialized Care, and Penn Med Consultants, Inc. Penn Med became a party defendant by oral motion made at trial on the preliminary injunction. The relief sought by the Commonwealth is a (1) direction by this Court that defendants produce all incident and accident reports from Briarcliff Pavilion for January 1, 1996 to date and continuing as events occur in the future: (2) an injunction barring defendant, their officers, agents servants and employees from violations of the Health Care Facilities Act, 35 P.S. § 448.103 et seq; and (3) the award of costs and other interim relief as the Court deems appropriate.

Defendants filed at trial a counter motion for preliminary injunction praying the Court to enjoin the survey by the Department of

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Health of Audubon Villa, a facility like defendant Briarcliff and managed by the same corporation, Penn Med, as Briarcliff. Defendants allege that the survey was a retaliatory act by reason of the refusal by defendants to turn incident and accident reports of Briarcliff over to the plaintiff.

THE FACTS

The credible facts adduced at hearing follow.

Defendant Slazinski is the administrator of Briarcliff Pavilion for Specialized Care, located at 249 Maus Drive, North Huntingdon Township, Westmoreland County, Pennsylvania. Briarcliff is licensed by the plaintiff under the Pennsylvania Health Care Facilities Act, 35 P.S. 448.101 No. 423 M.D. 1997 et seq., to operate a long-term care facility or nursing home. It is certified to participate in the Medicare and Medicaid programs.

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On April 22, 1997, the Division of Nursing Care Facilities of plaintiff based in Ebensburg, Pennsylvania began an investigation of two formal complaints made by relatives of residents against defendants for possible physical abuse of Briarcliff patients as manifested by skin tears, bone fractures and bruises. Josephine Bobik, a department surveyor, presented herself to defendants on April 22, 1997, properly identified herself and requested access to facility documents recording the causation of the residents' skin tears, bruises and fractures which she observed as part of her survey investigation that day. The director of nursing informed Ms. Bobik that the incident and accident reports record causation of resident injury. When a request was made to Mr. Slazinski to view the reports, he refused basing his denial on a corporate policy.

Aside from medical or financial records, defendants made available to Ms. Bobik incident logs which identified the resident only by room number, something not fixed. Causation is shown on the log only when another resident caused the injury or when under the heading "Description of Injury" a fall is noted. Other causation then appears only on the incident and accident report.

The facility in the past on November 7, 1996, prepared a written form PB-22 which recorded investigations of abuse, neglect or misappropriation of property by a facility employee. The facility reported abuse allegedly inflicted upon a resident by a staff member. An incident and accident report was attached to the PB-22 form.

The department in performing surveys of other facilities has never been denied access to incident and accident reports which show specific causation.

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On May 5 and 6, 1997, Ms. Bobik returned to Briarcliff as part of a licensure investigation which also may result in certification for Federal Medicare and Medicaid and asked to see the incident and accident reports. Again she was refused on May 5, 1997 and was told on May 6, 1997, that the records had been removed from the facility to corporate headquarters (Penn Med).

Defendants plead that incident and accident reports at Briarcliff and at any other facility run by Penn Med are quality

assurance records and part of their quality assurance programs. They allege that the records cannot be turned over to the Commonwealth because to do so would violate confidentiality mandates of Federal law. The administrators/operators of Briarcliff contend that the incident and accident reports fall into the category of quality assurance records of its quality assessment and assurance committee established in accordance with 42 U. S. C. §1395 (i) (3) (B). The committee meets quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and develops and implements plans of action to correct identified quality deficiencies.

No Federal statute or rule mandates that incident and accident reports are part of the quality assurance file. Defendants made that determination themselves before denying plaintiff access.

Defendants also assert that plaintiff could learn the facts of causation through staff and resident interviews and other open records kept at the facility.

