

Claims Report

United States Army Claims Service

Tort Claims Note

Are Contractor Health Care Providers “Employees of the Government”?

Claims attorneys and investigators must be alert to the fact that many of the health care providers (HCP) within the military medical care system are neither active duty service members nor government civilian employees. These non-government HCPs provide medical services to Department of Defense (DOD) health care beneficiaries through a variety of programs and contracts established or authorized by Congress, the most important of which are the following: Military-Civilian Health Services Partnership Program,¹ PRIMUS HCPs,² Residents in Training,³ and Personal and Nonpersonal Services Contract HCPs.⁴ The focus of this note will be on the most difficult category—personal services contract (PSC) HCPs.

Depending on the specific facts of a particular case, a non-government HCP may be considered either an independent contractor or a United States employee. Tests similar to the “strict control” test applied to other contractors and their employees have been applied to physician groups and to individual physicians providing medical services to the United States. There are two basic tests that have been developed for physicians who contract with the government: the “strict control” test, which comes from *Logue v. United States*,⁵ and the “strict control aside from professional judgment” test, which is discussed in *Lurch v. United States*.⁶

As a general rule, the federal circuit courts of appeal have held that non-personal services contract (NPSC) physicians either in private practice or associated with an organization under contract to provide medical services to facilities operated by the federal government are independent contractors, and not employees of the government for Federal Tort Claims Act (FTCA) purposes.⁷ Therefore, the employee status of NPSC

1. The Military-Civilian Health Services Partnership Program (HSPP) is established under U.S. DEP’T OF DEFENSE INSTR. 6000.12, HEALTH SERVICES OPERATIONS AND READINESS (29 Apr. 1996) [hereinafter DODI 6000.12]. The Partnership Program is not a contract and need not follow the requirements set forth in the Federal Acquisition Regulation, GENERAL SERVICES ADMIN. ET. AL., FEDERAL ACQUISITION REGS. (June 1997) [hereinafter FARs]. The most commonly used “internal” partnership agreement allows military treatment facility (MTF) commanders to enter into formal agreements whereby civilian HCPs utilize government facilities to treat beneficiaries eligible under TRICARE. The basic purpose of the program is to encourage TRICARE eligible beneficiaries to seek care in an MTF rather than in a more costly civilian medical facility. The advantages to the beneficiaries are greater access to care and no TRICARE cost share or deductible. Partnership Providers are paid only for treatment of TRICARE eligible beneficiaries receiving TRICARE authorized care, and their payment is through the TRICARE fiscal intermediary. They are subject to credentialing and hospital peer review procedures. The HSPP providers are not government employees, nor are they technically speaking, “contractors” because there is no nonpersonal contracting under the FARs. However, the relationship created between a government treatment facility and a HSPP provider is similar to that of an independent contractor. As with independent contractors, HSPP providers are non-government, civilian HCPs whose negligent acts should not create vicarious liability on the part of the United States. Inherent in their relationship with the United States is the critical fact that government employees do not exercise day-to-day duty supervision and control of the contractor or Partnership Provider; in the Partnership Program, Army personnel should not be supervising the Partnership Provider or vice versa.

2. Primary Care for the Uniformed Services (PRIMUS) Clinics are private, freestanding, medical facilities which provide health care to DA beneficiaries under contractual agreements. The HCPs who work at PRIMUS clinics are considered employees of an independent contractor and are not government employees. DODI 6000.12, *supra* note 1.

3. Frequently, civilian medical institutions will send their interns, residents, and other medical trainees to government treatment facilities for training purposes. Similarly, the United States may send its own medical trainees to civilian medical institutions for training purposes. The United States may be responsible for the tortious acts of a non-government employee of a civilian medical institution who is training in an MTF. Civilian interns, residents and other medical trainees in MTFs may be treated as “student volunteers” pursuant to 5 U.S.C. § 3111 (2000). On the flip side, federal employees who act as “borrowed servants” on loan to non-federal entities may still retain their status as federal employees for purposes of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2000) [hereinafter FTCA]. See *Palmer v. Flaggman*, 93 F.3d 196 (5th Cir. 1996); *Perry v. United States*, 936 F. Supp. 867 (S.D. Ala. 1996). The Military Claims Act, 10 U.S.C. § 2733 (2000), may also be used to process a claim against the United States for the actions of Army medical trainees training at civilian medical facilities under training agreements. For a thorough discussion of this issue see U.S. DEP’T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES, para. 3-8 (1 Apr. 1998) [hereinafter DA Pam 27-162]. Whether the borrowing MTF is liable may depend upon how the State interprets the borrowed or loaned servant doctrine, which purports to shift vicarious liability from the master of a negligent servant to the borrowing master. All cases involving health care trainees in MTFs should be thoroughly investigated to determine the nature and extent of day-to-day supervision and control of the trainee by government employees. Additionally, state law on agency should be researched to ascertain the elements required to assert or refute a borrowed or loaned servant defense.

