NO. 90502-9

SUPREME COURT OF THE STATE OF WASHINGTON

COURTNEY ROBINSON,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, and FOOTBALL NORTHWEST, LLC,

Respondents.

ANSWER TO PETITION FOR REVIEW BY RESPONDENT FOOTBALL NORTHWEST, LLC

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I. IDENTITY OF RESPONDENT

Respondent Football Northwest, LLC ("Seahawks"), respectfully requests that this Court deny review of the May 25, 2014 published opinion of the Court of Appeals in *Robinson v. Dep't of Labor & Indus.*, No. 69739-1-I, 326 P.3d 744 (2014). The decision affirmed the ruling of the King County Superior Court ("trial court") finding that Petitioner Courtney Robinson was not an employee of the Seahawks and thus not entitled to benefits under the Industrial Insurance Act ("Act"), RCW § 51.32.010, *et seq.*

II. COURT OF APPEALS DECISION

The Court of Appeals correctly decided this matter, holding that substantial evidence supported the trial court's factual findings, and ultimately its legal determination that Mr. Robinson was not an employee of the Seahawks under the Act and therefore not entitled to workers' compensation benefits.

III. ANSWER TO ISSUES PRESENTED FOR REVIEW

This Court only accepts review under four limited circumstances. RAP 13.4(b). In his *Petition for Review*, Mr. Robinson has failed to identify any of those four circumstances or argue their application to the present case. *See, e.g., Petition for Review*, p. 4. None are present here.

There is nothing in the Court of Appeals' decision that shows it is in conflict with a decision of this Court. RAP 13.4(b)(1). The Court of Appeals simply affirmed the trial court based on the substantial evidence present in the record demonstrating that Robinson did not meet, as a matter of fact, the two-part test for employment status established by this Court in *Novenson v. Spokane Culvert & Fabricating Co,* 91 Wn.2d 550, 553, 588 P.2d 1174 (1979). *See Robinson*, 326 P.3d at 751. There is no conflict between the Court of Appeals' decision and this Court's decision in *Novenson.* RAP 13.4(b)(1).

Moreover, this case presents a routine affirmation of a trial court decision finding no entitlement to benefits based on the factual record. As such, it is not one presenting "an issue of substantial public interest." RAP 13.4(b)(4). Subsection (b)(2), concerning conflict within the Court of Appeals, and subsection (b)(3), concerning constitutional issues, are plainly not applicable. Review should be denied.

IV. STATEMENT OF THE CASE

A. Undisputed Facts

On Appeal, Robinson did not assign error to the trial court's Findings of Fact ("FOF") 2, 3, 4, 8, 12, 14, 19, or 21. Appellate Brief of Robinson ("App.Br.") at 4 (assigning error). Thus, all of those Findings of

Fact as described below are verities on appeal. RAP 10.3(g); *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995).

On April 13, 2010, Mr. Robinson injured his knee while participating in an off-season "minicamp" held by the Seahawks. CP 45 (FOF ¶2). Robinson and fifteen other potential hires had attended the minicamp by invitation from the Seahawks. CP 45 (FOF ¶3). [1] Robinson was a "free agent" at the time of his invitation and participation in the minicamp. CP 45 (FOF ¶4).

Mr. Robinson tried out for at least two other teams before the Seahawks minicamp but had not been offered employment. CP 45 (FOF ¶8). [2] On or prior to April 12, 2010, the Seahawks provided Robinson with a "Free Agent Tryout Waiver" for him to review. CP 46 (FOF ¶12); Tr. 04/21, p. 54, ln. 20. Execution of the Free Agent Tryout Waiver was voluntary. CP 46 (FOF ¶14).

Mr. Robinson did not gain any benefit or value by participating in the minicamp. CP 46 (FOF ¶19). Of the sixteen people (including Robinson) who attended the Seahawks' minicamp in April 2010, five were later approached with employment offers from the Seahawks which led to

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[1] All told, 96 players attended the minicamp: sixteen potential hires and approximately 80 players under contract. *See* Perpetuation Deposition of Seahawks Vice President John Idzik ("Idzik Dep."), p. 25, lns. 17-25.

