

No. A09-1627

State of Minnesota
In Court of Appeals

ST. CROIX SENSORY INC,

Relator,

vs.

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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Legal Issue

Minnesota Rules provide a five-factor balancing test for determining whether, for the purposes of unemployment benefits, an individual performed services in employment or as an independent contractor. The two most important factors are whether the company had control over the means and manner of performance and whether it had the right to discharge without incurring liability. St. Croix Sensory, Inc. (“SCS”) exercised control over the means and manner of the performance of its sensory assessors - employees who smelled various odors and reported their observations - and could discharge them without incurring liability. Did the sensory assessors perform services for SCS in employment?

Unemployment Law Judge (“ULJ”) David Cox found that SCS’s sensory assessors performed services for SCS in employment under the Minnesota Unemployment Insurance Law, and held that SCS must pay taxes on wages paid to its sensory assessors.

Statement of the Case

This case involves the question of whether 37 sensory assessors were employees of SCS, whether wages SCS paid those individuals can be used for unemployment benefit purposes, and whether SCS must pay unemployment insurance taxes on wages paid to its sensory assessors.

The Department of Employment and Economic Development (the “Department”) conducted an audit that resulted in determinations of employment

status holding that SCS had an employer-employee relationship with 37 sensory assessors. The determination of employment status held that SCS must pay unemployment taxes on wages paid to those assessors, and to any others performing similar services.¹ SCS filed a protest with the Department of the determination, and the Department issued an affirmation of employment status finding that those assessors, and any others performing similar services, were employees of SCS.²

SCS appealed, and ULJ Cox held an in-person de novo hearing in which SCS participated. The ULJ issued a decision holding that the services the sensory assessors performed for SCS were in employment.³ SCS filed a request for reconsideration with the ULJ, who issued an order affirming his decision.⁴

This matter is before the Minnesota Court of Appeals on a writ of certiorari SCS obtained under Minn. Stat. §268.105, subd. 7(a) and Minn. R. Civ. App. P. 115.

Department's Relationship to the Case

The department is charged with the responsibility of administering and supervising the unemployment insurance program.⁵ As the Supreme Court stated

¹ Exhibit D-1. Exhibits in the record will be indicated "D" for the Department with the number following. Transcripts references will be indicated "T" with the page number following.

² Return 2C.

³ Appendix to Department's Brief, A5-A10.

⁴ Appendix, A1-A4.

⁵ Minn. Stat. § 116J.401, subd. 1(18) (2008).

in *Lolling v. Midwest Patrol*, unemployment benefits are paid from state funds, the Minnesota Unemployment Insurance Trust Fund and not from employer funds, the employer not being the determiner of entitlement.⁶ This was later codified.⁷ The Department's interest therefore carries over to the Court of Appeals' interpretation and application of the Minnesota Unemployment Insurance Law. The Department is thus considered the primary responding party to any judicial action involving an Unemployment Law Judge's decision.⁸

The Department does not represent any of the sensory assessors in this proceeding, and this brief should not be considered advocacy for any of its sensory assessors.

Statement of Facts

SCS is a sensory laboratory that specializes in odor testing, including testing the odor of material and products, conducting air quality testing, and training government and educational institutions in such testing.⁹ SCS hires individuals known as "sensory assessors" to smell certain odors and record their observations and reactions to the odors.¹⁰

⁶ 545 N.W.2d 372, 376 (Minn. 1996), citing *Jackson v. Honeywell*, 47 N.W.2d 449 (Minn. 1951).

⁷ Minn. Stat. § 268.069, subd. 2 (2008).

⁸ Minn. Stat. § 268.105, subd. 7(e) (2008).

⁹ T. 11.

¹⁰ T. 20.

Sensory assessors used SCS's accent olfactometer, a machine that dilutes odor to certain specifications, for the assessments, to accomplish this task.¹¹ The accent olfactometer is a heavy piece of equipment, mounted on a podium, requires a good deal of space, and is not particularly mobile.¹² Assessments must also be done in an entirely odor-free atmosphere, essentially requiring that the assessments be done in a laboratory.¹³ The work has to be performed at a neutral site and could not, for example, be performed in a client's home.¹⁴ The assessments are often performed on the SCS premises, but could also be performed off-site, at a client's request.¹⁵ Some assessors only work during sessions held on SCS' premises.¹⁶

SCS enters into contracts with each sensory assessor, which provide that they will be paid for each session for which they were hired, even if the session is canceled or they are asked to leave partway through the session.¹⁷ Assessors, once hired, "bid" on sessions via an online computer system.¹⁸ If a particular session receives more bids than available spots, SCS selects those assessors with the fewest number of completed sessions.¹⁹ Sensory assessors were usually paid

¹¹ T. 21, 71.

