

2010

# Innosys Inc. v. Department of Workforce Services, Workforce Appeals Board and Amanda Mercer : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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INNOSYS, INC.,

Petitioner,

vs.

DEPARTMENT OF WORKFORCE  
SERVICES, WORKFORCE APPEALS  
BOARD and AMANDA MERCER,

Respondents.

Case No. 20100184-CA

ALJ Decision No. 09-A-13439  
Workforce Appeals Board Nos.  
09-B-01323 & 10-R-00082

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**BRIEF OF PETITIONER**

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On Review from a Final Order  
of the Utah Department of Workforce Services, Workforce Appeals Board

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**ORAL ARGUMENT REQUESTED**

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	<u>i</u>
TABLE OF AUTHORITIES .....	<u>iii</u>
STATEMENT REGARDING JURISDICTION .....	<u>1</u>
STATEMENT OF ISSUES AND STANDARD OF REVIEW .....	<u>1</u>
STATUTES DETERMINATIVE OF THE APPEAL .....	<u>3</u>
STATEMENT OF THE CASE .....	<u>4</u>
STATEMENT OF FACTS .....	<u>5</u>
SUMMARY OF ARGUMENTS .....	<u>27</u>
ARGUMENTS .....	<u>29</u>
I.    THE CASE SHOULD BE REMANDED FOR A NEW HEARING BECAUSE THE ALJ PREJUDICED PETITIONER’S CASE BY EXCLUDING TESTIMONY FROM PETITIONER’S ADDITIONAL WITNESSES .....	<u>29</u>
A.    The ALJ Erred in Excluding Testimony about Ms. Mercer’s Dishonesty .....	<u>29</u>
B.    The ALJ Erred in Excluding Testimony about Ms. Mercer’s Careless Mistakes .....	<u>33</u>
C.    The ALJ Erred in Excluding Testimony about Help InnoSys Gave Ms. Mercer So She Could Do Her Job .....	<u>33</u>
D.    The ALJ Erred by Excluding Testimony about Warnings InnoSys Gave Ms. Mercer .....	<u>34</u>

II.	THE ALJ ERRONEOUSLY APPLIED THE RESIDUUM RULE BY IGNORING EVIDENCE THAT IS COMPETENT IN A COURT OF LAW AND BY TREATING EVIDENCE THAT WAS NOT HEARSAY OR WAS OTHERWISE COMPETENT IN A COURT OF LAW AS INADMISSIBLE HEARSAY .....	<u>35</u>
III.	THE ALJ ERRED IN MAKING FINDINGS OF FACT THAT ARE NOT SUBSTANTIALLY SUPPORTED BY THE EVIDENCE .....	<u>41</u>
A.	The Evidence Shows that Ms. Mercer Made More than One Careless Error .....	<u>41</u>
B.	The Evidence Shows that InnoSys Gave Ms. Mercer Warnings and that Ms. Mercer Knew What InnoSys Expected of Her .....	<u>43</u>
C.	The Evidence Shows It was Within Ms. Mercer’s Control to Meet InnoSys’s Expectations .....	<u>45</u>
D.	The Evidence Shows that Ms. Mercer did not Enter the Correct Value for the Test She was Performing .....	<u>47</u>
IV.	THE ALJ ERRED IN DENYING THE CONTINUANCE PETITIONER REQUESTED TO ACCOMMODATE THE DOCTOR’S ORDERS OF PETITIONER’S PRIMARY WITNESS .....	<u>48</u>
CONCLUSION .....		<u>49</u>
CERTIFICATE OF SERVICE .....		<u>50</u>
ADDENDUM .....		<u>51</u>

## TABLE OF AUTHORITIES

### FEDERAL CASE:

*Williamson v. United States*, 512 U.S. 594 (1994) ..... 29

### STATE CASES:

*Andreasen v. Hansen*, 8 Utah 2d 370, 335 P.2d 404 (1959) ..... 1, 30

*Astill v. Clark*, 956 P.2d 1081, 1086 (Utah App. 1998) ..... 32

*Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375 (Utah 1962) ..... 3, 49

*Berrett v. Denver & R.G.W.R.R.*, 830 P.2d 291 (Utah Ct. App. 1992) ..... 1

*Brown v. Glover*, 2000 UT 89, ¶ 43, 16 P.3d 540 ..... 3, 49

*Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997) ..... 2, 3

*Farnsworth v. Dep't of Workforce Services*, 2007 UT App 345 ..... 2, 3

*Gallegos v. Dick Simon Trucking, Inc.*, 2004 UT App 322, ¶¶ 8-9,  
110 P.3d 710 ..... 1

*Joseph v. W.H. Groves Latter Day Saints Hospital*, 7 Utah 2d 39,  
318 P.2d 330 (1957) ..... 1

*Mayes v. Department of Employment Sec.*, 754 P.2d 989, 992  
(Utah Ct. App. 1988) ..... 35

*Nixdorf v. Hicken*, 612 P.2d 348 (Utah 1980) ..... 40

*Prosper, Inc. v. Dep't of Workforce Services*, 2007 UT App 281, ¶¶ 11-13,  
168 P.3d 344 ..... 2, 35, 37

*State v. Vargas*, 2001 UT 5, 36, 20 P.3d 271 ..... 38

*Walker v. Peterson*, 3 Utah 2d 54, 278 P.2d 291 (1954) ..... 1, 30

STATUTES:

Utah Code Ann. § 35A-4-405(2)(a) .....	5
Utah Code Ann. § 63G-4-403(4)(d) .....	1, 2, 3
Utah Code Ann. § 63G-4-403(4)(g) .....	2, 3
Utah Code Ann. § 63G-4-403(4)(h) .....	3
Utah Code Ann. § 78A-3-103(2)(a) .....	1

REGULATIONS:

Utah Admin. Code R994-405-202(1)-(3) .....	5, 33, 40, 43, 44
--	-------------------

RULES:

Utah R. Civ. P. 61 .....	1
Utah R. Evid. 801(c) .....	36
Utah R. Evid. 801(d)(1)(A) .....	37, 38
Utah R. Evid. 801(d)(2)(A) .....	38

OTHER AUTHORITIES:

17 C.J.S. Continuances § 57 (1999) .....	3
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## STATEMENT REGARDING JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-103(2)(a) because this is an appeal from a decision of an administrative agency.

## STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Should the decision of the Administrative Law Judge (“ALJ”) be reversed and the case remanded for a new hearing because the ALJ prejudiced Petitioner’s case by excluding testimony from Petitioner’s additional witnesses?

InnoSys’s position that the ALJ’s decision should be reversed is supported by *Andreasen v. Hansen*, 8 Utah 2d 370, 335 P.2d 404, 408 (1959); *Walker v. Peterson*, 3 Utah 2d 54, 278 P.2d 291, 293 (1954); *Berrett v. Denver & R.G.W.R.R.*, 830 P.2d 291, 293 (Utah Ct. App. 1992) *citing Joseph v. W.H. Groves Latter Day Saints Hospital*, 7 Utah 2d 39, 318 P.2d 330, 334 (1957); Utah R. Civ. P. 61; and Utah Code Ann. § 63G-4-403(4)(d). A decision to exclude evidence should be reviewed under a correctness standard when the decision turns on a legal determination such as the admissibility of evidence and on a clearly erroneous standard when the determination turns on a question of fact. *Gallegos v. Dick Simon Trucking, Inc.*, 2004 UT App 322, ¶¶ 8-9, 110 P.3d 710. In this case, the ALJ erred in both respects. Accordingly, both standards will apply to separate errors. For the preservation of this issue, *see* R. at 67-68 (Hearing Tran. at 26:7-27:23), 351-355, 392-397.<sup>1</sup>

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<sup>1</sup> Citation conventions used in this brief are as follows: “R.” refers to the Record on Appeal as amended, “Hearing Tran.” refers to the transcript of the hearing of Respondent’s appeal of the denial of her unemployment insurance benefits, which is included in the Record on Appeal at 41-127, and “Add. Ex.” refers to an exhibit included in this brief’s Addendum.



2. Should the decision of the ALJ be reversed and the case remanded for a new hearing because the ALJ erroneously applied the residuum rule by ignoring evidence that is competent in a court of law and by treating evidence that was not hearsay or was otherwise competent in a court of law as inadmissible hearsay?

InnoSys's position that the ALJ's decision should be reversed is supported by *Prosper, Inc. v. Dep't of Workforce Services*, 2007 UT App 281, ¶¶ 11-13, 168 P.3d 344; Utah Code Ann. § 63G-4-403(4)(d). The determination of whether evidence constitutes hearsay and whether the residuum rule was correctly applied are questions that should be reviewed under a correctness standard. *Prosper*, 2007 UT App 281 at ¶ 8. For the preservation of this issue, *see* R. at 296-297 (Add. Ex. "A" at 3-4), 355-357, 385-386 (Add. Ex. "B" at 3-4)

3. Did the ALJ err in making the following findings of fact that are not substantially supported by the evidence:
  - a. Petitioner failed to provide enough evidence to show that Respondent committed more than one careless error;
  - b. Petitioner had not given Respondent a formal warning about her performance;
  - c. Petitioner did not establish that Respondent was able to meet Petitioner's expectations; and
  - d. Respondent entered the correct value for the test she was performing?

InnoSys's position that the ALJ did err is supported by *Farnsworth v. Dep't of Workforce Services*, 2007 UT App 345; *citing Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997); Utah Code Ann. § 63G-4-403(4)(g). For a copy of the *Farnsworth*

decision, *see* Add. Ex. “D”. When reviewing an agency’s findings of fact, the Court of Appeals should review them to see if the findings are substantially supported by the evidence when viewed in light of the whole record before the court. *Farnsworth*, 2007 UT App 345; *citing Drake*, 939 P.2d at 181; Utah Code Ann. § 63G-4-403(4)(g). For the preservation of this issue, *see* R. at 357-374

4. Did the ALJ err in denying the continuance Petitioner requested to accommodate the doctor’s orders of Petitioner’s primary witness?

InnoSys’s position that the ALJ did err is supported by *Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375 (Utah 1962); Utah Code Ann. § 63G-4-403(4)(h)(i), (iv). When reviewing a denial of a motion for continuance, the Court of Appeals should review the denial for an abuse of discretion. *Bairas*, 13 Utah 2d 269, 373 P.2d 375, 377 (Utah 1962); *see also Brown v. Glover*, 2000 UT 89, ¶ 43, 16 P.3d 540 (“an abuse of discretion may be found if a party has ‘made timely objections, [has] given necessary notice, and has made a reasonable effort to have the trial date changed for good cause.’”) *citing* 17 C.J.S. Continuances § 57 (1999). For the preservation of this issue, *see* Add. Ex. “E”, and 129-131 and 205-211, 212, 374-375 and 389.

### **STATUTES DETERMINATIVE OF THE APPEAL**

Resolution of this case necessarily involves application of Utah Code Ann. § 63G-4-403(4), which provides as follows:

- (4) The appellate court shall grant relief only if, on the basis of the agency’s record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

\* \* \*

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

\* \* \*

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

\* \* \*

(iv) otherwise arbitrary or capricious.

### **STATEMENT OF THE CASE**

This is an appeal from a decision of the Appeals Unit of the Utah State Department of Workforce Services granting unemployment insurance benefits to Respondent Amanda Mercer. Initially, the Department of Workforce Services denied Ms. Mercer's benefits based on the information furnished by InnoSys showing that Ms. Mercer was discharged for just cause because she made repeated careless mistakes and made false excuses for her mistakes rather than taking responsibility for them.

To establish that an employee was discharged for just cause and not entitled to unemployment insurance benefits, Employers bear the burden of showing: 1) the employee was culpable, meaning the that the employees conduct was so serious that continuing the employment relationship would jeopardize the employer's rightful interest; 2) the employee had knowledge of the conduct the employer expected; and 3) the employees conduct causing

the discharge was within the employees control. *See* Utah Code Ann. § 35A-4-405(2)(a); Utah Admin. Code R994-405-202(1)-(3).

The ALJ ruled that InnoSys had not carried its burden with regard to the culpability element. *See* R. at 297 (Add. Ex. “A” at 4). Accordingly, he did not reach the questions of knowledge and control but suggested he would have found that the element of control was not satisfied based on his belief that InnoSys had not shown that Ms. Mercer was able to meet InnoSys’s expectations. *See* R. at 297 (Add. Ex. “A” at 4) and 388 (Add. Ex. “B” at 6)(stating the issue of control is not germane because regardless of what the ALJ would have found on this issue, he did not reach it).

InnoSys maintains that the ALJ made several reversible errors. Therefore, InnoSys appealed the ALJ’s decision to the Workforce Appeals Board, which affirmed the ALJ’s decision. The Workforce Appeals Board also denied InnoSys’s request for reconsideration. Having solid legal and factual grounds for the reversal of the award of benefits to Ms. Mercer, InnoSys now appeals to this Court.

### **STATEMENT OF FACTS**

1. InnoSys’s primary witness, Dr. Ruey Jen (Jennifer) Hwu Sadwick (“Dr. Hwu”) has a PhD in electrical engineering and is the CEO of InnoSys. R. at 006, 008 and 078 (Hearing Tran. at 37:8-15).

2. Prior to the hearing, Dr. Hwu, was scheduled to have extensive surgery. Her surgery and recovery plan required a minimum of six weeks of bed rest. *See* Add. Ex. “E”.<sup>2</sup>

3. Unfortunately, the hearing was scheduled to occur just shortly after Dr. Hwu’s surgery. Therefore, InnoSys moved for a continuance of the hearing to allow Dr. Hwu sufficient time to recover before having to prepare for the hearing and testify. *See* Add. Ex. “E”; *see also* R. at 205-211.

