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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 REPLY BRIEF

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Rather than further its position, Respondent Department of Employment and Economic Development's brief in this appeal demonstrates that this Court must reverse the Department's erroneous determination that Sensory Assessors who provided services for St. Croix Sensory, Inc. ("St. Croix Sensory") are employees under Minnesota law. The Department does not dispute the underlying facts (although it does mischaracterize some of them, as will be discussed). Nor does the Department not dispute St. Croix Sensory's legal analysis of many of the relevant factors. The Department does not even attempt to distinguish or explain the many instructive cases cited by St. Croix Sensory, instead urging this Court to ignore its own prior decisions. The facts and the law can only lead an impartial tribunal to one conclusion: the 37 Sensory Assessors who performed services for St. Croix Sensory in 2006 were independent contractors.

Nowhere is that conclusion more evident than upon a viewing of Employer's Exhibit DVD (A.290), depicting representative St. Croix Sensory test sessions. The video constitutes living proof that St. Croix Sensory complies with the written Independent Contractor/Assessor Informed Consent and Agreement it has with each Sensory Assessor, and that St. Croix Sensory recognizes the Sensory Assessors' right to control the means and manner of their own performance. The Assessors do as they please during a test session. No one supervises them. Each Assessor determines and utilizes his or her own unique method and practice for sniffing the subject test samples. For the vast majority of the time during a session, the Assessors are reading, chatting, playing cards or the like – and because they are not employees "on the clock," St. Croix Sensory does not care.

A proper review of the record and a sound analysis of the Rule 3315.0555 factors leads to the clear conclusion that the Sensory Assessors are independent contractors. Accordingly, St. Croix Sensory respectfully requests that the Court reverse the Department's determination.

I. THE DEPARTMENT'S MISSTATEMENTS OF FACT.

While the facts in this case are undisputed, in that the Department presented no contrary testimony or other evidence on the record, the Department does misstate certain parts of that undisputed record in its Statement of Facts.

First, the Department states that Sensory Assessors use an olfactometer to perform their sensory assessments. (Respondent's Br. p. 5.) While it is true that some tests involve the use of the olfactometer, not all tests performed by the Sensory Assessors use this machine. As Employer's Exhibit DVD demonstrates, Sensory Assessors conduct a variety of sniffing tests, some without the use of any equipment other than their noses. (A.290.)

Second, the Department states that St. Croix Sensory has never disciplined an Assessor because the Assessor's have always been "self-disciplining." (Respondent's Br. p. 7.) The Department, in its Brief, takes this statement out of context. While it is true that the Assessors have been self-disciplining, the actual reason St. Croix Sensory has not disciplined any Assessors appears in Donna McGinley's answer to the next two questions regarding whether St. Croix Sensory has the authority to discipline the Sensory Assessors: "No. ... They are not under our control. They are their own. We are only requiring their observation." (A.46.) This testimony was unrebutted. Thus, the

undisputed record demonstrates that St. Croix Sensory did not discipline Assessors because it does not believe it has the authority to discipline Assessors.

Finally, the Department alleges in its Statement of Facts that "[St. Croix Sensory] is guided by industry standards, including those promulgated by the ASTM and the CEN, but not by state or federal regulation." (Respondent's Br. p. 7.) This statement ignores that Michael McGinley of St. Croix Sensory testified that Minnesota and other states and localities *require* St. Croix Sensory to use the ASTM International ("ASTM") and Committee for European Normalization ("CEN") standards. (See A.71.) The Department did not dispute this testimony at the hearing. Accordingly, it is factually incorrect for the Department to assert that the ASTM and CEN standards are simply "suggested" standards and not required by state and local governments. Further, it is unrealistic for the Department to imply that a company's adherence to international standard is superfluous or voluntary in the modern age of national and global trade.

