PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

ON THE RECORD
2017-D30

PROVIDER –
Mercy Medical Center

Provider No.: 22-0066

vs.

MEDICARE CONTRACTOR –
Wisconsin Physicians Service

HEARING DATE –
January 10, 2017

Cost Reporting Period Ended –
September 30, 2013

CASE NO.: 13-0633

INDEX

ISSUE

Whether Center for Medicare and Medicaid Services' ("CMS") June 27, 2012 determination that Mercy Medical Center ("Mercy" or "Provider") did not meet the quality reporting program requirements for Fiscal Year ("FY") 2013 and that its failure to meet these requirements would result in a two percent (2.0%) reduction in the FY 2013 market basket update was proper; and whether CMS's August 28, 2012 denial of the Provider's request for reconsideration of the market basket update penalty was arbitrary and capricious or otherwise improper.[1]

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted the Provider Reimbursement Review Board ("Board") finds that CMS properly imposed a 2 percent reduction to the market basket update used to calculate Mercy's FY 2013 Medicare payments. The Board also finds that CMS' reconsideration decision to uphold the 2 percent reduction to Mercy's market basket update was proper.

INTRODUCTION

Mercy is a Medicare-certified acute care hospital located in Springfield, Massachusetts. Mercy's designated Medicare administrative contractor is Wisconsin Physicians Service ("Medicare Contractor"). On June 27, 2012, CMS determined that Mercy failed to meet the requirements of the Hospital Inpatient Quality Reporting ("IQR") program for FY 2013.[2] As a result, Mercy received a 2 percent reduction in the FY 2013 market basket update.

Mercy requested CMS reconsideration of the decision.[3] On August 28, 2012, CMS upheld its reduction decision.[4] On February 11, 2013, Mercy timely appealed CMS' determination to the Board, and met the jurisdictional requirements for a hearing. The Board held a hearing on the record. Geoffrey Raux of Foley & Lardner LLP represented Mercy. Jerrod Olszewski, Esq., of Federal Specialized Services represented the Medicare Contractor.

STATEMENT OF THE FACTS

The Medicare program pays acute care hospitals for inpatient services under the inpatient prospective payment system ("IPPS").[5] Under IPPS, the Medicare program pays hospitals

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[1] Joint Request for Record Hearing dated August 25, 2016 at ¶ 5.
[2] Provider's Position Paper, Exhibit P-8.
[3] Provider Exhibit P-9.
[4] Provider Exhibit P-10.
[5] *See* 42 U.S.C. § 1395ww(d); 42 CFR Part 412. IPPS hospitals are often referred to as "subsection (d) hospitals".

predetermined, standardized amounts per discharge, subject to certain payment adjustments.[6] The standardized amounts are increased each year by "market basket update" to account for increases in operating costs.[7]

The Medicare Prescription Drug, Improvement, and Modernization Act ("MMA") of 2003[8] amended 42 U.S.C. § 1395ww(b)(3)(B) to establish the IQR program and requires each hospital to submit quality of care data "…in a form and manner, and at a time, specified by the Secretary."[9] For fiscal years 2007 through 2014, federal law specifies that a hospital that fails to report the required quality data under the IQR program is penalized by reducing the hospital's IPPS market basket percentage increase for the relevant year by two percentage points.[10] Federal law further specifies that a hospital that is subject to this penalty during a given year is also excluded from participation in the value-based purchasing ("VBP") program for that year and, thereby, not eligible to receive any value-based incentive payments under the VBP program for that year.[11]

The Medicare Contractor reduced Mercy's market basket update for FY 2013 by 2 percent because Mercy failed to submit Healthcare Associated Infection ("HAI")[12] data to the National Healthcare Safety Network ("NHSN") for the fourth quarter of calendar year 2011 by the submission deadline.[13]

As delineated in the final rule published on August 16, 2010 ("August 2010 Final Rule"),[14] and later corrected on October 1, 2010,[15] CMS required that Mercy submit Central Line Associated Bloodstream Infections ("CLABSI") data to the NHSN system for all four quarters of FY 2011. The four quarterly submission deadlines were:

1. Data from the first quarter of CY 2011 was due on August 15, 2011;
2. Data from the second quarter of CY 2011 was due on November 15, 2011;
3. Data from the third quarter of CY 2011 was due on February 15, 2012; and
4. Data from the fourth quarter of CY 2011 was due on May 15, 2012.