¹² T. 21.

¹³ T. 21.

¹⁴ T. 20.

¹⁵ T. 20, 42.

¹⁶ T. 100.

¹⁷ T. 106.

¹⁸ T. 60-62.

¹⁹ T. 62.

between \$20 and \$100 per session,²⁰ and are generally paid \$38 a session.²¹ Most sessions are between one-and-a-half and three hours.²² On some occasions assessors are hired for multi-day projects for the same client.²³ In 2006, the year that SCS was audited, the 37 assessors earned a total of \$82,684 in wages.²⁴ Some of the sensory assessors also worked for other sensory laboratories, including the two others in the Twin Cities area, at the University of Minnesota and at the Metropolitan Council.²⁵

Each assessor is trained before beginning work for SCS, and participates in a coaching program that “help[s] them understand their sense of smell” and “train[s] [assessors] on their sense of smell and their sensory perception in general,” as well as “encourage[s] them to trust their opinion.”²⁶

SCS tests each assessor before each session, to ensure that their sense of smell remains acute, and has not been affected impending illness, or by eating spicy foods, drinking alcohol, or wearing perfume or perfumed clothing.²⁷ If an assessor becomes ill during a session, he or she is sent home with pay.²⁸ If an

²⁰ T. 39.

²¹ T. 35.

²² T. 28, 98.

²³ T. 39.

²⁴ Return-2A, D-1(3).

²⁵ T. 42-43.

²⁶ T. 34.

²⁷ T. 40-41.

²⁸ T. 48.

assessor were to walk out mid-session, though, of his or her own accord, the assessor would not be paid.²⁹

SCS gives the assessors instructions on how to work the equipment and machines during the assessment, as well as how to complete the questionnaire, and requires the assessors to follow these instructions.³⁰ According to the contract between SCS and the assessors, assessors “retain[] 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.”³¹ SCS, though, “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.”³² SCS has never disciplined an assessor, because they have always been “self-disciplining.”³³

SCS is guided by industry standards, including those promulgated by the ASTM and the CEN, but not by state or federal regulation.³⁴ The CEN, or the Committed on European Norms, is issued by a European standards organization,³⁵

²⁹ T. 48.

³⁰ T. 26-27.

³¹ T. 23.

³² T. 23.

³³ T. 29.

³⁴ T. 24-25.

³⁵ T. 52, 54.

while the ASTM is generally used by organizations in North America.³⁶ SCS follows these standards at the request of its clients.³⁷

Standard of Review

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceeding, reverse or modify the decision if SCS' substantial rights were prejudiced because the decision of the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.³⁸

Whether an individual performed services as an employee or an independent contractor is a mixed question of law and fact.³⁹ The Court of Appeals recently held in *Skarhus v. Davannis*, that it views the ULJ's factual findings "in the light most favorable to the decision,"⁴⁰ and gives deference to the ULJ's credibility determinations.⁴¹ The Court also stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.⁴² In

³⁶ T. 55.

³⁷ T. 54.

³⁸ Minn. Stat. §268.105, subd. 7(d)(3)-(6) (2008).

³⁹ *Lakeland Tool & Eng'g v. Engle*, 450 N.W.2d 349, 352 (Minn. App. 1990).

⁴⁰ 721 N.W.2d 340, 344 (Minn. App. 2006) (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)).

⁴¹ *Id.* (citing *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. App. 2000), review denied (Minn. Dec. 20, 2000)).

⁴² *Id.* (citing Minn. Stat. §268.105, subd. 7(d)).

Ress v. Abbott Northwestern Hosp., Inc., the Supreme Court stated that the appellate courts exercise independent judgment on issues of law.⁴³

Argument

While there are aspects of the sensory assessors' work that resembles independent contractor status, the most critical ones indicate employment status. SCS has the right to control the means and manner of the sensory assessors' performance and to discharge them without incurring liability. As such, the ULJ correctly found that the sensory assessors performing services for SCS are employees and not independent contractors.