II. THE CORRECT STANDARD OF REVIEW FOR THIS CASE IS *DE NOVO.*

This Court should conduct a *de novo* review of this case. As the Department notes, this Court reviews an Unemployment Law Judge's ("ULJ") *factual findings* with deference to the ULJ's determinations. (Respondent's Br. p. 8.) This same deference does not apply, however, to the ULJ's *legal conclusions* made from the factual findings. Neve v. Austin Daily Herald, 552 N.W.2d 45, 47 (Minn. Ct. App. 1996).[1]

[1] The factual findings set forth in the "Findings of Fact" in the ULJ's January 9, 2009, Decision generally comport with the undisputed evidence presented by St. Croix Sensory at the hearing. St. Croix Sensory takes issue with the ULJ's legal conclusions stated in

Where, as here, the facts are undisputed, the Court skips the first step of its analysis, where the Court reviews factual findings and gives deference to the ULJ, and moves directly to the second step, applying the law to the facts. Id. At this step – the step where this appeal rests – the Court conducts a *de novo* review of the ULJ's legal conclusions. See Golant v. MCS Language Connection, No. C0-96-1857, 1997 Minn. App. LEXIS 606, at *2 (Minn. Ct. App. May 21, 1997).[2]

The Department suggests throughout its brief that the Court should uphold the ULJ's legal conclusions because they are supported by "substantial evidence." That is not the appropriate standard. As the Department's own case law states, whether the existence of a fact leads to a particular legal conclusion is a question of law that the Court reviews *de novo*. See Skarhus v. Davanni's Inc., 721 N.W.2d 340, 344 (Minn. Ct. App. 2006) ("But whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo."). Thus, for example, whether the undisputed facts demonstrate that St. Croix Sensory possessed or lacked the right to control the means and manner of the Assessors' performance is a legal conclusion that the Court reviews *de novo*. Because the ULJ erred in the legal conclusions he reached based on the undisputed facts, the Court should reverse the Department's determination and rule that the Sensory Assessors are independent contractors.

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the "Reasons for Decision" in the January 9, 2009, Decision. To the extent that the Court finds that the ULJ made factual findings in the "Reasons for Decision" section of his Decision, because the facts were undisputed at the hearing, any such factual finding by the ULJ that does not conform to the plain language of the hearing exhibits or the undisputed hearing testimony cannot be supported by substantial evidence.

[2] All of the unpublished decisions cited in this Reply Brief were included in the Appendix to Relator's initial Brief and therefore are not reprinted again here.

III. 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. As an initial matter, contrary to the Department's position, the Court should not ignore the case law presented by St. Croix Sensory, much of it arising from this very Court. While it is certainly true that unpublished cases are non-binding, to suggest that they are "less than helpful" ignores the common practice of Minnesota courts and creates an unworkable situation for the state's employers. This Court and the Minnesota Supreme Court regularly analyze, compare, and cite to other unemployment cases, published or not, to interpret the meaning and significance of the Rule 3315.0555 factors and to assess whether the evidence relating to a particular factor indicates an independent contractor or employment relationship. See, e.g, Neve v. Austin Daily Herald, 552 N.W.2d 45 (Minn. Ct. App. 1996); Wise v. Denesen Insulation Co., 387 N.W.2d 477 (Minn. Ct. App. 1986); Southwood Motors v. Department of Employment and Economic Development, A05-2182, 2006 Minn. App. Unpub. LEXIS 1029 (Minn. Ct. App. Sept. 12, 2006); Watts v. Modern Age Representatives, Inc., No. C8-98-2033, 1999 Minn. App. LEXIS 545 (Minn. Ct. App. 1999); Golant v. MCS Language Connection, No. C0-96-1857, 1997 Minn. App. LEXIS 606 (Minn. Ct. App. May 21, 1997); Midway Driving School v. Commissioner of Jobs and Training, No. CX-90-1061, 1990 Minn. App. LEXIS 958 (Minn. Ct. App. Oct. 2, 1990); Speaks, Inc. d.b.a.

Kirby Co. of Minneapolis v. Jensen, 243 N.W.2d 142 (Minn. 1976). The Courts' practice helps to create a consistent and predictable body of unemployment law.

The Department's position that this Court's prior cases have no instructive value and should be ignored also places companies (and workers) in the perilous position of having no source of instruction as to the proper interpretation of the Rule 3315.0555 factors. While some of those standards are self-explanatory, others are not; for example, it is not readily apparent from the Rule what constitutes "detailed instructions," or what role a contract plays in analyzing the relationship between a company and a worker. Without the ability to consult case law to decipher the meaning of particular Rule 3315.0555 factors, companies and workers would have no reliable avenue for understanding their relationship and would be lost, which would adversely impact employers, workers, and the Department's own enforcement efforts. Accordingly, the Court should consider the cases cited by St. Croix Sensory for their persuasive value in interpreting individual factors, rather than ignoring them as the Department does.

