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DIVISION OF
ADMINISTRATIVE
HEARINGS

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

REM-CLOS

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

CENTENNIAL HEALTHCARE INVESTMENT CORP. d/b/a EMERALD HEALTH CARE,

Respondent.
_____/

DOAH CASE NO: 01-1101
RENDITION NO.: AHCA-01-305-FOF-OLC

FINAL ORDER

Respondent, Centennial Healthcare Investment Corp., d/b/a Emerald Health Care, filed with the Agency for Health Care Administration (Agency) a Petition for Formal Administrative Hearing challenging the change in Respondent's licensure status from standard to conditional based on a Class II deficiency. The petition was referred to the Division of Administrative Hearings (DOAH) for further proceedings. The assigned Administrative Law Judge, Robert E. Meale, submitted a Recommended Order to the Agency on August 7, 2001. The order recommended that the Agency enter a final order restoring a standard rating to respondent effective January 11, 2001. The Recommended Order is attached hereto and incorporated herein.

EXCEPTIONS

Exceptions to the Recommended Order were filed by both Petitioner and Respondent. Respondent's sole exception was that the date of hearing in the recommended order was incomplete. Respondent's exception is accepted.

Petitioner's exceptions are directed primarily to the legal conclusions set forth in the recommended order and are addressed in the Conclusions of Law set forth herein.

FINDINGS OF FACT

The Agency hereby adopts the Findings of Fact set forth in the Recommended Order. However, the date of hearing, set forth in the preliminary statement, is corrected show that the hearing took place on June 5 and 6, 2001.

CONCLUSIONS OF LAW

The scrivener's error in paragraph 33, page 13, is corrected as follows: The word "event" in line 4 of the paragraph is correct to read "even."

The Agency accepts the Conclusions of Law set forth in the Recommended Order, as clarified in this final order. Paragraph 33 in the Conclusions of Law reads as follows:

> 33. As Respondent contends in its proposed recommended order, Petitioner's theory of liability is unclear. At the hearing, Petitioner disclaimed any reliance on the principle of strict liability even though its choice of federal regulation suggests such a theory, rather than a theory specifically focused on inadequacies in staffing, training, or supervision. There is little doubt of the neglect of Ms. LeBrun in causing the resident's injury and consequent decline, but little in the record attributes any responsibility for this neglect to Respondent. To the contrary, Respondent adequately discharged its responsibility to train its employees, including Ms. LeBrun, adequately discharged its responsibilities to assess and prepare a care plan for the resident, and adequately supervised Ms. LeBrun.

The above paragraph, although correct in this case, should not be construed as precedent for concluding that a licensee is not responsible for the actions of its employees unless there is inadequate training or supervision involved. A licensee is ultimately responsible for any deficiencies or violations occurring at its facility regardless of whether the deficiency was caused by one employee or many employees and regardless of whether the employee was well-trained and

adequately supervised. Section 400.23(7), Florida Statutes, requires the Agency to conduct a survey of every nursing home facility and "make a determination as to the degree of compliance by each licensee with the established rules adopted under this part as a basis for assigning a licensure status to that facility." Section 400.23(7)(b) states, "A conditional licensure status means that a facility, due to the presence of one or more class I or class II deficiencies. . . is not in substantial compliance at the time of the survey with criteria established under this part, with rules adopted by the agency, or, if applicable, with rules adopted under the Omnibus Budget Reconciliation Act of 1987..., Title IV (Medicare, Medicaid, and Other Health Related Programs), Subtitle C (Nursing Home Reform), as amended." It is clearly the presence of a deficiency, not the cause of the deficiency, that determines the licensure status. However, the legal and factual basis for the deficiency must be articulated.

