69739-1

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NO. 69739-1

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

COURTNEY ROBINSON,

Appellant,

v.

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

Respondents.

APPELLANT'S REPLY BRIEF

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A. Because This Is A Case of First Impression, The Court Should Look To The Public Policy Behind The Industrial Insurance Act And Existing Case Law For Guidance.

The parties are in agreement that this is a case of first impression in Washington State. Brief of Respondent Department of Labor & Industries (Department), p. 15; see also Brief of Respondent Football Northwest, LLC (Football Northwest), p. 42. While other jurisdictions have addressed the issue of prospective employees who are injured while engaging in a pre-employment tryout, Washington State has not been asked to do so until now.

In matters of first impression, public policy is particularly important. Where provisions of the Industrial Insurance Act are at issue, the overarching goal is to provide "sure and certain relief for workers, injured in their work." *Dennis v. Department of Labor & Industries,* 109 Wn.2d 467, 470, 745 P.2d 1295 (1987), citing RCW 51.04.010. To this end, the courts have held:

> …the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.

Id. To the extent the Respondents have relied on *Berry v. Dep't of Labor & Indus.* to assert that liberal construction should be narrowly applied in this case, this reliance is in error. First, Berry's employment status as a partner was specifically excluded under the Act. *Berry*, 45 Wn.App. at 884-85. That is not the case here. Second, and more importantly, the *Berry* Court's interpretation of liberal construction is no longer valid in light of the subsequent Supreme Court decisions of *Dennis* and *Harry v. Buse*. See *Berry v. Dep't of Labor & Indus.*, 45 Wn.App. 883, 729 P.2d 63 (1986); *Dennis,* 109 Wn.2d at 470; *Harry v. Buse Timber Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011 (2009).

For the past 26 years, broad, liberal construction has been the guiding principle that has been applied to the Industrial Insurance Act. The decisions in *Dennis* and *Harry*, as well as the statute, make this clear: "There 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" and in determining coverage the Industrial Insurance Act "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or deaths occurring in the course of employment." RCW 51.12.010

Where questions of coverage have been raised, the courts have generally looked at the situation on a case by case basis and focused on the

question of "did the work[er] consent with the 'employer' to the status of 'employee'?" *Novenson v. Spokane Culvert,* 91 Wn.2d 550, 554, 588 P.2d 1174 (1979), citing *Fisher v. Seattle,* 62 Wn.2d 800, 804-805, 384 P.2d 852 (1963). The reason for this is that "to thrust upon a worker an employee status to which he has never consented…might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common law damages." *Id.* In contrast, "when the party asserting the existence of an implied employment relation is not an employee seeking statutory compensation, but an employer seeking a defense to a common-law suit, different social values are at stake." *Id.* at 555. This is because "if an employment agreement is established, moderate statutory benefits are available to the injured worker; however, reaching such a conclusion in the second situation results in the destruction of valuable common-law rights to the injured worker." *Id.*

When it comes to injured workers and the existence of an employment contract, the focus is on the "employee." *Id.* at 553. Where employers have attempted to shirk their responsibility to their workers, the public policy goal has been to provide the injured worker with legal recourse, either through IIA coverage or through a common law tort action. As Arthur Larson explains in *The Law of Workmen's Compensation*:

> If…the exclusiveness defense is a 'part of the *quid pro quo* by which the sacrifices and gains of employees and employers are to some extent put in balance,' it ought logically to flow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.

Cluff v. Nana-Marriott, 892 P.2d 164, 172-173 (Alaska 1995), citing 2A Arthur Larson, *The Law of Workmen's Compensation* § 65.40, at 12-41 (1992).

In cases such as this one, where the employer has tried to have its cake and eat it too, the courts have not looked favorably on the employers' actions. See *Novenson v. Spokane Culvert,* 91 Wn.2d 550, 588 P.2d 1174 (1979); *Doty v. Town of South Prairie*, 155 Wn.2d 527, 120 P.3d 941 (2005). In *Novenson,* the employer found it advantageous to contract for temporary workers, rather than place them on its permanent payroll. The court reacted negatively to this, finding that Spokane Culvert sought "the best of two worlds—minimum wage laborers not on its payroll, and also protection under the work[er]'s compensation act as though such laborers were its own employees." *Id.* at 555.