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

1. Several Undisputed Factors Demonstrate That St. Croix Sensory Lacks The Right To Control The Means And Manner Of The Assessors' Performance.

As will be shown, the majority of the thirteen factors weighed in determining whether a company controls the means and manner of a worker's performance indicate that the Sensory Assessors are independent contractors. Indeed, the Department does not

even dispute that five of these factors weigh in favor of independent contractor status. Specifically, the Department does not dispute that:

- The Sensory Assessors are not required to submit oral or written reports relating to the method in which the services are performed to St. Croix Sensory. Minn. R. 3315.0555, Subp. 3(C).

- The Sensory Assessors set their own hours of work. Minn. R. 3315.0555, Subp. 3(H).

- The Sensory Assessors do not devote full time to Sensory Assessing for St. Croix Sensory. Minn. R. 3315.0555, Subp. 3(J).

- St. Croix Sensory pays the Sensory Assessors by the job and does not pay the Assessor's expenses. Minn. R. 3315.0555, Subp. 3(L).

- St. Croix Sensory cannot control where the Assessors choose to work. Minn. R. 3315.0555, Subp. 3(D). St. Croix Sensory does not and cannot require any Sensory Assessor to perform test sessions on St. Croix Sensory's premises. Instead, it is the Sensory Assessors who choose whether they will bid on sessions that occur at St. Croix Sensory's office. It is undisputed that St. Croix Sensory does not have any control over the off-site testing locations.[3] As such, this factor ultimately weighs in favor of a finding of independent contractor status.

These factors all indicate that St. Croix Sensory lacks control and the Assessors are independent contractors. In addition, The Department does not dispute that a sixth factor, relating to the Sensory Assessor's personal performance of services to St. Croix Sensory, is inapplicable to this case because the Assessors simply will not (and do not) bid for test sessions for which they are not personally available.

[3] The Department seems to suggest that whether the sensory services can be performed in an Assessor's home is a relevant inquiry. It is not. The relevant inquiry is whether the services are performed on the company's premises or at *any* other location, regardless of whether that other location is the worker's home. See Minn. R. 3315.0555, Subp. 3(D).

Based on the arguments the Department has elected to pursue on appeal, in order to rule that the Assessors were employees, this Court would have to completely disregard half of the factors enumerated by Rule 3315.0555. Rather than adopting such a tortured analysis, the Court should base its decision on the weight of the factors, which demonstrate that St. Croix Sensory does not control the means and manner of the Assessor's performance, and therefore, they are not employees.

2. The Department Does Not Dispute That The Language Of The Independent Contractor Contract Demonstrates That The Sensory Assessors Are Independent Contractors.

In addition to the enumerated factors discussed above, the Department also does not dispute that the language of the Independent Contractor/Assessor Informed Consent and Agreement provides the Sensory Assessors with the authority to control the means and manner of their performance, as a matter of law. The Department does not dispute that the ULJ's interpretation of the Agreement violated Minnesota law by failing to give all terms of the contract meaning and purpose. Moreover, the Department does not dispute that the only interpretation of the Agreement consistent with Minnesota law provides that the Sensory Assessors maintain the right to control the means and manner of their performance. This fact, alone, should result in a ruling that the Sensory Assessors are independent contractors.

This not a case where the parties simply wrote an agreement baldly stating that the worker was an "independent contractor," with nothing more, and then proceeded to engage in an employment relationship. In this case, the parties entered into a contract

explicitly dictating that the worker had the authority to control his or her means and manner of performance, and then complied with that contract. St. Croix Sensory repeatedly testified at the hearing that, because of this Agreement, it did not believe it had the authority to control the Sensory Assessors' performance. (A.40, 45-50, 82, 101-02, 240-46.) To rule that St. Croix Sensory controls the means and manner of the Assessors' performance would nullify a valid Minnesota contract and ignore the parties' intent when *neither party to the contract* has asked the Court to do so. Indeed, the Sensory Assessors themselves desire to be independent contractors and would likely give up this source of income if the Court forced them to radically change the fundamental basis of their relationship. (See A.66.) Because the Department, St. Croix Sensory, and the Sensory Assessors do not dispute that the Agreement gives the Assessors the right to control the means and manner of the Assessors' performance as a matter of law, the Court should reverse the Department's determination and find the Assessors to be independent contractors.

