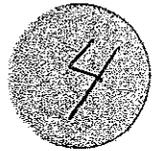


Case No. A09-1627



---

*STATE OF MINNESOTA  
IN COURT OF APPEALS*

---

**ST. CROIX SENSORY INC.,**

Relator,

vs.

**DEPARTMENT OF EMPLOYMENT  
AND ECONOMIC DEVELOPMENT,**

Respondent.

---

**RELATOR'S BRIEF**

---

Andrew E. Tanick (MN #178573)  
Jody A. Ward-Rannow (MN #387098)  
FORD & HARRISON LLP  
225 South Sixth Street, Suite 3150  
Minneapolis, MN 55402  
Telephone: 612.486.1700

*Attorneys for Relator*

Lee B. Nelson (MN #77999)  
332 Minnesota Street, Suite E200  
St. Paul, MN 55101-1351

Telephone: 651.259.7117

*Attorney for Respondent-  
Department*

---

## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| STATEMENT OF LEGAL ISSUES .....   | 1           |
| STATEMENT OF THE CASE .....   | 1           |
| STATEMENT OF FACTS.....   | 2           |
| I. THE PARTIES.....   | 2           |
| II. ST. CROIX SENSORY IS REQUIRED TO COMPLY WITH<br>INDUSTRY STANDARDS.....   | 3           |
| III. ST. CROIX SENSORY SEPARATES THE SENSORY ASSESSORS<br>FROM ITS EMPLOYEES.....   | 4           |
| IV. ST. CROIX SENSORY AND THE SENSORY ASSESSORS<br>CONTRACTUALLY AGREE THAT THE SENSORY ASSESSORS<br>ARE INDEPENDENT CONTRACTORS..... | 4           |
| V. INDIVIDUALS MUST MEET INDUSTRY STANDARDS TO WORK<br>AS A SENSORY ASSESSOR.....   | 6           |
| VI. THE TEST SESSIONS OCCUR AT VARIOUS LOCATIONS. ....  | 6           |
| VII. THE EVENTS OF A TESTING SESSION.....   | 7           |
| A. St. Croix Sensory Does Not Supervise The Assessors<br>While They Observe Odors.....  | 8           |
| B. St. Croix Sensory Does Not Supervise The Sensory Assessors<br>In Filling Out Their Questionnaires. ....                            | 9           |
| C. The Sensory Assessors Are Free To Do Whatever They Please<br>During The Time Spent In Between Sniffing Test Samples .....          | 10          |
| D. St. Croix Sensory Does Not Evaluate The Sensory Assessors’<br>Performance or Require Reports From Them.....                        | 11          |
| VIII. ST. CROIX SENSORY DOES NOT DICTATE THE ASSESSORS’<br>SCHEDULES.....   | 12          |

|       |  |    |
|-------|--|----|
| IX.   | ST. CROIX SENSORY’S LIABILITY FOR CANCELLATION OF TESTING SESSIONS OR REMOVAL OF ASSESSORS FROM TESTING SESSIONS.....  | 14 |
| X.    | ST. CROIX SENSORY’S METHOD OF PAYMENT FOR SENSORY ASSESSORS.....   | 14 |
| XI.   | THE TOOL FOR PROVIDING SENSORY ASSESSMENT SERVICES: THE NOSE.....  | 15 |
| XII.  | SENSORY ASSESSORS WORKING FOR ST. CROIX SENSORY ARE FREE TO PROVIDE THEIR SERVICES TO OTHER LABORATORIES. ....   | 15 |
| XIII. | SENSORY LABORATORIES AND THE SENSORY ASSESSORS CONSIDER THE ASSESSORS TO BE INDEPENDENT CONTRACTORS. ....  | 16 |
| XIV.  | TESTIMONY OF A REPRESENTATIVE SENSORY ASSESSOR. ....   | 16 |
|       | SUMMARY OF ARGUMENT .....  | 18 |
|       | LEGAL ARGUMENT .....   | 19 |
| I.    | THE STANDARD AND SCOPE OF APPELLATE REVIEW.....  | 19 |
| II.   | THE SENSORY ASSESSORS PROVIDING SERVICES TO ST. CROIX SENSORY ARE INDEPENDENT CONTRACTORS UNDER MINNESOTA’S FIVE FACTOR TEST.....  | 20 |
| A.    | St. Croix Sensory Lacks The Right To Control The Means And Manner Of Performance, Indicating That The Sensory Assessors Are Independent Contractors. ....                                  | 21 |
| 1.    | St. Croix Sensory And The Assessors Are Parties To A Contract Providing That The Sensory Assessors Are Independent Contractors And Control The Means And Manner Of Their Performance. .... | 22 |
| 2.    | St. Croix Sensory Does Not Require Sensory Assessors To Comply With Detailed Instructions,   |    |

|     |  |    |
|-----|--|----|
|     | Further Indicating It Lacks Control Over The Means And Manner Of Performance.....  | 26 |
| 3.  | St. Croix Sensory Does Not Require Sensory Assessors To Provide Any Reports Regarding The Method In Which The Services Are Performed, Further Indicating It Lacks Control Over The Means And Manner Of Performance. .... | 28 |
| 4.  | St. Croix Sensory Cannot Terminate A Sensory Assessor Without Incurring Liability To The Assessor, Further Indicating It Lacks Control Over The Means And Manner Of Performance. ....                                    | 29 |
| 5.  | St. Croix Sensory Does Not Set The Hours Of Work For Sensory Assessors, Further Indicating It Lacks Control Over The Means And Manner Of Performance.....  | 30 |
| 6.  | St. Croix Sensory Does Not Require Training Or Attendance At Meetings, Further Indicating It Lacks Control Over The Means And Manner Of Performance. ....  | 31 |
| 7.  | Sensory Assessors Do Not Devote Full Time To Assessing For St. Croix Sensory Indicating St. Croix Sensory Lacks Control Over The Means And Manner Of Performance.....  | 32 |
| 8.  | St. Croix Sensory Pays Sensory Assessors On A Job Basis And Does Not Pay Expenses, Further Indicating It Lacks Control Over The Means And Manner Of Performance. ....  | 33 |
| 9.  | St. Croix Sensory Is Required To Enforce Industry Standards, Further Indicating It Lacks Control Over The Means And Manner Of Performance.....   | 33 |
| 10. | The Remaining Factors Are Inconclusive And Do Not Support A Finding That St. Croix Sensory Has Control Over The Means And Manner Of Performance.....   | 34 |

|      |   |    |
|------|---|----|
| B.   | St. Croix Sensory Cannot Discharge A Sensory Assessor Without Incurring Liability, Indicating That The Sensory Assessors Are Independent Contractors. ....            | 36 |
| C.   | The Mode Of Payment Indicates That The Sensory Assessors Are Independent Contractors. ....  | 37 |
| D.   | The Furnishing Of Materials And Tools Indicates That The Sensory Assessors Are Independent Contractors. ....  | 38 |
| E.   | The Control Over The Premises Where The Services Are Performed Indicates That The Sensory Assessors Are Independent Contractors. ....                                 | 40 |
| III. | THE ADDITIONAL FACTORS ENUMERATED IN MINNESOTA RULE 3315.0555, SUBPART 2 ALSO INDICATE THAT THE SENSORY ASSESSORS ARE INDEPENDENT CONTRACTORS. ....                   | 41 |
| A.   | The Sensory Assessors Make Their Services Available To Other Companies Conducting Sensory Testing, Indicating That They Are Independent Contractors.....              | 41 |
| B.   | The Sensory Assessors Are In A Position To Suffer A Loss Or Gain A Profit In Their Work For St. Croix Sensory, Indicating That They Are Independent Contractors. .... | 42 |
| C.   | Some Of The Sensory Assessors Work For A Number Of Laboratories At The Same Time, Indicating That They Are Independent Contractors. ....                              | 43 |
| D.   | The Remaining Factors Do Not Support The Determination That The Sensory Assessors Are Employees.....  | 44 |
| IV.  | FINDING THE SENSORY ASSESSORS TO BE EMPLOYEES WILL DRASTICALLY CHANGE THE FACE OF HUMAN SUBJECTS TESTING IN MINNESOTA. ....   | 45 |
|      | CONCLUSION .....  | 46 |

## TABLE OF AUTHORITIES

### STATE CASES

|  |                                |
|--|--------------------------------|
| <i>Boily v Commissioner of Economic Sec</i> , 544 N.W.2d 295 (Minn. 1996) .....  | 21, 39                         |
| <i>Current Technology Concepts, Inc v Irie Enterprises, Inc</i> , 530 N.W.2d<br>539 (Minn. 1995).....  | 23, 24                         |
| <i>Frankle v Twedt</i> , 234 Minn. 42, 47 N.W.2d 482 (1951).....   | 21                             |
| <i>Geerdes v J R Watkins Co.</i> , 103 N.W.2d 641 (1960).....  | 22                             |
| <i>Golant v MCS Language Connection</i> , No. C0-96-1857,<br>1997 Minn. App. LEXIS 606 (Minn. Ct. App.<br>May 21, 1997).....                           | 19, 21, 22, 26, 27, 37, 39, 43 |
| <i>Hammes v Suk</i> , 190 N.W.2d 478 (1971) .....  | 37                             |
| <i>Independent Sch. District Number 877 v. Loberg Plumbing &amp; Heating</i> ,<br>123 N.W.2d 793 (Minn. 1963) .....                                    | 23, 24                         |
| <i>Midway Driving School v Commissioner of Jobs and Training</i> ,<br>No. CX-90-1061, 1990 Minn. App. LEXIS 958 (Minn. Ct. App.<br>Oct. 2, 1990) ..... | 30, 33, 34, 37                 |
| <i>Motorsports Racing Plus, Inc v. Arctic Cat Sales, Inc.</i> , 666 N.W.2d 320<br>(Minn. 2003).....  | 23                             |
| <i>Neve v. Austin Daily Herald</i> , 552 N.W.2d 45<br>(Minn. Ct. App. 1996) .....  | 1, 19, 21, 23, 27, 28, 37      |
| <i>Nolan's Repair &amp; Excavating v. Tesch</i> , No. CX-87-2121, 1988 Minn.<br>App. LEXIS 200 (Minn. Ct. App. Mar. 29, 1988) .....                    | 22, 39                         |
| <i>Pinewood General Corp. v. Roth</i> , No. C0-87-1625, 1988 Minn. App.<br>LEXIS 114 (Minn. Ct. App. Feb. 17, 1988).....                               | 22                             |
| <i>Seed v. Astra Genstar P'Ship</i> , No. C2-02-1143, 2003 Minn. App. LEXIS<br>68 (Minn. Ct. App. Jan. 28, 2003).....                                  | 23, 24                         |
| <i>Southwood Motors v. Department of Employment and Economic<br/>Development</i> , A05-2182, 2006 Minn. App. Unpub. LEXIS 1029 .....                   | 28, 35                         |
| <i>Valspar Refinish, Inc v Gaylord's, Inc.</i> , 764 N.W.2d 359 (Minn. 2009).....  | 23                             |

|   |                        |
|---|------------------------|
| <i>Weir v. Ye Olde Mug n Brush</i> , No. C5-94-2286, 1995 Minn. App.<br>LEXIS 796 (Minn. Ct. App. June 13, 1995)..... | 26, 27, 30, 37, 40, 43 |
| <i>Wise v. Denesen Insulation Co</i> , 387 N.W.2d 477<br>(Minn. Ct. App. 1986) .....                                  | 39, 43                 |