THE LAW APPLIED TO
THE FACTS

(1) THE PETITION OF THE COMMONWEALTH

Under the Health Care Facilities Act, 35 P. S. § 448.813 for the purpose of "determining . . . the adequacy of the care and treatment provided or the continuing conformity of the licensees to this act and to applicable local, state and Federal regulations, any authorized agent" of the Department of Health may "enter, visit and inspect . . . any health care facility licenses . . . under this act and shall have full and free access to the records of the facility and to the patients and employees therein and their records and shall have full opportunity to interview, inspect and examine such employees. Upon entering a health care facility, the inspector shall properly identify themselves" to the person in charge of the facility: 35 P.S. § 448.813. See also 28 Pa. Code § 201.14(a); 201.18(f) (1); 210.19(d) and 210.30(a).

Under Federal rules and regulations governing licensure of defendant's facility, Briarcliff must be and is licensed under applicable state law and must operate in compliance with all pertinent Federal, state and local laws, regulations and codes: v.36 Federal Register, No. 137 September 26, 1991, § 483.75.

Defendant bases its refusal to turn over the incident reports (which it rather than the Federal or state government have designated as quality assurance documents) in 42 U.S.C. § 1395 (i) - 3(b) (1) (B) which forbids disclosure of records of the quality assurance committee to the state or the secretary "except insofar as such disclosure is related to the compliance of the Committee . . ." The committee is directed in that section to identify issues of quality assessment and to develop appropriate plans to correct quality deficiencies.

Since the incident and accident reports are not documents which are generated by the committee to identify quality deficiencies or which develop and implement plans for appropriate action, the reports do not fall within the aegis of documents protected from disclosure by Federal law. It is the facility not the committee which prepares the documents and identifies them as quality assurance documents.

The State Operations Manual generated by the Health Care Financing Administration, Tag number F521, P.202, emphasizes that the committee produces plans of action to identify and correct quality deficiencies and that committee attempts to do so cannot be the basis for governmental sanctions. Committee generated documents are not the same as documents furnished the committee by the facility. Neither the statute nor the manual provides for confidentiality for any document beyond those concerned with the identification and proposed remedy of quality deficiencies.

Defendant, however, further urges the Court to rely on a Health Care Financing Administrative seminar training manual which, without a citation of authority, tells seminar participants not to ask for a record of accident and incident reports but rather to "ask for evidence of how they routinely monitor accident and incident reports, record them and have in place a system to prevent and/or minimize further accidents of incidents." This manual provision taken out of context can have

no authority to overcome the fact that neither Federal statute nor Health Care Facility regulations oust state authority to investigate complaints about abuse at health care facilities. An intent to pre-empt state authority to investigate and sanction facilities when issues of health and safety are involved must be set forth expressly: Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707, 717-718, 85 L. Ed. 2d 714, 105 S.Ct. 2371, 2375, 2377 (1985); Jones v. Rath Packing Company, 430 U.S. 519, 525, 51 L.Ed.2d 604, 97 S.Ct. 1305, 1309 (1977).

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Indeed, Federal Health Care Facilities regulations found in 42 C.F.R. ch. IV, § 483.75(a)(b) require state licensure and compliance by facilities with Federal, state and local law. The regulations at 42 C.F.R. ch. IV, § 448.332 mandate that the state survey agency establish procedures and adequate staff to investigate complaints of violations: 42 C.F.R. ch. IV, § 448.332. The regulations expressly authorize the state to investigate whether "an identifiable individual neglected or abused a resident, or misappropriated a resident's property." See 42 C.F.R. ch. IV, § 448.332 and § 488.335.

The power of the state to license coupled with the power of the state to investigate resident abuse clearly manifested in the Federal regulations make it clear that there has been no pre-emption by the Federal government of the right of the state to investigate allegations of resident abuse and to impose sanctions therefore including the denial of future licensure.

Thus, the confidentiality issue falls as to the incident and accident reports and with it the other argument that the department might retrieve the same information as to causation by interviewing staff and residents and perusal of other documents. The incident and accident report is the only report documenting the cause of resident injury.

