

STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

In re: MVP Health Plan, Inc.)	
2024 Small Group and Individual Group)	DOCKET NOS. GMCB-004-23rr
Vermont Health Connect Rate Filing)	GMCB-005-23rr
)	
SERFF Nos. MVPH-133660955)	
MVPH-133660956)	

MVP’S OPPOSITION TO HCA’S JULY 7, 2023 MOTION TO STRIKE

MVP Health Plan, Inc., (“MVP”) by and through Primmer Piper Eggleston & Cramer PC, opposes the Health Care Advocate’s (“HCA”) Motion to Strike Portions of the Prefiled Testimony of Christopher Pontiff (“Motion”) submitted to the Green Mountain Care Board (“Board” or “GMCB”) on July 7, 2023 as follows:

PRELIMINARY STATEMENT

The HCA moves to strike Answers to Question Nos. 21-24 and 27 (“Answers”) in MVP’s Prefiled Testimony of Christopher Pontiff (“Prefiled”) as “hearsay”. The Answers describe: 1) MVP’s efforts to steer members toward primary care; 2) details of its case management programs; 3) impact of MVP’s clinician staff; and, 4) explanations of MVP’s promotion of telemedicine, telehealth, and its use of technology to improve access to and quality of care and to promote affordability. The Board should deny the Motion for the following reasons:

First, MVP witness Christopher Pontiff’s testimony is not hearsay. It is testimony based on his personal knowledge and his knowledge bolstered through internal reasonable factual inquiry of the organization, not the out-of-court statements of some other person. The HCA is free to cross-examine MVP’s witness on his testimony.

Second, unlike a Court proceeding, the Board has discretion in this administrative setting, under the Administrative Procedure Act, 3 V.S.A. § 810 (“APA”), to consider any relevant and reliable evidence. The HCA seeks to bar information the Board requested in previous rate reviews deemed relevant by the Board. Further, evidence gathered by L&E from its “internal team”, gathered by the HCA from third party data sources and anecdotes from Vermonters, and MVP’s past submissions of similar relevant and reliable prefiled testimonial evidence, have all been admitted into evidence by the Board in this administrative proceeding. The Board routinely admits reliable hearsay information. The Board has found all of this evidence relevant, reliable and helpful for many years, and should do the same with this prefiled testimony, and deny the HCA’s Motion.

ARGUMENT

I. The Answers Are Not Hearsay And The HCA Will Not Be Prejudiced, Because It Is Free To Cross-Examine Mr. Pontiff.

The HCA’s sole objection to the Answers is that they are purported hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. V.R.E. Rule 801(c). Said another way, hearsay is when witness (“X”) testifies that non-witness (“Y”) told X something and the testimony is to prove that the “something” Y told X is true. The Answers are Christopher Pontiff’s testimony (X), *not* MVP’s clinical or marketing team’s testimony (Y). While the Answers were prepared “with the help of” the clinical and marketing teams, HCA points to no authority or argument that consultation with others somehow transmutes an in-court declarant’s testimony to the testimony of others. Mr. Pontiff’s testimony conveys his understanding of particular facts after consultation with others at MVP, not the testimony of others at MVP. The Answers also relay Mr. Pontiff’s personal knowledge regarding, among other things, case management at MVP, and the simple

logistics of how MVP's website works—information a Senior Director at MVP would certainly know. HCA has an opportunity to cross-examine Mr. Pontiff regarding his testimony, within the bounds of reasonable scope on cross-examination stated in V.R.E. Rule 611(b), and is in no way prejudiced by admission of the Answers.

The HCA argues that “an agent’s hearsay statements are *only* admissible if they pertain to matters within the scope of the agent’s employment” (emphasis added). *Motion* at p. 1. The HCA’s argument is not supported by the case it relies on: *Lasek v. Vermont Vapor Inc.*, 2014 VT 33, ¶¶ 22-23. In that case, the defendant, a producer of liquid filler for electronic cigarettes, tried to exclude a statement of one of its lab employees contained within a police report created after a fire destroyed the plaintiff’s facility. The Supreme Court found that the trial court erred in excluding the lab employee’s statement as hearsay because it fell within the hearsay exception for statements by a party’s agent within that agent’s scope of employment offered *against* that party. Here, the MVP Answers are not statements *against* MVP. The court in *Lasek*, did not consider whether an employee who stated factual information about the company, (which was outside of the scope of the department that they worked in) was barred from testifying about those facts. Hotel janitorial staff, for example, can certainly testify to the facts of a car wreck they witnessed in the hotel’s parking lot, even if it did not take place in the janitorial closet.