**STATE STATUTES**

|                             |                            |
|-----------------------------|----------------------------|
| Minn. R. 3315.0555 .....    | 1, 18, 20-21, 26-37, 41-45 |
| Minn. Stat. § 268.031 ..... | 21                         |
| Minn. Stat. § 268.035 ..... | 20                         |
| Minn. Stat. § 268.051 ..... | 20                         |

## STATEMENT OF LEGAL ISSUES

1. Whether Respondent Agency committed an error of law by determining that individuals who provided sensory assessment services for Relator during 2006 were, for purposes of unemployment insurance law, employees rather than independent contractors.

*Most Apposite Cases:*

Neve v. Austin Daily Herald, 552 N.W.2d 45 (Minn. Ct. App. 1996).

Minn. R. 3315.0555.

The Agency erred by finding that the Sensory Assessors at issue were employees of Relator rather than independent contractors. The evidence conclusively demonstrates that under the factors provided in Minn. Rule 3315.0555, the Sensory Assessors are independent contractors for the purposes of unemployment compensation. The Court must reverse the Agency's determination that the Sensory Assessors were employees of Relator.

## STATEMENT OF THE CASE

In the spring of 2008, an auditor from the Department of Employment and Economic Development visited Relator St. Croix Sensory Inc.'s ("St. Croix Sensory") Lake Elmo, Minnesota office and conducted an audit of St. Croix Sensory's business. The auditor issued a decision dated April 14, 2008, finding that 37 Sensory Assessors who provided services to St. Croix Sensory in 2006 were employees, rather than independent contractors as St. Croix Sensory had classified them. (A.14-15.)<sup>1</sup>

---

<sup>1</sup> Citations to Relator's Appendix are cited as "A. \_\_".

Accordingly, the auditor determined that St. Croix Sensory had underpaid its unemployment insurance premiums for 2006 because it had failed to include the 37 Sensory Assessors as employees for the calculation of its premiums. (A.14-15.)

On May 2, 2008, St. Croix Sensory appealed the auditor's determination that the Sensory Assessors were employees. (A.16.) A hearing on St. Croix Sensory's appeal was held before Unemployment Law Judge David Cox on November 18, 2008. (A.292.) On January 9, 2009, Unemployment Law Judge Cox issued a decision affirming the auditor's finding that the Sensory Assessors were employees rather than independent contractors. (A.296.) St. Croix Sensory filed a Request for Reconsideration on January 28, 2009. (A.297-304.) On August 10, 2009, Unemployment Law Judge Cox issued an order affirming his prior ruling. (A.305-08.) St. Croix Sensory filed a petition for Writ of Certiorari to this Court on September 3, 2009. (A.9.)

### **STATEMENT OF FACTS**

At the hearing before the Unemployment Law Judge, the State presented no contrary evidence to that presented by Relator St. Croix Sensory. (See A.68, 103, 117, 118-21.) Accordingly, the facts below are undisputed.

#### **I. THE PARTIES.**

St. Croix Sensory is a sensory laboratory specializing in odor testing, training, and sensory equipment rental and sales. (A.28.) St. Croix Sensory plans and assembles laboratories for clients in this country and internationally, and performs audits on those laboratories over time to ensure that they are maintaining industry standards. (A.28.) St. Croix Sensory offers a program called Odor School, which trains individuals who may be

performing odor enforcement services.<sup>2</sup> (A.28.) Government agencies, county and city governments, or industry professionals who are responsible for monitoring their company's odor emissions might register for Odor School. (A.28.) St. Croix Sensory also provides training services to universities, governments, and private industry for the purpose of monitoring odors in the field. (A.28.) In addition, St. Croix Sensory offers training to individuals wishing to learn how to monitor odors and to be able to use the equipment St. Croix Sensory develops and sells. (A.28.)

St. Croix Sensory offers odor testing of materials, products, and air, and conducts taste evaluations. (A.28.) St. Croix Sensory's odor testing clients seek independent assessments from neutral individuals who are not employees of the testing laboratory. (A.29.) St. Croix Sensory retains the services of such individuals, called Sensory Assessors, and treats them as independent contractors. St. Croix Sensory carefully considered the classification of the Sensory Assessors and revisits their classification every year to comply with the law. (A.29.)

## **II. ST. CROIX SENSORY IS REQUIRED TO COMPLY WITH INDUSTRY STANDARDS.**

St. Croix Sensory is required to follow ASTM<sup>3</sup> and CEN Industry Standards ("Industry Standards") for olfactory sensory testing. (A.69-71; 160-239.) The State of

---

<sup>2</sup> An example of odor enforcement services would be the evaluation of an odor to determine whether the strength of the odor complies with Environmental Protection Agency standards.

<sup>3</sup> ASTM is a very large organization that sets industry standards for many industries including helmets, amusement rides, pipes, cement and other industries. Within ASTM, there are many groups. One of those groups is the Sensory group, which created the Sensory standards. (A.71-72.) ASTM used to set only North American standards, but in

Minnesota, State of Missouri, City of Los Angeles, and City of New York have all specifically identified these Industry Standards as operational standards that St. Croix Sensory must follow as an olfactory testing laboratory.<sup>4</sup> (A.71.)

**III. ST. CROIX SENSORY SEPARATES THE SENSORY ASSESSORS FROM ITS EMPLOYEES.**

St. Croix Sensory takes steps to separate its employees from the independent Sensory Assessors. St. Croix Sensory schedules its employees' hours of work. (A.29.) The employees have specific job descriptions and duties. (A.29.) St. Croix Sensory pays its employees from the Company's general bank account and through Paychex payroll company. (A.29.)

In contrast, the Sensory Assessors control their own schedules and decide whether to participate in any testing sessions. (A.29.) St. Croix Sensory treats the Sensory Assessors like vendors and pays their stipends through online Quickbooks, which is a vendor paying system, and deducts the payments from a separate checking account. (A.29.)

**IV. ST. CROIX SENSORY AND THE SENSORY ASSESSORS CONTRACTUALLY AGREE THAT THE SENSORY ASSESSORS ARE INDEPENDENT CONTRACTORS.**

St. Croix Sensory presents each Sensory Assessor with a document entitled "Independent Contractor/Assessor Informed Consent and Agreement." (See A.142-45.)

---

the last five to ten years, ASTM has become more global and now has participation from Asian and South American countries. (A.72.)

<sup>4</sup> These are the states and cities of which St. Croix Sensory is aware that have identified the Industry Standards as requirements for olfactory testing. St. Croix Sensory is not representing that these are the only states and cities that have standards relating to olfactory testing.

This document has several purposes. First, it meets the State law requirements for obtaining informed consent for human subjects scientific testing. Second, the document obtains the Sensory Assessor's agreement to maintain the confidentiality of any information they learn during the scientific testing. In addition, the document sets forth the parameters for payment for testing services.

The Independent Contractor/Assessor Informed Consent and Agreement also clearly sets forth the nature of the relationship between the Sensory Assessors and St. Croix Sensory. Section 5 of the Agreement states in relevant part:

Assessor acknowledges that no employer-employee relationship is intended or exists under this agreement or otherwise between assessor or St. Croix Sensory. Assessor is responsible for any and all taxes. Assessor retains the right and responsibility to control or direct the manner in which the sensory evaluation services are to be performed consistent with standard methods and procedures of test sessions. St. Croix Sensory retains the right to inspect the assessor's work, to stop work, to prescribe alterations, and generally to ensure its conformity to the needs of St. Croix Sensory or St. Croix Sensory's client.

(A.39-40, 143.) St. Croix understands the language of the Independent Contractor/Assessor Informed Consent and Agreement to give the right to control the means and manner of the Sensory Assessor's performance to the Sensory Assessor.

(A.40.) Based on the Independent Contractor/Assessor Informed Consent and Agreement, St. Croix Sensory does not regulate, or believe that it has the authority to regulate, how the assessors sniff the samples or complete their observations. (A.101-02.)

**V. INDIVIDUALS MUST MEET INDUSTRY STANDARDS TO WORK AS A SENSORY ASSESSOR.**

While St. Croix Sensory conducts some Consumer Panels, the type of testing at issue in this case is different from Consumer Panels. Consumer Panels are testing sessions in which any lay person may make an observation. The testing sessions at issue in this case require the use of Sensory Assessors who have a sense of smell sufficiently sensitive to meet Industry Standards such that the individual can work in the industry. (See A.30, 103-05.) Specifically, Sensory Assessors must meet the CEN Standard for the sensitivity of their sense of smell. (A.72.) Under the CEN Standard, an Assessor's sense of smell is tested using a butanol test. Just as one would test his or her sense of hearing using standard sounds, one tests the sense of smell using known values of butanol to determine how sensitive an individual is to odors. (A.73.) Testing laboratories, including St. Croix Sensory, conduct the butanol sensitivity test on Sensory Assessors before each testing session to ensure that the Assessor's sense of smell still qualifies that individual to serve as a Sensory Assessor within the industry. (A.73.)