4. Rather than granting the time Dr. Hwu needed to recover, the ALJ only allowed an eight-day continuance. *Compare*, R. at 038, indicating a original hearing date of September 30, 2009, with R. at 041 showing a hearing date of October 8, 2009, *see also* R. at 212.

5. Consequently, during the time prior to the hearing, Dr. Hwu was confined to bed. R. at 043 (Hearing Tran. at 2:43).

6. She was heavily medicated with pain relievers having side effects of incoherence, dizziness and slurred speech. R. at 379-381.

7. She had no opportunity to meet with InnoSys’s counsel before the hearing. R. at 379.

8. Her ability to confer with counsel was severely limited. R. at 379.

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<sup>2</sup> Add. Ex. “E” is a copy of InnoSys’s Motion for Continuance. It is not included in the Record on Appeal because the Department of Workforce Services failed to scan it at the time and is unable to locate the original. *See* e-mail correspondence at Add. Ex. “F”.

9. Her means of marshaling evidence and witnesses was likewise severely limited.  
R. at 379.

10. She was still on pain medication when she was required to testify. R. at 379-380.

11. Due to the length of the hearing, her medication wore off and she was distracted by pain. R. at 379.

12. She also began bleeding during the hearing, which also seriously distracted her.  
R. at 379-380.

13. Nevertheless, Dr. Hwu testified. Of the several things about which Dr. Hwu testified, she testified that Ms. Mercer lied when Ms. Mercer tried to excuse a serious error Ms. Mercer had made. In particular, Ms. Mercer tried to blame computer software for either changing a zero value, which Ms. Mercer claims to have input, to a 5,000 value or had arbitrarily generated a 5,000 input value without Ms. Mercer knowing so. R. at 052 (Hearing Tran. at 11:15-26).

14. In addition to other testimony Dr. Hwu gave that Ms. Mercer's excuse was false, Dr. Hwu testified as follows that Ms. Mercer had admitted to the software consultant that Ms. Mercer had entered the 5,000 value:

JUDGE . . . Why did you conclude that she lied about this rather than that she had just made a mistake?

HWU-SADWICK Oh, because I - I actually did go to the - the trainer who is - who is the one who developed the software who is the one that handed the software code to Amanda who is

the one helped Amanda to - to learn the software. I went back to him and asked him - I asked him about whether he had any conversation with Amanda on the date of July 22nd. He say that yes, he did.

And I asked him how, you know, what's the conversation? He say that in checking for Amanda how she made a mistake, he found they had this number wrong in there. She point - he pointed that out to Amanda and then - and then Amanda was the one told this trainer on her own, she put that number in there previously and forgot -

JUDGE And what number are we talking about?

HWU-SADWICK It's - it's a number to set the initial state of the simulation.

JUDGE Okay. And what number was that?

HWU-SADWICK 5000, . . .

R. at 53-54 (Hearing Tran. at 12:29-13:5); *see also*, R. 54-55 (Hearing Tran. at 13:16-14:23).

15. Inconsistent with what Ms. Mercer told the trainer, Ms. Mercer testified as follows:

CLAIMANT I'd like to start off by saying that when the mistakes were found on the 22nd, I did on the 23rd call the trainer because they asked me to investigate what had happened. I did not know. So I called the trainer on the 23rd and talked to him for a good long time and I reported what was different from the other simulation. I never told him I put in 5,000, because I don't know how it got in there.

What I did tell him is that there was a warning that gave - said that I needed to input an exact number in order to get a right result. I don't really remember because it's been so long ago. But I do remember it was all about

this warning. And I said I had been playing with 50 and minus 50 and it his could hurt the results, because I did find the 5,000 in there.

R. at 068-069 (Hearing Tran. at 27:43-28:9); *see also* R. at 090 (Hearing Tran. at 49:27-40).

16. Ms. Mercer further testified on this point that she “never lied to them or blamed the software.” R. at 069 (Hearing Tran. at 28:13-14).

17. Later during cross examination she reaffirmed that she never blamed the software. R. at 089 (Hearing Tran. at 48:27-32).

18. But, when confronted by the ALJ on this issue, the following exchange ensued:

JUDGE                      Now, I thought the testimony I heard was a little different than that, Ms. Mercer. Let me recap here to make sure I understood correctly. The company thinks that that was caused because the initial value entered was 5,000. It was your testimony that you never entered 5,000 as the initial value, but it was your assumption that the initial value was zero. And that the mistake came because the software had changed that, is that correct? Ms. Mercer?

CLAIMANT                Can I have a minute?

JUDGE                      Actually, Ms. Adams, no, you can’t have a minute. I want an answer from Ms. Mercer on this. And I don’t want you coaching your witness, and I can’t see what you’re doing. So the Answer’s no. I want, Ms. Mercer?

CLAIMANT                Yes.

JUDGE                      I’d like an answer. I want to make sure I understood correctly what you testified to earlier.

CLAIMANT                Can you state it again?

JUDGE                      I’d be happy to.



CLAIMANT Thank you.

JUDGE When you ran this experiment or this verification or whatever we're going to call it, the sum of the currents exceeded the, the current that was input. The company later determined that was because the initial setting was 5,000 when it should have been zero. As far as you know, you knew the value was zero. If the mistake occurred because the initial value was 5,000, then the mistake was because a fault in the software and not because of an error that you had made in the initial input. Isn't that correct?

CLAIMANT Yes.

JUDGE Okay, then you blamed it on the software. I think that her testimony there was pretty clear Ms. Adams.

R. at 089-090 (Hearing Tran. at 48:34-49:25); *see also* Ms. Mercer's e-mail to this effect.

R. at 027.

19. As additional evidence of Ms. Mercer's dishonesty on this point, Dr. Hwu testified that Ms. Mercer made the following false excuse:

HWU-SADWICK . . . the mistake was because this new computer code was given to her by her trainer somehow just was capable of putting a number in without her knowing it, and that was the reason for the mistake. And, I actually - I actually walked her through - I believe I spent close to an hour actually walk through her -through - walk her through, the - the - my - kind of my - it's my disbelief of that could be a reason for her mistake.

JUDGE Okay.

R. at 049 (Hearing Tran. 8:3-11).

20. In response to the following questions, Dr. Hwu further testified with regard to Ms. Mercer's dishonesty on this point as follows:

JUDGE Okay, What - how do you feel that she lied to you to cover that up.

HWU-SADWICK . . . The next morning, she came with this, grieving<sup>3</sup> of the computer code somehow just was put a number in there without her knowing it. And, that answer was not, you know, by any means, that answer is just I don't believe it, and I don't buy into it. And so, I told her, I said, I said, I don't believe -- . .

JUDGE So it was, it was your conclusion that the error that she had made was not a result of the computer code?

HWU-SADWICK Computer code is just not capable of doing something the person did not do because it's a bad<sup>4</sup> thing. It's a -

JUDGE Okay.

HWU-SADWICK And so I - I give her a lot of questions for her to answer with the hoping she would actually come back, you know, realizing, you know, this is really not a good answer to wipe out this, you know, kind of just downplay this mistake. So I further asked her, I say that if the computer code was capable of just dunking<sup>5</sup> a number to you, you know, whenever it wants to, then how - how you feel about all the previous reports you have

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<sup>3</sup> The word "grieving" is a transcription error. The word should be "reasoning".

<sup>4</sup> The word "bad" is a transcription error. The word should be "dead".

<sup>5</sup> The work "dunking" is a transcription error. The word should be "dumping".

generated for us, and I give her a specific example of - I specifically wanted her to tell me how it was going to affect if this type of mistake could happen -

JUDGE I understand what you're saying.

HWU-SADWICK And so I told her to tell me if this is true, then how could - how could this particular instance, you know, think how she has been supplied to this students at the University of Utah doing his thesis based on Amanda's results, how can his results have been accurate? And so I was hoping, you know, through this question she would come back with real, you know, cause.

R. at 052-053 (Hearing Tran. at 11:13-12:1).

21. Ms. Mercer also made many more careless mistakes leading up to the one for which she was fired. Evidence of many other examples of Ms. Mercer's carelessness, irresponsibility and mistakes were introduced at her hearing. *See e.g.*, R. at 015, 018, 020, 025, 026, 028, 029, 030, 222, 224-225, 226, 227, 233, 238, 246 and 248.

22. Dr. Hwu also testified of Ms. Mercer's other careless mistakes as follows:

HWU-SADWICK But the problem is, like I kept emphasizing with her, is to check your results before you give the results. Don't give the results with mistakes.

JUDGE So the thing that concerned you the most was the errors she made?

HWU-SADWICK Exactly.

R. at 064 (Hearing Tran. at 23:37-43).

23. Ms. Mercer had a history of making false excuses for her carelessness and irresponsibility. Dr. Hwu testified of other false excuses Ms. Mercer made as follows:

JUDGE Okay, and what lie did he tell you that Ms. Mercer had told?

HWU-SADWICK He actually - he actually did have the computer running for whatever Amanda needed to do, but Amanda actually was not (inaudible) her work, but then - but then actually blamed on him not having the computer running for her, and, and that was a lie, yeah.

R. at 057 (Hearing Tran. at 16:11-16); *see also* R. at 243 and 245.

HWU-SADWICK The third one was again it's the same thing, just blaming on other people for her own -

JUDGE Whom did she blame?

HWU-SADWICK She - basically, I asked her about the equipment of the experiments. She told me she would get done on the previous day. And then she told me she didn't - she could not do the experiment because somebody else was using the equipment. And then Kyle<sup>6</sup> Johnson, another employee of ours, told me nobody was using the equipment. And so - so - and she - he felt really bad about being, you know, Amanda actually point the finger at the people who was not even involved at all.

R. at 057 (Hearing Tran. 16:20-31); *see also* R. at 012.

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<sup>6</sup> The name "Kyle" is a transcription error. The correct name is "Carl".

24. InnoSys warned Ms. Mercer about her carelessness and irresponsibility. Dr. Hwu testified that she had given Ms. Mercer formal warning both verbally and in writing via e-mail. R. at 061-062 (Hearing Tran. 20:18-2:34).

25. Furthermore, Dr. Hwu gave the following testimony concerning a warning she had given Ms. Mercer:

JUDGE                      So, Dr. Sadwick [referring to Dr. Hwu], did you ever formally say to Ms. Mercer that you would give her another chance to keep her job?

HWU-SADWICK    Yes. Yes.

JUDGE                      Okay. Tell me the date?

HWU-SADWICK    I can't -

JUDGE                      Then give me your best guess.

HWU-SADWICK    Yeah, I can't give you the exact date, but I know it's somewhere around, you know, June.

JUDGE                      June 2009?

HWU-SADWICK    Yeah . . .

R. at 062-063 (Hearing Tran. 21:36-22:8).

26. Written evidence of a warning Dr. Laurence P. Sadwick ("Dr. Sadwick") gave Ms. Mercer concerning her poor performance was also admitted as follows:

- 1) Isolation from device group and delivery demands.
- 2) Lacking in positive contribution to device group.

- 3) Lacking in RF test data credibility.
- 4) Exhibit technician behavior rather than engineering behavior with respect to responsibilities and resolving problems.
- 5) Lacking in careful application of engineering principles and practices.

R. at 013; *see also* R. at 250-251, 261.

27. Also, InnoSys sent Ms. Mercer several e-mails expressing concerns with Ms. Mercer's performance. *See, e.g.*, R. at 014-016, 018, 020 and 021.

28. In addition to giving Ms. Mercer warnings, InnoSys gave Ms. Mercer many specific instructions by which she was informed what was expected of her. In a number of e-mails she was instructed to 1) read up so she has the knowledge required for RF design with particular software; 2) use best efforts to ensure what she is doing is correct; and 3) document what she was doing carefully. *See* R. at 011 and 015.

29. In addition, Dr. Hwu coached her on many things. Dr. Hwu testified as follows:

HWU-SADWICK And I spent a lot of time, I still remember one afternoon, you know, instead of going to take care of something in the bank I really needed to take care, I told her I said I want to stay because I want to make sure - I actually got in the car, was on my way to the bank, and I actually turned around because I told her, I said I really need to make sure you do know how to address these things so you can get this report completed. I turned around and, you know, less than 15 minutes I was at her desk helping her to understand what we need her to do.

R. at 051 (Hearing Tran. at 10:31-38); *see also* R. at 076 (Hearing Tran. at 35:8-18).

30. In addition to giving testimony about warnings given to Ms. Mercer, Dr. Hwu further testified that Ms. Mercer knew what was expected of her as follows:

HWU-SADWICK . . . all I want to interject here is Amanda knows what kind of business we are doing. Amanda knows how accuracy, resolution and precision is so important in any of the mission that we serve it to.

JUDGE I understand, Dr. Sadwick [referring to Dr. Hwu].

HWU-SADWICK Components. Yeah.

JUDGE Let's move along, Mr. Day.

R. at 059-060 (Hearing Tran. at 18:37-19:1).

31. Furthermore, Ms. Mercer did not deny that she knew what was expected of her as follows:

DAY . . . Ms. Mercer, you - you knew what you were supposed to be doing at InnoSys, didn't you?

CLAIMANT I was given tasks and I tried to fulfill those tasks to the best of my abilities.

DAY So you knew what was expected of you, right?

CLAIMANT I was expected to get my job done on time, yes?

DAY And you knew what your job was, correct?

CLAIMANT Yes.

R. at 099 (Hearing Tran. at 58:29-40).

32. Furthermore, InnoSys furnished Ms. Mercer with everything she needed to enable her to perform her duties and meet InnoSys's expectations as shown by the following testimony:

DAY Okay. Did you give Amanda the resources she needed to do her job?