Additionally, the facts of *Lasek* are illustrative and cut against the HCA’s argument. If the Answers were statements of the marketing department or clinical staff as HCA suggests, a parallel exists between the police report in *Lasek* and the Prefiled here, and the lab employee’s statements in that police report similarly parallel the Answers. Even if the Answers were the statements of e.g. the marketing department at MVP, those statements are clearly within the scope of the marketing department’s (the purported declarant) employment just as the lab

employee's statements in the police report in *Lasek* were statements within the scope of his employment. The same reasons the Supreme Court relied on in *Lasek* in finding that the hearsay exception applied would apply here even if the Answers were statements made by some other department within MVP.

Finally, Mr. Pontiff was disclosed as a fact and an expert witness. Experts routinely base their testimony on information provided by others. Pursuant to V.R.E. Rule 703: “[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.”. Similarly, underlying facts or data need not be admissible evidence in order for Christopher Pontiff's testimony itself to be admissible. *Id.*

The Answers are not hearsay. The HCA is not prejudiced by admission of the Answers because it can cross-examine Mr. Pontiff, and the Board can give the Answers whatever weight it deems. The Motion should be denied.

II. The Board Should Admit Relevant Evidence Based On Its Broad Discretion Under 3 V.S.A. § 810.

The Board has broad discretion to admit relevant reliable evidence. Pursuant to Green Mountain Care Board Rule 2.307(d)(3), admissibility determinations are governed not just by the Vermont Rules of Evidence, but by the APA. The HCA ignores the APA in its Motion. Under the APA, the Board has the discretion to admit in this administrative proceedings “any evidence which may illuminate the case”. *Lambert v. Dep't of Taxes*, No. 2019-248, 2020 WL 95933, at *2 (Vt. Jan. 6, 2020) (administrative agency's discretion to admit evidence that “would normally be excluded in court hearings” is codified in 3 V.S.A. § 810(1) . . .”) quoting *Petition of Cent. Vermont Pub. Serv. Corp. for a 6.23% Increase in Rates*, 141 Vt. 284, 292 (1982) (reversing and remanding that rate review decision based on agency's exclusion of relevant

prefiled evidence where “[t]he exclusion of relevant evidence in an administrative proceeding is presumptively invalid” when admissibility is governed by the APA.). Furthermore, while the APA broadens the scope of admissibility, “the right to admit such evidence does not imply that agencies are also free to exclude relevant evidence.” *Id.* citing *In re New England Power Corp.*, 103 Vt. 453, 459 (1931) (“An agency refusal to receive evidence that is competent, relevant, and material is reversible error.”). The Vermont Supreme Court has affirmed agency decisions in the past which relied on hearsay evidence. *In re Fuad Ndibalema SNF Freshstart, LLC*, No. 2016-049, 2016 WL 5921035, at *2 (Vt. Oct. 7, 2016) (affirming on APA grounds, the Vermont Board of Health’s suspension of license over licensee’s challenge to board’s reliance on hearsay evidence).

In *MVP July 20, 2022, Vermont Health Connect Rate Review Hearing Transcript* at 13:12-19, the HCA argued in support of admission of the 2021 Vermont Household Survey over MVP’s hearsay objection that:

“The veracity of it cannot be reasonably questioned, and it is clearly relevant in the present case as it speaks directly to the statutory criteria of affordability and access. Lastly, I will note that in every past rate review that I have been part of, the Board has admitted said document with no objection from the Board.”

