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30 April 2007

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Review of the Way in which Physiotherapy Services are Funded and Accredited by the ACC

The New Zealand Law Society Accident Compensation Committee (the Committee) is grateful for the opportunity to comment on the above review. The members of the Committee are legal practitioners who practice in the area of accident compensation law and who, in the main, represent claimants who have suffered personal injury covered by the relevant accident compensation legislation.

Background

Under the 1972 and 1982 Accident Compensation Acts, payment for all medical treatment, including physiotherapy treatment, for personal injury suffered by accident was met by the Accident Compensation Commission (the ACC). A claimant who had cover in respect of the injury was not required to pay any part of the cost of treatment.

Section 27 of the Accident Rehabilitation and Compensation Insurance Act 1992, provided that the ACC was only required to pay for the cost of treatment to the extent permitted by regulations. Where the actual cost of treatment was not covered by the regulations, the treatment provider was entitled to charge the claimant a "co-payment". Similar provisions have been repeated in subsequent accident compensation legislation.

To the extent to which regulated payments did not meet the actual cost of treatment and where the claimant was required to make a co-payment in respect of treatment for a work injury, New Zealand was in breach of Article 9 of the International Labour Organisation Convention 17 which had been ratified by the New Zealand Government in 1938. The Article states: "*Injured workmen shall be entitled to medical aid and to such surgical and pharmaceutical aid as is recognised to be necessary in consequence of accidents. The cost of such aid shall be defrayed either by the employer, by accident insurance institutions, or by sickness or invalidity insurance institutions.*" This breach has been brought to the attention of the Government on numerous occasions.

The "Woodhouse" Report, upon which the original accident compensation legislation was based, stated at paragraph 294(a): "*... as part of compensation and for the promotion of rehabilitation, all medical and specialist services should be provided free of charge.*" At paragraph 310(c) the Report stated: "*The object of rehabilitation demands efficient medical attention at all levels. To attempt economies in this area would be to fail the man himself and would, we think, be an extravagance in itself.*"

With the abolition of the right to sue and the adoption of a statutory scheme of compensation for personal injury, it was part of the "social contract" that common law rights be substituted with

comparable statutory rights. The Committee takes the view that in the case of work-related injuries, where the right to recovery of the full cost of medical and associated treatment is not provided by the statutory scheme, there has been a breach of the “social contract” under which former common law or statutory rights were forfeited. Similar arguments apply where there was a former common law right based on proof of negligence or breach of statutory duty and full recovery for expenses incurred arising out of personal injury would have followed the event.

Treatment is an entitlement under s69(1)(a) of the Injury Prevention Rehabilitation and Compensation Act 2001. The concept of the ACC “purchasing” physiotherapy services on behalf of the claimant is foreign to the fundamental principle that the claimant is entitled to appropriate treatment for his/her injury to restore health, independence and participation to the maximum practicable as provided for in s70 of the IPRC Act. The current systems employed by ACC for payment for physiotherapy treatment have shifted the emphasis from the claimant’s rights to proper treatment in the interests of rehabilitation, to management of treatment and cost containment.

ACC Payments to Physiotherapists

Cost of Treatment Regulations (the Regulations) (SR 2003/388 as amended)

Whereas at common law the full actual cost of treatment was recoverable as special damages (subject to a deduction for contributory negligence) and under former Workers’ Compensation legislation the full cost of treatment was paid by the employer’s insurer, the Regulations limit the amount which can be paid for treatment to an accident victim. This limitation means that in most cases the full cost of the treatment is not covered and the injured claimant must make up the difference by way of a co-payment. This co-payment is grossly unfair where the injury was a work injury or was clearly caused by a negligent or criminal act of a third party.

Physiotherapy is not within the definition of a “*recognised branch of medicine*” under Regulation 3 but physiotherapists are within the definition of “*specified treatment provider*”. However, Regulation 17 makes provision for payment of specified treatment providers’ costs either at the Schedule amount of \$19 for each treatment or, if the provider elects with the ACC, at the lesser of \$61.50 per hour or at the rate per hour the provider would have charged the claimant for treating that type of injury. This payment system may encourage a double standard of treatment by physiotherapists depending on whether or not the provider has made an election. Where the provider has special experience or expertise in a particular type of injury or treatment, the regulated amount payable may have no relevance to the treatment either required or given by the physiotherapist.

