Issues In Continuing Care Risk Management

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To *Continuing Care Risk Management* (*CCRM*) members:

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August 28, 2015

Appropriate Diagnosis, Treatment of UTIs a Priority for Long-Term Care

Appropriate diagnosis and treatment of urinary tract infections (UTIs) are current priorities in long-term care, as described in an article in the August 2015 *Caring for the Ages*. A large part of the reason is because antimicrobial treatment of cases that are not really UTIs is linked to increases in drug resistance and to *Clostridium difficile* infection. One major challenge is determining whether an individual's symptoms actually represent a UTI. The Loeb criteria list criteria that should be met before antibiotic therapy is started. AMDA plans to undertake a project to improve UTI management in nursing homes, which will include an update of the Loeb criteria. The Stone criteria (which are an update of the McGeer criteria) indicate whether a case represents an infection for the purposes of surveillance. Both criteria emphasize that individuals should have at least one symptom that localizes to the urinary tract for a diagnosis of UTI. Similarly, AMDA's Choosing Wisely item on UTIs generally discourages performing urine cultures in the absence of signs and symptoms that localize to the urinary tract. Up to 50% of long-term care residents have bacteria in their urine without symptoms of infection; when cultures come back positive, antibiotic treatment is frequently ordered. However, treatment decisions should be individualized in those with advanced dementia. The Agency for Healthcare Research and Quality recently released UTI Communication Toolkit to improve education and communication regarding UTIs. Other efforts include increasing emphasis on hydration and educating families about diagnosis, monitoring, and antimicrobial stewardship.

CMS Extends Partial Enforcement Delay of Two-Midnight Rule through 2016

The Centers for Medicare and Medicaid Services (CMS) will extend the partial enforcement delay of its "two midnight" rule through December 31, 2015, states an August 12, 2015, announcement on CMS's website. Originally set to expire on September 30, 2015, the enforcement delay will now bar recovery auditors from conducting patient status reviews for those admitted on October 1, 2015, through December 31, 2015. Beginning on October 1, 2015, CMS intends for quality improvement organizations (QIOs) to assume the responsibility for conducting initial patient status reviews of providers to determine the appropriateness of Part A payment for short stay inpatient hospital claims. These reviews were previously conducted by the Medicare Administrative Contractors, who, CMS explains, are currently conducting the third round of Inpatient Probe and Educate reviews, with an anticipated completion date of September 30, 2015. The

agency notes that from October 1, 2015, through December 31, 2015, short-stay inpatient hospital reviews conducted by the QIOs will be based on Medicare's current payment policies. Then, beginning on January 1, 2016, QIOs and recovery auditors will conduct patient status reviews in accordance with any policy changes dictated by the Outpatient Prospective Payment System final rule and effective in calendar year 2016; however, CMS is asking recovery auditors to initially conduct patient status reviews only for those providers that have been referred by the QIO as exhibiting persistent noncompliance with Medicare payment policies, including, but not limited to, having high denial rates, consistently failing to adhere to the two-midnight rule, or failing to improve their performance after QIO educational intervention.

Driving Cessation Linked with Mortality, Cognitive and Functional Decline

Driving cessation is associated with decreased participation in outside activities, increased depression, accelerated cognitive decline, and increased 3-year mortality, according to a literature review conducted by the AAA Foundation for Traffic Safety. The review included 16 studies to evaluate the short- and long-term effects of driving cessation on older adults in light of the increase in the number of older licensed drivers; 81% of U.S. adults age 65 and older hold a driver's license, according to the authors. Among other negative impacts of driving cessation, the review found a 51% reduction in the size of older adults' social networks after they stop driving and an almost doubling of the risk of depressive symptoms. Former drivers were also almost five times as likely as current drivers to enter long-term care, and were four to six times more likely to die within three years. Given these outcomes, the authors recommend that programs that promote safe driving and mobility may be necessary as a physical and mental health intervention. Notably, because access to alternative transportation did not appear to offset the negative effects of driving cessation, the authors emphasize the need for independent mobility. The authors acknowledge evidence that drivers who are not physically or cognitively capable of driving derive clear benefits from driving cessation, including a 45% reduction in car crash rate.

OSHA Outlines New Alternative Resolution Process for Whistleblower Disputes

The Occupational Safety and Health Administration (OSHA) has issued an August 18, 2015, directive detailing the policies and procedures of a new early resolution process to be used as part of an alternative dispute resolution (ADR) program for whistleblower cases. Piloted in two of OSHA's regions from October 2012 to September 2013, the process proved to be a successful method for helping parties to reach a mutual and voluntary outcome to their whistleblower cases. Specifically, the ADR program offers whistleblower parties the opportunity to negotiate a settlement with the assistance of a neutral, confidential OSHA representative who has subject-matter expertise in whistleblower investigations. Because the pilot demonstrated that having staff dedicated to facilitating settlement negotiations provides an efficient and effective service that is highly desired by complainants and respondents alike, OSHA decided to make the process available to all of its regions. The agency notes that this directive does not prohibit OSHA whistleblower offices from offering complainants and respondents other ADR processes, such as third-party mediation. "OSHA receives several thousand whistleblower complaints for investigation each year," states Assistant Secretary of Labor for Occupational Safety and Health David Michaels, PhD, MPH, in an August 19, 2015, OSHA news release. "The alternative dispute resolution process can be a valuable alternative to the expensive and time consuming process of an investigation and litigation. It will provide whistleblower complainants and respondents the option of exploring voluntary resolution of their disputes outside of the traditional investigative process."