**VI. THE TEST SESSIONS OCCUR AT VARIOUS LOCATIONS.**

St. Croix Sensory odor testing sessions occur either on St. Croix Sensory's premises or at some other location, depending on the client's requirements. (A.37, 59.) Thus, St. Croix Sensory's customers, and not St. Croix Sensory, dictate the locations of the test sessions. Industry Standards require that the tests take place in an odor-free environment under laboratory conditions. (A.38.) St. Croix Sensory has no control over

the premises if a testing session is held at a location other than St. Croix Sensory's Lake Elmo office. (A.59.)

## **VII. THE EVENTS OF A TESTING SESSION.**

A testing session begins when the Assessors arrive at the testing location. (A.84.) Often there are multiple testing sessions taking place at one time. (See A.87.) A testing session can last from about one and one half hours to three hours. (A.45.) During a testing session, the Sensory Assessors spend only about two minutes in every fifteen to twenty minutes, and in any event no more than ten to fifteen minutes per hour, sniffing testing samples. (A.45, 111.) After sniffing a test sample, the Sensory Assessors complete a few different questionnaires depending on the information St. Croix Sensory's client requested. (A.31, 92.) When the assessors are not testing, they do other things, including knitting, reading, playing cards, and talking with others. (A.92, 290.) At no time during a test session does St. Croix Sensory supervise or evaluate the Sensory Assessors' performance. (A.46.)

No one from St. Croix Sensory supervises the Sensory Assessors during testing sessions. (A.83.) The only instructions that St. Croix Sensory provides to the Sensory Assessors are "strictly just completing the questionnaire and instructions on how to work the machine, the equipment that they're working on." (A.42-43.) The Assessors are not supervised while they are sniffing samples, they are not supervised as to how to fill out the questionnaires, and they are not supervised during the substantial "down time" during a session, nor does St. Croix Sensory evaluate their performance in any way.

**A. St. Croix Sensory Does Not Supervise the Assessors While They Observe Odors.**

During a testing session, the Laboratory Associate and Laboratory Assistant administer the samples to the Sensory Assessors. (A.81, 87.) When the test simply requires an Assessor to sniff a substance, the Assessors are given their own sample to observe the odor. (See A.290.) When the test requires sniffing air, the Sensory Assessors wait their turn to sniff the air samples. (A.87, 290.)

No one instructs the Assessors when to enter the testing room for their turn to sniff a sample and no one instructs the Assessors when to leave the testing room after they have completed their observations. (A.87.) The Assessors decide themselves when it is their turn to observe a testing sample and when they have sufficiently observed the sample. (A.87-88.)

When the Assessors observe the samples, St. Croix Sensory staff does not monitor their sniffing techniques or instruct them how to smell the test samples. (A.43, 82.) Everyone smells things differently and the Assessors retain the right to control how to smell each sample. (A.43.) For example, the Assessors determine, without being told by St. Croix Sensory, how long to sniff the samples and whether to take one long sniff or several short sniffs. (A.43, 89.) The Assessors have the discretion to ask to receive an odor sample again. (A.89.) They also decide how quickly (or slowly) to complete their sample observations and how much time to take in between sniffs of a sample. (A.90, 98, 101.) The Assessors decide whether to use a carbon respirator to refresh their nose (eliminate the influence of prior smells) in between sniffing test samples. (A.99.) St.

Croix Sensory does not tell the Assessors whether to sit or stand during the testing. (A.43.) St. Croix Sensory never corrects an Assessor on their technique for sniffing samples because the Assessor has the discretion to decide how to approach the testing session. (A.43.)

Other than making sure the Assessors actually sniff the test samples, the Laboratory Assistant and Laboratory Associate do not supervise or monitor the Assessors' performance during a testing session. (A.82, 240-46.) Indeed, the Laboratory Assistant and Laboratory Associate talk as little as possible during testing to allow the Assessors to independently and efficiently complete their work. (A.91.) The only communication between the Laboratory Assistant or Laboratory Associate and the Sensory Assessors occurs when the Laboratory Assistant or Laboratory Associate informs the Sensory Assessors of the sample number so the Assessors know which questionnaires to complete. (A.92.)

**B. St. Croix Sensory Does Not Supervise The Sensory Assessors In Filling Out Their Questionnaires.**

After smelling a test sample, the Assessors complete questionnaires with their independent observations. (A.31, 92.) St. Croix Sensory takes the Assessor questionnaire results, compiles all of the Assessor opinions and includes those opinions in a report to the client. (A.31.)

The Sensory Assessors may complete one or more of a few different questionnaires, depending on the information St. Croix Sensory's client requested. The first questionnaire is called the Intensity Data Form. (A.129.) On this form, the Sensory

Assessors indicate their opinion of the sample's odor strength. (A.32.) The Sensory Assessors also sometimes fill out two other questionnaires, known as the hedonic tone and descriptors forms. (A.130-31.) The hedonic tone form identifies whether the Assessors like or dislike the sample's odor. The descriptors form allows the Sensory Assessor to describe what the odor smells like, such as musty or sweet. (A.34.)

St. Croix Sensory does not supervise the Sensory Assessors' completion of the questionnaires. The only instructions St. Croix Sensory provides to Assessors for completing the questionnaires is that the forms require the use of a No. 2 pencil and that the computer reads drawn lines on one form and filled in boxes on the others. (A.44.) There are no correct or incorrect answers for an Assessor to place on the Intensity Data Form; the Sensory Assessors complete the form using their own opinions of the odors. (A.33-34.) The Sensory Assessors have the complete discretion to complete the forms however they choose. (A.33.) Moreover, St. Croix Sensory does not provide any training to Sensory Assessors regarding identifying a type (i.e., musty or sweet) of smell. (A.34, 44, 110.) It is left to the Sensory Assessors to decide, in their mind, what musty or sweet smells like. (A.34-35, 44, 110.) St. Croix Sensory never corrects an Assessor's description of an odor. (A.44, 111.)

**C. The Sensory Assessors Are Free To Do Whatever They Please During The Time Spent In Between Sniffing Test Samples.**

St. Croix Sensory does not instruct, or believe that it has the right to instruct, Assessors how to use the forty-five to fifty minutes of each hour they do not spend sniffing samples during a testing session. (A.45.) No one from St. Croix Sensory even

watches the Assessors while they pass that time in the waiting area. (A.96; 290.) Assessors read, knit, play cards, talk or do other things during the time between testing sessions. (A.45.) In contrast, if the Assessors were St. Croix Sensory employees (i.e., if St. Croix Sensory had the right to control the Assessors), St. Croix Sensory would require the Assessors to do work for the company during testing session down time. (A.93.)

St. Croix Sensory has never disciplined an Assessor for his or her behavior during a testing session and St. Croix Sensory does not believe that it has the authority to do so. (A.45-46.) As Donna McGinley, co-owner of St. Croix Sensory, testified about the Sensory Assessors, "They are not under our control. They are their own. We are only requiring their observation." (A.46.) The State did not dispute Ms. McGinley's testimony. (See A.68.)

**D. St. Croix Sensory Does Not Evaluate The Sensory Assessors' Performance Or Require Reports From Them.**

St. Croix Sensory never evaluates the Sensory Assessors' performance, on conducts performance evaluations of them. (A.46.) St. Croix Sensory's employees do not have any authority to discipline Assessors. (A.82, 240-46.)

St. Croix Sensory does not require Assessors to provide reports of how they conducted their tests or how they used their time when not sniffing samples. (A.47.) St. Croix Sensory does not request such reports from the Assessors because St. Croix Sensory pays the Assessors for their opinions written on completed questionnaires, not their time or the completion of a particular procedure. (A.47.) Accordingly, St. Croix Sensory believes the Sensory Assessors have the complete right to control the process for

how they make their observations. (A.47.) As long as the Sensory Assessors produce completed questionnaires, St. Croix Sensory does not care how they achieve the results.

(A.47.)

#### **VIII. ST. CROIX SENSORY DOES NOT DICTATE THE ASSESSORS' SCHEDULES.**

Sensory Assessors bid for St. Croix Sensory testing sessions in which they wish to participate. To bid or register, Sensory Assessors go to the registration portion of the St. Croix Sensory website. (A.77.) If a Sensory Assessor is new to St. Croix Sensory, they can also register for access to the registration webpages directly on the website. (A.77.) Once an Assessor logs into the registration website, the Assessor views all of the testing sessions available at that time. (A.77.) On the registration website, the Assessors can see how much money each testing session pays and where each testing session will take place. (A.78.) Sensory Assessors can also view notes about particular sessions, such as the estimated length of time for a testing session and whether a session will require sniffing of unusual or offensive odors. (A.78, 247-89.) Sensory Assessors select on the website the sessions (if any) in which they would like to participate. (A.79.) Each of the testing sessions has a closing date by which any Assessors interested in the testing session must register for it. (A.79.)

On the date that registration for a testing session is scheduled to close, the St. Croix Sensory employee responsible for administration of the testing sessions logs on to the St. Croix Sensory website and closes the session. (A.79, 247-89.) The administrator then views how many Assessors registered for the session. (A.79.) If more Assessors

registered than St. Croix Sensory needs for the session, then St. Croix Sensory engages in a neutral, computerized selection process to choose which Assessors will participate in the testing sessions. (A.79-80.) The computer selects the Assessors who have participated in the least number of sessions to participate in the upcoming testing session. (A.79-80.) By implementing that method, St. Croix Sensory maintains an objective and neutral selection process. (A.80.) Prior performance has nothing to do with selection for future testing sessions. (A.80.)

