

2010

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

REPLY BRIEF OF PETITIONER

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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ARGUMENTS

I. THE ALJ ERRED IN EXCLUDING ADDITIONAL TESTIMONY ABOUT MS. MERCER'S DISHONESTY

In opposition to InnoSys's appeal, the Workforce Appeals Board of the Utah Department of Workforce Services (the "DWS") argues that InnoSys did not carry its burden of proving that Ms. Mercer was dishonest¹ about the reason for her careless error. *See* Brief of Respondent ("DWS Brief") at 9, 10. In making this argument, the DWS begs the question when it asserts that the decision of the Administrative Law Judge ("ALJ") as affirmed by the Workforce Appeals Board is substantially supported by the evidence. DWS Brief at 16. The overarching question in this case is whether InnoSys was afforded a fair opportunity to put on the evidence it has of Ms. Mercer's dishonesty. InnoSys maintains that the ALJ prejudiced InnoSys from carrying its burden by excluding additional testimony about Ms. Mercer's dishonesty based on the ALJ's manifest misunderstanding of the law. *See* Petitioner's Brief ("Opening Brief") at 29-33.

¹ The DWS asserts that the exclusive reason for why InnoSys discharged Ms. Mercer was for being dishonest about her careless error and that her carelessness and irresponsibility would not have formed an independent just-cause basis for the discharge. DWS Brief at 8, 9, 10. InnoSys disputes this position and asserts that had Dr. Laurence P. Sadwick been permitted to testify about Ms. Mercer's additional careless mistakes and irresponsible behavior, the reprimand Dr. Sadwick gave Ms. Mercer and the reasons for the course of action he took, there would have been no question that independent of Ms. Mercer's dishonesty, InnoSys had just cause to terminate Ms. Mercer's employment.

In responding to InnoSys's opening brief, the DWS ignores InnoSys's firmly supported arguments surrounding the fact that the ALJ was operating under a misconception of the law either at the point the ALJ excluded additional testimony about Ms. Mercer's dishonesty or at the point he wrote his decision. *See* Opening Brief at 29-30. The DWS also ignores InnoSys's argument concerning the proper place for case-in-chief testimony as opposed to rebuttal testimony. *See* Opening Brief at 31-33.

These are critically important issues that implicate due process on a broader scale than administrative hearings. There must be room for correction when evidence is excluded based on a court's analysis made under a misconception of the law. *Andreasen v. Hansen*, 8 Utah 2d 3709, 335 P.2d 404, 408 (1959). In this case, Dr. Hwu-Sadwick's testimony cannot be "sufficient and credible" on the one hand and inadmissible hearsay on the other. *See Williamson v. United States*, 512 U.S. 594, 598 (1994). Yet, the ALJ excluded additional testimony about Ms. Mercer's dishonesty based on the ALJ's express determination that Dr. Hwu-Sadwick's testimony on this issue was "sufficient and credible" only to later rule in his written decision that the testimony was purely inadmissible hearsay. At one point or the other, the ALJ had to be operating under a misconception of the law.

Equally important is the proper sequence of case-in-chief testimony as opposed to rebuttal testimony. As discussed in the Opening Brief, the court cannot unilaterally relegate a party's case-in-chief evidence of different additional facts or corroborating facts to rebuttal

testimony without subjecting the different additional or corroborating facts to exclusion by appropriate objection. *See* Opening Brief at 31-33.

Rather than address these critically important issues, the DWS glosses over them with unsupported assertions as to what the ALJ meant when he stated Dr. Hwu-Sadwick's testimony was "sufficient and credible" and what InnoSys's intentions were with regard to additional testimony about these issues. *See* DWS Brief at 18. The record is quite clear, and the Court of Appeals should not speculate on what the ALJ meant and what InnoSys's intentions were. Counsel for InnoSys proffered that Dr. Sadwick "would also support the testimony that Amanda had been dishonest here." R. at 068 (Hearing Tran. at 27:1). In response, the ALJ immediately stated "I thought Dr. Sadwick's [referring to Dr. Jennifer Hwu-Sadwick] testimony with regard to that was sufficient and credible." R. at 068 (Hearing Tran. at 27:3). Accordingly, the record is clear, as the DWS apparently concedes, that at the time the ALJ stated he thought Dr. Hwu-Sadwick's testimony with regard to Ms. Mercer's dishonesty was "sufficient and credible" the ALJ meant it. *See* DWS Brief at 18. However, nowhere in the record is there support for the DWS's assertion that what was being discussed in this exchange was a mere "perception [Ms. Mercer] had been dishonest at times in the

past.”² DWS Brief at 18. In the context of the issues before the ALJ, the central question of dishonesty was whether Ms. Mercer lied about the cause of her careless error. That, in particular, was what Dr. Sadwick was prepared to testify about.