[2] In fact, Robinson tried out for four separate NFL teams, not including the Seahawks, and one UFL team. *See* 2011 Trancript of Board Proceedings ("Tr.") 04/21, p. 29, lns. 7-8; p. 53, lns. 12-19 (Robinson).

execution of a standard National Football League ("NFL") player contract and creation of employment relationships between the Seahawks and those players. CP 47 (FOF ¶21). Robinson was not among them. *Id.* [3]

B. Substantial Evidence

Mr. Robinson assigned error to FOF 5, 7, 9, 10, 11, 13, 15, 16, 20, and 22. App. Br. at 4. However, he failed to address how those factual findings lacked evidentiary support. [4] Each was supported by substantial evidence.

1. The Minicamp

The purpose of the April 2010 minicamp was for potential players such as Robinson to have "a chance to show [their] skills and talents and what [they] have" to the Seahawks staff so they could be evaluated for potential hire. Tr. 05/10, p. 8, lns. 11-26 (Seahawks Defensive Coordinator Gus Bradley) (bracketed text added); Tr. 04/21, p. 53-54, lns. 26-2

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[3] This uncontested Finding of Fact, alone, should end the appeal. That Finding reads: "Of the sixteen persons (including Mr. Robinson) who attended the Seahawks mini-camp in April, 2010, five were approached with employment offers from the Seahawks which led to the execution of a standard National Football League player contract and creation of employment relationships between the Seahawks and those players; Mr. Robinson was not one of those five players." CP 47 (FOF ¶21) (emphasis added). As Mr. Robinson does not contest this finding of fact, and thus concedes he was not "one of those five players" who entered into an "employment relationship[ ]" with the Seahawks, the analysis should end there. RAP 10.3(g).

[4] Accordingly, Robinson's challenge to the trial court's Findings of Fact should be considered waived. *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn.App. 474, 496, 254 P.3d 835 (2011) (*citing Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992); RAP 10.3) (opening brief provided no argument or analysis why challenged fact finding was not supported by substantial evidence, challenge deemed waived)

(Robinson). Robinson was not promised a position on the Seahawks at the conclusion of the minicamp. Tr. 04/21, p. 20, lns. 7-15 (Robinson's agent/attorney Lyle Masnikoff); Tr. 05/10, p. 10, lns. 23-25; p. 13, lns. 19-22 (Bradley); Idzik Dep., p. 12-13, lns. 1-2. The camp was merely Robinson's opportunity to "show [his] skills to the Seahawk staff," as he testified. Tr. 04/21, p. 53-54, lns. 26-2. Mr. Robinson was also not being "trained" on how to play football. Tr. 04/21, p. 48, lns. 19-20 (did not come to "learn to play football").

Attendance at the minicamp was purely voluntary, and Robinson was free to leave at any time. Tr. 04/21, p. 49, lns. 5-7 ("Q...You were not required to attend the minicamp, were you? A. No."); p. 23 lns. 11-19 (Robinson's agent/attorney Lyle Masnikoff; "strictly voluntary"); Idzik Dep., p. 10, lines 14-17 ("voluntary for everyone"). Just as attendance at the minicamp was not a guarantee of employment, absence from the minicamp was not a bar to future employment with the Seahawks, including employment via participation in another minicamp, or via other means. Idzik Dep., p. 17, ln. 25. During minicamp, players without a contract with the Seahawks, like Robinson, were not governed by NFL rules or discipline. Idzik dep., p. 17, lns. 19-21 ("The only players we can govern, with mandatory rules and discipline, would be players under contract."); p. 46-47, lns. 23-18; Tr. 04/21, p. 15, lns. 2-14 (Masnikoff);

Idzik Dep., p. 17, lns. 19-21; p. 46-47, lns. 23-18. The minicamp was of short duration, only 3 days. *See* "Free Agent Tryout Waiver and Release of Liability" Tr. 04/21, p. 54, Ex. 1.

2. Neither the Seahawks nor Robinson Consented

Neither the Seahawks nor Robinson consented to an employment relationship. Mr. Robinson was a "free agent," meaning he was not under contract with, and was thus free to sign with, any professional football team. CP 45 (FOF ¶4) (uncontested); Idzik Dep., p. 11, lns. 18-25; p. 19, lns. 22-14; Tr. 04/21, p. 54, lns. 22-25 (Robinson). Indeed, Robinson testified that "[t]o a certain extent" his understanding of "free agency" is that he "is not an employee of the Seattle Seahawks." Tr. 04/21, p. 56, lns. 2-6.

