69739-1

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NO. 69739-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

COURTNEY ROBINSON,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

The Department of Labor and Industries (Department) rejected Courtney Robinson's claim for industrial insurance benefits for an injury he sustained while trying out for a position with Football Northwest, LLC (Seahawks). The Department rejected Robinson's claim because he was not an employee covered by the Industrial Insurance Act, Title 51 RCW, at the time of his injury. Robinson appealed this determination. The Board of Industrial Insurance Appeals (Board) and the King County Superior Court affirmed the Department's determination, ruling Robinson was not a Seahawks employee.

The issue on appeal is whether a job applicant who is injured while performing a physical agility test required by a prospective employer is an employee covered by the Industrial Insurance Act when the employer has neither offered nor guaranteed the applicant employment. The Court should affirm the superior court's determination because extending industrial insurance coverage to job applicants who are injured during an interview process absent proof of a mutual employment agreement exceeds the scope and purpose of the Industrial Insurance Act. A person is not an employee under the Industrial Insurance Act unless there is evidence of the alleged employer's right to control the interviewee, a mutual agreement to the formation of an employment contract, and remuneration for the services

performed by the interviewee. In this case, the superior court's determination that no employment relationship existed between Robinson and the Seahawks is supported by substantial evidence and should be affirmed. Robinson failed to prove the Seahawks had the right to control him, there was no explicit or implied mutual employment agreement, and that he did not receive remuneration for participating in the mini-camp beyond reimbursement for travel costs.

II. ISSUE

1. Does substantial evidence support the superior court's findings that Robinson was free to leave the tryout at any point, there was no employment contract entered into between Robinson and the Seahawks, and Robinson was not paid wages such that Robinson was not an employee under RCW 51.08.180?

III. STATEMENT OF THE CASE

Robinson injured his knee while trying out for a position as a football player for the Seattle Seahawks. The pool of potential Seahawks players is in the thousands. BR John Idzik at 7-9.[1] To ascertain who the best candidates for the team are, the Seahawks invite potential players to interview with the team by participating in mini-camps. BR Idzik at 6. The mini-camp tryout model allows the team to meet an applicant, physically examine him, and observe him performing physical agility

[1] The certified appeal board record is cited as "BR." Witness testimony is referenced by the witness's name.

drills. BR Idzik at 10. In 2010, approximately 100 players tried out for or visited the Seahawks; of those, 22 were offered contracts. BR Idzik at 12.

At the time of the injury, Robinson was a free agent. BR Robinson at 54-56. He had previously signed a contract with the Philadelphia Eagles, but did not make the roster. BR Robinson at 28. After that, he tried out for other National Football League teams, but was not offered a contract. BR Robinson at 28-29.

Robinson was invited to tryout out for the Seahawks by participating in a mini-camp in April 2010. BR Robinson at 29. As part of the interview process, the Seahawks arranged for and paid for Robinson's flight, transportation, lodging, and meals. BR Idzik at 19. They did not compensate Robinson for his time or pay him a per diem. BR Idzik at 19.

The first day of the mini-camp interview involved a physical examination and an orientation meeting with the Seahawks team. BR Robinson at 31-32. During the orientation, Seahawks personnel explain participation in the tryout does not guarantee an applicant a contract. BR Idzik at 12; BR Paul Bradley at 8. Interviewees are also presented with a release form that explicitly states they are not Seahawks employees and are assuming the risk of any injury that might occur during the camp. BR Idzik at 10-11. The release is verbally explained to the interviewees. BR

Idzik at 11. If the interviewee agrees and signs the release, the interview process proceeds. BR Idzik at 11. In this case, Robinson signed the release explicitly stating he was not a Seahawks employee. BR Ex. 1; BR Robinson at 59.

On the second day of the interview, Robinson followed the itinerary provided to him by the Seahawks, which included meetings in the morning and a physical agility drill in the afternoon. BR Robinson at 33-35. While participating in the drill, Robinson injured his knee. BR Robinson at 36. The Seahawks sent him home later that day. BR Robinson at 42. Robinson was never offered a contract with the Seahawks. BR Idzik at 16.

Robinson filed a claim for industrial insurance benefits. BR Robinson at 47. The Department rejected his claim because he was not a Seahawks employee at the time of his injury. BR at 33-35. Robinson appealed to the Board. BR at 30-32. The Board affirmed the Department's order rejecting his claim. BR at 1, 12-17. Robinson appealed to superior court. The superior court found Robinson was a free agent, understood his participation was voluntary, and he was free to leave the tryout at any time. CP at 45. It also found Robinson knew he did not have a contract with the Seahawks and that an employment relationship was not formed by merely participating in the tryout. CP at 45-46. The

court found Robinson did not receive wages or per diem for his participation, although the Seahawks paid for his travel, lodging, and food. CP at 46. Similarly, it found neither Robinson nor the Seahawks gained "any benefit or value" from Robinson's participation in the mini-camp. CP at 46. Based on its findings, the superior court determined Robinson was not a Seahawks employee at the time of his injury. CP at 47. Robinson appealed to this Court.