A. Employment status

The classification of a worker as an employee or an independent contractor is not an all-or-nothing enterprise. It is a multi-factor analysis in which some factors can be expected to weigh in favor of employment status and some in favor of independent contractor status. The fact-finder – here, the Unemployment Law Judge – is charged with weighing a large amount of evidence and determining on the whole whether a relationship is more like employment or more like an independent contractor.

Cases concerning such classifications are exceedingly fact-specific, and while Minnesota is guided by the common-law test and by the factors – later

⁴³ 448 N.W.2d 519, 523 (Minn. 1989).

adopted into regulation – first established in *Guhlke v. Roberts Truck Lines*,⁴⁴ case law precedent is often less than helpful. While there is a plethora of case law on independent contractor relationships, much of it unpublished and therefore non-precedential, each one turns on its individual facts. A case may share nine out of ten factual elements with another, but the tenth fact may prove determinative, and it is therefore difficult to find great meaning in isolated components of various cases. For that reason, none of the many cases to which SCS cites in its brief are dispositive.

Nonetheless, for purposes of unemployment insurance, whether a worker is an employee or an independent contractor is determined according to a specific test set out in the Minnesota Rules.⁴⁵ The general statement of the test is as follows:

Subpart 1. Essential factors. 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

⁴⁴ *Guhlke v. Roberts Truck Lines* 128 N.W.2d 324 (Minn. 1964).

⁴⁵ Minn. R. § 3315.0555.

may vary depending upon the occupation or work situation being considered and why the factor is present in the particular situation.

* * *⁴⁶

The rule then goes on to list a variety of other, less essential factors. In the decision, the Unemployment Law Judge's decision concentrated on the two most important factors, and correctly concluded that the sensory assessors were employees of SCS.

1. Substantial evidence supports the ULJ's finding that SCS had the right to control the means and manner of its sensory assessors' performance.

While SCS claims not to have controlled the manner in which the assessors performed their work, it did in fact exercise significant control. For unemployment cases, the criteria for determining control over the means and manner of performance is codified in the Minnesota Rules.⁴⁷ The Rules state as follows:

Determination of control. Items A to M describe criteria for determining if the employing unit has control over the method of performing or executing services. The total circumstances must be considered to determine if control is present.

- A. Authority over assistants...**
- B. Compliance with instructions...**
- C. Oral or written reports...**
- D. Place of work...**
- E. Personal performance...**
- F. Existence of a continuing relationship...**
- G. Right to discharge...**
- H. Set hours of work...**
- I. Training...**

⁴⁶ *Id.*

⁴⁷ Minn. R. § 3315.0555, Subp. 3 (2008).

- J. Amount of time...**
- K. Tools and materials...**
- L. Expense reimbursement...**
- M. Satisfying requirements of regulatory and licensing agencies...⁴⁸**

The factors indicating that SCS had the right to control the sensory assessors' performance outweigh the factors that show otherwise.

a. Training.

SCS's training program indicates control over the means and manner of the sensory assessors' performance. Specifically, SCS holds a training program in which it teaches its assessors how to use their sense of smell, as well as other sensory perception, as well as how to use the equipment and fill out a form. It does not simply hire individuals to smell things; it teaches them how to do so. This training indicates control.

b. Compliance with Instructions.

Similarly, the record also shows that SCS reserves the right to both instruct its assessors on how to perform their jobs, as well as to force them to comply with those instructions. SCS conceded at hearing that it gives its assessors instructions on how to use the machines and fill out the questionnaires, and could take action to require disobedient assessors to comport with these instructions, although such action has never been required.⁴⁹ The Rules state that "[i]nstructions may be oral

⁴⁸ *Id.*

⁴⁹ T. 29.

or may be in the form of materials or written procedures which show how the desired result is to be accomplished.”⁵⁰ By giving the assessors specific instructions on how to work machines and fill out questionnaires, and requiring them to adhere to a process of smelling an odor and filling out a questionnaire pursuant to these instructions, SCS is clearly instructing the assessors workers how to perform their duties.

It does not matter that SCS does not tell the assessors how many sniffs to take, or whether to sit or stand while sniffing.⁵¹ The assessors have machines to use, they have to use them in a certain way, and they have to record their assessments, using a No. 2 pencil, on a questionnaire.⁵² They smell the samples that the laboratory associate or assistant hands to them, at the time they are handed them, in the order that they are handed them. They have to do this while physically healthy, while wearing clothes that have not been washed in scented detergent, while not using or wearing any perfumed products, and after having abstained from alcohol and spicy foods. That they can take three sniffs while standing, or one sniff while sitting, does not change the fact that SCS exercises control over the means and manner of its sensory assessors’ performance.