Some of the Sensory Assessors register for multiple testing sessions with St. Croix Sensory over time and some Assessors register for one testing session and never return. (A.47.) Some Assessors participate in testing sessions only on a seasonal basis and others participate in testing sessions year round. (A.47.) St. Croix Sensory does not discipline Assessors for not bidding on particular testing sessions. (A.47-48.) St. Croix Sensory does not have the authority to discipline an Assessor for not registering for a testing session. (A.48.) Sensory Assessors do not have a minimum number of testing sessions in which they are required to participate. (A.48, 121) Assessors do not have to request time off for vacation. (A.49.) They are not even required to inform St. Croix Sensory that they are going on vacation and will not participate in future testing sessions. (A.49.) St. Croix Sensory has never disciplined a Sensory Assessor for failing to inform the Company of a vacation and does not believe it has the authority to do so. (A.49.) The Sensory Assessors do not have any set hours of work. (A.50, 121.) The State does not dispute that the Assessors set their own schedules. (A.121.)

St. Croix Sensory also does have the authority to require a Sensory Assessor to smell a particular type of odor. (A.50.) St. Croix Sensory informs the Assessors on its website the type of odors that will be the subject of a particular testing session so Assessors can make an informed choice regarding participation in testing sessions. (A.50.) St. Croix Sensory does not discipline Assessors for choosing not to participate in any testing sessions. (A.51.)

**IX. ST. CROIX SENSORY'S LIABILITY FOR CANCELLATION OF TESTING SESSIONS OR REMOVAL OF ASSESSORS FROM TESTING SESSIONS.**

St. Croix Sensory cannot terminate an assessor without incurring liability. (A.52.) If St. Croix Sensory has to cancel a testing session for any reason after Sensory Assessors have registered for the session, St. Croix Sensory is required to pay the Assessors for the testing session. (A.52.) Similarly, if St. Croix Sensory were to dismiss a Sensory Assessor from a testing session for some reason, St. Croix Sensory must pay the Sensory Assessor the full amount of the stipend for that testing session. (A.64.) If a Sensory Assessor becomes ill during a testing session (which can occur due to the odors involved) and leaves the session, St. Croix Sensory must still pay the Assessor the **full** stipend for the session. (A.65.)

**X. ST. CROIX SENSORY'S METHOD OF PAYMENT FOR SENSORY ASSESSORS.**

St. Croix Sensory pays the Sensory Assessors a set stipend for each testing session, no matter how long the testing session lasts. (A.52, 54.) The Assessors are not paid by the hour, nor do they receive a salary. (A.52-55.) Thus, if a testing session lasts

longer than anticipated, the Assessors suffer a loss based on the fact that they do not receive any additional compensation from St. Croix Sensory, but are required to spend more time on the testing session than they had anticipated. (A.64.) Sensory Assessors know how much a particular testing session will pay, so they have the ability to select only testing sessions that compensate at the amount they wish to make. (A.56.) In general, the stipends for the testing sessions range from \$25 to \$100. (A.56.) St. Croix Sensory does not withhold any taxes from the payments made to the Sensory Assessors. (A.143.) St. Croix Sensory issues Form 1099's to Sensory Assessors at the end of the calendar year. (A.63.)

**XI. THE TOOL FOR PROVIDING SENSORY ASSESSMENT SERVICES: THE NOSE.**

Sensory Assessors provide the most important tool for the testing sessions: their nose. (A.57.) Industry Standards require that the Assessors maintain their sense of smell by staying healthy, avoiding fragrances and perfumes and not eating spicy foods or consuming alcohol prior to testing sessions. (A.57.) Prior to every testing session, Industry Standards require that St. Croix Sensory test every Sensory Assessor to ensure that the Sensory Assessor's sense of smell meets the Industry Standard minimum sensitivity for inclusion in a testing session. (A.58.)

**XII. SENSORY ASSESSORS WORKING FOR ST. CROIX SENSORY ARE FREE TO PROVIDE THEIR SERVICES TO OTHER LABORATORIES.**

St. Croix Sensory does not prohibit Sensory Assessors from providing their services to other sensory testing companies. (A.59, 63.) There are a few other Sensory odor laboratories in the Twin Cities metropolitan area, including, the University of

Minnesota odor laboratory and the Metropolitan Council laboratory. (A.59.) Some of the Sensory Assessors providing services to St. Croix Sensory also provide their services to these other laboratories. (See A.107.) St. Croix Sensory is aware of this practice and has not asked the Assessors to stop providing services to its competitors. (See A.107.) St. Croix Sensory does not have any preference or opinion regarding the Sensory Assessors' work for other companies. (A.63.)

### **XIII. SENSORY LABORATORIES AND THE SENSORY ASSESSORS CONSIDER THE ASSESSORS TO BE INDEPENDENT CONTRACTORS.**

Other sensory laboratories also consider Sensory Assessors to be independent contractors. The University of Minnesota treats the Sensory Assessors providing services to it as independent contractors.<sup>5</sup> (A.60, 102-03, 150-51.) Moreover, the Sensory Assessors, themselves, believe that they are independent contractors. (A.110.) No Sensory Assessor providing services to St. Croix Sensory has ever applied for unemployment insurance. (A.55.) The Assessors like having control and not having responsibility for abiding by St. Croix Sensory schedules. (A.65.) Some Assessors have said that they would not continue providing Assessor services if Sensory Assessors are determined to be employees, due to the loss of control they would suffer. (A.66.)

### **XIV. TESTIMONY OF A REPRESENTATIVE SENSORY ASSESSOR.**

At the appeal hearing, St. Croix Sensory called a typical Sensory Assessor as a witness. Jim Wade has been a Sensory Assessor since 2001. (A.107.) Mr. Wade has performed Sensory Assessor services for Metropolitan Council in addition to St. Croix

---

<sup>5</sup> St. Croix Sensory does not have knowledge of how the Metropolitan Council classifies the Sensory Assessors providing services to it.

Sensory. (A.107.) Mr. Wade performed Assessor services for both Metropolitan Council and St. Croix Sensory at the same time. (A.107.) St. Croix Sensory was aware that Mr. Wade was performing Assessor services for both organizations at the time and did not ask Mr. Wade to stop working with Metropolitan Council. (A.107.) Mr. Wade also believes that he could provide Assessor Services to other laboratories if he so desired. (A.116.) Mr. Wade signed the Independent Contractor/Assessor Informed Consent and Agreement. (A.108.) Mr. Wade does not believe he is an employee of St. Croix Sensory; he believes that he is an Independent Contractor providing services to St. Croix Sensory. (A.110.) He believes he is an Independent Contractor for many reasons:

Because I'm on my own. I use my own judgment. I use my own tool here, my nose and my head, to decide what, you know, what I'm smelling and what's going on. I don't really get supervised. I work when I want and when I don't want, I don't have to.

(A.110.) Mr. Wade does not believe that St. Croix Sensory directs the manner in which he performs his assessments. (A.110.) They do not tell Mr. Wade how many sniffs to take. (A.110.) St. Croix Sensory did not explain to Mr. Wade a standard for musty or sweet smells. (A.110.) They have never told Mr. Wade that his answers on a questionnaire were incorrect. (A.111.) St. Croix Sensory has never given Mr. Wade a performance review nor has it advised Mr. Wade regarding how to improve his performance. (A.111.) Mr. Wade believes that he spends ten to fifteen minutes per hour actually sniffing test samples during a testing session. (A.111.)

Mr. Wade does not believe that St. Croix Sensory supervises him. (A.113.) He does not believe that St. Croix Sensory controls the means and manner of his

performance. (A.113.) Mr. Wade is not required to bid on a certain minimum number of testing sessions. (A.113.) Mr. Wade is not required to bid on testing sessions that require him to smell odors he finds offensive. (A.113.) St. Croix Sensory provides Mr. Wade with enough information through the bidding process to determine the testing sessions in which he would like to participate. (A.113.) Mr. Wade does not ask St. Croix Sensory for time off to take vacations. (A.113.) In 2008, Mr. Wade was on vacation for approximately fourteen weeks. (A.113.) St. Croix Sensory did not discipline Mr. Wade for taking his extended travel. (A.113.) Mr. Wade confirmed that he is paid by the test session, not hourly. (A.115.) The length of testing sessions varies. (A.115.) Mr. Wade does not perform Assessor services as a primary source of income. He uses testing sessions as an extra source of spending money. (A.116.)

### **SUMMARY OF ARGUMENT**

The Sensory Assessors at issue in this case are independent contractors under the criterion enumerated in Minnesota unemployment insurance law. Minnesota Rule 3315.0555, Subpart 1 sets forth five factors courts shall consider in determining whether a worker is an independent contractor or an employee. The Sensory Assessors meet all five factors for being classified as independent contractors: 1) the Sensory Assessors have the right to control the means and manner of their performance; 2) St. Croix Sensory cannot terminate a Sensory Assessor without incurring liability to the Sensory Assessor for the discharge; 3) St. Croix Sensory pays the Sensory Assessors by the job; 4) the Sensory Assessors provide the most important tool for testing – their nose; and 5) the Sensory Assessors choose where they perform their work, which could be on or off of St.

Croix Sensory's premises. Because the totality of the circumstances demonstrates that the Sensory Assessors are independent contractors by a preponderance of the evidence, this Court should reverse the Department's determination and rule that the Sensory Assessors are independent contractors.

### **LEGAL ARGUMENT**

#### **I. THE STANDARD AND SCOPE OF APPELLATE REVIEW.**

In an unemployment insurance case, whether an individual is an independent contractor or an employee is a mixed question of fact and law and involves a two-step analysis. Neve v. Austin Daily Herald, 552 N.W.2d 45, 47 (Minn. Ct. App. 1996); Golant v. MCS Language Connection, No. C0-96-1857, 1997 Minn. App. LEXIS 606, at \*2 (Minn. Ct. App. May 21, 1997). First, if the facts are disputed, the Court determines whether there is evidence reasonably tending to support the Department's findings of fact. Neve, 552 N.W.2d at 47. In the second step of the analysis, the Court applies the law to the facts to determine whether an employment relationship exists. Id. Where the facts are undisputed, the Court moves directly to the second step, applying the law to the facts. Id. The existence of an employment relationship (or lack thereof) is a legal question that the Court reviews *de novo*. Golant, 1997 Minn. App. LEXIS 606, at \*2. The facts are undisputed in this case and, therefore, the Court should move directly to the second step of the analysis and conduct a *de novo* review of whether the Sensory Assessors at issue in this case are independent contractors or employees under Minnesota law. Because the facts demonstrate that the Sensory Assessors are independent contractors, the Court should reverse the Department's determination.