4. Contracting for HCPs is authorized under 10 U.S.C. § 1091 (2000), as amended by The Floyd D. Spence National Defense Authorization Act for Fiscal 2001, Pub. L. No. 106-398, § 1, 114 Stat. 1654, which authorizes the Department of Defense to contract for provision of direct health services. All contracts under this statute are subject to the FARs, the U.S. DEP’T OF DEFENSE ACQUISITION REG. SUPP. (Apr. 1, 1984) [hereinafter DFARS], and the U.S. DEP’T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPPL. (Dec. 1, 1984). A “services contract” is a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A “nonpersonal services contract” is one in which personnel rendering the services are not subject, either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the government and its employees. A “personal services contract” however, is one in which, either by its express terms or as administered, makes contractor personnel appear to be, in effect, government employees. 48 C.F.R. ch. 1, subpart 37.1 (2000).

HCPs is usually clear-cut, and not as confusing as the employee status of PSC HCPs. Nevertheless, claims attorneys and investigators should not assume that an NPSC physician will be considered an independent contractor in the event of litigation. Accordingly, claims attorneys and investigators should always conduct a thorough factual investigation in order to determine the exact nature and extent of any government supervision or control of an NPSC HCP, and should also research applicable state law to rule out potential liability on the part of the United States for the actions of an NPSC HCP under theories of “ostensible agency,” “apparent authority,” “equitable estoppel,” “borrowed servant,” or negligent hiring or credentialing.⁸

The issue of whether or not a PSC HCP is an employee of the United States for FTCA purposes is very complicated. In the early 1980s, when Congress first authorized DOD to hire PSC HCPs, DOD considered PSC HCPs to be independent con-

tractors and required them to carry their own medical malpractice liability coverage.⁹ However, in 1995, DOD changed its position and revised the personal services contracts, stating that PSC HCPs were federal employees entitled to the immunities provided military and DOD civilian HCPs.¹⁰ The effect of DOD’s policy was that PSC HCPs hired by the Department of the Army were not required to carry personal malpractice insurance, nor did DA purchase an overall malpractice insurance policy for its PSC HCPs.

Unfortunately, prior to 18 November 1997, the Department of Justice’s (DOJ) position on PSC HCPs differed from that of DOD. The DOJ believed that a PSC, or any other contract for that matter, could not, by its terms, expand the Government’s waiver of sovereign immunity under the FTCA, nor expand the scope of its liability for the tortious acts of a contract employee.¹¹ Therefore, even though a PSC contained language

5. 412 U.S. 521 (1972). The test for determining whether an individual is an employee of the United States or an independent contractor was set out by the Supreme Court in *Logue* as the “absence of authority in the principal to control the physical conduct of the contractor in performance of the contract.” *Id.* at 527. In *Logue*, a Federal prisoner was placed in a county jail pursuant to contractual arrangement. *Id.* at 522-25. Due to the alleged negligence of the county jailers, the prisoner committed suicide. *Id.* The Supreme Court refused to hold the United States liable for the negligence of the jailers because an examination of their relationship showed that federal employees did not run the day-to-day activities of the jail; instead, such activities were conducted and supervised by county employees in accordance with the terms of the government contract. *Id.* at 530, 533. The cases that have followed in the wake of *Logue* have applied its “strict control test,” that is, whether the United States exerts day-to-day supervision and control over the “detailed physical performance of the contractor.” *Id.* at 528; *United States v. Orleans*, 425 U.S. 807, 814 (1976). With respect to the federal employment status of physicians, an important case is *Wood v. Standard Products Co., Inc.*, 671 F.2d 825 (4th Cir. 1982). In *Wood*, a descendant of *Logue* and *Orleans*, a private physician who contracted with the U.S. Public Health Service to provide medical services to seamen in a remote and little-used port was held to be an independent contractor because there was no evidence that the government supervised or controlled the physician’s day-to-day practice or treatment of patients. *Id.* at 829-32. The facts which the Court in *Wood* found to be significant in reaching its holding included the following: the physician was referred to as a “contract physician” in the contract; the contract specified that the physician was to provide outpatient medical care in the same manner and of the same high quality as he provided for his private patients; the contract did not specify the physician’s hours, the physician had the right to refuse to treat patients; the Public Health Service provided no office space, support, services, supplies, or equipment to the physician; the physician’s billings, made to the Public Health Service, were made under a predetermined fee schedule; and, finally, site visits by the Public Health Service were meant only to check the adequacy of the physician’s facilities and not to “oversee” his practice. *Id.*