IV. STANDARD OF REVIEW

In a workers' compensation matter, a superior court reviews the Board's decision de novo based on the evidence presented to the Board. RCW 51.52.115; *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998). The Court of Appeals reviews the superior court's determination using the ordinary civil standards of review. RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). The superior court's findings of fact are reviewed for substantial evidence and evidence is viewed in the light most favorable to the non-appealing party. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *Rogers*, 151 Wn. App. at 180. Issues of law are reviewed de novo. *Rogers*, 151 Wn. App. at 180.

Persons claiming industrial insurance benefits are held to strict proof of their entitlement to such benefits, including proof they are

employees as defined by the Industrial Insurance Act. *Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 68, 129 P.2d 777 (1942); *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996). Although the Industrial Insurance Act is to be liberally construed, such liberal construction "only applies in favor of persons who come within the Act's terms[]" and "does not apply to defining who those persons might be." *Berry v. Dep't of Labor & Indus.*, 45 Wn. App. 883, 884, 729 P.2d 63 (1986).

V. SUMMARY OF THE ARGUMENT

A person who is injured during the physical agility portion of an interview for a potential job is not an employee unless there is a right to control the interviewee, a mutual agreement for employment, and remuneration provided for the services performed. A claimant must prove all three elements to establish entitlement to industrial insurance benefits. The superior court properly determined Robinson was not an employee at the time of his injury because he was merely trying out for a position with the Seahawks, had not been offered or guaranteed employment, and was not being paid for his services. Robinson's attempt to distinguish his situation from other interviewees on the basis of the amount of risk involved should be rejected as it is inconsistent with the terms and purpose of the Industrial Insurance Act.

VI. ARGUMENT

Robinson was an interviewee seeking potential future employment with the Seahawks. The Industrial Insurance Act is not intended to cover all job applicants merely because they believe they might obtain a job and the potential employer pays for their travel to an interview. Industrial insurance benefits are available to all "workers." *Doty v. Town of South Prairie*, 155 Wn.2d 527, 535, 120 P.3d 941 (2005). Under the Industrial Insurance Act, the terms "worker" and "employee" are synonymous. RCW 51.08.185. The term "worker" is defined as

> every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor[.]

RCW 51.08.180.

Robinson argues he was an employee of the Seahawks. Appellant's Br. at 4.[2] Whether an employment relationship exists should be decided based on the specific facts of each case. *See Clausen*, 15 Wn.2d at 69. The existence of an employment relationship must be demonstrated by objective evidence that would lead a reasonable person to

[2] A person can be a worker either if he or she is an employee or if he or she is an independent contractor where the essence of the contract is personal labor. RCW 51.08.180.

determine such a relationship exists. *Jackson v. Harvey*, 72 Wn. App. 507, 519, 864 P.2d 975 (1994). A claimant's "bare assertion of belief that he or she worked for this or that employer does not establish an employment relationship." *Id.*

For purposes of the Industrial Insurance Act, an employment relationship exists when there is evidence of: (1) the employer's right to control; (2) a mutual agreement to establish an employment relationship; and, (3) payment of wages. *Clausen*, 15 Wn.2d at 69; *Doty*, 155 Wn.2d at 537, 540-42; *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979). Whether these elements are met is a question of fact. *Smick v. Burnup & Sims*, 35 Wn. App. 276, 279, 666 P.2d 926 (1983).

In determining whether and when an interviewee is an employee, this Court should be mindful that its holding has potential ramifications outside of whether an industrial insurance claim is allowed. The Industrial Insurance Act is a compromise between employers and employees. In exchange for industrial insurance benefits, employees relinquish their common law remedies against employers and co-employees. RCW 51.04.010; *Daniels v. Seattle Seahawks*, 92 Wn. App. 576, 584-85, 968 P.2d 883 (1998). A finding that an interviewee is an employee deprives

the interviewee of common law remedies against the potential employer and future co-employees.

In this case, the superior court's findings that Robinson was free to leave the tryout at any time, there was no mutual agreement to form an employment relationship, and that Robinson was not paid wages for participating in the tryout are supported by substantial evidence. From these findings, the superior court properly determined Robinson was not an employee. This Court should affirm the superior court's order because the Seahawks did not have the right to control Robinson as he was a free agent, he was not offered or guaranteed employment contingent on successful performance in the mini-camp, and he did not receive remuneration for his services.