The provisions in the Regulations for payment of treatment costs take no account of the clinical requirements of the particular claimant. The Regulations have no regard for sex, age, physical condition, nature of the injury, multiple injuries, complexity of the injury or other conditions which might have a bearing on the clinical requirements of the claimant or the skill required by the physiotherapist providing the treatment. The Regulations are clearly directed at cost containment and not at the patient’s injury-related clinical needs.

The Regulations tend to undermine the basic principle of complete rehabilitation in order to restore the person’s health, independence and participation to the maximum extent practicable as required by s70 of the IPRC Act 2001.

Recommendations:

- Payment for physiotherapy treatment should recognise the clinical requirements of the claimant having regard to sex, age, physical condition, nature of the injury, complexity of the injury, multiple injuries, and the skill required of the physiotherapist in order to provide the optimum service which will restore the particular claimant’s health and participation to the maximum extent practicable.

- The current payment system does not fully recognise the clinical requirements of claimants or the skill and expertise required of the physiotherapist to provide proper treatment and is unlikely to do so within the present framework unless changes are made for the future.
- The payment system for physiotherapy treatment should be dealt with in the same way as payment for other medical treatment. The Regulations should be amended to provide for a scale of payments for physiotherapy treatment similar to the scale for other medical treatment.
- There should be a recognition that some physiotherapists have postgraduate qualifications and greater experience and expertise than others in respect of treatment for particular types of injury and their sequelae, and they should be rewarded accordingly as are medical specialists.

Endorsed Provider Network (EPN)

The EPN creates a division within the physiotherapy profession which can act as a deterrent to the rehabilitation of an injured claimant. A physiotherapist who has elected to join the EPN and therefore cannot charge the claimant a co-payment, is forced to comply with ACC directives regarding the number and/or type of treatments permitted. This can act as a deterrent to the provision of proper treatment for the claimant's actual clinical requirements and rehabilitation.

The ongoing compliance costs for accreditation standards can deter some physiotherapists from electing to join the EPN and those who do join are more likely to be driven by cost containment than providing the optimum treatment. The EPN system should not be used as a means of changing the behaviour of providers within the physiotherapy profession. That should be a matter for the profession to address or for separate legislation (e.g. the Health Practitioners Competence Assurance Act 2003 or observance of *NZS 8171:2005 Allied Health Services Sector Standard*).

If the objective of treatment is to restore the particular claimant's health and participation to the maximum extent practicable as required by s70 of the IPRC Act, there is no real justification for having different pricing frameworks and fee structures under regulations or the EPN, or other contract pricing frameworks for the provision of the necessary clinical physiotherapy services. If the services are required in order to restore a claimant's health and participation to the maximum extent possible they must be provided and paid for on a proper commercial basis.

Recommendations:

- The ongoing compliance costs for accreditation standards and the differences between pricing frameworks and fee structures act as a disincentive to the provision of proper treatment to restore claimants' health and participation to the maximum extent practicable. The EPN should be abolished and payment for all physiotherapy services put on the same basis.
- The provision of physiotherapy services should be paid for on the same basis as other medical services for accident victims with recognition of (i) different clinical requirements of claimants and (ii) postgraduate training and special expertise of some physiotherapists justifying additional payments.

Culture of ACC/Audits

It has come to the attention of the Committee that some physiotherapists who have disputed ACC payment systems believe that they have been visited by the ACC audit and/or fraud investigation units without apparent justification. There is a perception that the ACC uses its audit and fraud investigation powers to discipline some physiotherapists who challenge ACC policies, practices and procedures.

The ACC fraud investigation unit is quick to allege fraud when there is no evidence of an intention to defraud. For example, in *Lintott v ARCIC* (248/97) the Court said "*The evidence before the review and the Court does not indicate that the Corporation embarked on an enquiry involving the appellant,*

but rather it obtained evidence against the appellant from which it drew inferences, and then acted by cancelling compensation and instituting prosecution.” In *Caverhill v ARCIC* 2/10/98 Potter J HC Rotorua AP 93/97 the Court in allowing the appeal in respect of five of eleven fraud charges, adopted the subjective test articulated by McMullin J. in *R v Williams* [1985]1 NZLR 295 at 308 and said that it was reasonably possible that the appellant was acting honestly. In *Firth v ARCIC* [1998] 1 NZLR 513 the Court in following *R v Ruka* [1997] 1 NZLR 154 said that if a defendant were legally entitled to receive the money in question he or she has not obtained a pecuniary advantage to which he or she was not entitled. The Court of Appeal in *R v Donaldson* 8/12/04 CA 80/04 also applied the subjective test of intention to defraud.

