

COMPLAINT NUMBER	20/602
ADVERTISER	Physio Connect
ADVERTISEMENT	Physio Connect Out of Home
DATE OF MEETING	23 February 2020
OUTCOME	Not Upheld No further action required

Summary of the Complaints Board Decision

The Complaints Board did not uphold a complaint about two advertisements for Physio Connect which included the words “FREE” and “UNDER ACC”. The Board said the advertisements were not misleading as Physio Connect does not charge consumers for treatment which has been approved by the Accident Compensation Corporation (ACC).

Advertisements

There were two advertisements for Physio Connect, which were the subject of this complaint. One of the advertisements was a sandwich board on the footpath outside the clinic. It read: “Physio Connect – FREE PHYSIO – Under ACC – No referral required...”

The other advertisement was displayed on the exterior wall of the clinic. It said: “Physio Connect – Physiotherapy/Podiatry/Acupuncture – FREE UNDER ACC ...”

Summary of the Complaint

The Complainant was concerned the term "Free under ACC" was misleading as the service provided does have a cost, and a payment, which is made by ACC.

Issues Raised:

- Truthful Presentation
- Inappropriate or excessive use
- Endorsements

Summary of the Advertiser’s Response

The Advertiser defended the advertisement and said the use of the term “FREE under ACC” was not misleading. The Advertiser said it was important for them to let the public know, in plain English, that there is no charge to consumers for treatment which has been approved by ACC.

Relevant ASA Codes of Practice

The Chair directed the Complaints Board to consider the complaint with reference to the following codes:

THERAPEUTIC AND HEALTH ADVERTISING CODE

Principle 2: Truthful Presentation: Advertisements shall be truthful, balanced and not misleading. Advertisements shall not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust, exploit their lack of knowledge or without justifiable reason, play on fear. This includes by implication, omission, ambiguity, exaggerated or unrealistic claim or hyperbole.

Rule 2 (a) Truthful presentation: Advertisements shall be accurate. Statements and claims shall be valid and shall be able to be substantiated. Substantiation should exist prior to a claim being made. For medicines and medical devices, therapeutic claims must be consistent with the approved indication(s) (for medicines) or the listed intended purpose (for medical devices).

Rule 2 (b) Inappropriate or excessive use: Advertisements shall not encourage, or be likely to encourage, inappropriate or excessive purchase or use. Advertisements for prescription medicines shall not encourage, or be likely to encourage, inappropriate or excessive prescriptions or requests for a prescription.

Rule 2 (e) Endorsements: Advertisements shall not claim or imply endorsement of the product, device or service by any government agency, professional body or independent agency unless there is prior consent, the endorsement is current, verifiable and the agency or body is named.

Relevant precedent decisions

In considering this complaint the Complaints Board referred to a precedent decision, Decision 19/058, which was Not Upheld.

The full version of this decision can be found on the ASA website:

<https://www.asa.co.nz/decisions/>

Decision 19/058 concerned a billboard advertisement for Chemist Warehouse which stated that the Chemist Warehouse had free prescriptions. An asterisk qualified this statement saying there was \$5 off the standard subsidised prescription charge.

The Complaints Board said it was not misleading to use the word “free” as the vast majority of prescriptions are subsidised and waiving the \$5 surcharge does make the prescription free of charge to consumers.

Complaints Board Discussion

The Chair noted that the Complaints Board’s role was to consider whether there had been a breach of the Therapeutic and Health Advertising Code. In deciding whether the Code has been breached the Complaints Board has regard to all relevant matters including:

- Generally prevailing community standards
- Previous decisions
- The consumer takeout of the advertisement, and
- The context, medium, audience and the product or service being advertised.

Consumer or Competitor Complaint?

The Complaints Board agreed that this was a consumer complaint because the complainant was not a competitor.

Consumer Takeout

The Complaints Board agreed the likely consumer takeout of the advertisements was treatment provided by Physio Connect, if approved by ACC, is free to the consumer.

The Complaints Board said the two advertisements had similar messaging about the treatment being "Free under ACC" and both advertisements were considered together.

Were the advertisements misleading?

The Complaints Board said the advertisements were not misleading. This is because the consumer will not be charged for any treatment, if it is approved by the ACC, therefore it can be described as "Free".