The Court may enter a preliminary injunction after notice and hearing only if the relief is necessary to prevent immediate injury, there is a clear right to the requested relief, the injury would be irreparable or incapable of adequate compensation by an award of damages, the defendant's wrong is manifest, greater injury would result from refusal than from the

grant of the relief, plaintiff's remedy at law is inadequate, general equity jurisdiction is warranted, the action to be restrained is actionable, injunctive relief is reasonable equitable to abate the activity and the injunction will restore the status quo: Lewis v. City of Harrisburg, 631 A. 2d 807, 810 (1993). All the prongs of this test have been met. In light of the large number of injuries observed by the department's investigator and the two formal complaints filed in this case and the fact that the health and safety of residents is an issue of first importance, there is a need for immediate action on the part of the Court. The return of the incident and accident reports to open files will restore the status quo without any disruption of the daily work at the facility or the quarterly work of the committee.

The prayer of the department's petition will be granted. Since an agency of the Commonwealth requests the preliminary injunction, no bond will be required: Pa.R.C.P. 1531 (b).

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(2) THE DEFENDANT'S COUNTER-MOTION
FOR PRELIMINARY INJUNCTION

Defendants' counter-motion for preliminary injunction will be dismissed since it relates to a different party, Audubon Villa, and alleges a different set of facts from the underlying case. The dismissal is without prejudice to defendants' right to file an appropriate underlying case setting forth the new factual situation and requesting appropriate relief.

Eunice Ross, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF HEALTH,
Plaintiff

v.

RICHARD SLAZINSKI, NHA, AND
BRIARCLIFF NURSING CENTER
ASSOCIATES, A PENNSYLVANIA
LIMITED PARTNERSHIP, D/B/A

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Pennsylvania Department of Health
Division of Nursing Care Facilities
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BRIARCLIFF PAVILION FOR
SPECIALIZED CARE, AND PENN
MED CONSULTANTS, INC.,
Defendants

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: No. 423 M.D. 1997

ORDER (Number 1)

AND NOW, this 9th day of May, 1997, leave is granted defendants, Richard Slazinski, N.H.A., Briarcliff Nursing Center Associates, a Pennsylvania Limited Partnership, d/b/a/ Briarcliff Pavilion for Specialized Care and Penn Med Consultants, Inc., to amend their brief filed May 8, 1997 with the Court in response to the brief filed the same day by the plaintiff, Commonwealth of Pennsylvania, Department of Health.

Eunice Ross, Senior Judge

Associates, a Pennsylvania limited partnership, d/b/a/ Briarcliff Pavilion for Specialized Care and Penn Med Consultants, Inc., defendants, for preliminary injunction is denied without prejudice to the right of defendants to file an appropriate underlying action and to request appropriate relief as an incident thereto.

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Senior Judge

Eunice Ross,

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF HEALTH,
Plaintiff

vi.

RICHARD SLAZINSKI, NHA, AND
BRIARCLIFF NURSING CENTER
ASSOCIATES, A PENNSYLVANIA
LIMITED PARTNERSHIP, D/B/A
BRIARCLIFF PAVILION FOR
SPECIALIZED CARE, AND PENN
MED CONSULTANTS, INC.,
Defendants

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ORDER (NUMBER 3)

AND NOW, this 9th day of May, 1997, after hearing on the motion filed by plaintiff, Commonwealth of Pennsylvania, Department of Health, praying for a preliminary injunction directed to defendants Richard Slazinski, N.H.A., Briarcliff Nursing Center Associates, a Pennsylvania limited partnership, d/b/a/ Briarcliff Pavilion for Specialized Care and Penn Med Consultants, Inc., in accordance with the opinion contemporaneously entered.

It is ordered, adjudged and decreed that a preliminary injunction will issue and defendants, Richard Slazinski, N.H.A., Briarcliff Nursing Center Associates, a Pennsylvania limited partnership, d/b/a/ Briarcliff Pavilion for Specialized Care and Penn Med. Consultants, Inc., are directed within five days to produce all incident and accident reports of Briarcliff Pavilion covering all incidents and accidents occurring at the Briarcliff Pavilion from January 1, 1996, through May 6, 1997, for inspection and copying by the Commonwealth of Pennsylvania, Department of Health; defendants are further directed to comply with all requirements of 35 P.S. § 448.813 to enable the Department of Health upon proper identification of its inspectors to the person in charge of the facility to enter Briarcliff to visit and inspect the facility for any appropriate department function with full and free access to all facility records, employees and patients.

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No bond shall be required of plaintiff.

Eunice Ross, Senior Judge