Mr. Robinson did not receive any compensation for his participation in the minicamp. CP 46 (FOF ¶19) (uncontested); Tr. 04/21, p. 65, ln. 21, Ex. 2 (email stipulation); p. 31, lns. 14-17; p. 56, lns. 21-23 (Robinson). Mr. Robinson admitted he was not paid wages by the Seahawks. "Q. ...Were you paid an hourly rate by the Seahawks for participating in the tryout? A. No." Tr. 04/21, p. 56, lns. 21-23. "Q. And were you paid anything in addition, any other spending money? A. No, I was not, you know, not given any money." Tr. 04/21, p. 31, lns. 14-16; *see*

also CP 46 (FOF ¶19) (uncontested) ("Mr. Robinson did not gain any benefit or value by participating in the tryout during the minicamp."). Mr. Robinson also did not fill out a tax form "or any other employment related documents" indicating the receipt of wages or supporting any ostensible employment relationship with the Seahawks. Tr. 04/21, p. 56, lns. 10-12 (Robinson); Idzik Dep., p. 18-19, lns. 25-5.

The only items paid for by the Seahawks were Mr. Robinson's airfare and hotel accommodations. Tr. 04/21, p. 30-31, lns. 10-13 (Robinson). Mr. Robinson was also provided meals by the Seahawks during the minicamp. *Id.* [5] As his agent and attorney testified, the NFL allows clubs to pay for travel expenses for unsigned players, but not wages. Tr. 04/21, p. 16, lns. 7-12. John Idzik confirmed this testimony. Idzik Dep., p. 16, lns. 14-19. Conversely, players actually employed by (*i.e.*, under contract with) the Seahawks are paid on a *per diem* basis for their participation in minicamps. Idzik Dep., p. 19-20, lns. 21-18 (between $825 and $1,000 per week, prorated).

Mr. Robinson also voluntarily executed a "Free Agent Tryout Waiver and Release of Liability." CP 46 (FOF ¶14) (uncontested); Tr. 04/21, p. 54, lns. 3-6, Ex. 1. The document states it is entered into

[5] These items are plainly *not* "wages." *Doty v. Town of S. Prairie*, 155 Wn.2d 527, 542, 120 P.3d 941 (2005) ("[W]ages, simply stated, refer to the monetary remuneration for services performed.").

"Between Seattle Seahawks ("Club") and [written: Courtney Robinson] ("Player") for the Year 2010." Tr. 04/21, p. 54, Ex. 1. The document also explicitly states that, "[written: Courtney Robinson], (herein known as "Player") *who is not an employee of the Seattle Seahawks* (herein known as "Club"), has a desire to participate... in workout and/or mini-camp sessions [etc.]" *Id.* (emphasis added; bracketed text added for clarity). The document, signed by Robinson and attested to by a witness, states plainly that Mr. Robinson acknowledges he is a "Free Agent" and "is not an employee of the Seattle Seahawks[.]" *Id.* Robinson's execution of the document was voluntary. CP 46 (FOF 14) (uncontested). Further, at the time he signed the document, Robinson was represented by workers' compensation attorney and sports agent Lyle Masnikoff. Tr. 04/21, p. 9, lns. 5-10; p. 10, lns. 1-2; lns. 11-12; p. 11-12, lns. 23-4. Robinson's non-employment status was also reiterated with him verbally. Idzik Dep., p. 10, lns. 18-24 ("Well, the first thing we do... we have them sign a waiver of liability so they understand they're not an employee of the Seahawks... we explain that to them verbally too.").

Testimony from Masnikoff confirmed that NFL players' contracts of employment must be in writing and cannot be oral. Tr. 04/21, p. 15, lns. 9-11. In fact, under the NFL players' collective bargaining agreement, NFL contracts must be based on a specific form. CP 47 (FOF ¶21)

(uncontested); Tr. 04/21, p. 15, lns. 4-5 (Masnikoff); Idzik Dep., p. 15, lns. 10-12; p. 15-16, lns. 22-12, Ex. 3. Mr. Robinson was familiar with NFL contracting requirements, because he had previously executed the NFL form contract with another NFL franchise, the Philadelphia Eagles. Tr. 04/21, p. 15, lns. 12-19 (Masnikoff); p. 52, lns. 21-25 (Robinson). Robinson was "familiar with [the] procedure" of signing an NFL contract. Tr. 04/21, p. 15, lns. 12-19 (Masnikoff). Yet, Mr. Robinson did not sign and did not have a written NFL contract with the Seahawks. Tr. 04/21, p. 15, lns. 2-14 (Masnikoff); Idzik Dep., p. 18, lns. 22-24. Robinson understood that a signed contract meant employment as an NFL player, whereas some oral suggestion did not. CP 47 (FOF ¶21) (uncontested).