**II. THE SENSORY ASSESSORS PROVIDING SERVICES TO ST. CROIX SENSORY ARE INDEPENDENT CONTRACTORS UNDER MINNESOTA'S FIVE FACTOR TEST.**

The Sensory Assessors at issue are independent contractors pursuant to Minnesota's five factor test and, therefore, St. Croix Sensory was not required to provide unemployment insurance for them. Companies that employ individuals in the State of Minnesota must pay unemployment insurance premiums on the wages paid to each employee in covered employment each year. Minn. Stat. § 268.051, subd. 1. Covered "employment" for determining whether a company owes unemployment insurance premiums paid to an individual is defined in relevant part as:

[S]ervice performed by:

(1) an individual who is considered an employee under the common law of employer-employee and not considered an independent contractor;

Minn. Stat. § 268.035, Subd. 15.

Minnesota Rule 3315.0555 defines the factors Minnesota courts analyze when determining whether an individual is an employee or an independent contractor under Minnesota's unemployment insurance law. The Rule states in relevant part:

When determining whether an individual is an employee or an independent contractor, five essential factors must be considered and weighed within a particular set of circumstances. Of the five essential factors to be considered, the two most important are those.

A. that indicate the right or the lack of the right to control the means and manner of performance; and

B. to discharge the worker without incurring liability. Other essential factors to be considered and weighed within the overall relationship are the mode of payment; furnishing of materials and tools; and control over the premises where the services are performed. Other factors, including some not specifically identified in this part, may be considered if a determination

is inconclusive when applying the essential factors, and the degree of their importance may vary depending upon the occupation or work situation being considered and why the factor is present in the particular situation.

Minn. R. 3315.0555.

The right to control the means and manner of performance generally carries the greatest weight in a determination of the worker's status. Golant, 1997 Minn. App. LEXIS 606, \*4 (citing Boily v. Commissioner of Econ. Sec., 544 N.W.2d 295, 296 (Minn. 1996)). Courts evaluate whether a worker is an independent contractor or an employee by a preponderance of the evidence. Minn. Stat. § 268.031. Because the Sensory Assessors at issue are independent contractors under the factors enumerated in Minnesota Rule 3315.0555, the Court should reverse the Department's determination.

**A. St. Croix Sensory Lacks The Right To Control The Means And Manner Of Performance, Indicating That The Sensory Assessors Are Independent Contractors.**

The first factor is the right to control the means and manner of performance. St. Croix Sensory lacks any right to control the means and manner of the Sensory Assessors' performance, which dictates that the Sensory Assessors are independent contractors. Minnesota Rule 3315.0555, Subpart 3 provides fourteen criteria Minnesota courts must consider to determine whether a company controls the means and manner of a worker's performance. Minn. R. 3315.0555, Subp. 3. "The total circumstances must be considered to determine if control is present." Minn. R. 3315.0555, Subp. 3. "The determinative right of control is not merely over *what* is to be done, but primarily over *how* it is to be done." Neve, 552 N.W.2d at 48 (quoting Frankle v. Twedt, 234 Minn. 42,

47, 47 N.W.2d 482, 487 (1951)) (emphasis in original); Golant, 1997 Minn. App. LEXIS 606, at \*\*4-5. According to the Minnesota Supreme Court:

The distinction between an employee and an independent contractor may be said to consist largely in the difference between one who undertakes to achieve a given result under an arrangement with another who has authoritative control over the manner and means in which and by which the result shall be accomplished and one who agrees to achieve a given result but is not subject to the orders of another as to the method or means to be used.

Nolan's Repair & Excavating v. Tesch, No. CX-87-2121, 1988 Minn. App. LEXIS 200 (Minn. Ct. App. Mar. 29, 1988) (quoting Geerdes v. J.R. Watkins Co., 103 N.W.2d 641, 646 (1960)). Because the totality of the circumstances demonstrates that St. Croix Sensory does not have the right to control *how* the Sensory Assessors perform, the Court should reverse the Department's determination and find that the Assessors are independent contractors.

1. **St. Croix Sensory And The Assessors Are Parties To A Contract Providing That The Sensory Assessors Are Independent Contractors And Control The Means And Manner Of Their Performance.**

St. Croix Sensory and the Sensory Assessors are parties to a contract that specifically provides that the Sensory Assessors are independent contractors who retain the right to control the means and manner of their performance. While the existence of a contract defining a worker as an independent contractor is not always determinative of the status of the relationship, when the parties' subsequent actions conform with the intent of the agreement, Minnesota courts have found that the worker is an independent contractor. See Pinewood General Corp. v. Roth, No. C0-87-1625, 1988 Minn. App.

LEXIS 114, \*\*3-4 (Minn. Ct. App. Feb. 17, 1988). A company's reservation of the right to require the worker to follow certain instructions in the Independent Contractor/Assessor Informed Consent and Agreement does not negate the worker's overall right to control the means and manner of performance. See Neve, 552 N.W.2d at 48 (holding worker controlled the means and manner of her performance despite the independent contractor agreement providing that the Herald reserved the right to determine the order of newspaper delivery).

"The primary goal of contract interpretation is to ascertain and enforce the intent of the parties." Valspar Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359, 365 (Minn. 2009) (citing Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., 666 N.W.2d 320, 323 (Minn. 2003)). A Minnesota court "must" interpret a contract in a way that "gives all of its provisions meaning." Current Tech. Concepts, Inc. v. Irie Enters., Inc., 530 N.W.2d 539, 543 (Minn. 1995). "[I]n interpreting a contract, it is a cardinal rule of construction that 'the parties intended the language used by them to have some effect,' and a reviewing court must, therefore, avoid any interpretation that would 'render a provision meaningless.'" Seed v. Astra Genstar P'Ship, No. C2-02-1143, 2003 Minn. App. LEXIS 68, at \*11 (Minn. Ct. App. Jan. 28, 2003) (quoting Indep. Sch. Dist. No. 877 v. Loberg Plumbing & Heating, 123 N.W.2d 793, 799-800 (Minn. 1963) (citation omitted)).

In this case, the intent of the parties in entering into the Independent Contractor/Assessor Informed Consent and Agreement is explicitly stated in the Agreement: "no employer-employee relationship is intended or exists under this

agreement or otherwise between assessor or St. Croix Sensory.” (A.143.) With regard to the right to control the means and manner of performance, the Agreement states:

*Assessor retains the right and responsibility to control or direct the manner in which the sensory evaluation services are to be performed consistent with standard methods and procedures of test sessions. St. Croix Sensory retains the right to inspect the assessor’s work, to stop work, to prescribe alterations, and generally to ensure its conformity to the needs of St. Croix Sensory or St. Croix Sensory’s client.*

(A.143) (emphasis added).

In interpreting the above quoted language, the Unemployment Law Judge focused on the second sentence and found that this sentence meant that St. Croix Sensory had the right to control the means and manner of the Assessors’ performance. The Judge’s interpretation, however, renders the preceding, italicized sentence superfluous. Accordingly, Minnesota law prohibits such an interpretation of the contract. See Current Tech. Concepts, Inc., 530 N.W.2d at 543; Indep. Sch. Dist. No. 877, 123 N.W.2d at 799-800; Seed, 2003 Minn. App. LEXIS 68, at \*11 (rejecting the district court’s interpretation of the contract because it would render language in the contract superfluous). Instead, the above quoted language must be read so that each sentence has meaning. Reading the sentences together, the first sentence provides that the Sensory Assessors have the right to control the means and manner of their performance within the Industry Standards. The second sentence then provides that St. Croix Sensory retains the right to inspect the Assessors’ work to determine whether the Assessors are following the Industry Standards mentioned in the first sentence and, if not, to stop work and make changes to ensure

conformity with the Industry Standards.<sup>6</sup> The co-owner of St. Croix Sensory testified that St. Croix Sensory intended Section 5 of the Independent Contractor/Assessor Informed Consent and Agreement to be read in this manner. (A.40-41.) The State did not dispute or rebut this testimony. (See A.68.)

Moreover, the parties' subsequent conduct demonstrates that the Assessors and St. Croix Sensory interpreted the Independent Contractor/Assessor Informed Consent and Agreement as providing the Assessors with the right to control the means and manner of their own performance, with St. Croix Sensory merely retaining the right to enforce Industry Standards. The Independent Contractor/Assessor Informed Consent and Agreement in this case is not unlike a contract a homeowner may enter into with a building contractor remodeling a home. While the building contractor controls the means and manner of the contractor's performance, the home owner retains the right to inspect the work and stop work if the contractor fails to comply with building codes or fails to follow the blueprints. Such inspection does not make the building contractor an employee of the home owner. The contractor still controls the method for installing the drywall and welding the piping. Because the plain language of the Independent Contractor/Assessor Informed Consent and Agreement provides the Sensory Assessors

---

<sup>6</sup> For example, if a Sensory Assessor began eating jalapeños during a testing session, the second sentence of the above quote allows St. Croix Sensory to request that the Assessor stop eating the jalapeños because Industry Standards require that testing subjects not eat spicy foods immediately before or during a testing session because those foods alter an individual's sense of smell. (A.57.) The second sentence does not, however, provide St. Croix Sensory the right to tell an Assessor to take short sniffs, long sniffs, one sniff, many sniffs or the answers to put on the questionnaires.

with the right to control the means and manner of their performance, the Court should find that the Assessors do, in fact, have the right to control the means and manner of their performance. Accordingly, the Assessors are independent contractors.