A. Robinson Failed To Prove The Seahawks Had The Right to Control His Physical Conduct

The first factor in determining whether an employment relationship exists is the alleged employer's right to control the performance of work. *Clausen*, 15 Wn.2d at 69; *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 863, 86 P.3d 826 (2004). Whether such control is actually exerted is not determinative, as long as the alleged employer has the right to control the work. *Clausen*, 15 Wn.2d at 69-70. Factors to consider in determining whether the right to control exists include: "(1) who controls

the work to be done; (2) who determines the qualifications; (3) setting pay and hours of work and issuing paychecks; (4) day-to-day supervision responsibilities; (5) providing work equipment; (6) directing what work is to be done; and (7) conducting safety training." *Bennerstrom*, 120 Wn. App. at 863.

The Board has addressed the level of control necessary to elevate a trainee to an employee. The Board determined it is necessary to establish "consent to a substantial quantum of employer control for the purpose of identifiable and meaningful benefit to the employer in the furtherance of its business interests[.]" *In re Darlene Cate*, No. 00 20324, 2002 WL 529507, *6 (Wash. Bd. of Indus. Ins. Appeals Feb. 5, 2002). Under this reasoning, control over the application process itself is insufficient to establish employment if the control does not provide a meaningful business benefit to the potential employer.

Using the Board's standard, Robinson failed to establish the Seahawks had the right to control his work. Admittedly, Robinson's activities while in Washington for two days were governed by an itinerary prepared by the Seahawks. BR Robinson at 33. However, while the Seahawks may have controlled his tryout schedule, Robinson's participation was voluntary and he could leave at any time. BR Robinson at 49; BR Idzik at 17; CP at 46 (Finding of Fact (FF) 17). Furthermore,

even if the Court were to determine the Seahawks maintained the right to control Robinson, such control was not in furtherance of its business interests, as the superior court properly found, "[t]he Seahawks did not gain any benefit or value by Mr. Robinson's participating in the tryout during the mini-camp." CP at 46 (FF 20). Robinson has not shown this finding is not supported by substantial evidence when viewed in the light most favorable to the Seahawks and, thus, has failed to prove the Seahawks maintained the right to control him during the tryout.

B. The Seahawks And Robinson Did Not Agree To The Formation Of An Employer-Employee Relationship

Robinson participated in the tryout as a free agent seeking future employment with the Seahawks. Robinson's testimony that he thought he was likely to receive a contract is insufficient to establish an employment relationship because there is no proof of a mutual agreement. "A mutual agreement must exist between the employee and employer to establish an employee-employer relationship." *Novenson*, 91 Wn.2d at 553; *accord Jackson*, 72 Wn. App. at 515 ("the employment relationship must be entered into mutually by the employer and employee."); *Fisher v. City of Seattle*, 62 Wn.2d 800, 804, 384 P.2d 852 (1963) ("Unlike the common law, compensation law demands that, in order to find an employer-employee relation, a *mutual* agreement must exist between the employer

and employee."). Workers' compensation "'is a mutual arrangement between the employer and employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship.'" *Fisher*, 62 Wn.2d at 805 (quoting 1 Arthur Larson, Lex K. Larson, Workmen's Compensation Law § 47.10 (1952)).

1. The Waiver Signed By Robinson Explicitly Indicated He Was Not A Seahawks Employee

A written agreement entered into between parties defining their relationship is an important factor in determining whether an explicit or implied employment agreement exists. Workers cannot waive their rights to industrial insurance benefits. RCW 51.04.060. It follows that a person who is a worker under RCW 51.08.180 should not be precluded from receiving benefits if he or she signs a statement indicating he or she is not an employee. However, while such a statement cannot waive benefits, it is relevant in determining whether the parties intended to create an employment relationship in the first place.

In *Bennerstrom*, 120 Wn. App. at 856-57, a man who contracted with the state to provide services for his mother claimed he was a state employee and, thus, entitled to industrial insurance benefits. The court

found neither the state nor the alleged employee consented to an employment relationship. *Bennerstrom*, 120 Wn. App. at 859. The court disregarded the alleged employee's self-serving testimony, as "'[a] worker's bare assertion of belief that he or she worked for this or that employer does not establish an employment relationship.'" *Id.* (quoting *Jackson*, 72 Wn. App. at 519). The court looked at the terms of the contract entered into by the state agency and the alleged employee. *Id.* at 859-60. In two separate places, the contract indicated the contractor was not an employee of the state agency; the claimant also indicated in a letter that he was not an employee of the state agency. *Id.* at 860. Based on this, the court determined it was clear there was no mutual agreement to form an employment relationship. *Id.*

Like *Bennerstrom*, the agreement entered into between Robinson and the Seahawks evidences that the parties did not intend to form an employment relationship. Robinson was repeatedly informed he was not a Seahawks employee and his participation in the tryout would not guarantee him a contract. BR Idzik at 12. During the mini-camp orientation, tryout players were told they were not Seahawk employees and a waiver entitled "Free Agent Tryout Waiver and Release of Liability" was explained. BR Idzik at 10-11. Robinson signed this form upon his arrival at the tryout. BR Ex. 1; BR Robinson at 54. The form begins with

the acknowledgement that Robinson "is not an employee of the Seattle Seahawks[.]" BR Ex. 1.