The Complaints Board said most consumers are familiar with the ACC system in New Zealand and know that some treatment providers charge consumers a surcharge for services approved by ACC and some do not. In addition to this, most consumers know that ACC is a Government organisation which is funded from various sources: "All New Zealanders pay levies in different ways. This may be through your income, businesses, petrol, your vehicle registration (rego) or through government funding"¹.

Do the advertisements encourage inappropriate or excessive purchase or use?

The Complaints Board said the advertisements did not encourage inappropriate or excessive purchase or use. This is because any treatment provided to the advertiser's clients is dependent on the client making a successful ACC claim for cover and the ACC funding the treatment. The advertiser is also bound by their professional standards body the Physiotherapy Board and its Code of Ethics and Professional Conduct.

Do the advertisements imply the endorsement of a service by a government agency without consent?

The Complaints Board said the advertisements did not imply the endorsement of a service by a government agency without consent. The Board said the advertisement merely referenced the ACC; it did not imply any endorsement from the ACC.

The Complaints Board said the advertisements were not in breach of Principle 2, Rule 2(a), 2(b) or 2(e) of the Therapeutic and Health Advertising Code.

Outcome

The Complaints Board ruled the complaint was **Not Upheld**.

No further action required.

¹ From ACC website: <https://www.acc.co.nz/about-us/how-levies-work/what-your-levies-pay/>

APPEAL INFORMATION

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website www.asa.co.nz. Appeals must be made in writing via email or letter within 14 calendar days of receipt of this decision.

APPENDICES

1. Complaint
2. Response from Advertiser

Appendix 1

COMPLAINT

Both attached advertisements contravene Principle 2 of the Therapeutic and Health Advertising Code in that it is untrue, unbalanced, misleading and exaggerated - Treatment funded by ACC is not "free". It is paid for by the employers of NZ, this is omitted from the advert, again in contravention of Principle 2.

The second advertisement also contravenes Rule 2 (b). governing Inappropriate or excessive use " Advertisements shall not encourage, or be likely to encourage, inappropriate or excessive purchase or use."

If a health provider advertises a service as free, without need for referral then the client has little regard for the necessity of treatment, regardless of whether ACC funding applies. It could also be argued that Rule 2(e) is contravened, as stating that this particular providers service is "Free under ACC" implies that ACC is endorsing this service provider.

FURTHER INFORMATION PROVIDED BY THE COMPLAINANT

Question from the ASA Secretariat:

Is one of your main concerns that the advertised treatment is not "free" because it is paid for by New Zealand employers?

Response from the Complainant:

Yes, this is my concern. The dictionary definition of "Free" is "without cost or payment". The service provided does have a cost AND a payment, that is made by ACC.

ACC is funded by the Government, through the collection of levies and taxes. ACC health services are NOT free. The advert is misleading as none of this is communicated to the consumer in the overly simplistic statement "Free under ACC".

I work in the Pharmaceutical industry, so a useful corollary for your board to consider is if we advertised our medicines on a billboard with the phrase "Free under PHARMAC". Imagine the outcry. The same standards that apply to a medical product should apply to a medical service.

Finally, you and the board may wish to review <https://www.acc.co.nz/for-providers/provide-services/understanding-your-responsibilities/>; Part 9, Representing us Fairly. Specifically

"Giving clients accurate information about ACC

It's important that clients receive the correct information about us and your services.

Consumer law requires you to not mislead or deceive consumers about the services you provide.

For example, if you choose not to charge a co-payment, or we pay the full cost, use the statement, 'No surcharge' rather than 'free ACC'. This accurately reflects that we fund the treatment.

I'm not sure the relevance of your sending me the website information. It cannot be guaranteed that any consumer seeing the sandwich board, massive billboard or even the single phrase on the provider home page will take the time to read the information in order to ensure they have the correct "take out" from the marketing slogan. The advert must stand in its own right as not being misleading etc.

The statement "No referral needed" is essentially a "no-barrier" encouragement. A person may have a small niggle, which they are not motivated sufficiently to proactively see a clinician about, but this statement creates the scenario where a consumer may "walk in" on a whim. Hence a treatment is charged to ACC that may not otherwise have occurred.

Appendix 2

RESPONSE FROM ADVERTISER, PHYSIO CONNECT

I write to you to defend the advertising practices of Physio Connect, a community focused rehabilitation company that is committed to removing barriers that prevent the New Zealand public from accessing the care they require when they need it. It is noted that in New Zealand that there is a significant percentage of the population that defers or neglects healthcare because of cost, this is noted as up to 24% of the population in an easily accessible otago study.