2. **St. Croix Sensory Does Not Require Sensory Assessors To Comply With Detailed Instructions, Further Indicating It Lacks Control Over The Means And Manner Of Performance.**

St. Croix Sensory does not require the Sensory Assessors to comply with detailed instructions, which also indicates that St. Croix Sensory lacks the right to control the means and manner of the Assessors' performance. Minnesota Rule 3315.0555, Subpart 3(B) states in relevant part:

*Control is indicated when an individual is required to comply with detailed instructions about when, where, and how to work including the order or sequence in which the service is to be performed. Mere suggestions as to detail or necessary and usual cooperation where the work furnished is part of a larger undertaking, does not normally evince control. Some individuals may work without receiving instructions because they are highly proficient in their line of work; nevertheless, the control factor is present if the employer has the right to instruct or direct the methods for doing the work and the results achieved. Instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished. However, instructions required by state or federal law or regulation or general instructions passed on by the employer from a client or customer, generally does not evince control.*

Minn. R. 3315.0555, Subp. 3(B) (emphasis added). When the worker exercises his or her discretion and judgment over how to accomplish each assignment, that shows that the company does not have the right to control the means and manner of performance. See Golant, 1997 Minn. App. LEXIS 606, at \*5. The lack of any performance review by the company further displays that the company lacks control over the means and manner of the worker's performance. See Weir v. Ye Olde Mug 'n Brush, No. C5-94-2286, 1995

Minn. App. LEXIS 796, at \*4 (Minn. Ct. App. June 13, 1995). Moreover, a lack of direct supervision of the individual's work demonstrates that the company does not control the means and manner of the worker's performance. See Golant, 1997 Minn. App. LEXIS 606, at \*5.

In this case, the undisputed testimony and evidence shows that St. Croix Sensory does not require the Sensory Assessors to follow any detailed instructions whatsoever. Each assessor exercises his or her own judgment regarding how to sniff testing samples, when to sniff the testing samples, how to answer the questionnaires, and how to use their free time during testing sessions. The only instructions St. Croix Sensory provides to the Assessors are how to fill in the questionnaires so that the computer will read them (i.e., "this form requires a line" and "this form requires a box to be filled in"). Such instructions are not the "detailed instructions" contemplated by Subpart 3(B), but rather an explanation of what the parties have contracted for. When the instructions "relate to the definition of [the worker's] task and not to the means of accomplishing it, they are not relevant to the employment-status inquiry and do not support the ... decision [that the worker is an employee]." Neve, 552 N.W.2d at 48; see also Southwood Motors v. Department of Employment and Economic Development, A05-2182, 2006 Minn. App. Unpub. LEXIS 1029, at \*\*4-5 (Minn. Ct. App. Sept. 12, 2006) (same).

Moreover, the complete lack of any performance reviews by St. Croix Sensory demonstrates that St. Croix Sensory has no right to control the means and manner of the Sensory Assessors' performance. In fact, the video of an actual testing session shows that St. Croix Sensory does not even supervise the Sensory Assessors during the testing

sessions. The lack of detailed instructions indicates that St. Croix Sensory lacks the right to control the means and manner of the Sensory Assessors' performance.

3. **St. Croix Sensory Does Not Require Sensory Assessors To Provide Any Reports Regarding The Method In Which The Services Are Performed, Further Indicating It Lacks Control Over The Means And Manner Of Performance.**

St. Croix Sensory also does not require the Sensory Assessors to complete or provide any reports regarding the method in which they perform their services, again indicating that St. Croix Sensory lacks the right to control the means and manner of performance. Minnesota Rules 3315.0555, Subpart 3(C) states in relevant part:

Control is indicated if regular oral or written reports relating to the method in which the services are performed must be submitted to the employer. Periodic reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion of a job, or the reports are needed to determine compliance with the terms of a contract. Completion of receipts, invoices, and other forms customarily used in the particular type of business activity or required by law does not constitute written reports.

Minn. R. 3315.0555, Subp. 3(C). In this case it is undisputed that St. Croix Sensory does not require the Sensory Assessors to provide any oral or written reports relating to the method in which they perform their services. Accordingly, this factor indicates that St. Croix Sensory lacks the right to control the means and manner of the Sensory Assessors' performance.

4. **St. Croix Sensory Cannot Terminate A Sensory Assessor Without Incurring Liability To The Assessor, Further Indicating It Lacks Control Over The Means And Manner Of Performance.**

St. Croix Sensory cannot terminate a Sensory Assessor without incurring liability to the Assessor, indicating that St. Croix Sensory lacks control over the means and manner of the Assessors' performance. Minnesota Rule 3315.0555, Subpart 3(G) states in relevant part:

The right to discharge is a very important factor indicating that the right to control exists particularly if the individual may be terminated with little notice, without cause, or for failure to follow specified rules or methods. An independent worker generally cannot be terminated without the firm being liable for damages if he or she is producing according to his or her contract specifications. Contracts which provide for termination upon notice or for specified acts of nonperformance or default are not solely determinative of the right to control. That a right to discharge is restricted because of a contract with a labor union or with other entities does not mean there is no control.

Minn. R. 3315.0555, Subp. 3(G). In this case, St. Croix Sensory must pay an Assessor the full amount of the stipend for a testing session regardless of whether St. Croix Sensory discharges the Assessor from the session or otherwise cancels the session after the Assessor has registered for it. Accordingly, St. Croix Sensory incurs liability if it discharges an Assessor. This factor demonstrates that St. Croix Sensory lacks the right to control the means and manner of performance.

5. **St. Croix Sensory Does Not Set The Hours Of Work For Sensory Assessors, Further Indicating It Lacks Control Over The Means And Manner Of Performance.**

St. Croix Sensory does not set the hours of work for the Sensory Assessors indicating that St. Croix Sensory lacks the right to control the means and manner of the Assessors' performance. Minnesota Rule 3315.0555, Subpart 3(H) states in relevant part:

The establishment of set hours of work by the employer indicates control. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

Minn. R. 3315.0555, Subp. 3(H). When workers select their work schedules themselves, simply recording the schedules and resolving scheduling conflicts does not show that a company has control over the means and manner of the workers' performance. Such action by a company does not negate the workers' control over their schedules – the number of hours they work, the days they work, the times they work – and, thus, is evidence of the workers' right to control the means and manner of their performance. Weir, 1995 Minn. App. LEXIS 796, at \*4; Midway Driving School v. Commissioner of Jobs and Training, No. CX-90-1061, 1990 Minn. App. LEXIS 958, \*\*4-5 (Minn. Ct. App. Oct. 2, 1990).

In this case, St. Croix Sensory does nothing more than write down the Assessors' schedules and work out scheduling conflicts if too many Assessors register for a testing session. The Assessors decide when they want to work and how many testing sessions they want to work, by using the "bid" process. If the Assessors never want to work on Tuesdays, they do not bid on any test sessions on Tuesdays. If an Assessor wants to take a thirteen week vacation, the Assessor simply does not register for any testing sessions

and goes on vacation. The Sensory Assessor does not even inform St. Croix Sensory of the vacation. The fact that St. Croix Sensory cannot require an Assessor to participate in a testing session strongly displays St. Croix Sensory's lack of the right to control the Assessors' performance. The lack of set hours of work for the Sensory Assessors indicates that St. Croix Sensory lacks the right to control the means and manner of the Sensory Assessors' performance.

**6. St. Croix Sensory Does Not Require Training Or Attendance At Meetings, Further Indicating It Lacks Control Over The Means And Manner Of Performance.**

St. Croix Sensory does not require the Sensory Assessors to undergo training or attendance at employee meetings indicating that St. Croix Sensory lacks the right to control the means and manner of the Assessors' performance. Minnesota Rule 3315.0555, Subpart 3(I) states in relevant part:

Training of an individual by an experienced employee working with the individual, by required attendance at meetings, and by other methods, is a factor of control especially if the training is given periodically or at frequent intervals.

Minn. R. 3315.0555, Subp. 3(I). In this case, St. Croix Sensory does not have any orientation regarding "how to work for St. Croix Sensory." There is no training or retraining in St. Croix Sensory procedures. There are no Company meetings with Sensory Assessors. Accordingly, this factor indicates that St. Croix Sensory lacks the right to control the means and manner of the Sensory Assessors' performance.

7. **Sensory Assessors Do Not Devote Full Time To Assessing For St Croix Sensory Indicating St. Croix Sensory Lacks Control Over The Means And Manner Of Performance.**

The Sensory Assessors at issue in this case do not devote full time to assessing for St. Croix Sensory indicating that St. Croix Sensory lacks the right to control the means and manner of their performance. Minnesota Rule 3315.0555, Subpart 3(J) states in relevant part:

If the worker must devote full time to the activity, control is indicated. Full time does not necessarily mean an eight-hour day or a five- or six-day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. Full-time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels the person to devote all working time to that business, or the person may not be permitted to work for anyone else.

Minn. R. 3315.0555, Subp. 3(J). In this case, the Sensory Assessors providing services to St. Croix Sensory do not devote full time to Assessing. Testing sessions generally only last between one and one half hours and three hours, not full time. More importantly, St. Croix Sensory does not require Assessors to devote full time to assessing for the Company. Assessors are free to bid or not bid on any testing session and are, therefore, free to work or not work as many hours as they choose. Assessors use the St. Croix Sensory testing sessions to make extra spending money, not as a means of full time income. Accordingly, the fact that St. Croix Sensory does not require the Sensory Assessors to devote full time to assessing for the Company indicates that St. Croix Sensory lacks the right to control the means and manner of the Sensory Assessors' performance.

8. **St. Croix Sensory Pays Sensory Assessors On A Job Basis And Does Not Pay Expenses, Further Indicating It Lacks Control Over The Means And Manner Of Performance.**

St. Croix Sensory pays Sensory Assessors on a job basis and does not pay anything beyond that, such as expenses, indicating that St. Croix Sensory lacks the right to control the means and manner of the Assessors' performance. Minnesota Rule 3315.0555, Subpart 3(L) states in relevant part:

Payment by the employer of either the worker's approved business or traveling expenses, or both, is a factor indicating control over the worker. A lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

Minn. R. 3315.0555, Subp. 3(L). In this case, it is undisputed that St. Croix Sensory pays the Assessors by the testing session. The record lacks any evidence that St. Croix Sensory pays any expenses Assessors may incur. Therefore, this factor indicates that St. Croix Sensory lacks the right to control the means and manner of the Assessors' performance.