Furthermore, there is no support for the DWS’s assertion that Dr. Sadwick merely “thought” Ms. Mercer had been dishonest. DWS Brief at 17. The proffer was that Ms. Mercer “had been dishonest.” R. at 068 (Hearing Tran. at 27:1). Dr. Sadwick was prepared to prove Ms. Mercer had been dishonest about the careless mistake in question.

The DWS also erroneously asserts that “[t]he Employer did not intend to provide further admissible testimony regarding whether the Claimant lied about making the mistake.”

DWS Brief at 18. The DWS cites to nowhere in the record as foundation for this assertion because there is no foundation. Furthermore, this assertion is simply not true; Dr. Sadwick was prepared to give further admissible evidence that Ms. Mercer lied about making the mistake.

Similarly, there is not foundation for the DWS’s assertion that “[a]ccording to counsel, Dr. Sadwick’s testimony would not have proven the Claimant lied about making the mistake.”

² The DWS also misstates the record when it asserts that: “The ALJ . . . was merely stating that Dr. Hwu-Sadwick’s testimony regarding assistance given the Claimant, warnings and reprimands she had been given, and the Employer’s perception she had been dishonest at times in the past was sufficient and credible.” DWS Brief at 18. When excluding additional testimony on assistance given to Ms. Mercer and warnings and reprimands she had been given, the ALJ did not cite sufficiency and credibility as his basis for excluding the additional testimony. Only on the most central issue (Ms. Mercer’s dishonesty) did the ALJ exclude additional testimony expressly because he had concluded that the testimony on that issue was “sufficient and credible.” See R. at 067-068.

DWS Brief at 18. It is unclear which party's counsel the DWS is referring to here, but there is nothing in the record that supports the allegation that InnoSys's counsel expressed in any way that "Dr. Sadwick's testimony would not have proven the Claimant lied about making the mistake." Again, the proffer was that Dr. Sadwick would testify that Ms. Mercer "had been dishonest here." R. at 068 (Hearing Tran. at 21:1).

The DWS also erroneously asserts that testimony from additional witnesses would have been repetitive and argues that it is immaterial whether the ALJ excluded additional witnesses. DWS Brief at 17-18. The DWS's argument fails for several reasons. First the premise is false; as explained above, Dr. Sadwick was prepared to give ample additional evidence that Dr. Hwu-Sadwick did not have and evidence that Dr. Hwu-Sadwick, in her bedridden state, was not prepared to give. Second, there is no way for the ALJ to have determined that Dr. Sadwick's testimony would have been repetitive without hearing what Dr. Sadwick had to say. Third, if Dr. Hwu-Sadwick's testimony with regard to Ms. Mercer's dishonesty was hearsay and therefore insufficient and not credible, as the ALJ ultimately ruled, additional testimony was material. Therefore, the ALJ must have erred when he barred InnoSys, in its case-in-chief, from putting on additional evidence of dishonesty as argued above and in InnoSys's opening brief. *See* Brief of Petitioner ("Opening Brief") at 29-30.

Dr. Sadwick could have given additional indisputable evidence of Ms. Mercer's dishonesty for which she was discharged, but the ALJ excluded the testimony. By excluding additional testimony about Ms. Mercer's dishonesty, the ALJ prejudiced InnoSys. Therefore,

the case should be remanded for a new trial or as a minimum for additional testimony regarding Ms. Mercer's dishonesty.

II. THE ALJ ERRONEOUSLY APPLIED THE RESIDUUM RULE BY TREATING NON-HEARSAY EVIDENCE AS HEARSAY EVIDENCE OR OTHERWISE INADMISSIBLE EVIDENCE

In response to InnoSys's opening position that Dr. Hwu-Sadwick's testimony fits within the exceptions to the hearsay rule furnished by Utah R. Evid. 801(d)(1)(A) and 801(d)(2)(A), the DWS effectively argues that these exceptions do not apply. This conclusion, however, supports InnoSys's position that the ALJ erred when he excluded additional testimony about Ms. Mercer's dishonesty. If Dr. Hwu-Sadwick's testimony was inadmissible hearsay, it could not have been "sufficient and credible." *See* Opening Brief at 29. Accordingly, the ALJ should have allowed additional testimony about Ms. Mercer's dishonesty.