The best Robinson could muster on direct examination was that he subjectively believed it "very likely" that he "was going" to enter into a contract with the Seahawks at the end of the minicamp (not that he had done so). Tr. 04/21, p. 33, lns. 1-3; *but cf.* Tr. 05/10, p. 13-14, lns. 19-7 (Bradley). In cross-examination, Mr. Robinson conceded that his belief was little more than a "hope." Tr. 04/21, p. 49, lns. 2-4 ("Q. You were hoping to sign the contract at the end of the minicamp; correct? A. Correct.").

3. *Robinson Did Not Perform an Essential Function or Encounter the Special Risks of Employment*

Mr. Robinson did not expand a pool of applicants vital to the team's survival, as Mr. Masnikoff testified:

> Q. Do you have a sense of how many free agents there are in the NFL?... Anybody out there trying to catch on with an NFL team?
> A. There are thousands of them.

Tr. 04/21, p. 19, lns. 19-26. Idzik confirmed:

> Q. How big is the overall pool of non-contract players that you're able to recruit and sign?...
> A. Well, if you include non-contract players whose contract did not expire, then it's literally thousands...

Idzik Dep., p. 9, lns. 7-12. Mr. Robinson also admitted that there are a number of highly qualified applicants, but only 32 NFL teams. Tr. 04/21, p. 50, lns. 25-26; p. 51, lns. 1-4. That pool of applicants grows by thousands each year. *See* Idzik Dep., p. 7 lns. 9-17.

Mr. Robinson was not performing any essential function for the Seahawks by trying out for the team. Approximately 96 players attended the minicamp. Idzik Dep., p. 25-26, lns. 17-6. That number includes multiple players for every position. When Mr. Robinson dropped out of the minicamp, there was no need to replace him. Idzik Dep., p. 26, lns. 7-

21. With due respect to Mr. Robinson, he did not fill any "particular need" or present any "unique skills" to the Seahawks. Idzik Dep., p. 20-21, lns. 22-3; Tr. 05/10, p. 12, lns. 14-16 (Bradley: "nothing out of the ordinary"). The Seahawks also did not have a "special need" for a defensive back (Mr. Robinson's position) in April 2010. Tr. 05/10, p. 13, lns. 12-14 (Bradley).

Neither was Robinson encountering the "special risks" of employment as an NFL football player at the minicamp. Under NFL rules, the minicamp Robinson attended was required to be conducted (1) without pads; (2) without contact; and (3) at a monitored tempo for the purposes of additional safety. Idzik Dep., p. 29, lns. 21-22. Robinson was not playing in a pre-season or regular-season game, nor was he training for one. Tr. 04/21, p. 48, lns. 19-20 (Robinson). He was not encountering the "special risks" faced by NFL players.

The foregoing facts led naturally to the trial court's decision, and also led the Court of Appeals to affirm that Mr. Robinson was not an employee of the Seahawks at the time of the April 2010 minicamp. Both courts therefore concluded he was not entitled to workers' compensation benefits under the Act.

C. Procedural History

Mr. Robinson filed an Application for Benefits with the Department of Labor and Industries on June 7, 2010, alleging he sustained an industrial

injury in the course of employment with the Seahawks while attending the April minicamp. CP 44 (FOF ¶1). The Department denied the claim and affirmed its decision. *Id.* at 44-45. On October 8, 2010, Robinson filed an appeal with the Board of Industrial Insurance Appeals (the "Board"). *Id.* at 45. The Board affirmed the decision of the Department and denied Robinson's Petition for Review on October 7, 2011. *Id.* Robinson then appealed to the trial court. CP 44. The Honorable Regina Cahan, presiding without a jury, affirmed the Board. CP 44-50. Robinson appealed to the Court of Appeals, which affirmed the trial court. *Robinson*, 326 P.3d 744. Robinson now seeks review of that decision.

V. ARGUMENT

This Court grants review only under four limited circumstances:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). None of these circumstances is present here.

Workers' compensation benefits are provided only to "workers." RCW § 51.32.010. In order to qualify as a "worker" under the IIA, a claimant must prove that he is injured while "engaged in the *employment of an employer* under this title, whether by way of manual labor or otherwise in the course of his [ ] *employment.*" RCW § 51.08.180 (emphasis added). Accordingly, a claimant must prove an employment relationship between him and the putative employer in order to satisfy § 51.08.180. In determining whether or not an employment relationship exists, for the past 30 years, Washington courts have consistently applied this Court's two-part test established in *Novenson v. Spokane Culvert & Fabricating Co. See, e.g., Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn.App. 853, 856, 86 P.3d 826, *rev. den.*, 152 Wn.2d 1031 (2004) (applying *Novenson*).