CMS notified Mercy on June 27, 2012 that its fourth quarter 2011 CLABSI data was missing.[16] This omission resulted in a 2 percent reduction in Mercy's FY 2013 market basket update.

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[6] *See* 42 C.F.R. Part 412.
[7] *See* 42 U.S.C. § 1395ww(b)(3).
[8] Pub. L. No. 108-173, 117 Stat. 2066 (2003).
[9] MMA § 501(b). *See also* 42 C.F.R. § 412.140(c).
[10] *See* 42 U.S.C. § 1395ww(b)(3)(B)(viii)(I); 42 C.F.R. § 412.64(d)(2)(i)(B).
[11] *See* 42 U.S.C. § 1395ww(o)(1)(C)(ii); 79 Fed. Reg. 49854, 50048-50049 (Aug. 22, 2014).
[12] This data included Central Line Associated Blood Stream Infection ("CLABSI") data. *See* 75 Fed. Reg. 50042, 50223 (Aug 16, 2010).
[13] Provider Exhibit P-8.
[14] 75 Fed. Reg. at 50224.
[15] 75 Fed Reg. 60640, 60641(October 1, 2010).
[16] Provider Exhibit P-8.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Mercy states that it timely submitted the quarterly CLABSI data for the first three quarters of calendar year 2011 to NHSN. However, with respect to the data for the fourth quarter 2011, Mercy states that it was confused by an email reminder sent on May 3, 2012 by MASSPRO, CMS' Quality Improvement Organization ("QIO") contractor for Massachusetts.[17] Mercy claims that the email implied that the fourth quarter 2011 CLABSI data should be submitted to QualityNet rather than to the NHSN. On May 15, 2012, Mercy attempted to submit the quality data that it understood was due to the QualityNet website, however, Mercy claims that it experienced transmission and IT difficulties, and its data was not received until the next day, May 16, 2012.[18]

Mercy argues that the FY 2013 market basket reduction should not be applied to it in light of the confusing directions in MASSPRO's May 3, 2012 email message. Upon receipt of this email, Mercy contends that it reasonably understood that CMS, through its contractor, was instructing hospitals to submit their CLABSI data to QualityNet and not NHSN.[19] Mercy states that the notion that the submission was to be uploaded to QualityNet, rather than NHSN, was certainly plausible, particularly since hospitals participating in federal health care programs were already required to submit information on numerous measures (including measures on some hospital-acquired conditions) to QualityNet.[20]

Mercy argues that the Board should reverse the payment penalty in light of the confusing directive from MASSPRO and other transmission and IT difficulties that it experienced. Mercy believes it is not proper for CMS to impose the penalty "for data processing and communication errors that were clearly under the control of CMS or its contractors."[21]

Mercy also believes that CMS arbitrarily denied its reconsideration request without explanation and believes that the reconsideration denial was in direct conflict with CMS' stated policy that hospitals are not responsible for communication errors under the control of CMS or its contractors.[22] Mercy argues that CMS' denial of its reconsideration request was rendered in a manner that is inconsistent with how CMS has resolved reconsideration requests made in similar circumstances.

Mercy obtained information through the Freedom of Information Act process and other due diligence that they believe shows that CMS has consistently granted reconsideration requests when a provider's failure to meet program requirements could be classified into one of CMS' qualifying reconsideration categories, including (a) "unclear instructions given by QIOs [such as MASSPRO] or CMS" or (b) "difficulty with infrastructure

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[17] Provider's Final Position Paper at 6; Provider Exhibit P-4.
[18] Provider's Final Position Paper at 6-7.
[19] Provider's Supplemental Position Paper at 5.
[20] *Id.* at 8-9.
[21] Provider's Supplemental Position Paper at 8-9, quoting 71 Fed. Reg. 47870, 48041 (August 18, 2006).
[22] Provider's Supplemental Position Paper at 9-10.

(uploading issues)".[23] With respect to FY 2013, Mercy proffers data to show CMS determined that 163 providers did not meet certain requirements of the RHQDAPU[24] program and subsequently imposed market basket penalties on those providers. CMS received 112 reconsideration requests from those providers and 101 of those requests were related to penalties imposed by CMS for non-submission (or untimely submission) of CLABSI data.[25] Through the reconsideration process, CMS overturned 95 of the 101 requests related to CLABSI data, resulting in an overturn rate of 94%. CMS explicitly stated that these 95 reversals were overturned "based on communication and infrastructure issues."[26]