Nevertheless, the DWS maintains that Dr. Hwu-Sadwick's testimony was hearsay because "the Claimant did not admit to Dr. Hwu-Sadwick that she made a mistake." DWS Brief at 11. If Ms. Mercer had admitted to Dr. Hwu-Sadwick that Ms. Mercer had made a mistake, Ms. Mercer would not have been lying. The DWS's argument here illustrates why, on the other hand, Dr. Hwu's testimony is not hearsay. Hearsay is defined as "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). By arguing that the truth of the matter asserted in Dr. Hwu-Sadwick's testimony was that "Claimant lied to the

Employer” (DWS Brief at 12), the DWS misunderstands the definition of hearsay as referring to the matter asserted in the case—not the matter asserted in the statement. Rule 801(c) refers to the matter asserted in the statement as illustrated by *Prosper, Inc. v. Dep’t of Workforce Services*, 2007 UT App. 281, ¶¶ 12-13, 168 P.3d 344 (customer complaints offered in evidence to prove that complaints were made—not for the purpose of proving the complaints were true—are admissible). In summary, the statement made in Dr. Hwu-Sadwick’s testimony was that Ms. Mercer had admitted to the software consultant that Ms. Mercer had entered the wrong initial value in the simulation—not that Ms. Mercer had lied to InnoSys. The testimony was not offered to prove the matter asserted in the statement, i.e., that Ms. Mercer entered the incorrect initial value; it was offered to prove that Ms. Mercer lied to InnoSys. *See* R. at 53-54 (Hearing Tran. At 12:29-13:5). Therefore, by definition, Dr. Hwu-Sadwick’s testimony was not hearsay and it should have been given its appropriate weight.

The ALJ also violated the residuum rule by failing to give any weight to Dr. Hwu-Sadwick’s testimony concerning the technological impossibility of Ms. Mercer’s false excuse for her careless mistake. In its effort to excuse this violation, the DWS makes at least two errors. First, the DWS makes the unfounded assertion that “[t]he Employer’s belief the Claimant lied was based solely on the conversation relayed from the software consultant to the Employer.” DWS Brief at 10; *see also* DWS Brief at 5. To the contrary, Dr. Hwu-Sadwick testified that she knew Ms. Mercer was not telling the truth because computer code

is not capable of doing what Ms. Mercer said it had. *See* Opening Brief at 11-12, 39-40 (*citing* R. at 008, 052-053 (Hearing Tran. at 8:3-11; 11:13-12:1)).

Second, the DWS misses the mark in arguing that InnoSys did not lay sufficient foundation to qualify Dr. Hwu-Sadwick as an expert. *See* DWS Brief at 15-16. InnoSys's primary argument on this point is that expert witness testimony is not necessary because the layperson knows that computers are incapable of arbitrarily generating or changing the data input. The DWS makes no effort to rebut this argument. In today's world, this fact is within the common knowledge and experience of the layperson. Therefore, expert testimony should not be necessary. Opening Brief at 40 (*citing Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980)).

Nevertheless, a person is competent to testify as an expert when the person has knowledge that can assist the trier of fact in resolving the issues before it. Utah R. Evid. 702(a); *Depew v. Sullivan*, 2003 UT App 152, ¶ 42, 71 P.3d 601. In this case, Dr. Hwu-Sadwick, a PhD in electrical engineering, has more than sufficient knowledge of computers to assist the ALJ in resolving the issue of whether Ms. Mercer lied when she blamed the computer for her careless error.

If, however, the foundation for Dr. Hwu-Sadwick's testimony was insufficient to qualify her as an expert, the DWS is in no position to say sufficient foundation could not have been laid for Dr. Sadwick to give expert testimony on this issue. This again pronounces the error the ALJ made in excluding additional testimony about Ms. Mercer's dishonesty. If

Dr. Hwu-Sadwick's testimony concerning the technological impossibility of Ms. Mercer's false excuse lacked sufficient foundation to qualify as expert testimony, then it was not "sufficient and credible," and InnoSys should have been allowed to offer additional testimony, including that of Dr. Sadwick.

Furthermore, the DWS makes no argument that would justify the ALJ in ignoring Dr. Hwu-Sadwick's testimony with regard to other false excuses Ms. Mercer had given for other careless mistakes. Ms. Mercer's other false excuses for her carelessness or irresponsibility are residua of evidence that tend to make the probability that she lied in the final incident more probable than not and demonstrate her culpability. *See* Utah R. Evid. 401 and Utah Admin. Code R994-405-202(1).

Here, InnoSys reiterates its argument that regardless of whether Dr. Hwu-Sadwick's testimony was non-hearsay, whether it was admissible lay testimony, whether it was qualified expert testimony or whether it was otherwise admissible, InnoSys should have been permitted to put on additional evidence in its case-in-chief, including without limitation Dr. Sadwick's testimony, of Ms. Mercer's dishonesty. *See* Opening Brief at 29-33.