6. 719 F.2d 333 (10th Cir. 1983). In *Lurch*, the court created a variation of the strict control test. The *Lurch* court stated in dicta that the strict control test for determining employee or contractor status for FTCA purposes is inappropriate for cases involving doctors because doctors, due to their training and ethical obligations, can never be “controlled.” *Id.* at 337. The court believed that a doctor must always be free to exercise independent professional judgment as to what is best for each patient. *Id.* However, the *Lurch* court did not analyze the facts in light of their modified test because their holding was based on an examination of the contract with the doctor, which specified that the doctor would not be considered an employee of the Veterans Administration for any purposes. *Id.* at 338.

It should be noted that unlike contract physicians, a contract nurse can sufficiently be under the direct supervision and control of a government employee such that the nurse will also be considered a government employee, even if the nurse is individually credentialed, such as a nurse midwife or certified registered nurse anesthetist (CRNA). For example, in the case of *Bird v. United States*, the Tenth Circuit Court of Appeals found that a CRNA was an employee of the United States because state law placed the CRNA under the control and supervision of government physicians; the CRNA was required to work with patients designated by others; the CRNA had no separate office; the CRNA used hospital equipment exclusively; and the CRNA was under the same degree of control and supervision by the government surgeon as any government nurse in the hospital. 949 F.2d 1079, 1084-88 (10th Cir. 1993).

7. See, e.g., *Robb v. United States*, 80 F.3d 884 (4th Cir. 1996); *Carrillo v. United States*, 5F.3d 1302 (9th Cir. 1993); *Broussard v. United States*, 989 F.2d 171 (5th Cir. 1993); *Leone v. United States*, 910 F.2d 46 (2d Cir. 1990); *Lilly v. Fieldstone*, 876 F.2d 857 (10th Cir. 1989); *Lurch v. United States*, 719 F.2d 333 (10th Cir. 1983); *Bernie v. United States*, 712 F.2d 1271 (8th Cir. 1983). See also UNITED STATES ARMY CLAIMS SERVICE, FEDERAL TORT CLAIMS ACT HANDBOOK, para. II.B.2c (Sept. 1998) [hereinafter FTCA Handbook].

8. See *supra* note 7 and the cases cited therein.

9. Need citation.

10. See U.S. DEP’T OF DEFENSE INSTR. 6025.5, PERSONAL SERVICES CONTRACT (PSCs) FOR HEALTH CARE PROVIDERS (HCPs) (6 Jan. 1995) [hereinafter DODI 6025.5].

The existence of an employer-employee relationship created by a PSC shall result generally in the treatment of a PSC HCP [health care provider] similar to a DOD employee for many purposes. Included in this similar treatment is that Federal Tort Claims Act...claims alleging negligence by a PSC HCP shall be processed by the Department of Defense as claims alleging negligence by DOD military or civil service employees. As a result, the PSC HCP is not required to maintain medical malpractice liability insurance.

Id.

to the effect that a Government contract physician "shall" be treated as a Government employee for the purposes of the FTCA, a PSC physician was not treated as such by DOJ unless the physician was, in fact, an "employee of the Government" as determined by factual investigation and research of applicable federal case law.¹² If investigation indicated that a PSC HCP was not an "employee of the Government," then DOJ would not represent the PSC HCP, and would assert the independent contractor defense if suit were brought against the United States.

The positions of the DOD and DOJ were reconciled, at least prospectively, after President Clinton signed the National Defense Authorization Act for Fiscal Year 1998,¹³ on 18 November 1997. Section 736 of that law amended the Gonzalez Act,¹⁴ to add PSC contract physicians described in 10 U.S.C. § 1091.¹⁵ The effect of this amendment was to make PSC HCP "employees of the United States."

However, DOJ does not believe that the 1997 amendment is retroactive. Therefore, different procedures apply to claims arising before and after 18 November 1997. Accordingly, claims attorneys and investigators should be particularly alert to the following:

(1) For incidents occurring on or after 18 November 1997, any claims involving PSC HCPs should be investigated as if those HCPs were, in fact, U.S. employees and not independent contractors. From the litigation perspective, PSC HCPs are now protected from personal liability for malpractice claims. Claims attorneys and investigators should be aware that PSC HCPs finding themselves sued in their individual capacity for PSC-related incidents on or after 18 November 1997 may request representation or substitution from DOJ through Litigation Division, Office of The Judge Advocate General.