This distinguishes the sensory assessors from independent contractors like the applicant who delivered newspapers in *Neve v. Austin Daily Herald*. The Court, deciding the case before the statute was amended to address newspaper

⁵⁰ Minn. R. § 3315.0555, Subp. 3(B) (2008).

⁵¹ T. 26.

delivery, concluded that the delivery woman was not an employee because her only task was to deliver a dry newspaper on time.⁵³ The newspaper company did not declare how she was to deliver the newspaper, and thus she could have ridden a bicycle, walked, or tap-danced down the street, while wearing, eating, and drinking whatever she pleased. The sensory assessors are much more tightly controlled.

c. Existence of a Continuing Relationship.

Many of the sensory assessors have a continuing relationship with SCS. While some of the assessors only participate in one or two sessions, many continue working for SCS on a part-time basis, many work seasonally, and some have worked for SCS for “many years.”⁵⁴ Assessors are a relatively closed community; only approximately three to ten individuals in any given year express an interest in becoming an assessor for SCS, and SCS does not advertise the positions.⁵⁵ The fact that 37 sensory assessors earned a combined total of \$82,684 in one year, when most of the sessions paid only \$25 or \$38, indicates that many, if not most, of the assessors participated in many of these sessions. This is a continuing relationship.

⁵² T. 27.

⁵³ 552 N.W.2d 45 (Minn. App. 1996).

⁵⁴ T. 30.

⁵⁵ T. 89.

d. Authority over assistants.

Under Minn. R. § 3315.0555, Subp. 3(A) (2008), it may indicate control where an employer hires and pays the assistants of an individual (like a sensory assessor), and supervises the details of the assistant work. SCS hires laboratory associates and assistants and pays them to assist the sensory assessors in carrying out the tests.⁵⁶ These associates and assistants give samples to assessors,⁵⁷ watch to make sure that the sensory assessors are actually sniffing the samples,⁵⁸ and tell assessors the sample number for the odor that they are smelling.⁵⁹ These associates and assistants are onsite during the sessions,⁶⁰ and assessors can ask them questions.⁶¹

e. Tools and materials.

The Rules state that “furnishing of tools, materials, and supplies by the employer is indicative of control over the worker.”⁶² Here, SCS supplies the machines that are used, the odors that the assessors smell, and the questionnaires that they complete. SCS supplies sniffing masks for the assessors to wear, masks that SCS retains and washes in between uses.⁶³ SCS also supplies a carbon respirator, which assessors can use to refresh their sense of smell in between

⁵⁶ T. 53, 64-65, 75, 79.

⁵⁷ T. 76, 80, 83.

⁵⁸ T. 65.

⁵⁹ T. 75, 76.

⁶⁰ T. 64.

⁶¹ T. 74.

⁶² Minn. R. § 3315.0555, Subp. 3(K).

tests.⁶⁴ The fact that assessors supply their own noses is immaterial, as SCS argues, is immaterial.⁶⁵ Employees generally bring with them their own bodies, wherever they go. It is presumed that receptionists will report to work with their ears, and that lawyers will remain in possession of their brains while drafting briefs. While many of us have commented at one time or another that we would lose our heads unless they were screwed on, this is a rhetorical device, and is not meant to be taken literally. Assessors, like all employees, show up with their bodies SCS provides everything else.

f. Satisfying requirements of regulatory and licensing agencies.

The Rules are clear that an employer's standards do not indicate control where "an employer is required to enforce standards or restrictions imposed by regulatory or licensing agencies, such action does not evince control."⁶⁶ This is not the case here. CSC conceded at hearing that it follows the ASTM and CEN standards not because it is required to do so by any regulatory or licensing agency, but because "they're what's looked at in the industry as the industry standards and what our customers are requiring us to follow."

⁶³ T. 71.

⁶⁴ T. 82.

⁶⁵ T. 40.

⁶⁶ Minn. R. § 3315.0555, Subp. 3(M).

While individual clients may only have hired SCS because it agreed to abide by certain industry standards, that is a far cry from having a regulatory or licensing agency imposing such a standard.

g. Factors that suggest no control.

Admittedly, there are factors that suggest SCS did not exercise control over the means and manner of its sensory assessors' performance. But the assessors' overall relationship with SCS weighs more toward SCS having control over the means and manner of their performance.