Additionally, Robinson previously tried out for other teams and was familiar with the tryout process. BR Robinson at 28-29. He admitted he was a free agent, BR Robinson at 54-56, and was simply hoping to sign a contract at the end of the tryout. BR Robinson at 29. The superior court properly found that before his attendance at the Seahawks tryout, "Robinson knew that attendance at such mini-camp did not create an employment relationship between prospective players such as himself and National Football League teams." CP at 45 (FF 10).

No written employment contract was entered into between the Seahawks and Robinson. BR Idzik at 16. Teams within the National Football League utilize a specific contract form, BR Ex. 3, and Robinson was aware of the formal contracting process as he previously signed a contract with the Philadelphia Eagles, BR Robinson at 52. Because of Robinson's previous experience within the National Football League, the superior court found he knew "an employment relationship was not created between prospective players and teams until an offer of employment was made" and a standard National Football League contract executed. CP at 46 (FF 11). There was no such agreement.

2. No Implied Employment Contract Was Created Because The Seahawks Did Not Offer Or Guarantee Robinson A Contract If He Successfully Completed The Mini-Camp

Whether and when an interviewee can be considered an employee under the Industrial Insurance Act is a question of first impression in Washington. However, other states have addressed this question in the context of interviewees who are asked to participate in physical tests before being offered or guaranteed employment.[3] The different approaches taken by various states in determining whether an implied contract for hire exists provide some guidance for addressing Robinson's situation, as his mini-camp interview was similar to situations where police officer or firefighter applicants are required to pass physical agility examinations as part of an interview process.

Many courts have determined applicants who are injured during an interview process prior to being offered or guaranteed employment are not employees. *E.g.*, *Boyd v. City of Montgomery*, 515 So.2d 6 (Ala. Civ.

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[3] The workers' compensation laws of most states define an employee as "every person in the service of another under any contract of hire, express or implied." 2 Arthur Larson, Lex K. Larson, Workers' Compensation Law ch. 60 (2000). Under the Industrial Insurance Act, an employer is defined as one "who contracts with one or more workers[.]" RCW 51.08.070. Additionally, Washington courts have required proof of a mutual agreement to establish an employee-employer relationship. *Novenson*, 91 Wn.2d at 553; *Clausen*, 15 Wn.2d at 69 (indicating a claimant must establish "by clear and convincing evidence, that a contract of employment existed"); *see* RCW 51.08.070. Accordingly, other states' interpretations of whether an interviewee has entered into an implied contract for hire are helpful for determining how Washington courts should address this situation.

App. 1987) (person injured during a pre-employment physical agility test for a police department was not an employee); *Younger v. City of Denver*, 810 P.2d 647, 653 (Colo. 1991) (person injured during a pre-employment physical agility test for a police department was not an employee); *Bugryn v. State*, 97 Conn. App. 324, 330, 904 A.2d 269 (App. Ct. 2006) (person injured during pre-employment physical fitness test for a corrections officer position was not an employee because there was no offer of employment); *Sellers v. City of Abbeville*, 458 So.2d 592 (La. Ct. App. 1984) (person injured during pre-employment physical agility test for a police department was not an employee); *Leslie v. Sch. Servs. & Leasing, Inc.*, 947 S.W.2d 97 (Mo. Ct. App. 1997) (person injured during pre-employment training for school bus drivers was not an employee); *Cust-O-Fab v. Bohon*, 876 P.2d 736 (Okla. Ct. App. 1994) (person injured during a pre-employment welding skills test was not an employee); *Dykes v. State Accident Ins. Fund*, 47 Or. App. 187, 613 P.2d 1106 (Ct. App. 1980) (person injured during a physical agility test while trying out to be a deputy sheriff was not an employee).