9. **St. Croix Sensory Is Required To Enforce Industry Standards, Further Indicating It Lacks Control Over The Means And Manner Of Performance.**

The requirement that St. Croix Sensory enforce Industry Standards indicates that St. Croix Sensory lacks the right to control the means and manner of the Sensory Assessors' performance. Minnesota Rule 3315.0555, Subpart 3(M) states in relevant part: "If an employer is required to enforce standards or restrictions imposed by regulatory or licensing agencies, such action does not evince control." Minn. R. 3315.0555, Subp. 3(M). See also, Midway Driving School v. Commissioner of Jobs and

Training, No. CX-90-1061, 1990 Minn. App. LEXIS 958, \*5 (Minn. Ct. App. Oct. 2, 1990).

In this case, St. Croix Sensory is required to enforce Industry Standards that regulate scientific testing conditions. Accordingly, any potential rules for testing sessions are set by the industry standards, not St. Croix Sensory. Such rules do not evince control. As a result, St. Croix Sensory does not have the right to control the means and manner of the Assessors' performance.

**10. The Remaining Factors Are Inconclusive And Do Not Support A Finding That St. Croix Sensory Has Control Over The Means And Manner Of Performance.**

The remaining factors are inconclusive regarding the right to control the means and manner of performance and, therefore, should not be given any weight in the analysis of control. Sensory Assessors do not use assistants, therefore, there are no assistants to hire. See Minn. R. 3315.0555, Subp. 3(A). As discussed in detail below, the furnishing of tools factor is also inconclusive in this case. See Minn. R. 3315.0555, Subp. 3(K).

The factor regarding whether the Assessors conduct work on St. Croix Sensory's premises is similarly inconclusive. See Minn. R. 3315.0555, Subp. 3(D). The Assessors must perform their tests under laboratory conditions to meet the Industry Standards. Thus, this case does not present a situation where "the work could be done elsewhere" such that the location of the work would indicate control. Id. Moreover, the evidence showed that many of the testing sessions occurred at testing laboratories off of St. Croix Sensory's premises, further weakening any claim that the location of the testing sessions

indicates that St. Croix Sensory has control over the means and manner of the Assessors' performance. This factor does not support a finding of control by St. Croix Sensory.

The factor regarding whether the Assessors must personally render services to St. Croix Sensory is also inconclusive. Just as with the drivers in Southwood Motors, because the Sensory Assessors would simply not bid for a testing session in which they did not want to perform, a situation would not occur where they would not personally render the services. Thus, this factor is inapplicable. See Southwood Motors, 2006 Minn. App. Unpub. LEXIS 1029, at \*\*3-4 (“[this] criterion is inapplicable because the drivers are free to turn down any trip they cannot or do not want to make and therefore have no need to hire substitutes...”). Moreover, Sensory Assessors engage in specialized work, as they must have a highly sensitive sense of smell to pass the butanol test and qualify to participate in a sensory test. Accordingly, the fact that the Assessors personally render their services does not support a finding that St. Croix Sensory has control over the means and manner of their performance.

The continuing relationship factor is also inconclusive. See Minn. R. 3315.0555, Subp. 3(F). Some Assessors perform multiple testing sessions for St. Croix Sensory. St. Croix Sensory has no continuing relationship with others. Some Sensory Assessors perform one test and never return to St. Croix Sensory. Accordingly, the fact that some Assessors perform multiple tests for St. Croix Sensory does not support a finding that St. Croix Sensory has control over the means and manner of their performance.

Overall, the weight of the criterion for determining whether St. Croix Sensory has the right to control the means and manner of the Sensory Assessors' performance

indicates that St. Croix Sensory does not have the right to control the means and manner of performance. Therefore, the Court should reverse the Department's determination that the Sensory Assessors are employees.

**B. St. Croix Sensory Cannot Discharge A Sensory Assessor Without Incurring Liability, Indicating That The Sensory Assessors Are Independent Contractors.**

In addition to lacking the right to control the means and manner of performance, St. Croix Sensory cannot discharge a Sensory Assessor without incurring liability, which indicates that the Sensory Assessors are independent contractors. In this case, St. Croix Sensory must pay an Assessor the full amount of the stipend for a testing session regardless of whether St. Croix Sensory discharges the Assessor from the session or otherwise cancels the session after the Assessor has registered for it. The Unemployment Law Judge recognized this fact, but erroneously concluded that it did not indicate that the Sensory Assessors were independent contractors because St. Croix Sensory's liability would be small. (A.294.) The Department cites no legal authority providing that liability must be of a certain size to meet this factor. Accordingly, while the Unemployment Law Judge correctly recognized that the undisputed testimony showed that St. Croix Sensory would incur liability to a discharged Assessor, the Judge's interpretation of this factor was flawed. Because St. Croix Sensory would incur liability if it discharged an Assessor, this factor indicates that the Sensory Assessors are independent contractors. Moreover, because both of the two most important factors in the Rule 3315.0555 analysis – the right of control and liability for discharge – indicate that the Sensory Assessors are

independent contractors, this Court should reverse the Department's determination and find that the Assessors are independent contractors.

**C. The Mode Of Payment Indicates That The Sensory Assessors Are Independent Contractors.**

In addition to the two most important factors indicating that the Sensory Assessors are independent contractors, the mode of payment factor also indicates that the Sensory Assessors are independent contractors. As Minnesota Rule 3315.0555, Subpart 2(B) explains:

*A person working in employment is usually paid by the hour, week, or month. Payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour ...*

Minn. R. 3315.0555, Subp. 2(B) (emphasis added). Moreover, when an individual is responsible for paying his or her state and federal tax obligations, this is indicative of independent contractor status as a matter of law. See Neve, 552 N.W.2d at 48 (evidence that an individual assumed sole responsibility for her tax obligations was one factor supporting conclusion that she was an independent contractor); Golant, 1997 Minn. App. LEXIS 606, at \*6 (same); Weir, 1995 Minn. App. LEXIS 796, at \*5 (same); Midway Driving School, 1990 Minn. App. LEXIS 958, \*5 (citing Hammes v. Suk, 190 N.W.2d 478, 481 (1971) (facts that there were no deductions or withholding from checks for taxes or social security tended to negate an employment relationship)).

In this case, St. Croix Sensory indisputably pays the Sensory Assessors at issue by the job. Assessors are paid a set stipend for each testing session regardless of how long

the testing session lasts. Moreover, Independent Contractor/Assessor Informed Consent and Agreement provides that the Sensory Assessors are required to pay all state and federal tax obligations. St. Croix Sensory does not withhold any taxes from the payments provided to the Assessors. St. Croix Sensory issues a 1099 to Assessors at the end of the calendar year. Thus, the mode of payment strongly indicates that the Sensory Assessors are independent contractors and the Court should reverse the Department's determination.

**D. The Furnishing Of Materials And Tools Indicates That The Sensory Assessors Are Independent Contractors.**

The furnishing of materials and tools factor also indicates that the Sensory Assessors are independent contractors. There are three types of tools used by Sensory Assessors: their nose, the large laboratory equipment inside which the samples are inserted (see A.290), and the questionnaires the Sensory Assessors answer. As the Sensory Assessor who testified at the hearing explained, the most important tool a Sensory Assessor uses is his nose. The Sensory Assessors must invest in maintaining their sense of smell by avoiding perfumes (which includes scented detergents), not eating spicy foods or drinking alcohol prior to a testing session and by staying healthy to avoid allergies and illnesses that impair the sense of smell. Because the Sensory Assessors are responsible for maintaining their nose (just as an independent contractor model is responsible for maintaining his or her body), this factor indicates that the Sensory Assessors are independent contractors.

Moreover, the furnishing of the large olfactory equipment for Assessors to observe certain testing samples does not establish the existence of an employment relationship between the Assessors and St. Croix Sensory when St. Croix Sensory does not have the right to control the means and manner of performance. See Boily v. Commissioner of Economic Security, 544 N.W.2d 295, 297 (Minn. 1996) (discussing with approval the Court of Appeals decision finding the dentists were independent contractors despite the premises owner providing the large dentistry equipment and fixtures); Golant, 1997 Minn. App. LEXIS 606, at \*\*6-7 (citing Wise v. Denesen Insulation Co., 387 N.W.2d 477, 480 (Minn. Ct. App. 1986) (finding provision of materials did not establish employment relationship when company had no right to control salesperson's job performance)).

In addition, the furnishing of forms, such as the questionnaires provided to the Sensory Assessors by St. Croix Sensory, does not negate the independent contractor status. Golant, 1997 Minn. App. LEXIS 606, at \*6 (citing Wise v. Denesen Insulation Co., 387 N.W.2d 477, 480 (Minn. Ct. App. 1986)). Even if the Court were to find that all of the relevant tools and equipment are provided by St. Croix Sensory, because the other factors indicate that the Sensory Assessors are independent contractors, the furnishing of tools by St. Croix Sensory would not support a finding that the Sensory Assessors are employees. See Nolan's Repair & Excavating, 1988 Minn. App. LEXIS 200, at \*4 (finding that the driver was an independent contractor even though the company owned and maintained the truck that he drove). That is not the case, however. Because this

factor weighs in favor of a finding that the Sensory Assessors are independent contractors, the Court should reverse the Department's determination.

**E. The Control Over The Premises Where The Services Are Performed Indicates That The Sensory Assessors Are Independent Contractors.**

The control over the premises where the services are performed also indicates that the Sensory Assessors are independent contractors and further displays that St. Croix Sensory lacks any control over the Sensory Assessors whatsoever. When an individual signs a contract agreeing that he or she is not an employee, but rather an independent contractor, the fact that some work is performed on the company's premises does not negate the independent contractor relationship agreed to in the contract. See Weir, 1995 Minn. App. LEXIS 796, at \*5.