(2) For incidents occurring before 18 November 1997, USARCS should be notified immediately of the involvement of any PSC HCP. It is imperative that the facts be quickly and thoroughly investigated to determine the exact nature and extent of day-to-day government supervision and control of the PSC HCP, as well as to rule out any direct tortious activity on the part of a government employee in addition to that of the PSC HCP. If a PSC HCP is the sole tortfeasor, then the claim may be disposed of under the provisions of the Military Claims Act (MCA),¹⁶ and Chapter 3, Army Regulation 27-20.¹⁷ If both PSC HCPs and Government employees (for example, active duty military members or civilian Government employees) are involved, then a determination will be made by United States Army Claims Service (USARCS) and DOJ on a case-by-case basis with respect to whether the claim should be handled under the FTCA or the MCA. Following completion of the factual investigation, USARCS will determine whether to process the claim under the MCA, or to consult with DOJ with respect to whether DOJ will make an exception and permit USARCS to settle the claim under the FTCA in lieu of risking a suit for breach of contract brought by a PSC HCP who has an adverse judgment rendered against him.

The newest twist to the PSC HCP saga is whether the United States, after the amendment to the Gonzalez Act, will recognize as an employee a PSC physician who is employed under a contract between the U.S. Army and a corporation,¹⁸ rather than a contract directly between the U.S. Army and the PSC physician.

11. See TORTS BRANCH, CIVIL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, TORTS BRANCH MONOGRAPH: FEDERAL AGENCIES AND EMPLOYEES FOR PURPOSES OF THE FEDERAL TORT CLAIMS ACT (1997). The DOJ believes its position is supported by the federal court's holding in *Deshaw v. United States*, 704 F. Supp. 186 (D.Mont. 1988). In *DeShaw*, a case involving a PSC, the federal district court held that the Gonzalez Act, 10 U.S.C. § 1089 (2000), did not expand the tort liability of the United States under the FTCA, nor did it abrogate the "independent contractor" exception to the FTCA with respect to medical personnel performing services for agencies designated in the Gonzalez Act. 704 F. Supp. At 189-90. Instead, the court found that the immunity provisions of the Gonzalez Act apply only to "those medical personnel who provide services to the federal government under contract, but whose physical performance of their duties are supervised and controlled on a day-to-day basis by the federal Government. *DeShaw*, 704 F. Supp. 186, 190.

12. 28 U.S.C. § 2671 (2000).

13. Pub. L. 105-85, 111 Stat. 1629.

14. 10 U.S.C. § 1089.

15. Pub. L. No. 105-85, § 376, 111 Stat. 1814.

16. 10 U.S.C. § 2733.

17. U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS (1 Apr. 1998).

18. For example, NES, Coastal Services, and others.

The 1997 amendment to the Gonzalez Act states that the exclusive remedy for suits for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician “serving under a personal services contract entered into under section 1091” is the Federal Tort Claims Act.¹⁹ Section 1091(c)(1) states that the service secretary “shall establish by regulation procedures for entering into personal services contracts with individuals under subsection (a).”²⁰ The Federal Acquisition Regulations (FARS) allow PSCs to be made between an agency and a corporation that will provide the physician rather than requiring the contract be made directly with the physician.²¹ The Gonzalez Act²² does not expressly require that a PSC be made directly with the agency and the physician in order for the exclusive remedy to lie under the FTCA. Instead, it states that the PSC physician must be “serving under” a PSC contract in order to be covered.²³ While 10 U.S.C. § 1091(c)(1) uses the term “individuals” when referring to establishing PSCs, the statute directs the Secretary of Defense to establish by regulations procedures for entering into PSCs.²⁴ The regulations that have been established allow PSCs between the agency and corporations.²⁵

Claims attorneys should be aware that DOJ still questions the employee status of individual HCPs hired by a corporation under a PSC between the United States and the corporation because “personal services” contracts, by their nature, cannot be made with a corporation. However, DOJ has recognized the employee status of such HCPs, on a case-by-case basis only, based upon its interpretation of subsection (f) of the Gonzalez Act:²⁶ that individual PSC HCPs should be held harmless because they were not required to have any liability insurance of their own. Claims attorneys need to recognize this potential pitfall; they need immediately alert the respective USARCS Area Action Officers (AAO); and they need to immediately investigate the underlying facts. Such action by claims attorneys will help USARCS to consult with DOJ on an expedited basis regarding whether or not DOD will recognize a particular PSC HCP hired by a corporation as a United States employee for administrative claims settlement purposes. While investigating the underlying facts, questions to be addressed include, but are not limited to, the following:

(1) Does the corporation provide physician coverage to other MTFs and/or to

civilian hospitals? (Obtain a copy of all relevant contract documents, to include the solicitation, the winning bid, and the actual contract with the government).