If an applicant's participation in a test or training is preceded by an offer of employment if the applicant successfully passes the test or

training, there may be an implied employment agreement.[4] The offer or guarantee of employment combined with the interviewee's participation in the test or training creates a mutual employment agreement. *Dodson v. Workers' Comp. Div.*, 210 W. Va. 636, 644-45, 558 S.E.2d 635 (2001). For example, a Connecticut court determined an applicant for a corrections officer position who was asked to participate in a physical fitness test as part of the application process was not an employee. *Bugryn*, 97 Conn. App. at 330. The court reviewed approaches taken by other states, including the cases relied on by Robinson, and declined to extend workers' compensation coverage to applicants who simply hope to obtain employment with a prospective employer. *Id.* It held to establish an employment agreement, a claimant must prove, at "minimum, an offer of employment by an employer, *followed* by performance by the prospective employee[.]" *Id.*

An explicit or implicit guarantee of employment may also be sufficient to establish a mutual agreement for employment. The Supreme Court of Colorado determined an applicant for a police officer position who was required to pass a physical agility test was not an employee for

[4] Some states have taken a more conservative approach, determining an offer is insufficient when the employment offer is conditioned on passing a physical examination as the contract is not technically formed until the condition precedent is fulfilled. *See, e.g.*, *Gebhard v. Dixie Carbonic*, 261 Neb. 715, 721-22, 625 N.W.2d 207 (2001) (employment contract was not formed when applicant was offered a position contingent on passing a lifting test and was injured while participating in the test).

workers' compensation purposes because there was no guarantee she would be hired if she successfully passed the test. *Younger*, 810 P.2d at 653. In doing so, it rejected the approach of the New York and California decisions, and similar decisions. *Id.* at 650-52. Instead, it followed other states' approaches, determining that because there was no guarantee or promise of employment contingent on successful completion of the required tests, no employment agreement was formed. *Id.* at 653.

A determination that a guarantee of employment may create an implied employment agreement is in accord with the Board's reasoning. In the significant Board decision of *In re Kimberly Bemis*, No. 90 5522, 1992 WL 160668 (Wash. Bd. of Indus. Ins. Appeals May 1, 1992), the Board found a person who was required to attend mandatory training as part of a hiring process was an employee. In that case, the claimant applied to be an Alaska Airlines flight attendant. *Id.* at *2. She was required to attend a five-week training program, conducted by and paid for by Alaska Airlines. *Id.* A person who successfully completed the training was guaranteed employment. *Id.* The Board determined the trainee entered into an implied employment contract with the airline because, among other reasons, she was guaranteed future employment. *Id.* at *6.

Robinson was not offered a contract with the Seahawks. No one guaranteed him a position, nor was he told it was highly likely that he

would be offered a contract. BR Idzik at 21; BR Bradley at 8, 10-11, 13. Instead, he was repeatedly informed participation in the mini-camp did *not* guarantee a contract. During the tryout orientation, Seahawks personnel explained participation in the tryout did not guarantee a contract. BR Idzik at 12. Unlike *Bemis*, Robinson was not guaranteed employment with the Seahawks if he participated in the tryout. The tryout was merely an interview.

The guarantee of employment need not be explicit, if the claimant can show successful completion of a test or training program "in fact historically has led to employment for all, or even a majority of other trainees." *In re Cate*, 2002 WL 529507, *5. There were 16 tryout players at the mini-camp Robinson attended; only five were offered contracts. BR Idzik at 24. In 2010, approximately 100 players either tried out for or visited the Seahawks; only 22 were offered contracts. BR Idzik at 12-13. Participation in tryouts has not historically guaranteed an applicant a contract with the Seahawks.

The Seahawks and Robinson did not enter into an employment agreement, expressed or implied. Taking into consideration all of the surrounding circumstances, especially when viewed in the light most favorable to the Seahawks and the Department, no reasonable basis exists to conclude there was an expressed or implied mutual employment

agreement. Robinson has failed to establish he was an employee of the Seahawks.

C. Robinson Failed To Prove He Received Remuneration For The Time He Spent Trying Out For The Seahawks

A claimant must prove the receipt of wages to establish he or she is an employee.[5] *Clausen*, 15 Wn.2d at 69; *Doty*, 155 Wn.2d at 537. Wages are "monetary remuneration for services performed." *Doty*, 155 Wn.2d at 542. "[T]he very basis of the employee-employer relationship is the performance of service in return for some kind of remuneration therefor[.]" *Id.* at 537. A person who receives no wages is a volunteer and, except in limited circumstances, is not entitled to industrial insurance benefits. *Id.* at 538.

This Court should not disregard the requirement of remuneration for interviewees, for in the absence of a wage requirement "every person who makes application to an employer for a job, fills out an application and takes any kind of test is ipso facto an employee." *Dykes*, 47 Or. App. at 190. In the absence of a wage requirement or employment agreement, an employer would be responsible for the costs of an injury or occupational disease sustained by every person it interviews.