Assisted Living: Antipsychotics Prevalent Even in Residents without Dementia

Using data from 3,175 residents of 90 assisted-living communities, the research and analytics center of a senior housing provider found that the prevalence of antipsychotic use is 37% among residents with dementia—but also 37% among residents without dementia. In an August 12, 2015, article in *McKnight's Senior Living*, the center's chief medical officer also reports "remarkable variability" in prevalence of antipsychotic use among the communities, ranging from 6% to 97%. Finding that the proportion of individuals with dementia who receive antipsychotic drugs is more than twice as high outside of nursing homes as within nursing homes, a recent report from the U.S. Government Accountability Office recommended that the U.S. Department for Health and Human Services take a more active role in reducing such usage (see the March 13, 2015, *Issues in Continuing Care Risk Management*). "Multimodality tactics that address troubling behavior are warranted," the author writes. "However, medications, even antipsychotic medications, should not automatically be viewed as 'the enemy,' as their appropriate use conveys very real benefits that may outweigh their very real risks."

Pennsylvania Establishes Nursing Home Quality Task Force

Responding to a lawsuit alleging inadequate care in 14 nursing homes, Pennsylvania Secretary of Health Karen Murphy has announced the formation of a task force that will be responsible for identifying steps the department can take to improve the quality of care in nursing homes across the state. The task force will review existing state regulations with a goal of identifying opportunities for improving the quality and safety of nursing homes. In addition, the state announced that its auditor general will audit the health department's processes for responding to complaints. The health department will also work with additional outside groups to complement the task force's work. The task force will include members of the governor's office, secretaries of the state departments of aging, human services, and state, and a state senator and representative, and seven industry experts.

Evidence Lacking for Environmental Infection Control Practices

Despite the acknowledged importance of environmental cleaning of hard surfaces as part of an overall infection control program, only limited evidence exists regarding which practices are most effective, according to a report from the ECRI Institute-Penn Medicine Evidence-Based Practice Center sponsored by the Agency for Healthcare Research and Quality. The study's authors reviewed 80 clinical studies published in the past 25 years regarding cleaning practices targeting high-profile infections such as *Clostridium difficile*, methicillin-resistant *Staphylococcus aureus*, and vancomycin-resistant *enterococci*. They found few comparative effectiveness studies directly comparing either disinfection methods or monitoring and surveillance methods; they note that although "surface cleaning and disinfection products and technologies have been widely studied . . . the evidence base and current expert opinion have yielded consensus favoring only the value of quaternary ammonium and chlorine-based products." Furthermore, subject matter experts interviewed by the authors consistently emphasized that although certain cleaning or disinfection agents may perform a certain way in studies, their use in practical applications can vary widely, limiting their effectiveness. The experts also emphasized the importance of appropriate hand hygiene in limiting the spread of healthcare-associated infections, a factor that may not be accounted for in reviewing environmental cleaning practices.

In the Courts: Case Involving Choking Death to Proceed against Assisted-Living Facility

In a lawsuit against the operator of an assisted-living facility and its parent company involving a resident who died after choking on her food, the U.S. district court for the district of New Jersey has denied the defendants' motions for summary judgment regarding the negligence, punitive-damages, and "piercing the corporate veil" claims but dismissed the claims based on statutory violations.

About two years after the resident moved into the facility, a nurse found the resident choking on her food and performed the Heimlich maneuver, dislodging the obstruction. The resident went to the hospital for observation and returned later the same day. No reassessment was performed. Although the nurse said she completed an incident report, the defendants were unable to locate it during litigation. Staff informed the resident's physician the next morning, but he did not examine her.

Two days later, the resident was observed to be "leaning to one side and looking tired." She was not reassessed, and her physician was not notified. About two weeks later, the resident again began choking during a meal. The parties disputed whether staff performed the Heimlich maneuver. When emergency medical services arrived, they found that she had stopped breathing. They found "copious amounts of food" in her airway, which they managed to clear. She was brought to the hospital on a ventilator, but her son, acting as her healthcare proxy, decided to remove it. She died the same day.

On appeal, the district court found that issues of fact remained regarding whether the defendants met the duty of care that they owed to the resident. For example, the plaintiff submitted evidence that staff inconsistently adhered to organizational policies and procedures addressing response to choking, incident reporting, resident assessment, and physician notification regarding resident change in condition. The court thus denied the defendants' motion for summary judgment regarding the negligence claims.

It also denied the defendants' motions for summary judgment regarding the plaintiff's request for punitive damages and his claim arguing that the parent company should be held liable for the actions of the subsidiary (called "piercing the corporate veil"). Specifically, the court found that the plaintiff's claims that the negligence allegations arose from deliberate understaffing, and thus warranted punitive damages, were "fact-sensitive." It also found that the plaintiff had presented enough evidence that the operator was merely a "shell" company to merit trial.

However, the court dismissed the plaintiff's claims based on statutory violations, finding that the cited statutes were either inapplicable to assisted-living facilities or did not create a private cause of action. (*Watson v. Sunrise Senior Living Facility, Inc.*, No. 10-cv-230 (KM)(MAH), 2015 U.S. Dist. LEXIS 93962 [D.N.J. July 17, 2015].)

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