HWU-SADWICK Oh, yes, more than I ever give it to anyone else, yes. You know, never anyone with the work with a trainer on the side to check her mistake, to coach her every step along. I paid -

JUDGE I understood that, Ms. Dr. Sadwick [referring to Dr. Hwu]. Let's go on.

DAY Okay. Did she have access to other engineers to help her, if she needed to?

HWU-SADWICK Yes, she has four PHD's. All four -

JUDGE Let's see if we can keep these answers to yes or no.

HWU-SADWICK Yes.

JUDGE Thank you.

DAY And did you hire a consultant to help her?

HWU-SADWICK Yes, that's the trainer, yes.

DAY Okay, that was an independent contractor; not an employee?

HWU-SADWICK Yes.



DAY Did she have the equipment she needed?

HWU-SADWICK Yes. If not immediately, it's a small company, we were always able to get things to her in a matter of days, rather than weeks and days like a lot of other larger companies.

DAY Okay. Did your customer also help train her? Mr. Pete Mattin (phonetic)?

HWU-SADWICK Yes, the - yeah, yes. One particular customer was nice enough to come and work on the testing and coach Amanda along twice, at least twice or three times, yeah.

DAY Is Amanda an engineer herself?

HWU-SADWICK Yes, she was hired as an engineer? [sic]

DAY Does she have a degree in electrical engineering?

HWU-SADWICK Yes.

JUDGE Bachelor's Degree?

HWU-SADWICK Yes.

JUDGE Thank you.

DAY Do you believe she was capable of doing the tasks that you asked her to do?

HWU-SADWICK Yes.

JUDGE I covered that earlier.

R. at 065-066 (Hearing Tran. at 24:28-26:38); *see also* R. at 235 for example of Dr. Sadwick giving Ms. Mercer assistance.

33. Dr. Hwu gave additional testimony Ms. Mercer was able to meet InnoSys's expectations:

JUDGE . . . Dr. Hwu, do you think that if you had an engineer who had been doing the job that Ms. Mercer was doing who had more experience than Ms. Mercer had, that that engineer would have had fewer problems?

HWU-SADWICK No. I really think it's all a matter of checking what she did and checking the results that she got.

JUDGE All right. So you think that the problems were not caused by a lack of experience, but were caused by carelessness?

HWU-SADWICK Yes because -

JUDGE Okay. I do understand your testimony with regard to that then. Thank you.

HWU-SADWICK Oh, okay.

JUDGE Mr. Day?

DAY Okay. I believe there's ample evidence to show, Your Honor, that she was given all of the training she needed and the follow-up assistance to analyze the reports.

JUDGE And is that what you believe, Dr. Hwu?

HWU-SADWICK Can you repeat, Dan? Your voice faded away.

JUDGE Ask the question of Dr. Hwu, Mr. Day?

DAY Yes. Was Amanda given instruction or training on how to analyze the data and reports that she was asked to create?

HWU-SADWICK Yes. Actually, I was the one performing that training. I created for her, only for her and never for anybody else, I create a handbook. It's a white folder book. I put all the - all the things that I thought would help her to minimize her mistakes in there. I went through two reports with her line by line telling what -

JUDGE All right. So you thought her training was adequate; is that correct, Dr. Hwu?

HWU-SADWICK Yes.

R. at 094-095 (Hearing Tran. at 53:17-54:11).

34. Dr. Hwu also gave the following testimony showing that Ms. Mercer was capable of meeting InnoSys's expectations:

JUDGE Based on that testimony, Dr. Sadwick [referring to Dr. Hwu] -

HWU-SADWICK Uh-huh.

JUDGE - maybe I should conclude that Ms. Mercer was not really suited for this job?

HWU-SADWICK No.

JUDGE Wasn't capable of doing it?

HWU-SADWICK No, no, no. She does - she does good work when she - when she wants to. And then she doesn't - she just - it's just like my own kids, you know. You've told them, okay, if you follow the procedure of the understanding what your problem and take what the teacher teach you how to solve the problem carefully, and then check you results. And then if you made a mistake once, make sure you write on that mistake so that you will never make that same mistake again. You know, it's just like I'm telling my kids. I told her -

JUDGE I understand what you're saying.

HWU-SADWICK I tell her -

JUDGE Dr. Sadwick [referring to Dr. Hwu], I understand what you're saying.

HWU-SADWICK Yeah. So really -

JUDGE All right. We're going to have a lot of other issues to cover. So I don't think we need -

HWU-SADWICK Good, okay.

JUDGE - to spend more time on that.

R. at 058-059 (Hearing Tran. at 17:36-18:22).

35. Dr. Hwu also gave Ms. Mercer specific instructions on how to avoid the careless mistakes she was making. In particular, Dr. Hwu instructed Ms. Mercer to: "i. read what you do to get correct knowledge; ii check what you are doing are correct and iii document and learn how to report what you are doing without mistake." R. at 011.

36. Even Ms. Mercer admits that the error leading to her termination was obvious and could have been avoided by following Dr. Hwu's instructions:

DAY                      Okay, Ms. Mercer, the - degree of difference between the current on that last - I'm talking about the last mistake that we've been talking about today where the current going in was more than the sum of the total of the current - pardon me, the sum total of the current was more than the current going into the device; do you recall what the difference was?

CLAIMANT              No.

DAY                      Wasn't it nearly two times?

CLAIMANT              I don't know. How would I know that? It's been so long ago.

DAY                      Well, you did produce e-mail.

JUDGE                   She said she doesn't remember, Mr. Day.

DAY                      Okay. Well, maybe I can refresh that recollection.

CLAIMANT              Send me to an e-mail so I can recite it. If you're asking me on the hold, I don't know.

DAY                      Okay, I'll do that. Can you see Exhibit 22?

CLAIMANT              Okay.

DAY                      Does that refresh your recollection?

CLAIMANT              Yes, now what is your question?

DAY	What was the difference?
CLAIMANT	Almost double.
DAY	Almost double. Why did you miss that?
CLAIMANT	Again, when I reviewed my report, well I took steps that I was taught to do. The physicality of the device was working to what it was told. I took all reports straight from the software.
JUDGE	Let me see if I can ask a question here, so I'll understand this. And I think I understand what Mr. Day is trying to get at here, Ms. Mercer
CLAIMANT	Okay.
JUDGE	Shouldn't it have been obvious to you as an engineer that if the current that you measured coming out is more than 2,000 watts, yet the current going in was at 1,022; have I read that correctly?
CLAIMANT	Yes.
JUDGE	That there was something wrong because the current coming out can't exceed the current going in; shouldn't that have been obvious to you?
CLAIMANT	Yes.
JUDGE	It should have? How is it that you missed that?
CLAIMANT	Like I said, when I - when I reviewed these, I reviewed mainly on the physicality aspects of the picture and I took the software results straight from the software, and it was

giving the correct efficiency I needed to have. So I put that in the report.

JUDGE                      You didn't consider this something that you should have checked before you submitted the report?

CLAIMANT                No.

JUDGE                      Go ahead Mr. Day.

R. at 101-103 (Hearing Tran. at 60:40-62:18).

37.     After Dr. Hwu's direct testimony concluded, InnoSys attempted to call Dr. Sadwick as its second witness. The ALJ asked what he would testify about, and InnoSys proffered that Dr. Sadwick would give additional testimony about Ms. Mercer's dishonesty at InnoSys, but the ALJ refused to allow this testimony as follows:

DAY                        He would also support the testimony that Amanda had been dishonest here.

JUDGE                      I thought that Dr. Sadwick's [referring to Dr. Hwu] testimony with regard to that was sufficient and credible.

DAY                        Okay.

R. at 068 (Hearing Tran. at 27:1-5).

38.     After expressly determining that Dr. Hwu's testimony regarding Ms. Mercer's dishonesty was "sufficient and credible," the ALJ later concluded in his written decision that Dr. Hwu's testimony on this point was inadmissible hearsay. *See* R. at 296-297 (Add. Ex. "A" at 3-4).

39. As follows, the ALJ further excluded additional evidence InnoSys was prepared to present:

DAY                      He is going to testify about a, -- he'll testify about help that he gave her so that she could do her job.

JUDGE                   Well, we've already had testimony that she had adequate help.

R. at 067 (Hearing Tran. at 26:18-21).

40. In spite of this, the ALJ concluded that he “would have found that the element of control was not satisfied,” reasoning that “[t]he Claimant provided credible testimony she did her best,” and that he “would have found that the Employer has not established that she was able to meet its expectations.” R. at 297 (Add. Ex. “A” at 4).

41. The exchange with the ALJ regarding further witnesses for InnoSys continued as follows:

DAY                      Okay. He will testify that there was a meeting that he had with Ms. Mercer and another employee where he reprimanded them and made it clear that if they didn't improve their performance, that their employment would be subject to termination.

JUDGE                   Okay. Job and<sup>7</sup>] jeopardy is not an issue here in the State of Utah. The only issue is whether or not she knew what the employer expected of her.

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<sup>7</sup> The word “and” is a transcription error. The word should be “in”.



DAY                      So, it's not critical that she knew that if she did not perform, she would lose her job?

JUDGE                  No. Nowhere in the rules does it say that. It only says that she had to know what the Employer expected of her.

DAY                      Are you satisfied that she knew, because I -

JUDGE                  I am.

R. at 067 (Hearing Tran. at 26:23-38).

42.     The ALJ also excluded testimony about Ms. Mercer's careless mistakes as follows:

JUDGE                  Anything else then, from that witness?

DAY                      That's primarily what I would have had him do, and he would be able to talk about a lot of mistakes that I am convinced you're convinced of . . .

JUDGE                  I am . . .

R. at 068 (Hearing Tran. at 27:7-16).

43.     After denying further testimony about Ms. Mercer's many additional mistakes and warnings given, the ALJ went on to make the erroneous finding that InnoSys "also failed to provide enough evidence to show that the Claimant committed more than one careless error and then show why one careless error necessitated discharge when it had given her no formal warnings." R. at 297 (Add. Ex. "A" at 4).

## SUMMARY OF ARGUMENTS

During the hearing the ALJ barred additional evidence about Ms. Mercer's dishonesty based on his understanding at the moment that Dr. Hwu's testimony on that issue was "sufficient and credible." Later, in his written decision, he determined that Dr. Hwu's testimony with regard to Ms. Mercer's dishonesty was purely hearsay that would be inadmissible in a judicial court of law. By its nature, inadmissible hearsay cannot be "sufficient and credible." Therefore, from the ALJ's inconsistent treatment of Dr. Hwu's testimony, it is apparent that he was operating under a misunderstanding of the law regarding hearsay evidence either at the time when he excluded additional testimony about Ms. Mercer's dishonesty or at the time when he wrote his decision.

The ALJ also excluded other evidence pertaining to specific issues based on his determination during the hearing the Dr. Hwu's testimony was sufficient on those issues. Later, he made findings in his written decision that InnoSys had not presented enough evidence on those issues.

The Workforce Appeals Board trivialized the prejudice caused by the exclusion of additional testimony by suggesting the ALJ simply determined that the additional testimony was better used as rebuttal testimony. Making that determination, however, was impossible at that point because InnoSys had not rested its case-in-chief. As a consequence, the ALJ prejudiced InnoSys from presenting both corroborating testimony and testimony of other

matters not covered by Dr. Hwu in InnoSys's full case-in-chief that could not appropriately be introduced as rebuttal testimony.

The ALJ also misapplied the residuum rule by treating Dr. Hwu's testimony as hearsay when by definition it was not hearsay and was otherwise admissible under at least two of the exceptions to the hearsay rule. Furthermore, the the ALJ ignored other evidence of Ms. Mercer's dishonesty that was competent in a court of law. If he would have given that evidence its appropriate weight, the residuum rule would not have applied.

The ALJ also erred in making findings that were not substantially supported by the evidence. Most prejudicial was his finding that InnoSys had not presented evidence of more than one careless mistake that Ms. Mercer had made. This finding was prejudicial when the ALJ rested his decision on the culpability element because making repeated careless mistakes is culpable behavior.

The degree to which the other unsupported findings of the ALJ are germane is questionable because they cut to the elements of knowledge and control, which the ALJ did not reach. They are addressed in this brief, however, to ensure that InnoSys is afforded adequate opportunity on remand to establish these elements unhindered by erroneous findings.

Finally, the ALJ erred in refusing to grant a continuance of the hearing long enough for Dr. Hwu to recover from her surgery. As a consequence Dr. Hwu was required to testify

under unreasonably difficult circumstances. The prejudice caused by this was compounded by the prejudice caused by excluding additional testimony.

## **ARGUMENTS**

### **I. THE CASE SHOULD BE REMANDED FOR A NEW HEARING BECAUSE THE ALJ PREJUDICED PETITIONER’S CASE BY EXCLUDING TESTIMONY FROM PETITIONER’S ADDITIONAL WITNESSES**

#### **A. The ALJ Erred in Excluding Testimony about Ms. Mercer’s Dishonesty**

The issue on which the ALJ concluded that InnoSys had not shown just cause for Ms. Mercer’s discharge was the issue of whether Ms. Mercer had been dishonest with InnoSys. The ALJ concluded that InnoSys did not establish that Ms. Mercer had lied to cover up her careless mistake based on his reasoning that Dr. Hwu gave hearsay testimony when she testified that Ms. Mercer had admitted to the trainer that she (Ms. Mercer) had entered the initial value of 5,000. R. at 296-297 (Add. Ex. “A” at 3-4).