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[5] Although this requirement has not been included in cases where there was no question of the existence of remuneration, it remains a required element as employment "constitutes 'services performed by an individual for remuneration.'" *Doty*, 155 Wn.2d at 540 (quoting RCW 51.08.195).

Robinson argues he received wages because the Seahawks paid for his travel, hotel, and meals while he participated in the tryout and such reimbursement should be included in calculating his wage at the time of injury under RCW 51.08.178(1). Appellant's Br. at 17-18. However, reimbursement for these costs does not rise to the level of remuneration for trying out for the team.

Simply because a type of reimbursement may be included in determining a worker's wage replacement benefits under RCW 51.08.178(1) does not mean such payment constitutes remuneration sufficient to create an employment relationship. *Doty*, 155 Wn.2d at 541-42; AGO 1984 No. 5, at 4-5. For example, the receipt of "'maintenance and reimbursement' for necessary incidental expenses[]" is insufficient to transform a volunteer into an employee. *Doty*, 155 Wn.2d at 540 (quoting RCW 51.12.035(2)). In *Doty*, the Supreme Court considered whether a per diem paid to a volunteer firefighter constituted remuneration so as to transform the volunteer firefighter into an employee. 155 Wn.2d at 542. The court considered the per diem in relation to minimum wage requirements, as well as the fact that the per diem was paid regardless of the amount of work performed, in determining it was merely reimbursement for expenses incurred and not a wage. *Id.*

The Board's reasoning in *In re Bemis*, 1992 WL 160668, is distinguishable. In that case, the Board determined the receipt of an eight-dollar meal stipend and a five-week training course were sufficient to constitute wages. 1992 WL 160668, *6. Unlike the claimant in *Bemis*, Robinson did not gain special skills specific to employment with the Seahawks or obtain training that enabled him to perform a new job. *See* BR Robinson at 48. He simply came to try out in hopes that he might obtain future employment with the Seahawks. BR Robinson at 49.

It is unclear whether the Board in *Bemis* would have considered the meal stipend alone to have been a wage. However, the receipt of meals and travel reimbursement is not remuneration in light of the Supreme Court's 2005 determination in *Doty*. Paying for an interviewee's or volunteer's lunch is not remuneration for services performed, especially when the amount paid does not depend on the quality or amount of work performed. A prospective employer should not be responsible for injuries occurring during a lunch interview, nor should the interviewee be forced to give up common law remedies against the prospective employer merely because he or she receives a free lunch.

Robinson volunteered his time to try out for the Seahawks. He was not compensated for the time he spent practicing with the team, meeting with coaches, or traveling. In fact, under a collective bargaining

agreement and National Football League rules, a person participating in a tryout cannot be compensated for his time. BR Idzik at 16. The Seahawks covered Robinson's food, travel, and lodging expenses. BR Idzik at 19. Payment of these costs does not rise to the level of remuneration for his services. Rather, it was merely maintenance and reimbursement for incidental expenses he necessarily incurred to participate in the tryout. Finally, even if the Court were to determine the superior court erred in finding Robinson "did not gain any benefit or value by participating in the tryout[,]" CP at 46 (FF 19), Robinson was still not an employee because there was no mutual employment agreement.

D. A Mutual Agreement For Employment, Express Or Implied, Is Required In All Situations. Robinson's Argument That An Exception Should Be Made When An Interview Involves Some Heightened Risk Is Contrary To The Purpose and Scope Of The Industrial Insurance Act

Robinson asks this Court to disregard Washington precedent and determine there is no need for a mutual employment agreement when an interviewee is subject to some undefined amount of risk. Appellant's Br. at 23-26. Robinson's request ignores a long-line of Washington precedent requiring a mutual agreement to establish employment under the Industrial Insurance Act. *Novenson*, 91 Wn.2d at 553; *Fisher*, 62 Wn.2d at 805; *Clausen*, 15 Wn.2d at 69. While a mutual agreement may be implied, there is no support for simply disregarding this requirement when an

interview involves some risk to the applicant. Furthermore, the Industrial Insurance Act does not distinguish between people based on the amount of risk or hazard involved in a certain type of employment.

This Court should reject Robinson's argument that his interview, unlike other interviews, should be covered because it involved some heightened risk. In support of his heightened risk argument, Robinson points to the Board's reasoning in *Bemis*. Appellant's Br. at 18-20. In *Bemis*, the Board reviewed several out-of-state cases, including cases from New York and California. The reasoning of these out-of-state cases, which emphasized extending workers' compensation coverage to tryouts for hazardous jobs, is inapplicable under Washington's current Industrial Insurance Act. The court must interpret the Industrial Insurance Act, not the laws of other states. *Bolin v. Kitsap County*, 114 Wn.2d 70, 75, 785 P.2d 805 (1990).

