Comment on “ACC response on rotator cuff tears”

I refer to the letter published in the 11 February 2011 issue of the NZMJ titled ACC response on rotator cuff tears.

I write to you as someone who represents ACC claimant in both the review and appeal process and have successful overturned a number of decisions by ACC declining to fund shoulder surgery and have a sound knowledge of the legislative requirements in issues of causation, including leading case law.

I take issue with the following statement (paragraph 2): “New Zealand is unique, although there is a similar discussion in Germany, in that the ability to attribute a substantial or wholly traumatic contribution to pathology requiring treatment determines the funding stream and the waiting time for the appropriate operation.”

The highlight part of that sentence is grossly incorrect and misleading to your members and really gets to the heart of the issue/problem.

The ACC legislation excludes a personal injury if the physical injury has been caused wholly or substantially by an underlying degenerative condition.

The above statement gives the reader the impression that the physical injury has to be caused “wholly or substantially” by an accident, which is not true. I refer you to Section 26, subsection 2 & 4 of the Accident Compensation Act 2001, link here: Section 26 of the ACA 2001

The term “wholly or substantially” is regarded by the ACC Appeal Courts as “largely” or “closer to 100% than 50%”. In other words, a degenerative process can be more than a 50% contribution to the cause of a physical injury and that injury still covered as a personal injury caused by an accident. This is a typical scenario for shoulder injuries where it seems likely, based on my experience as an ACC advocate, that there is usually some degree of degenerative process present within the shoulder, which may or may not be relevant to the actual physical injury e.g. a tendon tear.

It is very frustrating to see ACC’s medical advisors confuse the legislative criteria, which discourage your members, and claimants, from pursuing funding from ACC because they do not understand the actual criteria for a personal injury, as defined in the legislation. It seems that decisions on causation are being made by medical people when it is a matter for those with a sound understanding of the legislative criteria, where ACC internal medical advice is but one opinion to be considered by the decision-maker, the treating surgeon another, when weighting up the evidence and making a decision based on the balance of probability.

I would like the NZ Medical Association to challenge ACC on this point and a correction to the statement made.

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