This reasoning is contrary to the reasoning he applied when he excluded additional testimony about Ms. Mercer’s dishonesty. Unless otherwise admissible, hearsay is by nature insufficient and not credible. *See Williamson v. United States*, 512 U.S. 594, 598 (1994)(listing credibility hazards to hearsay evidence). Yet, during the hearing, the ALJ excluded additional testimony about Ms. Mercer’s dishonesty based on his reasoning that Dr. Hwu’s testimony on this point was “sufficient and credible”. Statement of Facts (“Facts”), ¶ 37, *citing* R. at 068 (Hearing Tran. at 27:1-5). It cannot be both ways; either Dr. Hwu’s testimony was “sufficient and credible” and should have been given its appropriate weight

or it was hearsay inadmissible in a court of law and the ALJ should have allowed additional testimony about Ms. Mercer's dishonesty when InnoSys attempted to introduce it.

InnoSys maintains that Dr. Hwu's testimony was not hearsay or otherwise fits within exceptions to the hearsay rule and is therefore admissible in a court of law. Nevertheless, either during the hearing when the ALJ expressly determined that Dr. Hwu's testimony was "sufficient and credible" or when he drafted his written decision, he must have been operating under a misunderstanding of the law with regard to hearsay evidence. Addressing this type of error, the Supreme Court of Utah stated the following:

We recognize that generally speaking expressions made by the trial court will not affect the validity of a judgment if it is otherwise sustainable. But this is not true if the statement shows that a material issue was analyzed by the court under a misconception as to the law, where a correct application of the law might well have produced a different result. Doing so would be comparable to letting the jury find a verdict under erroneous instructions.

*Andreasen*, 335 P.2d at 408 (1959); *citing Walker*, 278 P.2d at 293 (1954). In this case, if the ALJ had not excluded Dr. Sadwick's testimony or if he had not treated Dr. Hwu's testimony as inadmissible hearsay, the outcome might well have been different. InnoSys maintains it would have made all the difference. Accordingly, InnoSys maintains that the ALJ committed manifest error and respectfully requests that the Court of Appeals remand the case for a new hearing or as a minimum for additional testimony to be heard pertaining to Ms. Mercer's dishonesty.

The Decision of the Workforce Appeals Board trivializes the prejudicial impact of the ALJ's error by stating that "the Administrative Law Judge determined that Dr. Sadwick could best be used as a rebuttal witness." 1 at 386 (Add. Ex. "B" at 4). While the ALJ may have suggested such a determination with regard to other testimony that InnoSys proffered, he did not make such a determination on this issue. *See* R. at 067-068 (Hearing Tran. at 26:7-27:7).

In any event, this position fails for a number of reasons. First, as the party bearing the burden of proof, InnoSys should be afforded the opportunity to present its case-in-chief before having to rest and yield to the presentation of the defense. Implying that it is the employer's obligation to call the appropriate witnesses, the Workforce Appeals Board stated, "[i]t is not the Administrative Law Judge's obligation to prove the Employer's case or ensure that the Employer calls the appropriate witnesses." R. at 386 (Add. Ex. "B" at 4). By corollary, it is not the ALJ's prerogative to determine how the Employer's witnesses could best be used.

The liberty of choosing how to use a witness's testimony is particular sacred when the choice is to use the testimony in the case-in-chief as opposed to using the testimony in rebuttal.

Rebuttal evidence has been defined as 'evidence tending to refute, modify, explain, or otherwise minimize or nullify the effect of the opponent's evidence.' . . . Rebuttal evidence should be limited to evidence made necessary by the opponent's case-in-reply, . . . and evidence required to counter new facts presented in the defendant's case-in-chief. The purpose of rebuttal evidence is not to merely contradict or corroborate evidence already presented, but to respond to new points or evidence first introduced by the

opposing party. . . '[W]here a defendant introduces evidence of an affirmative matter in defense or justification, the plaintiff, as a matter of right, is entitled to introduce evidence in rebuttal as to such affirmative matter.'

*Astill v. Clark*, 956 P.2d 1081, 1086 (Utah App. 1998)(internal citations omitted).

Accordingly, when the plaintiff has testified in its case-in-chief that the defendant did A, B and C, and the defendant in her defense has testified that she did not do A, B and C, the plaintiff is generally not permitted to return on rebuttal and testify that yes indeed the defendant did do A, B and C because it is not rebutting new points or evidence first introduced by the defendant. Also, the plaintiff is not be permitted to come back after the defense has rested and testify that in addition to A, B and C, the defendant did X, Y and Z because the introduction of new points or evidence unfairly disadvantages the defendant. *See Astill*, 956 P.2d at 1085. These forms of inappropriate rebuttal testimony prejudice the defendant. Therefore, they are legitimately subject to exclusion as outside the scope of rebuttal testimony. *Id.*

In this case, Dr. Sadwick was prepared to give both corroborating testimony and testimony about new points and evidence that Dr. Hwu had not covered and Ms. Mercer did not covered. Accordingly, Dr. Sadwick's testimony was not appropriate for rebuttal testimony, and InnoSys was required to present his testimony in InnoSys's case-in-chief. Therefore, when the ALJ excluded Dr. Sadwick's testimony based on the ALJ's determination at the time that Dr. Hwu's testimony was "sufficient and credible," the ALJ deprived Plaintiff of the right to present "sufficient" evidence with corroborating testimony

from Dr. Sadwick and additional evidence that had not been covered. Therefore, it was error for the ALJ to deny InnoSys that opportunity regardless of his position at that time concerning hearsay evidence.

B. The ALJ Erred in Excluding Testimony about Ms. Mercer's Careless Mistakes

The ALJ also erred in excluding testimony of Ms. Mercer's additional careless mistakes. Facts, ¶ 42, *citing* R. at 068 (Hearing Tran. at 27:7-16). As explained below, InnoSys did show that Ms. Mercer made many careless mistakes and was prepared to show that Ms. Mercer made many other careless mistakes. The ALJ, however, denied InnoSys its right to present this evidence. This affected his erroneous finding that the one careless error in question was an isolated incident, which in turn affected the ALJ's erroneous conclusion that "[t]he Employer has not satisfied the element of culpability." *See* R. at 297 (Add. Ex. "A" at 4). This error was prejudicial because repeated injurious acts form an additional basis for InnoSys's claim that Ms. Mercer was culpable. *See* Utah Admin. Code R994-405-202(1).

Also, without taking the additional testimony about careless mistakes that Ms. Mercer had made the ALJ was not in a position to find, as he expressed he would have, that InnoSys "has not established that she was able to meet its expectations." R. at 297 (Add. Ex. "A" at 4).



C. The ALJ Erred in Excluding Testimony about Help InnoSys Gave Ms. Mercer So She Could Do Her Job

The ALJ further erred in excluding additional testimony that Ms. Mercer had the help she needed to do her job. Facts, ¶ 39, *citing* R. at 067 (Hearing Tran. at 26:18-21). If, as a matter of fact, InnoSys furnished adequate help for Ms. Mercer to do her job, a hypothetical finding that it was beyond Ms. Mercer's control to meet InnoSys's expectations is unsupported by the evidence. With additional witnesses, InnoSys could have removed all doubt about Ms. Mercer's ability to meet InnoSys's expectations if she would have merely exercised a reasonable degree of care with her work, which Ms. Mercer did not do.

D. The ALJ Erred by Excluding Testimony about Warnings InnoSys Gave Ms. Mercer

The ALJ also prejudiced InnoSys by not allowing additional testimony with regard to warnings InnoSys gave Ms. Mercer. Facts, ¶ 41, *citing* R. at 067 (Hearing Tran. at 26:23-38). Whether you call it a reprimand or a warning it is the same. After depriving InnoSys of giving additional testimony of warnings, the ALJ went on to make an erroneous finding that InnoSys "had given her no formal warnings." The fact is that InnoSys did give Ms. Mercer formal warnings as Dr. Hwu testified and other witnesses would have testified. Therefore, the case should be remanded to afford InnoSys its full due process rights to present testimony the ALJ erred in excluding.

II. THE ALJ ERRONEOUSLY APPLIED THE RESIDUUM RULE BY IGNORING EVIDENCE THAT IS COMPETENT IN A COURT OF LAW AND BY TREATING EVIDENCE THAT WAS NOT HEARSAY OR WAS OTHERWISE COMPETENT IN A COURT OF LAW AS INADMISSIBLE HEARSAY

The decision of the ALJ rests primarily on the following erroneous reasoning:

I find the Employer discharged her not because of the mistake made with the test but because it concluded that she had lied about it. The Employer's conclusion was based on the statement from the software consultant who reported the Claimant admitted she had erroneously entered an initial value of 5,000. The Employer offered no firsthand evidence that the Claimant admitted she had entered an initial value of 5,000. The Court of Appeals has consistently held that 'findings of fact cannot be based exclusively on hearsay evidence. They must be supported by a residuum of legal evidence competent in a court of law.' *Mayes v. Department of Employment Sec.*, 754 P.2d 989, 992 (Utah Ct. App. 1988). The Employer presented no 'legal evidence competent in a court of law' to support a finding that the Claimant admitted she entered an initial value of 5,000.

R. at 296-297 (Add. Ex. "A" at 3-4). Aside from the prejudice the ALJ caused by excluding additional testimony on Ms. Mercer's dishonesty, the ALJ misapplied the residuum rule in reaching this conclusion. Since the decision in *Mayes* was entered, the Court of Appeals has clarified that ruling. In particular, in *Prosper*, 2007 UT App 281, ¶¶ 11-13, the Court of Appeals clarified that "findings of fact 'cannot be based exclusively on inadmissible hearsay evidence' because admissible hearsay evidence is 'evidence competent in a court of law.'"

It should be noted here that Dr. Hwu's testimony on this point was admitted without objection, but for several other reasons, the ALJ's reasoning is erroneous. First, Ms.

Mercer's admission that she had entered the initial value of 5,000 is not hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c). Here an examination of the actual testimony is helpful:

JUDGE . . . Why did you conclude that she lied about this rather than that she had just made a mistake?

HWU-SADWICK Oh, because I - I actually did go to the - the trainer who is - who is the one who developed the software who is the one that handed the software code to Amanda who is the one helped Amanda to - to learn the software. I went back to him and asked him - I asked him about whether he had any conversation with Amanda on the date of July 22nd. He say that yes, he did.

And I asked him how, you know, what's the conversation? He say that in checking for Amanda how she made a mistake, he found they had this number wrong in there. She point - he pointed that out to Amanda and then - and then Amanda was the one told this trainer on her own, she put that number in there previously and forgot -

JUDGE And what number are we talking about?

HWU-SADWICK It's - it's a number to set the initial state of the simulation.

JUDGE Okay. And what number was that?

HWU-SADWICK 5000, . . .

Facts, ¶ 14, *citing* R. at 53-54 (Hearing Tran. at 12:29-13:5).

In *Prosper*, the Court of Appeals noted that if an out of court statement is offered for some purpose other than to prove the truth of the matter asserted - e.g., to prove that it was made and not for its truth - it is not hearsay. *Prosper*, 2007 UT App 281, ¶ 12. In *Prosper*, the Court of Appeals concluded that evidence of customer complaints submitted to prove that complaints were made was not hearsay because the evidence was not submitted for the purpose of proving that the complaints were true. *Prosper*, 2007 UT App 281, ¶ 13. Likewise, in this case, Dr. Hwu's testimony that Ms. Mercer had admitted to entering a 5,000 value was not offered to prove that Ms. Mercer had actually entered the 5,000 value, but to prove that she had lied about her responsibility for her mistake. Therefore, by definition, the statement was not hearsay.

Also, pursuant to Utah R. Evid. 801(d)(1)(A), Dr. Hwu's testimony is not hearsay. Rule 801(d)(1)(A) states that "[a] statement is not hearsay if: (1) . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten." In this case, Ms. Mercer testified at the hearing and was subject to cross-examination. On this issue, Ms. Mercer testified that she did not enter the 5,000 value. Facts, ¶¶ 15-18, *citing* R. at 068-069 (Hearing Tran. at 27:43-28:14) and 089-090 (Hearing Tran. at 48:27-49:40). Furthermore, with regard to this testimony, Ms.

Mercer stated that she didn't "really remember." Facts, ¶ 15, *citing* R. at 068-069 (Hearing Tran. at 27:43-28:9).

On the other hand, Dr. Hwu's testimony was of a statement Ms. Mercer made prior to the hearing which was inconsistent with Ms. Mercer's testimony at the hearing. Because Ms. Mercer testified at trial and was subject to cross-examination concerning her inconsistent statements, Dr. Hwu's testimony was admissible as non-hearsay under Utah R. Evid. 801(d)(1)(A). The Workforce Appeals Board erred in determined that "[t]he testimony in question does not meet any of the exceptions to the hearsay rule and is therefore not legally competent evidence." R. at 386 (Add. Ex. "B" at 4).

Also, Utah R. Evid. 801(d)(2)(A) states that admissions by party-opponents are not hearsay. Specifically, this Rule states that: "A statement is not hearsay if: . . . (2) Admission by party-opponent. The statement is offered against a party and (A) is the party's own statement . . ." *See also, State v. Vargas*, 2001 UT 5, ¶ 36, 20 P.3d 271 ("Rule 801(d)(2)(A) removes an 'admission by party-opponent' from the definition of hearsay").

For the foregoing reasons, Ms. Mercer's admission that she had entered the initial value of 5,000 was not hearsay or was admissible hearsay. Accordingly, Dr. Hwu's testimony was "legal evidence competent in a court of law." During the hearing, the ALJ seemingly agreed. As noted above, when InnoSys was prepared to call its second witness, the ALJ inquired about the general content of the witness's testimony. When counsel for InnoSys proffered that the witness "would support the testimony that Amanda had been

dishonest here,” the ALJ represented “I thought that Dr. Sadwick's [referring to Dr. Hwu] testimony with regard to that was sufficient and credible,” and refused to take additional testimony on that issue. R. at 068 (Hearing Tran. at 27:1-5). Therefore, the ALJ's conclusion that InnoSys “presented no ‘legal evidence competent in a court of law’ to support a finding that Claimant admitted she entered an initial value of 5,000” (R. at 296-297 (Add. Ex. “A” at 3-4)) is inconsistent with the ALJ's own position taken during the hearing and was erroneous as a matter of law.