At the hearing in this case, the ALJ asked what the charge required "in terms of legal obligation." Counsel for the Agency referred to the federal requirement that "each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being in accordance with the comprehensive assessment plan of care." (T-30) The ALJ then asked whether it was the Agency's contention "that a facility is strictly liable," and counsel for the Agency responded, "Absolutely not, Judge. Absolutely whatsoever not." (T-30) After counsel for the Agency explained that Respondent had to be shown to be negligent, the ALJ asked counsel for the Agency whether "one employee deviating from written policies and procedures causing serious injury through that deviation to one resident in and of itself

constitutes the negligence [needed to establish the deficiency]." Agency counsel responded,

> No, Judge. The reason that the tag was written was not based on what this resident - I'm sorry, on what this employee did, but rather on what other employees that were supervising her and that were involved with her did.
>
> And there were pretty much several areas that the surveyor looked at, but I think the more important ones were whether the employee had sufficient training, whether she was properly supervised, and you will hear testimony today that there were problems with the number of staffs (sic) that were on the floor, but I think that the biggest issue was the supervision that was provided.... (T-32, 33)

It its exceptions, the petitioner contends that paragraph 33 in the Recommended order is incorrect because there was no confusion concerning the theory of liability. Petitioner notes that the authority for the agency action always was 42 C.F.R. § 483.25,[1] which states: "Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care." At the hearing, however, petitioner stated that the Agency's determination that the facility had failed to provide the "necessary care or services" was <u>not</u> based on the actions of the employee, Mrs. LeBrun, but rather on the failure of the Respondent to sufficiently train and supervise its employee. In its exceptions, Petitioner sets forth the ALJ's factual findings relating to the improper transference of the resident by Mrs. LeBrun, and then states that there was competent substantial evidence to support a violation of 42 C.F.R. §483.25 in that the facility failed to provide "necessary care and services" by "failing to follow its own policy [a "no-lift" policy] and the resident's care plan

[1] Made applicable to nursing homes in Florida pursuant to Rule 59A-4.1288, F.A.C.

[which required that two employees be used to transfer the resident]." Petitioner is correct that the evidence might support such a conclusion, but petitioner did not rely on that theory at the hearing, as can be seen from counsel's statements quoted above. Petitioner has provided citation to no authority that would authorize the Agency to change the Conclusions of Law and uphold the Class II deficiency based on evidence proving a different violation of 42 C.F.R. § 483.25, the failure to properly transfer the resident, than that specifically alleged, the failure to properly train and supervise an employee.

Petitioner also takes exception to the ALJ's finding in paragraph 33 that Respondent adequately supervised its employee. Petitioner states that certain findings of fact support a conclusion that Respondent violated 42 C.F.R. §483.25 by failing provide the necessary care and services to the resident due to the failure of Respondent to properly supervise its employee.

Although there are underlying findings of fact which could lead to the factual conclusion that the Respondent had failed to properly supervise Ms. LeBrun, resulting in a failure to provide the necessary care and services to the resident, the ALJ determined, as a factual finding, that Ms. LeBrun was adequately supervised. It is the Administrative Law Judge's function "to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *see also* Perdue v. TJ Palms Associates, Ltd., 755 So.2d 660, 666 (Fla. 4th DCA 1999). The evidence presented at a hearing may be sufficient to support two inconsistent conclusions, but it is the ALJ's

role to "decide the issue one way or the other." Heifetz, 475 So. 2d at 1281. Therefore, Petitioner's exception is rejected.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

In accordance with the recommendation of the ALJ, the Respondent's conditional licensure status effective January 11, 2001, is vacated, and Respondent's standard rating is restored effective January 11, 2001.

DONE and **ORDERED** this 14 day of December, 2001, in Tallahassee, Leon County, Florida.

Rhonda M. Medows, MD, Secretary
Agency for Health Care Administration

A PARTY ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH IS INITIATED BY FILING A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE AGENCY FOR HEALTH CARE ADMINISTRATION AND A COPY, ALONG WITH THE FILING FEE, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THIS ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was served on the persons named below by U.S. Mail, or by the method of service indicated, on the 2 day of January, 2004.

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