Washington's law is distinguishable from New York's law in the 1950s. In the case of *Smith v. Venezian Lamp Co.*, 168 N.Y.S.2d 764, 5 A.D.2d 12, 13 (1957), a New York court determined a person who was asked to polish a lamp so the employer could "try him out" was an employee. Unlike this case, the employer reported to the state that it was the employer and the trial was to establish base pay. *Id.* The court determined employment exists "where a tryout involves an operation that

would be ordinarily viewed as hazardous[.]" *Smith*, 5 A.D.2d at 13. The mention of the "hazardous" nature of the tryout was essential to the court's determination because, at that point in time, New York's workers' compensation laws only applied to hazardous employment. N.Y. Workers' Compensation Law § 3 (McKinney 2007). This concept is inapplicable under the modern Industrial Insurance Act.

The Industrial Insurance Act originally applied only to employees engaged in extra-hazardous work. *Doty*, 155 Wn.2d at 531; *Scott v. Dep't of Labor & Indus.*, 77 Wn.2d 888, 892, 468 P.2d 440 (1970) (noting the Industrial Insurance Act only applied to employments determined to be "'inherently constantly dangerous' in the light of 'modern industrial conditions'"). In 1971, coverage was extended to all types of employment, with a few statutorily enumerated exceptions. *Doty*, 155 Wn.2d at 531. The law now states, "[t]here is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state." RCW 51.12.010. To distinguish between interviews based on the amount of hazard involved is contrary to the purpose and scope of the modern Industrial Insurance Act.

Additionally, contrary to Robinson's suggestion, Appellant's Br. at 24, this Court should not follow Professor Larson's suggestion that an injury sustained during a tryout should be allowed when it "flows directly

from employment activities or conditions." 2 Arthur Larson, Lex K. Larson, Workers' Compensation Law § 26.02[6] (2012). Larson's premises are based on a synthesis of other state's laws, mainly New York and California in this instance, which differ from Washington's. There is no basis in Washington law for allowing a claim when tasks "flow[] directly from employment activities or conditions" and "involve[] a high degree of risk." Appellant's Br. at 20. Injuries are allowed when sustained while acting in the course of employment and need not "flow" from the work the employee is compensated for. *See* RCW 51.08.013(1).

Robinson also looks to a 1972 California workers' compensation case to support his theory that he should be covered because practicing football presents a special risk. Appellant's Br. at 15-16, 19. Again, California's laws differ from Washington's. The purpose of California's workers' compensation law "is to protect individuals against the special risks of employment." *Arriaga v. County of Alameda*, 9 Cal. 4th 1055, 1061, 40 Cal. Rptr. 2d 116, 892 P.2d 150 (1995). Thus, a California court, noting the purpose of its law was to protect workers against special risks, determined the act covered tryouts before the formation of an employment contract when the special risks of employment were present. *Laeng v. Workmen's Comp. Appeals Bd.*, 6 Cal. 3d 771, 782, 100 Cal. Rptr. 377, 494 P.2d 1 (1972). There is no special risk test in Washington. Rather,

the law is intended to "reduc[e] to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. If there is no employment relationship, it is irrelevant for industrial insurance purposes whether there is any special risk involved in the interview process.

Robinson also points to "[f]ederal workers' compensation law" to argue his interview was within "a special 'zone of danger'[.]" Appellant's Br. at 25 n.1. The law Robinson refers to is the test for determining whether an injury arises out of employment obligations, not whether an employment relationship exists, and is inapplicable in this case. *See O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362, 85 S. Ct. 1012, 13 L. Ed. 2d 895 (1965); *Kalama Servs., Inc. v. Director, Office of Workers' Comp. Programs*, 354 F.3d 1085, 1091-92 (9th Cir. 2004).

There is no basis in the Industrial Insurance Act for distinguishing between a person interviewing for a defensive linebacker position who is asked to perform a physical agility test and a person interviewing to be a secretary who is asked to take a keyboarding test. *See Wash. State Sch. Dirs. Assoc. v. Dep't of Labor & Indus.*, 82 Wn.2d 367, 372, 510 P.2d 818 (1973) (noting "[t]he secretary who trips and falls over a piece of carpet is as injured and in need of the coverage provided by the act as is the

workman in the lumber mill who trips and falls.") The Court should reject Robinson's invitation to create a law differentiating between interviewees for hazardous employment or tryouts that involve a special risk and other interviewees as such a distinction is contrary to RCW 51.12.010.