The Board ultimately admitted the exhibit as helpful information. *MVP July 20, 2022, Vermont Health Connect Rate Review Hearing Transcript* at 220:4-221:5. The Board’s ruling mirrors the language in 3 V.S.A. § 810 allowing admission of evidence that may otherwise be excluded under Vermont Rules of Evidence where “it is of a type commonly relied upon by reasonably prudent [persons] in the conduct of their affairs.” See *Id.*

The HCA identifies no inaccuracy in the Answers, and nothing controversial in the Answers that would make their admission in this proceeding prejudicial to the HCA. *In re*

Rishar, No. 2015-232, 2015 WL 6395310, at *4 (Vt. Oct. 21, 2015) (affirming Human Services Board decision on grounds that APA permits inclusion of relevant hearsay evidence and, “[m]oreover, there is no dispute that the hearsay statement at issue was accurate.”). The HCA does not argue that the Answers do not provide reliable and relevant evidence which is squarely contemplated by 8 V.S.A. § 4062, admissible under the APA, which the Board has requested in the past and to which the HCA has never objected (*infra*).

A. **The Answers Provide Relevant Information That The Board Has Requested In Prior Years.**

The Answers are intended to streamline these proceedings by providing in the Prefiled updated answers to questions the Board previously found relevant enough to ask MVP and to which the HCA has never objected.

In prior years the Board has asked MVP about efforts to steer members towards primary care and the HCA has not objected to MVP providing that testimony. *MVP July 22, 2019, Vermont Health Connect Rate Review Hearing Transcript* at 159:6-160:23 (former Chairman Kevin Mullin stating that follow-up information from MVP’s clinical team on discussions regarding PCPs, “would be very helpful.”); *MVP July 24, 2018, Vermont Health Connect Rate Review Hearing Transcript* at 120:14-25 (MVP Witness Matthew Lombardo testifying in response to Board Member Holmes that, “I do know we set our benefit designs to have a lower PCP cost than your specialist visit. That’s a strategic decision to try to direct care to PCPs . . .”). The HCA did not object to the Board’s question, or Matthew Lombardo’s testimony. Answer No. 21 provides an update to information about MVP’s efforts regarding PCPs.

The Board has asked questions on how MVP takes steps to reduce low-value care via its clinical and case management teams. *MVP July 19, 2021, Vermont Health Connect Rate Review Hearing Transcript* at 176:20-180:24. Answer No. 22 provides an update to that information.

In the Board's *July 22, 2021 Post-Hearing Questions* at Question 12, the Board asked MVP to provide information on its case management program. The HCA did not object to MVP's response to Question 12. Answer Nos. 23-24 provide updated information on MVP's case management program.

In the Board's *July 25, 2018 Post-Hearing Questions* at Question 1, the Board asked MVP to: "[p]rovide detailed information concerning the consumer website's usage and member traffic to the site." The following year, the Board also asked for information regarding traffic to MVP's website and. *July 24, 2019 Post-Hearing Questions* at Question 7. In the Board's *July 23, 2020 Post-Hearing Questions* at Questions 5-6, the Board asked for "an analysis of Vermont insureds' utilization of telehealth and telemedicine at Vermont providers and out-of-state providers." The HCA did not object to the Board's questions or MVP's responses in either year. Answer No. 27 provides an update to this information.

If the HCA's argument in the Motion is right, then much of its own evidence should be excluded. At the July 20, 2022 rate review hearing, the Health Care Advocate, Michael Fisher testified on "overall inflation, ability to get appointments for the care they need, impacts on employers, the disconnect of these rates rising faster than real wages . . ." and more. *MVP July 20, 2022, Vermont Health Connect Rate Review Hearing Transcript* at 216:7-15. Mr. Fisher testified that families would spend a certain percentage of their income on various plans based on calculations "we"—meaning the HCA—performed. *Id.* 217:20-25. Mr. Fisher also went on to testify, relaying a quote from the written Public Comment all of which is out-of-court statements given for the truth of the matter asserted, that "[o]ne person said, insurance – insurance is already so expensive that we can hardly afford it even with two adults who work full time." *Id.* at 216:19-22. The Board cited to Mr. Fisher's testimony in its findings of fact. *In re: MVP Health*

Plan, Inc. 2023 Vermont Health Connect Rate Filing, GMCB-005-22rr and GMCB-006-22rr, Decision and Order at ¶ 81. The Board also reasonably considers written public comment, *Id.* at ¶ 80. All of these pieces of testimony relied on information provided to Mr. Fisher by others, both internal to the HCA and public commentary. Those “others” were certainly not produced by the HCA for cross-examination. Nevertheless, the Board reasonably considered Mr. Fisher’s testimony.