The Board reviewed the August 2010 Final Rule and notes that it was clear that the CLABSI and Surgical Site Infection data was to be submitted to the NHSN using the standard procedures that have been set forth by CDC for NHSN participation in general and for submission of these two measures to NHSN in particular. It further explained that detailed requirements for NHSN participation, measure specifications, and data collection could be found at *http://www.cdc.gov/nhsn/*.[27]

The Board also reviewed the May 3, 2012 email from MASSPRO and finds the email confusing in part but notes that it clearly states Mercy had been "identified as having outstanding Quarter 4 2011 CLABSI data" and clearly stated the "data submission deadline for 4Q11 is May 15, 2012". The Board does not find that the MASSPRO email directed the hospital to submit the CLABSI data to QualityNet. Rather, the MASSPRO email informs other quality improvement organizations ("QIOs") that a "New Excel file has been uploaded to the My QualityNet account of users with the 'Hospital Report Contact Role'" and that this new file includes CLABSI data submitted to NHSN by the hospitals as of May 1, 2012.[28] While inclusion of this information in an email to Mercy may have been confusing, the information was clearly not directed to Mercy and did not advise Mercy to submit CLABSI data to QualityNet. The Board notes that Mercy correctly submitted the CLABSI data for the first three quarters of 2011 to the NHSN. And, if there was confusion on Mercy's part, Mercy should have sought clarification long before the May 15, 2012 data submission deadline.

Additionally the Board finds no evidence in the record of CMS or Medicare contractor systems problems preventing the timely submission of Quarter 4 2011 data to the NHSN. Rather, the record shows that Mercy communicated with the QualityNet help desk related to a problem uploading inpatient clinical data and that Mercy needed to upgrade its version of Java.[29] In addition the confirmation submitted by Mercy to document its Quarter 4

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[23] Provider's Supplemental Position Paper at 11.
[24] Reporting Hospital Quality Data for Annual Payment Update Program.
[25] Provider Exhibit P-13 at 1.
[26] *Id.*
[27] 75 Fed. Reg. at 50223.
[28] Provider Exhibit P-4.
[29] Medicare Contractor Exhibit I-6 at 48.

CLASBI submission relates to data for the first quarter of 2012.[30] As a result of the above the Board concludes that it was Mercy's staff error the resulted in its failure to submit Quarter 4 2011 CLASBI data in the form and manner, and at a time specified by the Secretary.

The Board also rejects Mercy's argument that CMS' denial of its reconsideration request was rendered in a manner that is inconsistent with how CMS resolved reconsideration requests in similar circumstances. The evidence Mercy obtained confirms that CMS consistently upheld non-compliance determinations that resulted from provider error,[31] while it consistently overturned determinations that resulted from CMS system errors.[32] The record shows that CMS classified Mercy's failure to submit its CLABSI data as provider staff error.[33] As such the Board finds that the CMS reconsideration properly upheld the determination that Mercy did not meet the IQR program requirements.[34]

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Board finds that CMS properly imposed a 2 percent reduction to the market basket update used to calculate the FY 2013 Medicare payments for Mercy under IPPS. The Board also finds that CMS' reconsideration decision to uphold the 2 percent reduction to Mercy's market basket update was proper.

BOARD MEMBERS PARTICIPATING:

L. Sue Andersen, Esq.
Charlotte F. Benson, CPA
Jack Ahern, MBA, CHFP, FHFMA (dissenting)
Gregory H. Ziegler, CPA, CPC-A

FOR THE BOARD:

/s/
L. Sue Andersen, Esq.
Chairperson

DATE: September 28, 2017

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[30] Provider Exhibit P-6 and P-7.
[31] Provider Exhibit P-16 at 6-9.
[32] Provider Exhibit P-16 at 1-2.
[33] Provider Exhibits P-13 at 4 and P-14 at 1.
[34] Provider Exhibits P-13 and P-14.

Jack Ahern, dissenting,

Having carefully read and considered the Board majority decision, I respectfully disagree with the majority decision. It is my finding that the Mercy Medical Center ("Mercy" or "Provider"), has proffered sufficient evidence to establish by a preponderance of the evidence, that the Provider's non-compliance with data submission requirements was primarily due to a CMS communication error and therefore the 2% (approximately $ 1 million in 2013) reduction in the market basket update imposed upon the Provider should be reversed. The 2% reduction was imposed by the CMS Office of Clinical Standards and Quality subsequent to a finding that Mercy did not submit 4th quarter 2011 Healthcare-Associated Infection ("HAI") Central Line-Associated Blood Stream Infection ("CLABSI") data by the May 15, 2012 submission deadline. [P – 8 Letter from CMS to Mercy Medical Center, dated June 27, 2012.]