Under *Novenson*, an employer-employee relationship only exists when "(1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship." 91 Wn.2d at 553, 588 P.2d 1174. Whether or not a claimant meets the *Novenson* test is a question of fact. *Rideau v. Cort Furniture Rental*, 110 Wn.App. 301, 302, 39 P.3d 1006 (2002); *Smick v. Burnup & Sims*, 35 Wn.App. 276, 279, 666 P.2d 926 (1983).

Moreover, although the Act is liberally construed "in favor of persons who come within the act's terms," *Berry v. Dep't of Labor &*

Indus., 45 Wn.App. 883, 884, 729 P.2d 63 (1986), the Act's liberal construction "does not apply to defining who those persons might be." *Id.* Rather, claimants are held "to strict proof of their right to receive the benefits provided by the act." *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds by Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958).

In this case, the Court of Appeals' review was limited to "whether substantial evidence support[ed] the trial court's factual findings and then review, *de novo*, whether the trial court's conclusions of law flow[ed] from the findings." *Rogers v. Dep't of Labor & Indus.*, 151 Wn.App. 174, 180, 210 P.3d 355 (2009) (bracketed text added for clarity) (quoting *Watson v. Dep't of Labor & Indus.*, 133 Wn.App. 903, 909, 138 P.3d 177 (2006) (citing *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5–6, 977 P.2d 570 (1999)). "Substantial evidence" is merely evidence sufficient to persuade a fair-minded, rational person of the truth of the matter asserted. *Ferencak v. Dep't of Labor & Indus.*, 142 Wn.App. 713, 719–20, 175 P.3d 1109 (2008); *see also Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn.App. 335, 340, 725 P.2d 463, (1986) ("the standard for 'substantial evidence' is 'any reasonable view [that] substantiates [the trial court's] findings, even though there may be other reasonable interpretations'")

(citation omitted; bracketed text in original). The Court of Appeals was also required to review the record in the light most favorable to the party who prevailed at the trial court level, *i.e.*, the Seahawks. *Harrison Mem'l Hosp. v. Gagnon,* 110 Wn.App. 475, 485, 40 P.3d 1221 (2002).

In its decision, the Court of Appeals simply applied the two-part *Novenson* test, analyzed the trial court's uncontested findings of fact and the substantial evidence supporting the challenged findings, and found, appropriately, that Mr. Robinson did not meet the two-part *Novenson* test for employment status. *Robinson*, 326 P.3d 744 (2014).

There is nothing in the decision of the Court of Appeals that suggests it ran afoul of this Court's decision in *Novenson* or that this case presents "an issue of substantial public interest." RAP 13.4(b)(1), (4). There is also nothing showing that this case presents a conflict within the Court of Appeals or that constitutional issues are at stake. RAP 13.4(b)(2), (3). In his *Petition for Review*, Mr. Robinson fails to make any argument that any of the circumstances presented in RAP 13.4(b) are present here. Instead, he simply restates the arguments laid out in his Court of Appeals briefs.

The decision of the Court of Appeals represents a routine and correct affirmation of the trial court based on the uncontested findings of

fact and substantial evidence presented in the record. There is no basis for this Court to accept review of this case.

VI. CONCLUSION

This case presents a routine affirmation by the Court of Appeals of the trial court based on verities of appeal and findings of fact supported by substantial evidence present in the record. It does not justify review. Mr. Robinson has not presented any arguments supporting review under the criteria set forth in RAP 13.4(b). For these reasons, this Court should deny further review.

Respectfully submitted this Friday, July 25, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on Friday, July 25, 2014, a copy of the Answer of Respondent, Football Northwest, LLC, was served on all counsel of record by U.S. Mail Postage Prepaid.

BAUER MOYNIHAN & JOHNSON LLP

Santana Strange

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Enclosed for filing with regard to Courtney Robinson v. Dep't L&I, et al (No. 90502-9) is the attached Answer to Petition for Review by Respondent Football Northwest, LLC. Craig K. Connors is the attorney filing the Answer; his WSBA number is 24054. The address for Bauer Moynihan & Johnson is below. The main phone number is (206) 443-3400. Please send a confirmation of receipt to me.

Thank you!

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