Furthermore, Ms. Mercer's admission to having entered the 5,000 value was not the only evidence InnoSys offered in support of InnoSys's conclusion that Ms. Mercer made a false excuse for her careless mistake. Dr. Hwu gave testimony that she knew Ms. Mercer was giving a false excuse because of the technological impossibility of her excuse. Facts, ¶¶ 19-20, *citing* R. at 052-053 (Hearing Tran. at 11:13-12:1) and (Hearing Tran. 8:3-11). On this point, the Workforce Appeals Board suggests that in the absence of expert witness testimony, Dr. Hwu's testimony about the impossibility of Ms. Mercer's excuse is not credible. R. at 385 (Add. Ex. “B” at 3). It should be noted here as well that Dr. Hwu's testimony on this point was introduced without objection. Nevertheless, the Decision of the Workforce Appeals Board ignores the fact that Dr. Hwu and Dr. Sadwick have PhDs in electrical engineering. Facts, ¶ 1, *citing* R. at 8, 78 (Hearing Tran. at 37:8-15). As such they qualify as experts on the issue of whether Ms. Mercer's excuse was a technological impossibility. Therefore, “[a]s a PhD in electrical engineering, [Dr. Hwu] knew that [Ms.

Mercer's] assertion could not possibly be true" even before learning from the software consultant that Ms. Mercer had admitted to entering the wrong value. R. at 008.

On the other hand, if expert witness testimony was required to establish the credibility of whether the computer software was capable of arbitrarily altering or entering the input, Ms. Mercer is certainly less qualified to testify that the source of her error was the computer software.

In actuality, expert witness testimony should not be needed. When the question "is within the common knowledge and experience of the layman . . . the guidance provided by expert testimony is unnecessary." *Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980). Today, virtually all people in this state are experienced with computers and know as Dr. Hwu testified, computers are incapable of arbitrarily generating or changing the input. The 5,000 value could not have spontaneously originated or independently replaced the zero value.

The ALJ also ignored evidence that was received without objection that Ms. Mercer had made false excuses for her careless errors in the past. Facts, ¶ 23, *citing* R. at 057 (Hearing Tran. 16:11-16, 20-31), 012, 243 and 245. The ALJ's failure to make these findings is prejudicial not only because this evidence shows a pattern of Ms. Mercer's inability to accept responsibility for her careless errors and her willingness to make a false excuse to cover up her errors. This evidence is critical because, as stated above, repeated injurious acts form a basis for InnoSys's claim that Ms. Mercer was culpable. *See*, Utah Admin. Code R994-405-202(1).

Moreover, the ALJ ignored evidence of Ms. Mercer’s history of making false excuses for her carelessness and irresponsibility. This evidence tends to make it more probable than not that Ms. Mercer gave a false excuse for her careless mistake in the final incident. Again, the evidence was received without objection. When all of this evidence is given its appropriate weight, there is more than sufficient legal evidence competent in a court of law to support a finding that Ms. Mercer did make false excuses for her careless errors. The ALJ’s failure to give this evidence appropriate weight violates the residuum rule. Therefore, the case should be remanded for a new hearing to have this evidence weighed with the additional evidence the ALJ excluded.

### III. THE ALJ ERRED IN MAKING FINDINGS OF FACT THAT ARE NOT SUBSTANTIALLY SUPPORTED BY THE EVIDENCE

#### A. The Evidence Shows that Ms. Mercer Made More than One Careless Error

The ALJ erred in finding that the InnoSys “failed to provide enough evidence to show that the claimant committed more than one careless error.” R. at 297 (Add. Ex. “A” at 4). Surprisingly, the ALJ himself acknowledged in the hearing that “there were repeated careless mistakes.” R. at 093 (Hearing Tran. at 52:29). Indeed, Dr. Hwu testified of other careless mistakes. Facts, ¶ 22, *citing* R. at 64 (Hearing Tran. at 23:37-43). Furthermore, InnoSys made a number of attempts to put on evidence of careless mistakes that Ms. Mercer had made, but the ALJ would not hear it because he expressed that he was satisfied with what evidence was given. As shown above, the ALJ excluded additional testimony of Ms.



Mercer's careless mistakes. Furthermore, he restricted the testimony Dr. Hwu had to give on this issue as well. The following exchange is illustrative:

DAY                      Okay. Your Honor, could I ask you if you're satisfied with the, regard to the issue of whether or not these were this last incident was an isolated incident? Or - I mean, if you're not, I would like to go through -

JUDGE                  Well, there were, there were a lot of mistakes. It seems to me that the icing on the cake here was the, in Dr. Sadwick's [referring to Dr. Hwu] description, the lie that, um, Ms. Mercer told in order to cover up her last mistakes. I'm going to take judicial -

DAY                      And -

JUDGE                  I'm going to take judicial notice of the fact that there have been a number of e-mails back and forth between, um, the claimant and Dr. Sadwick, um, with regard to problems that they were having with the testing.

DAY                      Just problems with the testing, or careless mistakes?

JUDGE                  Well and problems, yeah, that, Ms. Mercer was having in performing her job. I'll characterize it that way. Will that be sufficient for you?

DAY                      Well, I think it's important to stress that they were, that carelessness was the source of the mistakes.

JUDGE                  Okay. And is that the conclusion you drew Dr. Sadwick [referring to Dr. Hwu]?

HWU-SADWICK        Yes, because really -

JUDGE                      Okay. Thank you. All right. I got it.

R. at 063-064 (Hearing Tran. at 22:40-23:22).

While the ALJ said he took judicial notice of the e-mails, he apparently ignored them. They contain many examples of Ms. Mercer's additional carelessness, irresponsibility and mistakes. *See e.g.*, R. at 015, 018, 020, 025, 026, 28, 29, 30, 222, 224-225, 226, 227, 233, 238, 246 and 248. Again, ignoring this evidence was prejudicial because the evidence of Ms. Mercer's repeated carelessness was sufficient to satisfy the culpability element. *See*, Utah Admin. Code R994-405-202(1).

B.        The Evidence Shows that InnoSys Gave Ms. Mercer Warnings  
            and that Ms. Mercer Knew What InnoSys Expected of Her

Furthermore, there is not substantial support for the ALJ's finding that InnoSys "had never given her any formal warnings about her performance." R. at 295; *see also* R. at 297. The ALJ ignored evidence in the record that Ms. Mercer was given warnings. Dr. Hwu testified that she had given Ms. Mercer formal warning both verbally and in writing. Facts, ¶¶ 24-25, *citing* R. at 061-63 (Hearing Tran. 20:18-22:18).

The ALJ also ignored written evidence of a formal warning InnoSys gave Ms. Mercer on June 15, 2009. *See* R. at 013 and 250-251. In addition, Dr. Sadwick would have testified more fully about this and other warnings that Ms. Mercer was given, but as explained above, the ALJ erred in refusing to allow Dr. Sadwick to testify.

Furthermore, for inexplicable reasons, the ALJ failed to acknowledge “several e-mails about problems [InnoSys] perceived with her performance” (R. at 295) as warnings. For examples of such e-mails, *see* R. at 014 - 016, 018, 020 and 021.

Pursuant to the Administrative Code, evidence of warnings cuts to the knowledge element of a just cause termination. Utah Admin. Code R994-405-202(2). Nowhere in Utah Admin. Code R994-405 does it specify that a warning must be formal. To the contrary, the rule refers merely to warnings. Therefore, holding InnoSys to an arbitrary standard of formality in administering warnings was error. What constitutes “formal” in the ALJ’s mind is also arbitrary. Ordinarily, one would conclude that when a written document expressing the employer’s dissatisfaction with an employee’s performance is sent to the employee, any formality requirement has been satisfied. Indeed, the record reflects that “e-mails are considered official notice” at InnoSys. R. at 032. Even the ALJ noted that notice of job in jeopardy is not required under the rules. R. at 067. Really, what is required is that the employee have notice of what was expected of her. Accordingly, e-mails expressing problems about failure to meet performance expectations are sufficient.

In addition to giving Ms. Mercer warnings, InnoSys gave Ms. Mercer many specific instructions by which she was informed what was expected of her. In a number of e-mails she was instructed to 1) read up so she has the knowledge required for RF design with particular software; 2) use best efforts to ensure what she is doing is correct; and 3) document what she was doing carefully. Facts, ¶ 35, *citing* R. at 011; *see also* R. at 015. In addition,

Dr. Hwu coached her on many things. Fact, ¶ 29, *citing* R. at 051 (Hearing Tran. at 10:30-39) and 76 (Hearing Tran. at 35:8-18).

Also, as shown in the facts cited above, Ms. Mercer knew and acknowledged that she did know what was expected of her. Facts, ¶¶ 30-31 *citing* R. at 059-060 (Hearing Tran. at 18:37-19:1) and 099 (Hearing Tran. at 58:29-40). Therefore, the ALJ's finding that InnoSys did not give Ms. Mercer sufficient warnings, or in other words that she did not know what was expected of her, is not substantially supported by the evidence.

C. The Evidence Shows It was Within Ms. Mercer's Control to Meet InnoSys's Expectations

Moreover, the ALJ's suggestion that he would not have found that InnoSys did not establish that Ms. Mercer was able to meet InnoSys's expectations is not supported by the record. Inability to meet expectations cuts to the element of control. InnoSys presented ample evidence that Ms. Mercer was capable of meeting expectations and that doing so was within her control. The ALJ, however, ignored that evidence and excluded additional evidence InnoSys was prepared to introduce. For example, Dr. Hwu testified that she put aside other matters to ensure that Ms. Mercer had the help she needed. Fact, ¶ 29, *citing* R. at 051 (Hearing Tran. at 10:26-43). As demonstrated by this testimony, even the CEO of the company was willing to drop otherwise important matters to help Ms. Mercer meet InnoSys's expectations. It was also certainly within Ms. Mercer's control to ask for help when she needed it. The evidence shows that InnoSys furnished Ms. Mercer with everything she needed to enable her to perform her duties and meet InnoSys's expectations, but Ms. Mercer

simply would not exercise the care needed to do so. Facts, ¶ 32-34, *citing* R. at 058-059 (Hearing Tran. at 17:36-18:22), 065-066 (Hearing Tran. at 24:28-25:38), 094-095 (Hearing Tran. at 53:17-54:11) and 235.

Also, it was within Ms. Mercer's control to follow the basic instructions Dr. Hwu also gave Ms. Mercer. In particular, it was within Ms. Mercer's control to follow Dr. Hwu's instruction that Ms. Mercer check her work before submitting it. Facts, ¶¶ 34-35, *citing* R. 11, 058-059 (Hearing Tran. at 17:36-18:22). Ms. Mercer could have avoided her careless mistakes simply by following this simple admonition. If she would have simply checked her report before submitting it, she would have found her obvious error. Even Ms. Mercer admits that the error was obvious. Facts, ¶ 36, *citing* R. at 101-103 (Hearing Tran. at 60:40-62:18).

Most certainly, it was within her control to at least review her calculations for such an obvious error and to proof read the report before submitting it. Ms. Mercer was told and instructed over and over again to do so and ample evidence of this was provided in both the testimony given during the hearing and the exhibit evidence.

Also, once the report was submitted and InnoSys had discovered the error, it was certainly within Ms. Mercer's control to accept responsibility for the error rather than to falsely make a technologically impossible excuse for her carelessness, but Ms. Mercer simply was not willing to accept responsibility for her careless mistakes. Contrary to what the ALJ

“would have found,” (R. at 297) the substantial evidence is that it was fully within Ms. Mercer’s control to avoid the acts that resulted in her discharge.

D. The Evidence Shows that Ms. Mercer did not Enter the Correct Value for the Test She was Performing

The ALJ’s finding that Ms. Mercer had entered the correct value for the test she was performing is also not substantially supported by the record. Apparently recognizing the ridiculous and false nature of her excuse, Ms. Mercer waffled in her testimony on whether she had blamed her careless mistake on the software. Facts, ¶¶ 15-18, *citing* R. at 027, 068-069 (Hearing Tran. at 27:43-28:9) and 089-090 (Hearing Tran. at 48:27-49:40). The inconsistency in her testimony combined with her being coached in the middle of her testimony casts severe doubt on the credibility of her testimony.

Furthermore, when testifying about this issue, Ms. Mercer stated that “I don’t know. How would I know that? It’s been so long ago.” Facts, ¶ 36; R. at 102 (Hearing Tran. at 61:5). With her laps of memory about her vastly mistaken results, a finding that she entered the correct value lacks substantial support.

Furthermore, Ms. Mercer submitted no evidence contrary to Dr. Hwu’s testimony that the computers are incapable of arbitrarily altering the input. If, in truth, she had entered a zero value, the 5,000 value never would have been an issue. When the undisputed evidence is that computers are incapable of generating or altering the input, the ALJ’s finding that “the Claimant provided credible testimony that she did not enter an initial value of 5,000, and that

she entered an initial value of zero as she should have,” (R. at 297) is not supported by the evidence.