The Board majority decision holds that the Provider should not have misinterpreted an email from the CMS-assigned contractor who managed quality reporting. The email, sent on May 3, 2012, reads:

[P – 4: Email message from Masspro to Mercy Medical Center, dated May 3, 2012]

> **From:** [Redacted Name of QIO Quality Reporting Advisor]@maquio.sdps.org
>
> **Sent:** Thursday, May 03, 2012 11:57 AM
>
> **To:** [Redacted Names of Mercy Medical Center Quality Reporting Staff]
>
> **Subject:** FW: 4Q11 CLABSI Deadline May 15, 2012
>
> **To: Mercy Medical Center**
>
> Your hospital has been identified as having outstanding Quarter 4 2011 CLABSI data. This will serve as a reminder that the upcoming deadline for Quarter 4 2012 CLABSI data is rapidly approaching.
>
> ---
>
> QIOs: A new Excel file has been updated to the *My QualityNet* account of users with the "Hospital Report Contact Role". (Users who do not have this role, may contact their QualityNet Security Administrator).
>
> This file includes Central Line-Associated Blood Stream Infection (CLABSI) data submitted to the National Healthcare Safety Network (NHSN) as of **May 01, 2012** for the hospitals with an active Hospital Inpatient Quality Reporting (IQR) Notice of Participation on File.
>
> IP_CLABSI_4Q11_Non_Submit – Hospitals have NOT submitted CLABSI data to CMS for 4Q2011.
>
> ***The data submission deadline for 4Q11 is May 15, 2012.***

> Failure to submit data by the data submission deadline date for each quarter may result in an annual market basket update with a 2.0 percentage point reduction.
>
> Thanks very much for your attention to meeting the data submission deadlines.
>
> [QIO Quality Reporting Advisor - Redacted Name], RN
>
> Quality Reporting Advisor
>
> Patient Safety Initiative, Masspro
>
> [Redacted phone number]
>
> [QIO Quality Reporting Advisor - Redacted Name]@magio.sdps.org
>
> www.masspro.org
>
> [Mass Pro Logo; Quality Improvement Organizations ….]

The Provider interpreted this email [P-4] to mean that the CMS quality reporting contractor was directing the Provider to abandon the established practice of submitting HAI CLABSI data to CMS via the NHSN system and to initiate submission of the data to CMS via another system and portal called *My QualityNet*. While the Board majority concedes the email from the CMS contractor was indeed confusing, it holds that the email did not constitute a communication error that justified failure to timely submit quality data.

It is undisputed that the applicable regulations providing for appeal and potential reversal of a 2% penalty do not prescribe the specific elements or standards used to assess which communication error excuses are justifiable under the law. Notwithstanding the absence of detailed guidance, the Board majority and the Provider have both implicitly deduced a standard of general applicability by referencing prior CMS penalty reversals obtained by the Provider under the Freedom of Information Act and included in Mercy's Position Paper. [Provider's Supplemental Position Paper at 11; P – 13 to P - 16.] The Board majority and the Provider agree that CMS has consistently limited penalty reversals to those fact patterns that CMS determined indicate that non-compliance was not due to provider error. However, the Board majority asserts that Mercy's circumstances properly fall under the "provider error" category and not the "CMS communication error" category. The Board majority decision is based on review of summaries and statistics pertaining to prior CMS reconsideration affirmations and reversals which were requested and obtained by the Provider under FOIA and presented to the Board to support Mercy's claim of inequitable and arbitrary CMS adjudication.

This casuistic approach is limited to reviewing summaries of prior decisions and decision statistics to elicit a general standard of review and is largely circular because it assumes that CMS properly applied an appropriate standard in the first place. As such, this approach is an insufficient basis to reduce a hospital's payment by $ 1 million. Referencing a list of unpublished cases and deducing how CMS has previously applied a justifiable excuse or

communication error standard is informational, but insufficient to validate the standard itself, unless the authoritative basis and discernable rationale associated with the application of the standard itself is also defined and properly referenced.

The Provider's Position Paper [P-16] briefly lists facts pertaining to the 49 penalty reversals but the rationale for the decisions is not presented. My review of the 49 reversed case summaries strongly suggests that CMS applied a standard that was inconsistent, and in some instances a much lower standard than the standard being applied in this case by CMS and the Board majority.