(2) Does the corporation provide physician coverage to other departments or services within the MTF involved in the claim? (Obtain a copy of all relevant contract documents).

(3) Does the corporation have any malpractice coverage? If not, why not? If so, what is the name, address, and a point of contact of the insurer? (Obtain a copy of all relevant insurance policies).

(4) How does the corporation hire and assign physicians to the MTF(s)?

(5) Does the corporation recruit and hire nationwide? (Obtain a copy of the corporation’s hiring agreement with the physician).

(6) Does the physician hired by the corporation have any individual insurance coverage?

(7) How long has the physician hired by the corporation worked at the MTF? (How long has the MTF contracted with the corporation, and how many times has the individual physician’s contract with the corporation been renewed?)

(8) Does the physician hired by the corporation work only at the MTF, or does the physician work at other MTFs or civilian medical facilities?

(9) If the physician works at other MTFs or civilian medical facilities, what is the additional employer information (i.e.,

19. 10 U.S.C. § 1089(a).

20. *Id.* § 1091(c)(1).

21. FAR, *supra* note 1, at 37.104; DFARS, *supra* note 4, at 237.104(b)(ii)(A)(1) and (B).

22. 10 U.S.C. § 1089.

23. *See id.* § 1089(a).

24. *Id.* § 1091 (c)(1).

25. FAR, *supra* note 1, at 37.104; *see also* DFARS, *supra* note 4, at 237.104(b)(ii)(A)(1) and (B).

26. 10 U.S.C. § 1089(f).

employer name, address, dates of employment of physician, supervisor's name, etc.)?

(10) What are the terms of that physician's employment at the MTF? What are that physician's duty days and duty hours at the MTF? What is the physician's chain of supervision? Does he or she work alone (e.g., the only emergency room physician covering on weekends or nights)?

(11) Is the entire department or service operation (e.g., emergency department) contracted out?

(12) Do government physicians work in that department or service along with the physician hired by the corporation and involved in the claim? If so, is the latter physician treated the same as or different from the government staff?

(13) What was the nature of the day-to-day supervision and control by a government employee or employees of the physician hired by the corporation and involved in the claim? Does the physician need to consult with anyone before treating a patient in the MTF? Who, if anyone, reviews the physician's charts? How many charts are reviewed, and when? What is the purpose of the review?

(14) What is the credentialing/decredentialing procedure for physicians hired by corporations to work in MTFs?

(15) Were there any signs or notices posted that a non-government physician was providing care to the claimant?

(16) Did the physician hired by the corporation wear the same, or a different uniform? Did the physician wear a nametag identifying him as a contract employee?

(17) Were there any SOPs regarding staffing or supervision in the MTF department or service involved? (If so, obtain copies).

(18) What is the statute of limitations in the applicable state with respect to bringing suit against the corporation and the individual physician hired by the corporation?

In view of the obvious complexity of this government employee issue, it is imperative that all claims attorneys and investigators do the following as soon as possible:

(1) Obtain a complete set of medical records;

(2) Organize the records and prepare a detailed chronology of care, not only delineating the care provided, but also identifying the care provider and the employee status of the care provider;

(3) Immediately notify the appropriate USARCS AAO of any HCPs who may not be government employees, particularly NPSC and PSC providers;

(4) Promptly investigate the facts to determine the nature and extent of any day-to-day supervision and control of the suspected non-government HCPs;

(5) Promptly put the claimant's attorney on notice of any non-government HCPs involved in the claimant's treatment.

In every case involving non-Government HCPs, timely and thorough investigation is imperative. Claims attorneys and investigators should never assume employee or non-employee status of HCPs involved in their claims. Moreover, even in cases involving independent contractors, that is, NPSC physicians, claims attorneys should also research applicable state law to determine if there is potential liability on the part of the United States for the acts of the independent contractors under theories such as "ostensible agency," "apparent authority," or "equitable estoppel." Also, claims attorneys should be alert for potential government liability exposure under the theories of negligent hiring or credentialing, particularly if the independent contractor has a "track record" of complaints or adverse events. Finally, claims attorneys should research state law to determine the availability to the United States of the defense of "Captain of the Ship," for example, in cases such as those involving an independent contract surgeon who could potentially be held liable for the tortious acts of government operating room personnel (for example, retained sponge cases). Ms. Byczek.