E. The Test For Determining Whether An Employment Relationship Exists Should Not Be Diluted So As To Extend Industrial Insurance Benefits To Mere Interviewees When The Interview Process Is Beneficial To the Prospective Employer

An interview does not transform into an employment relationship merely because the employer benefits from interviewing different applicants. Contrary to the New York and California cases cited by Robinson, Appellant's Br. at 21-22, Washington's law requiring a mutual employment agreement cannot be met merely by establishing some benefit to a potential employer. If this Court were to extend coverage whenever there is some benefit to an employer, all applicants who participate in some sort of an interview would be deemed employees because the prospective employer always benefits, to some degree, from engaging in the interview process to ascertain which candidates are best suited for a job.

An argument similar to Robinson's was rejected in the case of *Boyd*, 515 So.2d 6. In that case, a person who was required to pass a physical agility test as part of her application to become a police officer

argued she was an employee entitled to workers' compensation benefits because the physical agility test benefited the police department by allowing it to determine those applicants who were able to perform the job. *Boyd*, 515 So.2d at 7. The court rejected this argument, noting the interviewee willingly exposed herself to a risk by participating in the test and any speculative benefit received by the employer was insufficient to impute an employment contract. *Id.* at 7-8.

The possibility of obtaining better qualified candidates can be distinguished from other circumstances where an applicant actually performs work for the employer before being guaranteed permanent employment. For example, if a person wanted to work for a contractor and the contractor indicated he wanted the applicant to finish a building project to observe his carpentry skills, there may be a mutual agreement for temporary employment. *See In re Chris Thrush*, No. 09 21463, 2010 WL 5891813, **2-4 (Wash. Bd. of Indus. Ins. Appeals Nov. 5, 2010) (person who was asked to perform work for two days, thereby displacing the need for employees to perform the same tasks, was an employee because his work provided a direct economic benefit to the employer); *In re Cate*, 2002 WL 529507, *6 (requiring an "identifiable and meaningful benefit to the employer in furtherance of its business interests"). That was not the case here.

Additionally, Robinson's argument is contrary to the superior court's findings. The superior court made several findings relevant to determining whether the Seahawks benefited from Robinson's tryout. The court determined the purpose of the mini-camp was for the Seahawks to meet with Robinson, along with 15 other applicants, and watch the applicants perform drills. CP at 45 (FF 5). The court found, "[t]he Seahawks did not gain any benefit or value by Mr. Robinson's participating in the tryout during the mini-camp." CP at 46 (FF 20). These findings are supported by substantial evidence.

The Seahawks did not obtain a meaningful benefit from allowing Robinson to try out for the team, nor did his participation in a drill displace the need for contracted Seahawks players. The pool of potential Seahawks players is in the thousands. BR Idzik at 7-9. In 2010, the Seahawks had approximately 100 applicants try out for and visit the team. BR Idzik at 12. Inviting potential players to participate in a mini-camp allows the Seahawks to meet the players in person, have them examined by a team physician, and then observe them participating in drills. BR Idzik at 10. A mini-camp can last from one hour to three days. BR Idzik at 18. During a tryout, applicants participate in football drills; they do not actually play a game as Seahawks players. BR Idzik at 29. Whether an individual applicant participates in the mini-camp is inconsequential to the

Seahawks, as there is no need to replace the applicant if he is not able to participate in the camp. BR Idzik at 26. There is substantial evidence to support the superior court's determination that the Seahawks did not benefit from Robinson trying out for the team and, thus, even if this Court were to modify the law to allow a benefit to a potential employer to be sufficient to establish an employment relationship, such test is not met in this particular case.

Robinson has failed to prove he was an employee under the Industrial Insurance Act because the Seahawks did not have the right to control him as a free agent, there was no explicit or implied mutual employment agreement, and he received no remuneration for trying out for the team beyond reimbursement for travel costs. The Department, Board, and superior court all properly rejected his claim because he was not a Seahawks employee at the time of his injury.

VI. CONCLUSION

For the reasons stated above, the Department respectfully requests the Court affirm the superior court's determination that Robinson was not an employee under the Industrial Insurance Act.

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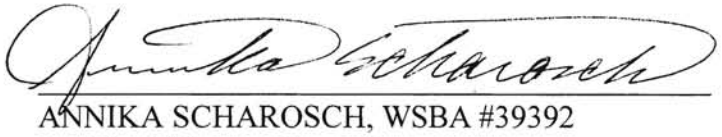
RESPECTFULLY SUBMITTED this 14th day of April, 2013.

ROBERT W. FERGUSON
Attorney General



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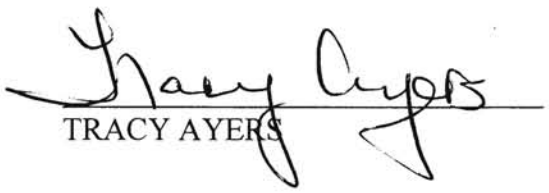

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