For instance, under the category of "IT INFRASTRUCTURE', a reversal for a certain case has been granted [P-16] and the only statement of facts and discussion provided is as follows:

> Provider blames "Qnet downtime" as a reason they did not submit 1 SCIP case for 3Q06. However, upon research from the HRP QIOSC, this provider did not access the RHQDAPU provider report available to them. In addition, on the day of submission 1330 Qnet reports were run, "so it would appear that QNet was available that day."

The above rationale is by no means clear since the above provider was granted a reversal when the fact pattern seems to indicate solid grounds for confirming, rather than reversing, the penalty. Moreover, no authoritative test, basis, or other generally applicable standard is referenced to conclude that a reversal is appropriate.

The above cited case is representative of the ambiguous nature of the CMS reversal standard. Review of multiple other reversed penalty case summaries also confirms that the communication error standard applied for reversal appears to be less stringent than the standard applied to Mercy.

Review of a reversal pertaining to claim submission also calls into question what standard is being applied by CMS. As indicated in the following reversal summary [P-16], even the hospital in question claimed the error was self-inflicted and not due to CMS, yet for an unspecified reason, CMS granted a penalty reversal:

> "1 AMI claim not submitted for 1Q06. Other charts successfully submitted at the same time chart in question was supposed to be submitted. Hospital claims "technology problem" but does not specifically blame CMS." (emphasis added)

The following reversal appears to be particularly applicable to the case at hand. The sole information and CMS discussion on the record relating to this case is as follows [P-16]:

> "QIO provided misleading information and impeded the hospital from providing [sic] competed data." (emphasis added)

The above cited CMS reversal is listed by CMS as a case which falls under the CMS assigned reversal category "CMS / QIO / CONFUSION" and the CMS finding is entirely based on "misleading QIO information" which "impeded," but apparently did not absolutely prevent, the above referenced hospital from timely compliance. CMS's penalty reversal, as cited above, squarely contradicts the Board majority's assertion that a confusing email does not constitute a justifiable excuse simply because the email could possibly be deciphered to be pointing to a compliant submission. If, as the Board majority asserts, higher level guidance, such as the August 2010 Final Rule and CMS's Quality Net website, negates the finding of a justifiable excuse because such guidance provides sufficient direction to alert a provider to ignore, modify, or properly parse and interpret confusing instructions from a QIO, then it would follow that "CMS / QIO / CONFUSION" reversals and the reversal category itself would not be an option for CMS.

Communication Error as a Grounds for Reversal of Penalty

CMS has stated in the Federal Register that *"CMS has not held a hospital responsible for data processing or communication errors that were clearly under the control of CMS or its contractors. However, CMS does hold the hospital responsible for its own errors in data processing and communication."* [71 Fed. Reg. 47870, 48041 (August 18, 2006); P-11.] Absent any other authoritative guidance specifically defining what constitutes a "communication error" that rises to the level of a justifiable excuse for Medicare quality reporting purposes, some proxy for detailed guidance must be applied to consistently and equitably ascertain if a justifiable excuse existed. One such proxy could be the application of the "reasonable-person" standard often used in tort law to assess if one party or another was negligent in the exercise of their duties to perform.

Per *Black's Law Dictionary,* 10th edition, page 1457, the reasonable person standard is defined as follows:

> **reasonable person.** (1856) 1. A hypothetical person used as a legal standard, esp. to determine whether someone acted with negligence; specif., a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and others' interests. ● The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions.

Using the above clearly defined and time tested reasonable person standard, a systematic review of the wording in the questionable email and the actions taken by the Provider can be made in a transparent and reviewable manner.

The record indicates that the Provider interpreted the email (cited above) to mean that CLABSI data previously submitted to NHSN should no longer be submitted to NHSN but rather to the *My QualityNet* system.

I find the Provider's interpretation reasonable for the following reasons:

Firstly, this email is sent from an authoritative source, the person and organization tasked by CMS with managing the quality data submission process. I find that it was therefore prudent for Mercy to give this email significant deference. [Provider's Final Position Paper at 1; P-4 Masspro Email.]