These cases tend to show that the ACC Fraud Investigation Unit approaches investigations on the assumption that claimants are accepting, on a fraudulent basis, entitlements to which they are not entitled. A similar approach appears to be adopted in respect of payments to physiotherapists. Where claims are made for payments for treatment given which is outside the “norm” the ACC policy is to “*identify and manage provider behaviour that is outside ACC’s expectations and evidence-based practice*”. It is assumed the claim is being made fraudulently, an assumption which appears to trigger either an immediate audit of the physiotherapist’s practice or a threat of prosecution.

In paragraph 4.6 of its submissions to this review the ACC has stated: “*In April 2004, Operation Quest III began and focused on physiotherapists and chiropractors. A sample of providers was selected from invoiced billing schedules submitted by providers to ACC between 1 September 2003 and 31 January 2004. The sample population represented only those physiotherapists and chiropractors that claimed by the ‘per treatment visit’ rate under the Cost of Treatment Regulations. The investigation found that the level of fraud observed within the physiotherapist and chiropractor provider groups for individual transactions is 8.14%. Improving compliance and effectiveness of execution of prescribed ACC claims procedure would have a significant impact on the reduction of provider fraud.*” It is a serious matter to allege fraud by a professional person. The submission confirms that the ACC operates on the basis that physiotherapists whose “*behaviour is outside ACC’s expectations and evidence based practice*” are acting fraudulently.

None of the reported cases appear to have changed the way physiotherapists are monitored. The ACC requirement that prior approval for treatment that is outside the “treatment profile” shows that the fee payment system is being used to monitor and control the way physiotherapists provide services. This is a clear indication that the ACC payment system can act to the detriment of claimants. Claims for treatment which is outside the treatment profile cannot be regarded as fraudulent unless there is clear evidence of criminal intention to defraud or *mens rea*.

The adoption of the treatment profile system overrides the physiotherapists’ professional clinical judgment and can be detrimental to the claimant’s rehabilitation. The requirement for prior approval for treatment is inconsistent with the fact that physiotherapists may provide treatment for ACC claimants within their scope of practice (which is set by the Physiotherapy Board of New Zealand and continued by the Health Practitioners Competence Assurance (HPCA) Act 2003) provided the person has cover for the injury.

The treatment profile system is a management system which by its nature requires all claimants to be treated in the same way when in fact each claimant is an individual whose clinical needs are different from all others. As professionals, physiotherapists treat their patients according to their individual clinical needs. Physiotherapists can be diverted from the course of appropriate treatment by the rules imposed by the payment system to the detriment of the claimant.

Recommendations:

- The ACC cannot allege fraudulent behaviour of physiotherapists whose behaviour is outside the ACC’s expectations and evidence based practice unless there is clear evidence of criminal intention to defraud.

- The ACC should only undertake audits of physiotherapy practices for proper purposes, in appropriate circumstances, and within appropriate guidelines. Audits and threats of prosecution must not be used to discipline physiotherapists.
- The treatment profile methodology adopted by the ACC should be abandoned and appropriate treatment for an individual claimant should be left to the professional clinical judgment of the treating physiotherapist.

The Physiotherapy Profession Generally

Physiotherapists must undergo appropriate medical training and be registered to practice in New Zealand. Physiotherapy is an essential branch of physical medicine which is complementary to the medical profession and should be supported and paid accordingly.

When treating accident victims, physiotherapists should be regarded as qualified paramedics equivalent to general medical practitioners and their knowledge, experience and expertise should be recognised in the same way as other providers of medical services are recognised in the ACC fee payment system. All physiotherapists should be included under the same payment regime by the ACC.

Expertise arising from specialist postgraduate training or experience must be recognised where improved rehabilitation outcomes can be shown to follow treatment. The expertise should be rewarded by additional payment in the same way that medical expertise is recognised.

General

The Committee is of the view that the focus of physiotherapy treatment must be on the restoration of the claimant's health and participation to the maximum extent possible as required by s70 of the IPRC Act 2001.

The emphasis must be on the optimum clinical treatment being provided by physiotherapists who should be treated as medical professionals possessed of appropriate clinical judgment when giving treatment.

The ACC policy of attempting to control physiotherapists' behaviour which is "*outside the ACC's expectations and evidence-based practice*" is unacceptable because it is a management system based on a template which fails to recognise the individual claimant's clinical requirements.

The EPN should be abolished and all physiotherapists paid on the same basis with financial recognition for specialist postgraduate training or special expertise in giving treatment which results in improved rehabilitation outcomes.

The Committee hopes that these comments are of assistance in the review.

Yours sincerely



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