First, it is true that the assessors provide their own noses, as relator's brief repeatedly noted. But SCS provides the assessors with the various odors to be tested, in a number of different formats, and also provides the assessors with assessment forms on which they note their reactions to various scents.

Second, while the assessors are paid a fixed amount for each session, the payment amount closely correlates with the amount of time it takes to complete the task, essentially rendering it an hourly wage. An hour session might only pay \$25, while a longer session would pay \$38. These employees are paid for their time as much as for the completion of a job. Finally, while SCS does not require its assessors to work any particular hours or sessions, assessors can only work on the days and times established by SCS, at the place set by SCS, and have to complete their work in the time allotted by SCS.

2. Substantial evidence supports the ULJ's finding that SCS could discharge sensory assessors without incurring liability.

Another major factor in determining whether a worker is an employee is the right to discharge without liability. SCS could discharge its sensory assessors without liability. The comments about this factor describe it as "a very important factor...particularly if the individual may be terminated with little cause, without notice, or for failure to follow specified rules or methods."⁶⁷

There is no dispute that SCS could terminate its sensory assessors at any time and for any reason, either by sending them off the job site, by cancelling assessments for which they had already signed up, or by refusing to hire them for any future assessments, although SCS has apparently never exercised this authority.⁶⁸ Similarly, the sensory assessors could stop working for SCS at any time by either walking off the job or by no longer bidding on assessments, and they would incur no liability. SCS could also discharge an assessor for failing to follow instructions or meet performance standards. This ability to terminate the relationship at any time without the other party having any recourse suggests employment status. And SCS's ability to discharge the sensory assessors without incurring liability combined with its control over their performance supports the ULJ's decision that they were employees.

SCS argued at hearing that it could not terminate an assessor without liability, as it would be required to pay an assessor for the entire session, even if

⁶⁷ Minn. R. § 3315.0555, Subp. 3(G).

the session is cancelled or an assessor begins a session and is fired midway through it.⁶⁹ This does not indicate liability; an employer who pays an employee his full wages for the day he was terminated, despite the fact that he only worked part of the day before being escorted out, has not incurred liability, nor has an employer who pays an employee he can't use because poor weather or a supply shortage has made working on a particular day impossible. Similarly, the fact that the assessors are paid when a session is cancelled, say because the sample has not arrived on time, does not show an independent contractor relationship. Moreover, the contract itself does not indicate that an assessor must be paid if the assessor refuses to work, or refuses to conform his work to SCS' standards. Thus, as the ULJ pointed out, SCS' liability is either extremely limited or nonexistent.

3. Other factors that show an employment relationship.

A variety of other factors suggest employment status. These factors are all listed in Minn. R. 3315.0555.

a. The sensory assessors performed services in the usual course of SCS's business activities.

The Rules state that a worker who performs services that are a part of the process of the employer's trade or business is more likely an employee than an independent contractor.⁷⁰ The word "process" is defined in the Rules as

⁶⁸ T. 32.

⁶⁹ T. 35, 106.

⁷⁰ Minn. R. § 3315.0555, Subp. 2 (2008).

something that is done to directly carry out the fundamental purpose for which the business exists, such as a worker painting automobiles at an auto body repair shop.⁷¹ In this case, the sensory assessors clearly perform services that directly carry out the fundamental purpose of SCS. SCS needs individuals to smell various odors and report on what they smell; that is one of the fundamental functions of SCS, a business that specializes in odor testing. If the sensory assessors did not perform these services, SCS would have to hire someone else to do so; it could not conduct its business as usual without sensory assessors. This weighs toward considering the assessors as employees.

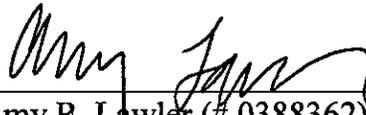
Again, there are always factors that weigh on both sides of the equation in terms of whether individuals are employees or independent contractors. But SCS controls the means and manner of their performance by training them, giving them instructions to follow for various assessments, and requiring them to complete their assessments in a relatively efficient fashion; and it has the right to discharge them without incurring liability. These two factors are given the most weight when determining employment status. As such, the ULJ properly found in this case that the sensory assessors were employed by SCS.

⁷¹ *Id.*

Conclusion

Unemployment Law Judge David Cox correctly concluded that the sensory assessors were employed by SCS. The Department requests that the Court affirm the decision of the Unemployment Law Judge.

Dated this 6th day of January, 2010.



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