In this case, the Sensory Assessors have signed a contract agreeing that they are independent contractors. Some of the testing sessions for which the Sensory Assessors could register take place at St. Croix Sensory's office and some of the testing sessions take place off-site. (A.252, 271.) St. Croix Sensory has no control over the off-site testing locations. Because St. Croix Sensory has no control over which testing sessions the Sensory Assessors select for participation, St. Croix Sensory also has no control over where the Sensory Assessors work. It is entirely possible that a Sensory Assessor could choose to bid for *only* off-site testing sessions and, therefore, never work on St. Croix Sensory's premises. In the alternative, it is entirely possible that a Sensory Assessor could choose to bid for only testing sessions that occur at St. Croix Sensory's office. As a result, this factor displays that St. Croix Sensory does not require the Sensory Assessors

to perform work on St. Croix Sensory premises, which indicates that the Sensory Assessors are independent contractors.<sup>7</sup> Because all five of the factors enumerated in Minnesota Rule 3315.0555, Subpart 1 indicate that the Sensory Assessors are independent contractors, the Court must reverse the Department's determination and find that the Sensory Assessors are independent contractors.

**III. THE ADDITIONAL FACTORS ENUMERATED IN MINNESOTA RULE 3315.0555, SUBPART 2 ALSO INDICATE THAT THE SENSORY ASSESSORS ARE INDEPENDENT CONTRACTORS.**

In addition to the five factors enumerated in Minnesota Rule 3315.0555, Subpart 1, all indicating independent contractor status, the factors enumerated in Subpart 2 also support a finding that the Sensory Assessors are independent contractors. Subpart 2 contains eight factors for a court to consider, some of which duplicate the factors contained in Subpart 1. See Minn. R. 3315.0555, Subps. 1-2. Because the Subpart 2 factors also indicate that the Sensory Assessors are independent contractors, the Court should reverse the Department's determination.

**A. The Sensory Assessors Make Their Services Available To Other Companies Conducting Sensory Testing, Indicating That They Are Independent Contractors.**

The Sensory Assessors make their services available to other sensory testing companies, which indicates that they are independent contractors. Minn. R. 3315.0555, Subp. 2(A). Only other sensory testing companies have use for Sensory Assessors. This

---

<sup>7</sup> In actuality, the work is performed where the Sensory Assessors choose to perform their work. The fact that St. Croix Sensory cannot control whether the Sensory Assessors work at the St. Croix Sensory office or an off-site testing location also further displays that St. Croix Sensory does not control the means and manner of the Assessor's performance.

is not a circumstance where Sensory Assessors would go door-to-door advertising their services, as a painter or lawn service might. This is not a situation where it would make sound business sense to print marketing materials, such as business cards, because there are only two other known testing laboratories in the Twin Cities Metropolitan area: the University of Minnesota Sensory Laboratory and the Metropolitan Council laboratory. Thus, the types of mass marketing processes other independent contractors might use are inapplicable in this case. Instead, the Court should look to whether the Sensory Assessors have actually contacted the two other testing laboratories to provide their services to determine whether the Sensory Assessors make their services available to the public. As the undisputed evidence shows, there are Sensory Assessors providing services to St. Croix Sensory that also provide services to the other laboratories in the area. Thus, the Assessors make their services available to the public. Therefore, this factor indicates that the Sensory Assessors are independent contractors and the Court should reverse the Department's determination.

**B. The Sensory Assessors Are In A Position To Suffer A Loss Or Gain A Profit In Their Work For St. Croix Sensory, Indicating That They Are Independent Contractors.**

Similarly, the Sensory Assessors are in a position to suffer a loss or gain a profit through their work at St. Croix Sensory and, therefore, this factor indicates that the Assessors are independent contractors. Minn. R. 3315.0555, Subp. 2(C). St. Croix Sensory pays the Assessors a set stipend for each testing session regardless of the amount of time the testing session takes to complete. St. Croix Sensory also provides the Assessors with an estimate for how long a session will last. If a testing session lasts

longer than the Assessor anticipated, then the Assessor earns less money per hour for the testing session. If a testing session takes less time than anticipated, the Assessor earns more money per hour than anticipated. Because the Assessor is paid the same amount no matter how long they work, the Assessors have an incentive to work to complete the testing session in the least amount of time possible. This incentive to complete the work quickly is exactly the type of incentive indicative of an independent contractor. Employees generally have a disincentive or no incentive to work quickly because they are paid by the hour or have set hours of work. Accordingly, this factor indicates that the Sensory Assessors are independent contractors and the Court should reverse the Department's determination.

**C. Some Of The Sensory Assessors Work For A Number Of Laboratories At The Same Time, Indicating That They Are Independent Contractors.**

Some of the Sensory Assessors work for a number of Sensory Laboratories at the same time, indicating that they are independent contractors. Minn. R. 3315.0555, Subp. 2(F). The issue is whether workers are *free* to perform services for others, not whether they actually do perform services for others. Wise v. Denesen Insulation Co., 387 N.W.2d 477, 481 (Minn. App. 1986) (“the issue is not whether [the worker] chose to work for other employers, but whether [the company] had the right to restrict his employment.”)); see also Golant, 1997 Minn. App. LEXIS 606, at \*5; Weir, 1995 Minn. App. LEXIS 796, at \*5 (same). In this case, it is undisputed that the Sensory Assessors are free to provide services to any of St. Croix Sensory's competitors. In fact, many of the Assessors have and do perform services for St. Croix Sensory's competitors while

also providing services to St. Croix Sensory. Accordingly, this factor indicates that the Sensory Assessors are independent contractors and the Court should reverse the Department's determination.

**D. The Remaining Factors Do Not Support The Determination That The Sensory Assessors Are Employees.**

The remaining Rule 3315.0555, Subpart 2 factors are inconclusive or inapplicable in this case and do not support the Department's determination that the Assessors are employees. The Sensory Assessors agree to complete a specific job, which indicates that they are independent contractors, even if they would not incur liability for leaving a testing session if they became ill during the session. See Minn. R. 3315.0555, Subp. 2(D). However, because the testing materials could be harmful to individuals who have a medical reaction to them, for human subjects safety reasons, St. Croix Sensory must allow the Assessors to leave if they become ill without creating an incentive for the Assessors to hide potentially harmful medical conditions to get paid. Accordingly, this factor is inconclusive.

There is no evidence in the record regarding who is responsible for the negligence, personal behavior, and actions of the Sensory Assessors. Accordingly, this factor is inconclusive and should not weigh in the Court's analysis. See Minn. R. 3315.0555, Subp. 2(G).

While it is true that the services the Sensory Assessors perform are part of St. Croix Sensory's business or trade, Minnesota Rule 3315.0555 specifically states that, "This consideration, as with all other considerations, is not a sole determinative factor."

Minn. R. 3315.0555, Subp. 2(H). Moreover, sensory testing panels are not the only services St. Croix Sensory provides. As the testimony showed, St. Croix Sensory assists organizations in establishing testing laboratories, audits sensory testing laboratories, provides training services to government agencies and other companies in the industry, and develops and sells sensory equipment. Accordingly, this factor, alone, is not determinative of independent contractor or employee status. Because the overwhelming majority of the Subpart 2 factors indicate that the Sensory Assessors are independent contractors, the Court should reverse the Department's determination and hold that the Sensory Assessors are independent contractors.

**IV. FINDING THE SENSORY ASSESSORS TO BE EMPLOYEES WILL DRASTICALLY CHANGE THE FACE OF HUMAN SUBJECTS TESTING IN MINNESOTA.**

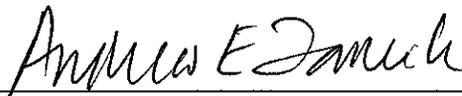
Finally, finding that the Sensory Assessors at issue are employees will drastically change how all human subjects testing is conducted in Minnesota and will likely hinder much scientific research. The University of Minnesota, for example, classifies Human Subjects as independent contractors. (See Employer's Exh. 1, A.24-25, 60, 102-03, 150-51.) If the Sensory Assessors at issue in this case are employees despite the limited instructions, time spent, and oversight they are provided by St. Croix Sensory, the Court can imagine the ramifications for medical research in Minnesota. Consider a clinical test for an experimental drug run through the University of Minnesota. The Human Subject is offered \$100 to participate in a 30 day study. The University laboratory provides the Human Subject with very specific instructions about what to eat and not eat, the medications they can take, etc. The Human Subject is required to keep a detailed diary so

the laboratory can determine the validity of their results. According to the Department's ruling in this case, the Human Subject would be an employee, and the University laboratory would be required to pay unemployment insurance premiums on this test subject. Considering the number of Human Subjects tests done at the University of Minnesota and other medical institutions in the State, upholding the Department's ruling in the case could serious harm the University's and others' ability to maintain their status as top research institutions. The Court should uphold the status quo in this State and find that Human Subjects, such at the Sensory Assessors at issue in this case are independent contractors.

### CONCLUSION

For the reasons set forth above, Relator St. Croix Sensory, Inc. respectfully requests that the Court reverse the Department's determination that the Sensory Assessors are employees under the Minnesota unemployment statute.

Date: December 7, 2009



Andrew E. Tanick (#178573)

Jody A. Ward-Rannow (#387098)

**FORD & HARRISON LLP**

225 South Sixth Street, Suite 3150

Minneapolis, Minnesota 55402

Telephone: 612.486.1700

Facsimile: 612.486.1701

**ATTORNEYS FOR RELATOR ST.  
CROIX SENSORY, INC.**

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

---

St. Croix Sensory Inc.,

Case No. A09-1627

Relator,

v.

**CERTIFICATE OF WORD COUNT**

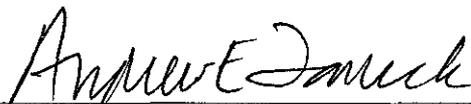
Department of Employment and Economic  
Development,

Respondent.

---

I, Andrew E. Tanick, hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. I certify that the brief contains 12,459 words. I further certify that, in preparation of this brief, I used Microsoft Word 2003, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the calculating the word count.

Date: December 7, 2009



---

Andrew E. Tanick (MN #178573)  
Jody A. Ward-Rannow (MN #387098)  
**FORD & HARRISON LLP**  
225 South Sixth Street, Suite 3150  
Minneapolis, Minnesota 55402  
Telephone: 612.486.1700  
Facsimile: 612.486.1701

**ATTORNEYS FOR RELATOR**