III. THE ALJ ERRED IN DENYING THE CONTINUANCE PETITIONER REQUESTED

By refusing to allow Dr. Hwu-Sadwick sufficient time to recuperate from surgery, the ALJ prejudiced InnoSys. In opposition to InnoSys's position on this point, the DWS makes the statement that, "[c]ounsel, presumably, could have met with Dr. Hwu-Sadwick at any time prior to the hearing." DWS Brief at 21. Consider this statement in light of the facts. On

September 15, 2009, the DWS gave notice of the original hearing date of September 30, 2009. R. at 038-040. InnoSys received the notice on September 16th or 17th. On September 18, 2009, InnoSys moved for a continuance of the hearing because Dr. Hwu-Sadwick was scheduled to have complicated surgery on September 21, 2009 requiring a minimum of six weeks of bed rest thereafter. Exhibit “E” to Opening Brief. A day after Dr. Hwu-Sadwick’s surgery, Ms. Mercer opposed the motion for continuance. On September 25, 2009, InnoSys filed its Reply Memorandum in Support of Motion for Continuance. R. at 205-211. On or about September 28, 2009, the ALJ granted only 8 additional days continuance. *See* R. at 212. It is not reasonable to expect a witness in the first three weeks of a six-week, doctor-ordered recovery to meet with the company’s attorney at her bed side to prepare for an unemployment compensation hearing. Recognizing that Dr. Hwu-Sadwick simply could not carry the burden of preparing for the hearing, Dr. Sadwick, carried virtually all of this burden only to have the ALJ exclude him from testifying.

The DWS asserts that the transcript and audio recording do not support the argument that Dr. Hwu-Sadwick was testifying under unreasonable conditions. DWS Brief at 20. It goes without saying that much is not revealed by a bare transcript and an audio recording. The fact that Dr. Hwu-Sadwick was experiencing pain and was bleeding would not come through on a transcript or audio recording. Nevertheless, from a fair reading of the transcript and review of the audio recording, the Court should conclude that Dr. Hwu-Sadwick was not functioning at her normal capacity.

The DWS's quotation of Dr. Hwu-Sadwick stating, "I think it should be fine. I'm sitting in bed anyway, so it should be fine" is not a fair representation of the situation. DWS Brief at 21. This statement was made at the very beginning of the hearing. At that point, little did Dr. Hwu-Sadwick know that she would begin bleeding and that the hearing would continue on to the point that the pain relieving ability of her medications would wear off and so forth. Also, Dr. Hwu-Sadwick furnished sworn testimony of the difficulties she experienced after she made this statement at the beginning of the hearing. *See* R. at 379-81. Furthermore, Dr. Hwu-Sadwick's physician has provided a statement regarding the side effects of the medication Dr. Hwu-Sadwick was using, which compromised her ability to testify effectively. *See* R. at 381. In response, the DWS has nothing to contradict this evidence. Under the circumstances of this case, it was an abuse of discretion for the ALJ to deny the continuance Dr. Hwu-Sadwick requested and in turn exclude testimony from InnoSys's additional witness who carried the burden of preparing for the hearing. Consequently, the ALJ exclusively relied on the witness from InnoSys who, due to her surgery was unable to prepare for the hearing and whose ability to effectively testify was compromised by the unreasonable circumstances under which she was made to testify.

IV. THE PETITIONER MARSHALED THE EVIDENCE

The DWS's position on marshaling of evidence is a bare recitation of the law void of any analysis of InnoSys's efforts to marshal the evidence. As such, the DWS's position is merely a conclusory assertion that InnoSys has failed to marshal the evidence. In the absence

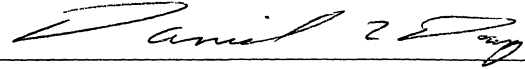
of any substantive argument, it is difficult to raise arguments in reply. In any event, the DWS's arguments with regard to marshaling are to a degree not germane, given that the ALJ never reached the issues of knowledge and control. With regard to the ALJ's finding that InnoSys "failed to provide enough evidence to show that the claimant committed more than one careless error," however, the ALJ made the marshaling burden relatively light. InnoSys's only burden is to show evidence in the record of another careless error. InnoSys has carried that burden by showing numerous careless mistakes as even noted by the ALJ during the hearing. *See* R. at 093 (Hearing Tran. at 52:29).

With regard to whether Ms. Mercer entered the correct value for the test she was performing, InnoSys has marshaled the evidence available from the record. The primary concern here is that InnoSys cannot marshal all the evidence because the ALJ erred in excluding additional testimony and evidence on this topic. Had the ALJ allowed additional testimony, the evidence would have left no doubt that Ms. Mercer entered the wrong initial value and was not truthful about having done so.

CONCLUSION

For the foregoing reasons and the reasons set forth in InnoSys's Opening Brief, a miscarriage of justice will occur if the decisions of the ALJ and the Workforce Appeals Board are left to stand without additional testimony and evidence being considered. Accordingly, InnoSys respectfully requests that this case be remanded for a new hearing or as a minimum for the taking of additional testimony and evidence.

RESPECTFULLY SUBMITTED this 1st day of December, 2010.



Daniel L. Day, Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Daniel L. Day, hereby certify that on the 1st day of December, 2010, I served two copies of the foregoing Reply 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:

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