#### IV. THE ALJ ERRED IN DENYING THE CONTINUANCE PETITIONER REQUESTED TO ACCOMMODATE THE DOCTOR’S ORDERS OF PETITIONER’S PRIMARY WITNESS

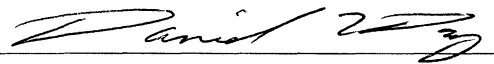
The ALJ also prejudiced InnoSys by refusing to grant the continuance needed for Dr. Hwu to recover from her surgery. As a result of the ALJ’s refusal, Dr. Hwu was confined to bed during the time prior to the hearing and heavily medicated with pain relievers. Facts, ¶¶ 5-6; *citing* R. at 43 (Hearing Tran. at 2:43) and 379-381. She had no opportunity to meet with InnoSys’s counsel before the hearing. Facts, ¶ 7, *citing* R. at 379. Her ability to confer with counsel was severely limited. Facts, ¶ 8, *citing* R. at 379. Her means of marshaling evidence and witnesses was likewise severely limited. Facts, ¶ 9, *citing* R. at 379. When she was required to testify, she was still on pain medication having side effects of incoherence, dizziness and slurred speech. Facts, ¶ 10, *citing* R. at 379-381. Due to the length of the hearing, her medication wore off and she was distracted by pain. Facts, ¶ 11, *citing* R. at 379. She also began bleeding during the hearing, which also seriously distracted her. Facts, ¶ 12, *citing* R. at 379-381. Because she was testifying from her bed, she did not have the benefit of counsel at her side during her testimony. She was limited in her ability to examine exhibits because she did not have hard copies in front of her with counsel directing her to exhibits in question. Furthermore, it is clear that Dr. Hwu was suffering from the side effects of the medication that she was taking for her pain. Yet the ALJ would only allow testimony

from Dr. Hwu. In short, the ALJ prejudiced InnoSys by making it unreasonably difficult for Dr. Hwu and InnoSys to prepare for the hearing and by causing Dr. Hwu to testify under unbearable circumstances. Therefore, InnoSys should be granted another opportunity to present its case under conditions that are fair to both sides. *See Bairas*, 13 Utah 2d 269, 373 P.2d 375(Utah 1962); *see also Brown v. Glover*, 2000 UT 89 at ¶ 43.

### CONCLUSION

For the foregoing reasons, InnoSys respectfully requests that the decisions of the ALJ and the Workforce Appeals Board be reversed and the case remanded for a new hearing or as a minimum for the taking of additional testimony.

RESPECTFULLY SUBMITTED this 2<sup>st</sup> day of September, 2010.

  
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Daniel L. Day, Attorney for Petitioner

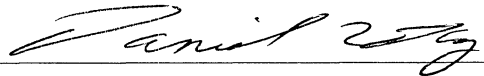


## CERTIFICATE OF SERVICE

I, Daniel L. Day, hereby certify that on the 21<sup>st</sup> day of September, 2010, I served two copies of the foregoing Brief of Petitioner together with a CD copy in a searchable Portable Document Format pursuant to Standing Order No. 8 upon the parties listed below by mailing the same by first class mail to the following addresses:

Molly Adams  
Kathleen McConkie  
150 North Main, Suite 202  
Bountiful, Utah 84010

Suzan Pixton  
Jaceson R. Maughan  
Department of Workforce Services  
140 East 300 South, 2<sup>nd</sup> Floor  
P.O. Box 45244  
Salt Lake City, UT 84145-0244

  
\_\_\_\_\_

## **ADDENDUM**

Exhibit “A”	Decision of the Administrative Law Judge
Exhibit “B”	Decision of the Workforce Appeals Board
Exhibit “C”	Decision of Workforce Appeals Board (Reconsideration)
Exhibit “D”	<i>Farnsworth v. Dep’t of Workforce Services</i> , 2007 UT App 345
Exhibit “E”	Motion for Continuance of Hearing
Exhibit “F”	E-mail Correspondence Between Counsel

## **EXHIBIT “A”**

DEPARTMENT OF WORKFORCE SERVICES  
APPEALS UNIT

Decision of Administrative Law Judge

Appellant  
AMANDA MERCER  
C/O MOLLY ADAMS  
150 N MAIN STE 202  
BOUNTIFUL UT 84010

Respondent  
INNOSYS INC  
C/O LARRY N KLINGLER & ASSOC  
8941 S 700 E STE 104  
SANDY UT 84070-2402

S.S.A. NO: XXX-XX-8965

CASE NO: 09-A-13439

APPEAL DECISION: Benefits are allowed.  
The Employer is charged.

CASE HISTORY

Appearances:	Employer/Claimant	
Issues to be decided:	35A-4-405(2)(a)	Discharge
	35A-4-307	Employer Charges

The original Department decision denied unemployment insurance benefits on the grounds the Employer discharged the Claimant for just cause. That decision also relieved the Employer's benefit ratio account for the cost of benefits paid to the claimant.

**APPEAL RIGHTS:** The following decision will become final unless, within 30 days from **October 13, 2009**, further written appeal is received by the Workforce Appeals Board (P O Box 45244, Salt Lake City, UT 84145-0244; FAX 801-526-9244; or online at <http://www.jobs.utah.gov/appeals>) setting forth the grounds upon which the appeal is made.

FINDINGS OF FACT

The Claimant filed a claim for unemployment insurance benefits with the State of Utah effective July 26, 2009. She last worked for Innosys, Inc., from January 2008, to July 27, 2009, as an engineer earning \$56,000 per year.

The Employer does engineering for defense contractors. It was working on a contract worth \$2,000,000. The Employer assigned the Claimant to perform a specific test. She performed the test and gave a report to the Employer on June 22, 2009. The report contained an error. It showed the output current through three stages to be about twice the input current. This error should have been

obvious to an engineer. The Employer discovered the error on July 22, 2009. It investigated and concluded that the error was caused because the testing procedure had an initial value of 5,000. The initial value should have been zero. The Employer testified that the software consultant reported the Claimant admitted to him she had entered the wrong initial value. It did not present any testimony from the consultant. The Claimant testified she did not admit she had entered the wrong initial value and testified she had entered the correct initial value. She did not know how the value of 5,000 was entered. When the Employer confronted her about the error she maintained she had not entered the incorrect initial value. It concluded the Claimant had lied about this and discharged her for lying. The Employer would have made a different decision if the Claimant had admitted she had entered the wrong number and would probably have given her another chance.

The Employer had sent the Claimant several e-mails about problems it perceived with her performance but had never given her any formal warnings about her performance.

The Claimant's error caused the project the Employer was working to be delayed by three months and jeopardized its contract for \$2,000,000.

The Claimant did her best.

## **REASONING AND CONCLUSIONS**

### **Separation**

The Unemployment Insurance Rules pertaining to Section 35A-4-405(2)(a) of the Utah Employment Security Act provide, in pertinent part:

#### **R994-405-202. Just Cause.**

To establish just cause for a discharge, each of the following three elements must be satisfied:

##### **(1) Culpability.**

The conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest. If the conduct was an isolated incident of poor judgment and there was no expectation it would be continued or repeated, potential harm may not be shown. The claimant's prior work record is an important factor in determining whether the conduct was an isolated incident or a good faith error in judgment. An employer might not be able to demonstrate that a single violation, even though harmful, would be repeated by a long-term employee with an established pattern of complying with the employer's rules. In this instance, depending on the seriousness of the conduct, it may not be necessary for the employer to discharge the claimant to avoid future harm.

(2) Knowledge

The claimant must have had knowledge of the conduct the employer expected. There does not need to be evidence of a deliberate intent to harm the employer, however, it must be shown the claimant should have been able to anticipate the negative effect of the conduct. Generally, knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a written policy, except in the case of a violation of a universal standard of conduct. A specific warning is one way to show the claimant had knowledge of the expected conduct. After a warning the claimant should have been given an opportunity to correct the objectionable conduct. If the employer had a progressive disciplinary procedure in place at the time of the separation, it generally must have been followed for knowledge to be established, except in the case of very severe infractions, including criminal actions.

(3) Control

(a) The conduct causing the discharge must have been within the claimant's control. Isolated instances of carelessness or good faith errors in judgment are not sufficient to establish just cause for discharge. However, continued inefficiency, repeated carelessness or evidence of a lack of care expected of a reasonable person in a similar circumstance may satisfy the element of control if the claimant had the ability to perform satisfactorily.

(b) The Department recognizes that in order to maintain efficiency it may be necessary to discharge workers who do not meet performance standards. While such a circumstance may provide a basis for discharge, this does not mean benefits will be denied. To satisfy the element of control in cases involving a discharge due to unsatisfactory work performance, it must be shown the claimant had the ability to perform the job duties in a satisfactory manner. In general, if the claimant made a good faith effort to meet the job requirements but failed to do so due to a lack of skill or ability and a discharge results, just cause is not established.

The Employer was harmed by the Claimant's mistake in conducting the test but testified it probably would not have discharged her for this if she had admitted she had made a mistake. I find the Employer discharged her not because of the mistake made with the test but because it concluded that she had lied about it. The Employer's conclusion was based on the statement from the software consultant who reported the Claimant admitted she had erroneously entered an initial value of 5,000. The Employer offered no firsthand evidence that the Claimant admitted she had entered an initial value of 5,000. The Court of Appeals has consistently held that "findings of fact cannot be based *exclusively* on hearsay evidence. They must be supported by a residuum of legal evidence competent in a court of law." *Mayes v. Department of Employment Sec*, 754 P 2d 989, 992 (Utah Ct App 1988). The Employer presented no "legal evidence competent in a court of law" to support a

finding that the Claimant admitted she entered an initial value of 5,000. In addition the Claimant provided credible testimony that she did not enter an initial value of 5,000, and that she entered an initial value of zero as she should have. The Employer has not established the final incident that caused it to discharge the Claimant.

The Employer also alleges that the Claimant made numerous errors due to carelessness. The Claimant disputed this contention. It is clear that the Claimant made at least one error due to carelessness. When she reported the results of the test she should have noticed that the output current was about twice the input current and that this could not occur. She should have investigated this and rerun the test so it showed values that were logically consistent. The Employer has not satisfied the element of culpability. It failed to establish the final incident that caused it to discharge the Claimant. It also failed to provide enough evidence to show that the Claimant committed more than one careless error and then show why one careless error necessitated discharge when it had given her no formal warnings.

Since the Employer has not established that the Claimant lied the elements of knowledge and control do not apply. Even if I had concluded that the Employer discharged the Claimant for continued errors of carelessness I would have found the element of control was not satisfied. The Claimant provided credible testimony she did her best. I would have found that the Employer has not established that she was able to meet its expectations.

The Employer has not satisfied all of the elements required to establish it discharged the Claimant for just cause. Benefits are, therefore, allowed.

#### Employer charges

The Utah Employment Security Act relieves an employer of charges for unemployment insurance benefits when the employer discharged the claimant for reasons which are disqualifying under Section 35A-4-405(2) of the Act or for non-performance due to medical reasons. The Act does not grant relief when the reason for the discharge would not have resulted in a disqualification, even if the discharge resulted from circumstances over which the employer had no control. In this case, the Claimant was not discharged for disqualifying reasons, and none of the exceptions contained in Section 35A-4-307 of the Utah Employment Security Act and R994-307-101 apply. The Employer, therefore, is ineligible for relief of charges.

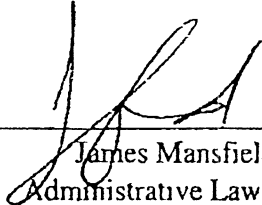
#### **DECISION AND ORDER:**

#### Separation

The Department's decision denying unemployment insurance benefits pursuant to Section 35A-4-405(2)(a) of the Utah Employment Security Act is reversed. Benefits are allowed effective July 6, 2009, and continuing provided the claimant is otherwise eligible.

**Employer Charges**

The Employer is not relieved of charges as provided by Section 35A-4-307 of the Utah Employment Security Act and is liable for its prorated share of benefits costs paid to the Claimant.



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James Mansfield  
Administrative Law Judge  
DEPARTMENT OF WORKFORCE SERVICES

Issued: October 13, 2009

JM/asp



## **EXHIBIT “B”**

WORKFORCE APPEALS BOARD  
Department of Workforce Services  
Division of Adjudication

AMANDA MERCER, CLAIMANT  
S.S.A. No. XXX-XX-8965

:

:

Case No. 09-B-01323

INNOSYS, INC.,  
EMPLOYER

:

**DECISION OF WORKFORCE APPEALS BOARD:**

The decision of the Administrative Law Judge is affirmed.

Benefits are allowed.

The Employer is not relieved of benefit charges.

**HISTORY OF CASE:**

In a decision dated October 13, 2009, Case No. 09-A-13439, the Administrative Law Judge reversed the Department decision and allowed unemployment insurance benefits to the Claimant effective July 26, 2009. The Employer, Innosys, Inc., was ineligible for relief of benefit charges in connection with this claim.

**JURISDICTION OF WORKFORCE APPEALS BOARD:**

The Workforce Appeals Board has authority to review the Administrative Law Judge's decision pursuant to §35A-4-508(4) and (5) of the Utah Employment Security Act and the Utah Administrative Code (1997) pertaining thereto.

**EMPLOYER APPEAL FILED:** November 11, 2009.

**ISSUES BEFORE WORKFORCE APPEALS BOARD AND APPLICABLE PROVISIONS OF UTAH EMPLOYMENT SECURITY ACT:**

1. Did the Employer have just cause for discharging the Claimant pursuant to the provisions of §35A-4-405(2)(a)?
2. Is the Employer eligible for relief of charges pursuant to the provisions of §35A-4-307(1)?

**FACTUAL FINDINGS:**

The Workforce Appeals Board adopts in full the factual findings of the Administrative Law Judge.

**REASONING AND CONCLUSIONS OF LAW:**

The Claimant worked for the Employer from January 2008 until she was discharged on July 27, 2009. The Claimant worked as an engineer for the Employer, who provided engineering for defense contractors.

While with the Employer, the Claimant received several email messages regarding improving her performance. None of the email messages contained a warning that her job was in jeopardy. The final incident occurred when the Claimant was working on a large contract and was assigned to perform a specific test. The Claimant submitted a report to the Employer on June 22, 2009 which contained an error regarding the output current. After discovering the error, the Employer conducted an investigation, determining that the error occurred because the initial value entered into the computer was 5.000 rather than zero. The Employer claims that the Claimant admitted to the software consultant she entered the incorrect value. When confronted, the Claimant denied admitting that she entered the incorrect value. The Employer eventually determined that the Claimant was lying about entering the initial value and discharged her.