Physio Connect has been in operation for 15 years, 12 of those under our current trading name. Physio Connect was initially established in a community healthcare center, Te puna hauora, where it was a contractual rule that we were not able to change our patients as Te puna hauora focused on accessible health for community service card holders. It was through this initial relationship that we saw in practice the need of the public in an accessible provider of rehabilitative care. Since our initial formulation - we have grown to 15 sites and employ 108 staff across auckland. In the last 24 months we have provided 208,709 appointments to the public, 98 % of those meeting requirements for ACC funding.

Over the course of our 12 year trading history we have continuously advertised as "FREE under ACC". This has been essential to letting the public know what they have access to when they are injured in plain english that all levels of cognition and linguistic understanding can interpret. We are still using this method of advertising at all 15 sites across auckland, on our website and in community posts to let the public know about their ability to access care without an associative cost as it is a consumer right.

By definition - the plaintiff is incorrect in [...] (their) argument. We do not advertise as plainly 'FREE', We advertise as 'FREE under ACC', as shown in her attached images as evidence. This statement/slogan defined means

Free - without cost or payment

Under – governed by

ACC - accident compensation corporation

By definition what the patient receives is exactly what is advertised, treatment that is without cost or payment, when their claim is managed or governed by ACC.

Further to the above point, let it be known that the government also utilizes the use of 'FREE' in the advertisement of medical treatment.

- Free dental for under 18's
- Free GP visits for under 13's
- Free labtests

If we are to exercise an argument on Physio Connect for the use of free to the consumer treatments that are paid through external agents, do we not have to make the same considerations for those 'free' services that are paid through the government via tax mechanisms?

The argument made by [...] regarding the use of the term 'free' in the pharmaceutical industry is also floored as Chemist warehouse uses the term "FREE prescriptions" with a clarifying point that the \$5 cost is covered by the organisation. This has gone through rigorous scrutiny and has come out as okay for use, as it puts the customers best interest at the forefront of the open market mechanics and leads to better outcomes for the consumer.

The last point i wish to raise is regarding the argument regarding patients accessing care 'that may have otherwise not occurred', to this i say, Who are we to decide whether a client requires treatment or not? If a client is in pain, believes they need treatment, it is their legislative right to seek the advice and treatment from a trained professional. Beyond that, it a patients legislative right to access care with the cover of ACC when they suffer an injury that meets the legislative definition of an injury. As a provider under ACC, physio connect has an obligation to treat clients and create claims on the clients behalf to submit to ACC, it is not our responsibility to determine if a claim meets ACC's legislative cut off for cover, further, Physio Connect only receives payment for those claims that recieve cover, so to make a statement that Physio Connect receives payments for claims that do not require care, don't meet ACC requirements of would have otherwise not happened is blatantly incorrect. It would be correct to state that a treatment that occurs at Physio Connect for a claim that meets legislative requirements may have otherwise not occurred due to a client's inability to afford the ongoing cost of treatment at an alternative provider. Thus we are providing a public service that needs to be available for the betterment of public health access to health.

It is clare that we are FREE under ACC as stipulated above. As we have gone through a similar argument through competitor complaints with the Physio Board of New Zealand and won against the claim of our advertising being misleading i have attached the arguments formed by our barrister and a senior MP. I am also happy to share the physiotherapy conduct committee report stating there is no breach as there is only positive impact to the public and no harm incurred.

Furthermore, the foundation of this argument being put forward to defend is flawed as the plaintiff – [...] has a personal relationship with a competing business and thus is personally benefiting from this complaint and effected by our entry and growth within the rehabilitative market. In these instances we need to let the free market laws prevail. The best service provided at the best price with the best outcome. If our service did not solve an issue in the market and was not providing value to the community our advertisement would not be of concern. Moreover, it is imperative that advertising around health be clear and concise to ensure there is no room for misinterpretation by the public. It is clear our service is free to the consumer at the time of their treatment and the consumer reads it in that way.

I am available for any further concerns, i trust you will be in agreement with my rebuttal above as it is in the public interest to provide accessible healthcare with no barriers. Disagreement with my response would promote further barriers in healthcare and would be an unethical objection going against the current promoted political and governmental narrative.