3. The Remaining Factors Demonstrate That St. Croix Sensory Lacks The Right To Control The Means And Manner Of The Assessors' Performance.

The remaining factors, not addressed above, also indicate that St. Croix Sensory lacks the right to control the means and manner of the Sensory Assessors' performance.

a. St. Croix Sensory Does Not Provide Training As Contemplated By The Rule.

First, St. Croix Sensory does not provide the training that the Rule contemplates in order to support employment status. See Minn. R. 3315.0555, Subp. 3(I). In arguing that

St. Croix Sensory "trains" its Sensory Assessors, the Department misunderstands the service offered to individuals by St. Croix Sensory. St. Croix Sensory offers many types of so-called training programs as part of its business. A better word for these programs, however, might be "education." St. Croix Sensory educates individuals who need to learn how to operate in the olfactory sensory industry, whether they work for St. Croix Sensory or not. (A.28.) These education programs are designated "ODOR SCHOOL®," for odor enforcement services, programs on how to monitor odors in the field for industry professionals, and programs for individuals who want to learn to be Sensory Assessors. (A.28.) The Sensory Assessor education program does not teach individuals how to work specifically for St. Croix Sensory. It teaches people how to be Sensory Assessors for *any* laboratory, similar to a certificate program. It is entirely possible that Assessors have completed the program at St. Croix Sensory and then provided services to other laboratories, but never provided any service to St. Croix Sensory.

In contrast, the training to which the Rule refers is training specific to the company, i.e., training on how to be an employee of the company. Such training would include attending company meetings or following a more experienced employee around the workplace or on a sales call. See Minn. R. 3315.0555, Subp. 3(I). It is undisputed that St. Croix Sensory does not provide any such training. In fact, Donna McGinley testified that if an experienced Assessor from another laboratory wanted to perform sensory assessing services for St. Croix Sensory, St. Croix Sensory would not take the Assessor through the education program. (A.34.) Instead, St. Croix Sensory would simply conduct the butanol test on the Assessor to ensure that his or her sense of smell

met the industry standard and inform the assessor how to complete the assessment questionnaires so that the computer could read them.[4] (A.34.) This undisputed testimony shows that the "training" given by St. Croix Sensory is not tied to a position at St. Croix Sensory, as contemplated by the Rule. Because St. Croix Sensory does not require Sensory Assessors to complete training under the meaning of the Rule, this factor indicates that St. Croix Sensory lacks control over the means and manner of the Assessors' performance.

b. St. Croix Sensory Does Not Require The Assessors To Comply With Detailed Instructions.

St. Croix Sensory does not require the Assessors to comply with detailed instructions, indicating that St. Croix Sensory does not have control over the means and manner of their performance. For a finding of control under this factor, the worker must be "*required* to comply with *detailed* instructions." Minn. R. 3315.0555, Subp. 3(B) (emphasis added). In arguing that this factor evinces control by St. Croix Sensory, the Department ignores that St. Croix Sensory cannot require compliance with any instructions it provides and that the instructions it provides are not "detailed."

In support of its argument, the Department argues that St. Croix Sensory "conceded at the hearing" that it "could take action to require disobedient assessors to comport with these instructions, although such action has never been required." (Respondent's Br. p. 12.) The Department cites to page 29 of the hearing transcript in support of this statement. On page 29 of the Transcript, however, Donna McGinley of St.

[4] As discussed below, simply instructing a person how to fill out a particular questionnaire does not create an employment relationship.

Croix Sensory explicitly and unequivocally testified that St. Croix Sensory did *not* have the authority to discipline assessors for any reason. (A.46.) Moreover, the Department does not dispute that, under Minnesota law, the lack of any performance review by St. Croix Sensory indicates a lack of a requirement to follow detailed instructions and a lack of control by the company. 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). Because St. Croix Sensory has no authority to discipline assessors for failure to follow any instructions given by St. Croix Sensory, the instructions are not "required," as they must be to demonstrate control by St. Croix Sensory under this factor.