The Administrative Law Judge determined that the Employer did not establish just cause for its decision to discharge the Claimant. The Administrative Law Judge determined that while the Employer was harmed by the error, the Employer discharged the Claimant based on a statement she allegedly made to the software consultant. Further, the Employer testified that it would have reacted differently had the Claimant admitted to making a mistake. The Administrative Law Judge further found that the Employer failed to provide any personal testimony or firsthand evidence of the Claimant's alleged statements to the software consultant, relying instead on hearsay during the hearing, while the Claimant provided reliable testimony that she did not enter the incorrect value and never admitted that she entered the incorrect value. As such, the Administrative Law Judge determined that the Employer failed to establish culpability. Because of this, the Administrative Law Judge did not reach the issues of knowledge and control.

The Employer raises a number of arguments on appeal to the Board. On appeal the Employer first argues that the Administrative Law Judge erred in excluding testimony from the Employer's additional witnesses, that the Administrative Law Judge erred in treating an admission by a party opponent as hearsay, and that the Administrative Law Judge erred in ignoring additional evidence supporting a finding that the Claimant made a false excuse for her careless mistake. The Employer further argues that the Administrative Law Judge's determination that the Claimant's testimony was more credible is not supported by the record, that the Administrative Law Judge's finding that the Employer failed to establish that the Claimant committed more than one careless error was not supported by the record, that the Administrative Law Judge erred in ignoring evidence of the warnings that had been given to the Claimant, that the Claimant had the necessary control to avoid the acts for which she was discharged, that the Administrative Law Judge erred in not granting the lengthy continuance requested by the Employer, and that the Employer's witness did not have the benefit of counsel by her side during her testimony.

That the Employer disagrees with the Administrative Law Judge's conclusion is not surprising. Parties that end up on the unfavorable side of a credibility determination are generally disappointed. Whenever two parties give divergent testimony, a credibility determination must be made. It is the duty of the Administrative Law Judge to consider conflicting testimony and determine which party is more credible. Since the Administrative Law Judge is in the unique position of being an active participant in the hearing, interacting with the parties and also questioning the witnesses, the Judge's credibility finding will usually not be disturbed by the Board. If there is evidence in the record to support the credibility finding made by the Administrative Law Judge, the Board will not substitute its own judgment for that of the Judge unless there is a clear showing of error.

Here the Administrative Law Judge found the Claimant more credible than the Employer on the issue of whether the Claimant entered an incorrect value or admitted to entering an incorrect value to the software consultant. Inasmuch as the Employer failed to call the software consultant as a witness, the Administrative Law Judge was left with a credibility determination between the Claimant and the Employer on the issue of the initial value. The Claimant provided personal testimony about the incident. The Employer relied on statements supposedly made by the Claimant to the software consultant then relayed by the consultant to the Employer. Based on this, the Administrative Law Judge determined that the Claimant was more credible on this issue.

Further, the Employer argues at great length on appeal that the Administrative Law Judge erred in ignoring the Employer's testimony that the Claimant's excuse was technically impossible. In support of this, the Employer argues that the Claimant's excuse was technically impossible because the Employer testified it was technically impossible. Again, the Administrative Law Judge made a credibility determination based on the evidence offered. Absent expert testimony to the contrary, the Administrative Law Judge found the Claimant credible when she testified that she did not enter the incorrect initial value. There is ample evidence in the record to support the Administrative Law Judge's findings. There is no showing of error, and the Board will not alter the findings of fact.

The Administrative Law Judge made his decision based on the testimony presented during the hearing. The Court of Appeals has consistently held that "findings of fact cannot be based *exclusively* on hearsay evidence. They must be supported by a residuum of legal evidence competent in a court of law." *Mayes v. Department of Employment Security*, 754 P. 2d 989 (Utah App. 1988). The Utah Rules of Evidence establish certain exceptions to the hearsay rule. Evidence which fits into one of those exceptions is admissible in a court of law and is thus "legally competent" evidence and can form the residuum necessary for a finding of fact in an administrative hearing. The Employer argues on appeal that the Administrative Law Judge erred in determining that the reported testimony of the software consultant was hearsay rather than an admission by a party opponent, which, the Employer contends, is an exception to the hearsay rule. That argument might have merit had the Employer called the software consultant as a witness. The Employer, however, did not call the software consultant as a witness, and despite its arguments on appeal that it was prevented from introducing the software consultant as a witness, never attempted to call the software consultant as a witness. Instead, the Employer's evidence regarding its decision to terminate the Claimant rested

on what the Employer's witness had been told by the software consultant regarding statements made by the Claimant to the software consultant. The testimony in question does not meet any of the exceptions to the hearsay rule and is therefore not legally competent evidence.

The Employer also argues that the Administrative Law Judge refused to let the Employer call additional witnesses. However, the Employer only attempted to call one other witness, Dr. Larry Sadwick. Though the Administrative Law Judge did not reach the issue of control, the Employer now argues that additional witnesses would have shown that the Claimant had the necessary control over the actions leading to her discharge. With the exception of Dr. Sadwick, however, the issue of additional witnesses was not raised by the Employer during the hearing. In a discharge situation, the Employer bears the burden of proving its case. It is not the Administrative Law Judge's obligation to prove the Employer's case or ensure that the Employer calls the appropriate witnesses. The Employer now argues that it was prepared to show that the Claimant made many careless mistakes, that she was reprimanded for them, that she knew what was expected of her, that it was in her control to avoid the mistakes, and that the mistakes damaged the Employer. If the Employer's witness was unable to illustrate those points, the Employer ought to have called another witness. The only other witness proposed by the Employer was Dr. Sadwick, who, according to counsel during the hearing, would have testified that he helped the Claimant, that he at one time reprimanded her, and that he thought the Claimant was dishonest. The Administrative Law Judge determined that Dr. Sadwick could best be used as a rebuttal witness. Counsel was then asked if there were any other witnesses. Counsel stated that there were not. As such, the argument that the Employer was prevented from calling a host of additional witnesses is without merit.

The Unemployment Insurance Rules pertaining to Section 35A-4-405(2)(a) of the Utah Employment Security Act provide, in pertinent part:

**R994-405-202. Just Cause.**

To establish just cause for a discharge, each of the following three elements must be satisfied:

(1) Culpability.

The conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest. If the conduct was an isolated incident of poor judgment and there was no expectation it would be continued or repeated, potential harm may not be shown. The claimant's prior work record is an important factor in determining whether the conduct was an isolated incident or a good faith error in judgment. An employer might not be able to demonstrate that a single violation, even though harmful, would be repeated by a long-term employee with an established pattern of complying with the employer's

rules. In this instance, depending on the seriousness of the conduct, it may not be necessary for the employer to discharge the claimant to avoid future harm.

(2) Knowledge.

The claimant must have had knowledge of the conduct the employer expected. There does not need to be evidence of a deliberate intent to harm the employer; however, it must be shown the claimant should have been able to anticipate the negative effect of the conduct. Generally, knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a written policy, except in the case of a violation of a universal standard of conduct. A specific warning is one way to show the claimant had knowledge of the expected conduct. After a warning the claimant should have been given an opportunity to correct the objectionable conduct. If the employer had a progressive disciplinary procedure in place at the time of the separation, it generally must have been followed for knowledge to be established, except in the case of very severe infractions, including criminal actions.

(3) Control.

(a) The conduct causing the discharge must have been within the claimant's control. Isolated instances of carelessness or good faith errors in judgment are not sufficient to establish just cause for discharge. However, continued inefficiency, repeated carelessness or evidence of a lack of care expected of a reasonable person in a similar circumstance may satisfy the element of control if the claimant had the ability to perform satisfactorily.

(b) The Department recognizes that in order to maintain efficiency it may be necessary to discharge workers who do not meet performance standards. While such a circumstance may provide a basis for discharge, this does not mean benefits will be denied. To satisfy the element of control in cases involving a discharge due to unsatisfactory work performance, it must be shown the claimant had the ability to perform the job duties in a satisfactory manner. In general, if the claimant made a good faith effort to meet the job requirements but failed to do so due to a lack of skill or ability and a discharge results, just cause is not established.

In order to establish just cause for a discharge, the Employer must satisfy all three elements of the just cause standard. Here, the Employer failed to satisfy the elements necessary to show just cause.

To establish culpability, the Employer must show that the Claimant's conduct was so serious that continuing their relationship would jeopardize the Employer's rightful interests. Here, while the Employer was potentially harmed by entry of the incorrect initial value, the Employer testified that

it likely would have given the Claimant another chance had the Claimant admitted to making the mistake and, in the Employer's opinion, not lied about the entry of the initial value. Further, despite the Employer's argument on appeal, it does not matter whether the Claimant committed more than one careless error. The Claimant was not discharged over any number of careless errors. The Claimant was discharged because she did not admit to making a mistake when she prepared this particular report for the Employer. In arriving at the decision to discharge the Claimant, the Employer relied on statements she allegedly made to the software consultant. When offered the opportunity to establish just cause at the hearing, the Employer chose not to call the software consultant to testify as to his conversations with the Claimant. The Employer instead offered only hearsay testimony on statements made by the Claimant to the software consultant while the Claimant offered credible personal testimony that she did not enter the incorrect value or admit to the consultant that she entered the incorrect value. As such, the Employer failed to establish the element of culpability.

Though the Administrative Law Judge did not reach the elements of knowledge and control, the Employer argues that the Claimant had adequate knowledge of the conduct expected by the Employer due to the numerous warnings that she received from the Employer. The Employer cites a number of email messages submitted as evidence during the hearing. Though not germane to the decision, the email messages are devoid of warnings regarding the Claimant's continued employment. While the email messages address performance issues, including how to improve performance, the messages do not contain a warning to the Claimant if she failed to meet the Employer's expectations. Further, when questioned directly, the Employer testified that she did not characterize her email messages as warnings:

JUDGE: The warnings that you gave her, were they characterized as warnings; were they entitled warnings, or were they just e-mails?

HWU-SADWICK: It's -- it's just e-mails and then--

JUDGE: Okay. Did the e-mails ever say that they were warnings, or did they just tell her about your concerns?

HWU-SADWICK: No, I never actually physically called these--

JUDGE: You didn't ever characterize them as warnings?

HWU-SADWICK: No.

Likewise, the Employer's argument on appeal that it established control is not germane. Though he states he would have found the Employer did not establish the element of control had he reached it, the Administrative Law Judge did not reach the issue of control as the Employer failed to establish the element of culpability.

Finally, the Employer argues on appeal that the Administrative Law Judge did not grant a lengthy continuance to accommodate Dr. Hwu-Sadwick's surgery and bed rest. The Employer further argues that because of this, Dr. Hwu-Sadwick was prevented from meeting with counsel, was forced to appear from her bed, did not have the benefit of counsel at her side during the hearing, began bleeding and became distracted during the hearing, and suffered from the side effects of the pain medication she was taking. The Employer was granted a short continuance based upon Dr. Hwu-Sadwick's surgery. Expectations of a six week continuance are simply unrealistic. Further, the Administrative Law Judge did not prevent counsel from meeting with the Employer's witness prior to the hearing or from being at the bedside of the witness during the hearing. Counsel presumably could have gone to the witness's home to prepare for the hearing and could have been at her bedside during the hearing. Further, if Dr. Hwu-Sadwick began bleeding and became distracted, or if she was suffering from the side effects of her medication, she did not mention it during the hearing or request additional accommodations from the Administrative Law Judge.

Finally, the Employer argues that the Employer and its witness was treated unfairly and "harshly" by the Administrative Law Judge, that the Administrative Law Judge interrupted and reprimanded the Employer and its counsel more than the Claimant and her counsel, and that the Claimant's counsel was allowed to coach and lead the Claimant. The record does not support these arguments.

The decision awarding benefits is affirmed. The Board adopts the Administrative Law Judge's reasoning and conclusions of law in full.

#### **DECISION:**

The decision of the Administrative Law Judge allowing unemployment insurance benefits to the Claimant effective July 26, 2009, under the provisions of §35A-4-405(2)(a) of the Utah Employment Security Act is affirmed.

The Employer, Innosys, Inc., is ineligible for relief of benefit charges in connection with this claim as provided by §35A-4-307(1) of the Act.

#### **APPEAL RIGHTS:**

Pursuant to §63-46b-13(1)(a) of the Utah Administrative Procedures Act, you may request reconsideration of this decision within 20 days from the date this decision is issued. Your request for reconsideration must be in writing and must state the specific grounds upon which relief is requested. The request must be filed with the Workforce Appeals Board at 140 East 300 South, Salt Lake City, Utah, or may be mailed to the Workforce Appeals Board at P.O. Box 45244, Salt Lake City, Utah 84145-0244. A copy of the request for reconsideration must also be mailed to each party by the person making the request. If the Workforce Appeals Board does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied pursuant to §63-46b-13(3)(b) of the Utah Administrative Procedures Act. The filing



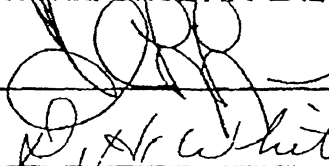
of a request for reconsideration is not a prerequisite for seeking judicial review of this order. If a request for reconsideration is made, the Workforce Appeals Board will issue another decision. This decision will set forth the rights of further appeal to the Court of Appeals and time limitation for such an appeal.