Secondly, the subject line, *"**Subject**: FW: 4Q11 CLABSI Deadline May 15, 2012,"* is consistent with a conclusion that the central topic of this email was solely the upcoming May 15th, 2012, deadline for submitting the 4th quarter of 20**11**. However, the email title line which followed below the subject line also referenced the 4th quarter of 20**12**, (the following year). [Provider's Final Position Paper at 4.] The year mismatch may have been a typographical error which would undoubtedly constitute a communication error causing confusion. The central theme of the email title, as expressed in the subject line, was repeated in bold print in the lower portion of the body of the email: "***The data submission deadline for 4Q11 is May 15, 2012."*** [Provider's Final Position Paper at 1; P - 4, Masspro Email; P-10, August 28th reconsideration decision denying reversal of penalty.]

Thirdly, the email seems to have indiscriminately comingled an incongruent mixture of intended receivers: although sent to the Provider, in the middle of the email, the intended receiver appears to indiscriminately switch to contractors or Quality Improvement Organizations "QIO's" and again back to the Provider as the email concludes.

Fourthly, no further communication was sent after this date and before the deadline to clarify any possible misunderstanding about whether to submit CLABSI data via *QualityNet* or the NHSN data portal. Therefore, this confusing email sent less than two weeks before the May 15th deadline, was from the Provider's operational perspective the most recent, authoritative guidance Mercy received before the deadline and could reasonably be viewed as superseding or implementing and updating prior instructions and more esoteric and distant levels of guidance.

Finally, the email specifically referenced CLABSI data submitted to NHSN, and strongly implied, if not stated, that something new and different was being done with this data than in the past; "A new Excel file has been updated to the My QualityNet account of users with the "Hospital Report Contact Role". …. This file includes Central Line-Associated Blood Stream Infection (CLABSI) data submitted to the National Healthcare Safety Network (NHSN)." (emphasis added)

The Board majority correctly noted that other guidance contradicted the email and the Provider *could* have pursued further clarification. However the Provider reasonably accepted the email at face value and thereby mistakenly concluded that the email represented proper and timely authoritative guidance advising the use of *QualityNet* to submit its CLABSI data rather than using the NHSN portal as had been done in prior quarters.

Significantly, the record indicates that in adjudicating Mercy's reconsideration request, CMS found that Mercy had declined Masspro's offer of assistance with data submission. [See P-13 at 4: CMS finding that calls were made to the Provider but "Mercy Medical Center

declined Masspro's offer to help with submission"] However, the record established by CMS does not include any support documentation such as date, time, a summary of the Masspro calls, who made or received the calls, or any factual corroboration that such calls were indeed made. Thus no conclusion can be drawn other than at some point in time Masspro may have offered to help the Provider submit some of its quality data. It is reasonable however, to admit the possibility that Mercy did not perceive any need for assistance until it actually attempted to submit CLABSI data to *QualityNet* following what it viewed to be the QIO's instructions.

With respect to the timeliness of the Provider's initial attempts to submit the data, the record raises serious questions as to whether Mercy imprudently waited until the last day, not allowing sufficient time to deal with the confusion caused by the contractor email. [I – 6 at 6: QualityNet help desk call log which indicates time of call regarding submission difficulties was on the afternoon of the last day the data was due, May 15, 2012, at 4:13 pm.] Therefore, with respect to calls made to the *QualityNet* help desk, it is clear that the calls for assistance on the record were made in the waning hours of the deadline day. Absent from the call log is any indication of when earlier in day (or prior days) work on submission was initiated by Mercy.

With respect to delaying until the last day to attempt data submission, the reasonable-person standard should be considered to assist with discerning if a justifiable excuse existed for non-compliance: "The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions." [*Black's Law Dictionary*. 10th edition, page 1457.]

With respect to timeliness, I find that the evidence on the record narrowly supports a finding that, while Mercy's actions were neither ideal nor advisable, delaying to the last day did not rise to the level of negligent unreasonableness or preclude a finding of a justifiable excuse. Knowing that a new and inexperienced staff member had been given the data entry task, the Provider clearly did not exercise an abundance of caution by waiting to the last possible day to finalize data submission. Moreover, the Provider would have been much better able to mitigate system and communication problems to effect timely submission of data, if the Provider had initiated the portal related portion of its data entry process several days before the deadline.

However, I find that had the Provider not been misdirected to the wrong data entry portal, *My QualityNet*, by an authoritative CMS contractor email, it is likely that the submission would have been fully compliant. Notably, the record indicates the Provider successfully submitted CLABSI data for the prior 3 quarters to NHSN; there is no evidence indicating this positive result would not be reproduced, even if done on May 15, 2012.

Thus, for the reasons stated above, I hold that the 2% penalty should be reversed.

/s/
Jack Ahern, MBA, CHFP, FHFMA
Board Member

Date: September 28, 2017