Moreover, the limited instructions provided by St. Croix Sensory are not the "detailed instructions" referenced in the Rule. First, the Department misunderstands the "instructions" St. Croix Sensory provides on how to use the machines as part of their services. Any education on use of an olfactometer would be given during the Assessor's education to become a Sensory Assessor, whether the Assessor received that education from St. Croix Sensory or elsewhere. As Donna McGinley testified, St. Croix Sensory would not provide an experienced Assessor who wished to participate in a St. Croix Sensory session with instructions on how to use the olfactometer. (See A.34.) Instead, St. Croix Sensory would only provide this experienced Assessor with instructions relating to how the computer reads the questionnaires Assessors complete. (A.34.)

Thus, the only instructions St. Croix Sensory provides to Assessors regarding how to perform services for St. Croix Sensory are the instructions on how to complete the questionnaires so the computer can read them. When St. Croix Sensory contracts with an

Assessor, it is actually purchasing a completed, readable questionnaire from the Assessor. Accordingly, St. Croix Sensory has the right to define a "readable questionnaire" for the Assessor. To that end, St. Croix Sensory's instructions literally consist entirely of (1) "use a No. 2 pencil" and (2) "draw a line on this form, and fill in a box on that form." Such instructions cannot be the detailed instructions contemplated by the Rule. If they are, then a home owner could never give a building contractor a blueprint for a remodeling job – they could only say "remodel my kitchen" and leave the rest to chance. The homeowner could not request a particular paint color or copper piping, because those would be "detailed instructions" under the Department's theory, making the contractor the homeowner's employee.

St. Croix Sensory's instructions to Assessors regarding how to complete the questionnaire so that it is readable by the computer only serves to define the end product that St. Croix Sensory is purchasing from the Assessor. As a matter of Minnesota law, instructions that relate to the definition of the worker's task are irrelevant to the employment-status inquiring and do not support a decision that a worker is an employee.[5]

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[5] Contrary to the Department's assertion that the case law cited by St. Croix Sensory is non-precedential, Neve is a published decision of this Court and is binding authority. The Department's attempt to distinguish Neve as a case about newspapers is misplaced. The Neve court did not limit its analysis of what constitutes "detailed instructions" to just newspaper cases. In at least one other case this Court has used Neve to define "detailed instructions" outside the newspaper context. See Southwood Motors, 2006 Minn. App. Unpub. LEXIS 1029, at **4-5. Moreover, the Department seriously mischaracterizes the holding in Neve by understating the instructions the company gave to the worker. The instruction was not simply to deliver a "dry newspaper," and the worker was not free to "tap-dance[] down the street," as the Department sarcastically states. (Respondent's Br. 14.) The newspaper company in Neve instructed the worker as to: "the people to whom she was to deliver newspapers; (2) the exact location of deliveries (a plastic tube in rural

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).

The Department does not dispute that St. Croix Sensory does not give the Assessors *any* instructions regarding how to sniff the test samples or how to analyze or define an odor. By simply watching Employer's Exhibit DVD (A.290), it is readily apparent that the Assessors are not complying with any instructions. The Department is simply wrong when it states (without citing any part of the record) that the Assessors must smell the samples "at the time they are handed them, in the order they are handed them." (Respondent's Br. p. 13.) The last three minutes of the video displays two Assessors who selected different times to sniff the samples they had been given. One of the Assessors even continued having a conversation after she had been handed a sample, and only sniffed it when she was ready. (A.290.) St. Croix Sensory's limited instructions are neither required nor detailed, as contemplated by the Rule, and therefore, this factor indicates that St. Croix Sensory lacks control over the means and manner of the Assessors' performance.

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areas, as opposed to the doorstep of subscribers in towns); (3) the deadline by which she was to complete her task; (4) bagging procedures for inclement weather; and (5) the Herald's preference for a consistent pattern of delivery." Neve, 552 N.W.2d at 48.

c. The Existence Of A Continuing Relationship With Some Assessors Does Not Indicate An Employer-Employee Relationship.