You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230, Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35A-4-508(8) of the Utah Employment Security Act; §63-46b-16 of the Utah Administrative Procedures Act; and Rule 14 of the Utah Rules of Appellate Procedure followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

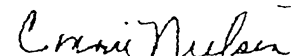
Date Issued: January 4, 2010

TL/CN/DW/JM/jm ddn

WORKFORCE APPEALS BOARD



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MAILING CERTIFICATE

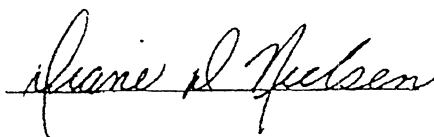
I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 4th day of January, 2010, by mailing the same, postage prepaid, United States mail to:

AMANDA MERCER  
999 ALLINGTON DR  
N SALT LAKE UT 84054-5016

LARRY N KLINGER  
INNOSYS INC  
8941 S 700 E STE 104  
SANDY UT 84070-2402

MOLLY ADAMS  
MCCONKIE LAW OFFICE  
150 N MAIN STE 202  
BOUNTIFUL UT 84010

DANIEL L DAY  
ATTORNEY FOR INNOSYS INC  
9571 S 700 E STE 104  
SANDY UT 84070

A handwritten signature in cursive script, appearing to read "Daniel L. Day", written over a horizontal line.

## **EXHIBIT “C”**

**WORKFORCE APPEALS BOARD**  
Department of Workforce Services  
Division of Adjudication

AMANDA MERCER, CLAIMANT

S.S.A. No. XXX-XX-8965

:

Case No. 10-R-00082

:

RECONSIDERATION

INNOSYS INC.,

:

EMPLOYER

**DECISION OF WORKFORCE APPEALS BOARD:**

Employer's request for reconsideration is denied.

**HISTORY OF CASE:**

In a letter received January 21, 2010, Employer, InnoSys Inc., requested reconsideration of the decision of the Workforce Appeals Board issued in this case on January 4, 2010. The decision of the Workforce Appeals Board was based on a review of a decision of an Administrative Law Judge after a formal hearing.

**JURISDICTION OF WORKFORCE APPEALS BOARD:**

The Board has jurisdiction to review the request for reconsideration pursuant to Utah Code Annotated §63-46b-13(3) on the grounds that the Board's decision was final agency action within the meaning and intent of that section of law.

**DECISION:**

The Employer's request for reconsideration is denied. The decision of the Workforce Appeals Board dated January 4, 2010, remains in effect.

**APPEAL RIGHTS:**

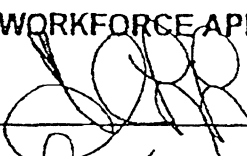
You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230, Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35A-4-508(8) of the Utah Employment Security Act; §63-46b-16 of the Utah Administrative Procedures Act; and Rule 14 of the Utah Rules

of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure

WORKFORCE APPEALS BOARD

Date Issued February 3, 2010

TL/CN/DW/JM/JM/cd

  
\_\_\_\_\_  
Dixie White  
\_\_\_\_\_  
Carmen Nelson  
\_\_\_\_\_

MAILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 3rd day of February, 2010, by mailing the same, postage prepaid, United States mail to.

DANIEL L DAY  
ATTORNEY FOR INNOSYS INC  
9571 S 700 E STE 104  
SANDY UT 84070

LARRY N KLINGER  
INNOSYS INC  
8941 S 700 E STE 104  
SANDY UT 84070-2402

MOLLY ADAMS  
MCCONKIE LAW OFFICE  
150 N MAIN STE 202  
BOUNTIFUL UT 84010

AMANDA MERCER  
999 ALLINGTON DR  
N SALT LAKE UT 84054-5016

  
\_\_\_\_\_

## **EXHIBIT “D”**

IN THE UTAH COURT OF APPEALS

----ooOoo----

Richard Farnsworth,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner,	)	
	)	Case No. 20070655-CA
v.	)	
	)	
Department of Workforce	)	F I L E D
Services,	)	(October 18, 2007)
	)	
Respondent.	)	2007 UT App 345

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Original Proceeding in this Court

Attorneys: Richard Farnsworth, Draper, Petitioner Pro Se  
Geoffrey T. Landward, Salt Lake City, for Respondent

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Before Judges Bench, Orme, and Thorne.

PER CURIAM:

Petitioner Richard Farnsworth seeks judicial review of a decision of the Workforce Appeals Board (the Board) assessing a fraud overpayment and penalty.

A claimant is disqualified from benefits "[f]or each week with respect to which the claimant made a false statement or representation or knowingly failed to report a material fact to obtain" benefits. Utah Code Ann. § 35A-4-405(5)(a) (Supp. 2007). "Each claimant found in violation of this Subsection (5) shall repay to the division the overpayment and, as a civil penalty, an amount equal to the overpayment." Id. § 35A-4-405(5)(c). In order to find a fraudulent overpayment and assess a statutory penalty, the evidence must establish the elements of materiality, knowledge, and willfulness. See Utah Admin. Code R994-406-401. "When reviewing the factual findings made by an administrative agency, an appellate court will generally reverse only if the findings are not supported by substantial evidence." Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997).

Farnsworth challenges the Board's finding of willfulness. He believes that his former girlfriend obtained his personal



identification number (PIN) and filed claims on his case while he was incarcerated. He argues that the willfulness finding is not supported by substantial evidence because he did not personally file claims containing false statements, responses, or omissions. A majority of the Board disagreed, reasoning that Farnsworth "failed to properly safeguard his PIN, thereby allowing his girlfriend to access it and file claims," and that, "[c]onsequently, [he] is responsible for the information his girlfriend provided . . . in his name." The dissent opined that the majority imposed an unreasonable level of responsibility on Farnsworth, that he took all steps necessary to safeguard his PIN, and that his girlfriend committed the fraud

The Claimant Guide Farnsworth received advises that no one other than the claimant should have access to his PIN and a claimant will "be held accountable for any payments made in error if other people use your PIN " See also Utah Admin Code R994-406 401(1)(c) (stating that a claimant is liable for amounts paid if his PIN or Department-issued debit card is used by another person) Farnsworth testified that he knew he was responsible for safeguarding his PIN. He also testified that he kept all of his documents, including those containing his confidential PIN, in a file located in his apartment He speculated that his girlfriend, who was also collecting unemployment benefits and was familiar with the process, obtained his PIN and continued to make claims during his incarceration without his knowledge Before this court, the Board states that although it "agrees the endorsement signatures on the benefit checks indicate that persons other than the claimant cashed some of the checks," the facts and the evidence did not establish who cashed the checks The Board also asserts that knowing the identity of that person is not crucial However, we agree with the dissenting Board member that the willfulness element for a fraud overpayment has not been established. Farnsworth's conduct should not be considered willful because he took all of the steps necessary to secure his PIN by filing it away without any identifying information As noted by the dissent, the girlfriend was "familiar enough with unemployment insurance benefits to properly identify the unlabeled number as the claimant's PIN," and it was apparently she who defrauded the Department of Workforce Services, not Farnsworth

Because we conclude that the finding of willfulness is not supported by substantial evidence, the requirements for assessing both a fraud overpayment and a statutory penalty are not

satisfied. We therefore reverse the decision assessing an overpayment and statutory civil penalty.

---

Russell W. Bench,  
Presiding Judge

---

Gregory K. Orme, Judge

---

William A. Thorne Jr., Judge

## **EXHIBIT “E”**

DANIEL L. DAY 7502  
Attorney for Respondent  
9571 South 700 East, Suite 104  
Sandy, Utah 84070  
Telephone: (801) 676-1506

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DEPARTMENT OF WORKFORCE SERVICES APPEALS UNIT

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AMANDA MERCER (SSN XXX-XX-8965),

Appellant,

vs.

INNOSYS, INC.

Respondent.

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MOTION FOR  
CONTINUANCE OF HEARING

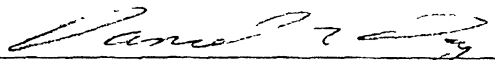
Case No. 09-A-13439

Respondent, InnoSys, Inc., through its undersigned counsel, hereby moves the Court for a continuance of the unemployment appeal telephone hearing in the above-entitled case.

Respondent makes this motion because, for medical reasons, its primary witness, Dr. Jennifer Hwu Sadwick, will be unable to testify on September 30, 2009 when the hearing is currently scheduled. "She is scheduled to have a complicated surgery on September 21, 2009 and she will require at least 6 weeks for recovery." Letter from Dr. Howard T. Sharp, M.D. attached as Exhibit "A" and incorporated herein by reference. Dr. Sharp has requested that Dr. Sadwick not be required to participate in a hearing until after her recovery is complete. *See* Exhibit "A".

For the foregoing reason, Respondent respectfully moves the Appeals Unit for a continuation of the hearing in this matter until a suitable date in November, 2009.

DATED this 18<sup>th</sup> day of September, 2009.

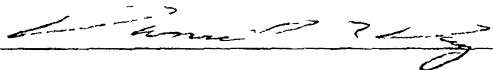
  
Daniel L. Day, Attorney for InnoSys, Inc.

### CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Motion for Continuance of Hearing, in Case No. 09-A-13439, to be served by the method indicated below, postage or delivery fee prepaid, this 18<sup>th</sup> day of September, 2009, to:

Amanda Mercer  
999 Allington Drive  
North Salt Lake, Utah 84054-5016

☒ United States Mail  
☐ Federal Express  
☐ Hand Delivery  
☐ Facsimile Transmission





The University of Utah  
Department of Obstetrics & Gynecology

Date: 9/16/2009

RE: Jennifer Sadwick

MRN: 19131952

DOB: 3/10/1960

To Whom It May Concern:

Jennifer is one of my gynecological patients at University Hospital and clinics. She is scheduled to have a complicated surgery on September 21, 2009 and she will require at least 6 weeks for recovery. We would appreciate your consideration in allowing Jennifer to wait until after her recovery period before she is required in any court proceeding.

If you have any questions, my office number is (801) 213-2995.

Sincerely,

Howard T Sharp, MD

Division of Obstetrics and Gynecology

University of Utah Health Sciences Center

## **EXHIBIT “F”**

Daniel Day

---

From: Jaceson Maughan [jacesonmaughan@utah.gov]  
Sent: Wednesday, August 04, 2010 10:21 AM  
To: Daniel Day  
Subject: RE: InnoSys v. DWS

Dan,

For whatever reason that document was not scanned into the system. We do not have it. If you want to reference it in your brief, attach it as an exhibit. Let me know about the extension. I leave at 5:00 today and won't be back until Monday. Thanks.

Jaceson R. Maughan  
Legal Counsel  
Department of Workforce Services  
40 East 300 South  
Salt Lake City, UT 84145  
(801) 526-9783

NOTICE: This communication may contain privileged or other confidential information. If you are not the intended recipient or believe that you have received this communication in error, please do not print, copy, retransmit, disseminate, or otherwise use this information. Also, please indicate to the sender that you have received this e-mail in error, and delete the copy you received. Thank-you.

>> On 8/3/2010 at 6:20 PM, in message  
"BDF1D2143C727A4990C89309CC27965601375418552F@P1EC2EVS02.HMC1.COMCAST.NET", Daniel Day <dan@daylaw.com> wrote:

Dear Jaceson:

Rather than incur the additional cost of a motion for enlargement of time to file InnoSys's brief, I have been trying to meet the August 6<sup>th</sup> deadline in spite of the delay caused by the incomplete record. Unfortunately, I am afraid a motion for enlargement of time will likely be necessary. My examination of the Record on Appeal again shows that it is still incomplete. While Ms. Mercer's Response and Request to Deny Respondent's Motion for Continuance of Hearing and InnoSys's Reply Memorandum in Support of Motion for Continuance are included in the record, I do not see InnoSys's original Motion for Continuance of Hearing in the Amended Record nor do I see it referred to in the Amended Certificate. Apparently the original motion was not included. If I am mistaken, please let me know what page numbers correspond to the Motion for Continuance of Hearing. Otherwise, could you do a thorough review of the DWS file and see that the Record on Appeal is amended to include the entire record below? Your immediate attention to this would be appreciated?

Best regards,

DANIEL L. DAY  
ATTORNEY AT LAW  
9571 South 700 East, Suite 104  
Sandy, Utah 84070  
Tel. (801) 676-1506



**From:** Jaceson Maughan [mailto:jacesonmaughan@utah.gov]  
**Sent:** Thursday, July 29, 2010 4:37 PM  
**To:** Daniel Day  
**Subject:** Re: InnoSys v. DWS

Dan,

I'm certainly willing to agree to an extension, but I'm not going to confirm with Ms. Mercer's counsel or prepare the paper work for the extension. I'm not even certain it needs to be coordinated with Ms. Mercer's counsel as she will not be submitting a brief. Send the stipulation to me when it's ready.

Jaceson R. Maughan  
Legal Counsel  
Department of Workforce Services  
140 East 300 South  
Salt Lake City, UT 84145  
(801) 526-9783

NOTICE: This communication may contain privileged or other confidential information. If you are not the intended recipient or believe that you have received this communication in error, please do not print, copy, retransmit, disseminate, or otherwise use this information. Also, please indicate to the sender that you have received this e-mail in error, and delete the copy you received. Thank-you.

>>> On 7/29/2010 at 4:04 PM, in message  
<BDF1D2143C727A4990C89309CC2796560137541852A6@P1EC2EVS02.HMC1.COMCAST.NET>, Daniel Day <[dan@daylaw.com](mailto:dan@daylaw.com)> wrote:

Dear Jaceson:

I received the amended record yesterday. As you suggested, I would appreciate an extension of time to prepare InnoSys's brief now that I have the full record. Would you be willing to confirm that Ms. Mercer's counsel is willing to stipulate to an extension and prepare the paperwork? If you could do so, I would appreciate it.

Best regards,

DANIEL L. DAY  
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