Furthermore, L&E’s July 11, 2023 Prefiled Testimony (“L&E Prefiled”) at 5:1-12, illustrates that parties to the rate review process ordinarily work internally “as a team” to provide information to the Board. That information is not excluded at the hearing because the witness relied on team-members for information. L&E’s July 5, 2023 Actuarial Memoranda are signed by Traci Hughes and Jacqueline Lee. However, as Ms. Lee explains in the L&E Prefiled, “[a]s a team, we review the submitted documentation to determine whether the proposed rates comply with the standards of review described above” *L&E Prefiled* at 5:10-11. Ms. Lee is the primary reviewer for MVP’s rate filings this year, and although she will be the witness testifying at this year’s hearing, she does not do all of the work herself. L&E team-members Allison Young, Traci Hughes, Jackie Lee and Kevin Ruggeberg all have a hand in reviewing MVP’s rate filings and creating the drafts and information Ms. Lee reviews. *Id.* at 5:5-9.

Finally, the HCA continues to rely on the type of information it seeks to exclude now. In the HCA’s *July 10, 2023 Letter to The Board Regarding The Board’s Information Request to L&E*, filed days after the Motion, the HCA relays information about its staff’s efforts to calculate and retread L&E’s steps and expressed “our opinion” and concern about L&E’s data that it provided to the Board pursuant to the Board’s request. The HCA regularly offers the same type

of information derived from internal efforts as MVP and to the extent the Answers are excluded, similar HCA evidence and information should be excluded.

The Board has previously deemed the information provided in past years, and now updated in the Answers, relevant through its questioning of MVP. The information provided in the Answers remains relevant, should be admitted, and the Motion should be denied.

B. Similar Subject Answers Were Admitted Through Pre-Filed Testimony In Prior Years Without HCA Objection.

HCA apparently does not take issue with the substance of any part of the Answers, merely that they were prepared with the help of other individuals at MVP, a change of course from its apparent position in prior years.

The Answers are merely updates to last year's Answer Nos. 21-23¹ and 26 in MVP's Prefiled Testimony of Chris Pontiff dated July 6, 2022 ("2023 Prefiled"). HCA stipulated to the admission of the 2023 Prefiled with the same "prepared with the help of" language, and it was admitted into evidence last year. Answer Nos. 21-23 and 26 in the 2023 Prefiled were themselves updates to Answer Nos. 21-23 and 27 in MVP's Prefiled Testimony of Chris Pontiff dated July 6, 2021 ("2022 Prefiled"). HCA also stipulated to the 2022 Prefiled and it was admitted into evidence at that rate hearing. In fact, answers to essentially the same questions, and others prepared with the help of marketing or clinical staff at MVP, have appeared in MVP's prefiled testimony and have been admitted into evidence with the HCA's stipulation ever since these proceedings first included prefiled testimony. See *MVP's Prefiled Testimony of Matthew Lombardo dated July 7, 2020*. The HCA presents no reason for its complete change of direction this year.

¹Answer 23 in the *2023 Prefiled* is broken into two Answers (23 and 24) in this year's Prefiled.

CONCLUSION

The Answers are not hearsay and the Board has broad discretion to consider relevant evidence in these administrative proceedings. The Answers present simple fact testimony updating information the Board has asked for in the past which should be admitted into evidence here and the Board should deny the Motion.

Dated: July 13, 2023

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CERTIFICATE OF SERVICE

I, Ryan M. Long, hereby certify that I have served a copy of *MVP's Opposition to HCA's July 7, 2023 Motion to Strike* via e-mail upon the following:

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