The existence of a continuing relationship between St. Croix Sensory and some of the Sensory Assessors does not indicate the existence of an employer-employee relationship. It is undisputed that some assessors only participate in one or two sessions for St. Croix Sensory and then never return. Others choose to have a continuing relationship.[6] Under the Department's analysis, this factor indicates independent contractor status for some of the Assessors and employee status for others. As a result, lending this factor any weight would create an unworkable result where individuals performing the exact same tasks would be classified differently based solely on the number of test sessions in which they participate. This factor, therefore, is inconclusive and not determinative of either employment or independent contractor status because of the wide range of relationships St. Croix Sensory has with Assessors. To hold otherwise would be to make this factor a determinative factor, which is not what Rule 3315.0555 intends, and would also penalize St. Croix Sensory for making the Assessment experience enjoyable and financially worthwhile for its Assessors.

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[6] The combined approximately $82,000 in fees earned by the Assessors averages to approximately $2,200 per Assessor for the entire year. Based on the Department's own claim that the Assessors earn the equivalent of $25/hour, $2,200/year would translate to working about 1.6 hours per week. Working 1.6 hours per week hardly resembles any normal employment relationship. The Department also refers to the fees earned by the Sensory Assessors as "wages." (Respondent's Br. p. 6.) Obviously, calling the fee a wage begs the question presented to this Court.

d. The Sensory Assessors Have No Assistants.

The Sensory Assessors have no assistants and, therefore, this factor is inconclusive, as well. The Department incorrectly asserts that the Laboratory Associate and Laboratory Assistant are the Sensory Assessors' assistants. The job descriptions for these St. Croix Sensory employees are in the record and do not state that these individuals are assistants of the Sensory Assessors. (A.240-46.) Instead, they are responsible for assisting St. Croix Sensory in maintaining the laboratory and the test samples. These two workers manage the test sessions; they do not aid the Sensory Assessors in their work.

Holding that these individuals are assistants to the Sensory Assessors would make this factor superfluous within the Rule. It is inevitable that every independent contractor will have a contact person at the company with whom they interact. This contact person will inevitably have to provide the independent contractor with information regarding jobs and generally communicate messages between the contractor and the company. As a result, under The Department's theory that these types of individuals are assistants to the worker, *every* company will be found to have hired assistants for the worker. This factor will *never* weigh in favor of an independent contractor status, rendering it meaningless in the Court's analysis. The legislature could not have intended such a result.

The Department makes no allegations that any other individuals operate as assistants to the Sensory Assessors. Accordingly, this factor is inconclusive in the analysis of whether the Sensory Assessors are independent contractors or employees.

e. St. Croix Sensory Is Required To Follow Industry Standards.

Any rules the Sensory Assessors must follow are mandated by the ASTM and CEN Industry Standards that St. Croix Sensory is required to follow. While it is true that St. Croix Sensory's customers require it to follow the Industry Standards, the Department simply misstates the record when it argues that no government department or agency requires St. Croix Sensory to follow those Industry Standards. Michael McGinley testified at the unemployment hearing that the State of Minnesota, State of Missouri,[7] City of Los Angeles and City of New York *all* require that olfactory laboratories, such as St. Croix Sensory, follow these standards. This testimony, which the Department completely ignores, is undisputed.

The undisputed record demonstrates that any rules the Sensory Assessors are required to follow regarding maintenance of their sense of smell or laboratory conditions are dictated by Industry Standards, which are in turn required by state and local governments. Pursuant to Rule 3315.0555, Subp. 3(M) these rules do not evince control indicative of an employment relationship.

B. St. Croix Sensory Would Incur Liability If It Discharged A Sensory Assessor, Demonstrating That The Assessors Are Independent Contractors.

As described in St. Croix Sensory's initial Brief, St. Croix Sensory would incur liability if it discharged a Sensory Assessor, indicating that the Sensory Assessors are independent contractors. The Department's argument to the contrary is misplaced.

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[7] Missouri Regulation 10 C.S.R. 10-2.070 specifically requires the use of the ASTM standard. See Appendix to Reply Brief at A-1 – A-2.

As an initial matter, the Department is incorrect in stating that the ULJ found that St. Croix Sensory could discharge the Assessors with incurring liability. In fact, the ULJ reached inconsistent and conflicting legal conclusions, only one of which aligned with his factual finding. The ULJ made the factual finding that "While [sic] has not been a common occurrence, an assessor leaving a session prematurely would probably be compensated the same amount as an assessor completing the test session." (A.293). Moreover, the ULJ himself specifically asked Donna McGinley if an Assessor would be compensated for a test session if St. Croix Sensory cancelled the session and she unequivocally answered that the Assessors would be paid. (A.53.) Thus, the undisputed facts demonstrate that St. Croix Sensory *would* incur liability if it discharged an Assessor during a test session.

Despite his factual finding and the undisputed evidence, the ULJ made two conflicting legal conclusions on this factor. First, the ULJ concluded that St. Croix Sensory would incur liability, but "any theoretical liability is very limited." (A.294.) Then the ULJ proceeded to argue, from thin air, that the Independent Contractor/Assessor Agreement somehow "suggest[ed] a right to discharge an assessor who did not perform those standards, without incurring liability." (A.295.) The Agreement contains no such language; it does not say that St. Croix Sensory can remove an Assessor from a test session without incurring liability. The ULJ took it upon himself to not only ignore the sworn testimony in response to his own question, but also to write a term into the Agreement that did not exist. In contrast, the ULJ's initial legal conclusion was correct: St. Croix Sensory would incur liability if it terminated an Assessor while an Assessor was

performing services for St. Croix Sensory. The ULJ's observation that the liability incurred would be "limited" is not relevant under the Rule.

The Department argues that the requirement that St. Croix Sensory pay an Assessor for a full test session if discharged during a test session does not indicate liability, indicating that the Department misunderstands the concept of liability. An entity that is required to pay the full payment for a job regardless of whether the job is fully performed has suffered liability, plain and simple. In the case of a cancelled test session, it is undisputed that St. Croix Sensory is required to pay the Sensory Assessors even though the Sensory Assessors did not produce the completed questionnaires for which they were paid. That is textbook liability. The Department's example of employers who pay employees for a full day when they are discharged mid-way through the day is inapposite, because such payments to employees are gratuitous, not required. Employers are not required to pay non-exempt employee for hours they do not work. If an employer makes a voluntary payment to avoid a scene as a terminated employee exits the building, or simply as a matter of good will to a departing employee, that payment does not illustrate "liability;" it illustrates a voluntary business decision.

The undisputed evidence demonstrates that St. Croix Sensory would incur liability for terminating an Assessor while the Assessor was performing services for the Company. As such, this factor indicates an independent contractor status and the Court should reverse the Department's determination.

C. The Remaining Three Factors Of The Five Factor Test Also Demonstrate That The Sensory Assessors Are Independent Contractors.

1. The Department Does Not Dispute That Two Of The Three Remaining Factors Indicate That The Sensory Assessors Are Independent Contractors.

Two of the remaining three factors are undisputed. First, the Department does not dispute that the control over where the services are performed also indicates that the Sensory Assessors are independent contactors and further displays that St. Croix Sensory lacks any control over the Sensory Assessors whatsoever.

Second, the Department does not dispute that the Assessors are paid by the job. Despite conceding that the Assessors are paid by the job, the Department argues that the "payment amount closely correlates with the amount of time is takes to complete the task, essentially rendering it an hourly wage." (Respondent's Br 17.) The Department presents absolutely no record support for this strange assertion. Donna McGinley testified that the standard rate for an estimated three hours session is $38. (A.52.) The Department states that a one hour session would be priced at $25. (Respondent's Br. p. 17.) The Court may take judicial notice of the fact that three hours' pay at $25/hour does not equal $38 dollars -- even in a down economy. Thus, the payment amount is not "closely correlate[d]" to the length of the session.

Moreover, non-exempt employees are not paid if they are told not to come to work. In contrast, if St. Croix Sensory must cancel a test session after registration, it pays the Assessors their full stipend. (A.53.) The ULJ questioned Donna McGinley extensively as to whether St. Croix Sensory paid the Assessors an hourly wage and she

very clearly stated that it does not. (A.52-56.) Based on that undisputed testimony, the ULJ made an accurate factual finding that St Croix Sensory pays by the job. (A.293.)

Furthermore, even if the fee for a session did correlate precisely to an hourly amount, it would be irrelevant. Rule 3315.0555, Subp. 2(B) specifically states that it is acceptable for a lump sum payment provided to an independent contractor to be "computed by the number of hours required to do the job at a fixed rate per hour...." Minn. R. 3315.0555, Subp. 2(B). Accordingly, these two factors indicate that the Sensory Assessors are independent contractors and the Court should reverse the Department's determination.

2. The Furnishing Of Tools Factor Indicates That The Sensory Assessors Are Independent Contractors.

Finally, the Sensory Assessors provide the most important tool for Sensory Assessing – their nose – and, therefore, this factor indicates that the Sensory Assessors are independent contractors. The Department's facetious comparison of the Sensory Assessors to a receptionist or a lawyer entirely misses the mark and fails to understand the qualifications to be a Sensory Assessor. To be a Sensory Assessor, one must pass a butanol test by displaying that he or she has a sufficiently sensitive sense of smell. To continue to provide sensory assessing services in the industry, one must maintain their sense of smell. A receptionist does not take specific actions to maintain his or her hearing and does not need an above average level of hearing to qualify to be a receptionist. The argument that a lawyer uses her brain to draft legal briefs similarly

misses the mark, because everyone obviously uses their brain in every aspect of their life. Moreover, some attorneys work as independent contractors.

Because a Sensory Assessor in the industry requires a specialized nose to work, the Sensory Assessors are more analogous to a fashion model. A model's tool is his or her body. Not anyone with any body type can become a fashion model. Models must work to maintain their bodies to continue working in the fashion industry. If one considers the case of a model, it becomes apparent that a body part can be a tool in some kinds of work. Sensory Assessing is one of those kinds of work. Because the Sensory Assessors provide the central tool for performing their work, their noses, this factor indicates that the Assessors are independent contractors. As a result, all five of the five factors indicate that the Assessors are independent contractors. The Court should reverse the Department's determination.

IV. THE SENSORY ASSESSORS PROVIDING SERVICES TO ST. CROIX SENSORY ARE INDEPENDENT CONTRACTORS UNDER THE ADDITIONAL FACTORS ENUMERATED IN MINNESOTA RULE 3315.0555, SUBP. 2.

The Sensory Assessors are also independent contractors under the additional factors enumerated under Minnesota Rule 3315.0555, Subpart 2. Of the remaining eight factors provided in this Subpart, the Department only argues that one of these factors indicates an employer-employee relationship. The Department does not dispute St. Croix Sensory's position that the remaining *seven* factors either affirmatively indicate independent contractor status or are inconclusive or inapplicable in this case. The

Department's reliance on only one out of eight factors clearly indicates which way these factors weigh.

Ignoring the other seven factors, the Department argues that the Sensory Assessors perform services in the usual course of St. Croix Sensory's business activities, which indicates that they are employees. 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). The Department has conceded that the other seven Subpart 2 factors support a finding of an independent contractor status. St. Croix Sensory has demonstrated that the five factor test, discussed above, also demonstrates an independent contractor status. Thus, the Court would need to find that this one minor factor *is* a determinative factor to affirm the Department's determination.

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.

V. THE DEPARTMENT CONCEDES THAT POLICY CONSIDERATIONS SUPPORT THE SENSORY ASSESSORS' STATUS AS CONTRACTORS.

In its initial Brief, St. Croix Sensory pointed out that requiring Minnesota businesses to treat individuals such as Sensory Assessors as employees would drastically change how all human subject testing is conducted in Minnesota and would likely hinder much vital scientific research. The Department does not address this important policy consideration in its Brief, apparently conceding that the public would be best served by allowing the Assessors to remain contractors, as both the Assessors and St. Croix Sensory desire. St. Croix Sensory recognizes that the Court of Appeals is not a policy-making Court, but the Court should nonetheless consider the consequences of its decision, in terms of not only St. Croix Sensory's Assessors, but also in terms of medical research endeavors in which the State of Minnesota is, as of now, a world leader. Those endeavors would be devastated by a determination that research institutions must treat human subjects as employees.

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: January 19, 2010

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STATE OF MINNESOTA
IN COURT OF APPEALS

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Relator,

v.

Department of Employment and Economic Development,

Respondent.

Case No. A09-1627

CERTIFICATE OF WORD COUNT

I, Andrew E. Tanick, hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. I certify that the brief contains 6,607 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.

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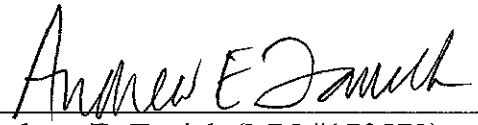

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