Both the Department and the Seahawks cite *Novenson* as support repeatedly throughout their briefs. However, what is interesting about *Novenson* is how closely the actions of Spokane Culvert mirror the actions

of the Seahawks in that both employers tried to escape legal responsibility to their employees. While Spokane Culvert attempted to escape liability by contracting with a temp agency and then invoking the workers' compensation statute, the Seahawks forced Mr. Robinson to waive his right to common-law action before allowing him to tryout for the team. However, once he did and was injured, the Seahawks denied him the right to seek compensation under the IIA, arguing he had waived workers' compensation coverage by signing the waiver of liability.

It is well settled that neither an employer nor a worker may exempt him or herself from the burdens or benefits of workers' compensation. RCW 51.04.060; Department, p. 12. The fact that an employee states he is not an employee does not deny him coverage under the Act. *Solven v. Labor & Industries*, 101 Wn.App. 189, 195, 2 P.3d 492, *review denied*, 142 Wn.2d 1012 (2000). While signing a waiver form may negate tort liability, it does not prevent a worker from being covered under the Industrial Insurance Act. RCW 51.04.060. Rather, in this state, workers' compensation coverage cannot be waived by either the employee or the employer, and any attempt to do so is pro tanto void. Id.

In those instances where a worker is denied one form of coverage, public policy and the IIA dictate the injured worker should be allowed to seek recourse through some legal channel. Where one channel has been

closed off, another should remain open. Additionally, employers must not be allowed to deny responsibility to an individual who is injured while performing duties for the employer, at the employer's request and on the employer's premises. While Mr. Robinson's situation is one of first impression, the public policy and case law supporting a finding of coverage is not.

B. *Bolin v. Kitsap* Provides Support For Finding That Mr. Robinson Is Covered By The Industrial Insurance Act.

In *Bolin v. Kitsap Co.*, the Supreme Court found that a juror was an employee of Kitsap County for purposes of workers' compensation. *Bolin v. Kitsap Co.,* 114 Wn.2d 70, 785 P.2d 805 (1990). In finding coverage, the Court noted "there is a hazard in all employment" and the "title should be liberally construed for purposes of reducing to a minimum the suffering and economic loss" to the injured worker. *Id.* at 72. Noting that "jury service" was not on the list of excluded employments, the court focused on both the involuntary nature of jury duty as well as the fact the claimant did not have a common law remedy. *Id.* at 73. The court relied heavily on the two-prong test of *Novenson,* which it set out as follows:

> In *Novenson*, the court enunciated a 2-part test to determine whether an employment relationship existed for purposes of the Industrial Insurance Act. We held that 'an employment relationship exists only 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.'

Id. at 73. In describing the consent prong, the court stated "the law requires the employee's consent, lest an employment relationship be implied without his consent to deprive him of his right to sue at common law. In that context, consent is necessary." *Id.* Because jurors are denied a common law remedy and not finding coverage under the Act would have denied Mr. Bolin any coverage, the court found coverage for jurors under the Act. *Id.* at 74. The court took note of other states that had rejected jurors as covered, noting that while many used a test similar to *Novenson*, "unlike Washington's, [these statutes] define employment as 'appointment or contract of hire'." *Id.* at 75. Thus, the liberal construction of Washington's IIA, combined with a desire to provide the injured party with some form of recompense, led to a finding of coverage.

When Mr. Robinson arrived at the Seahawks' facility, he was given a piece of paper. Testimony of John Idzik, p. 10. After traveling over 2,000 miles with the hope of securing employment, Mr. Robinson was informed that to proceed further and to even have the opportunity to tryout with the Seahawks, he was required to sign a waiver giving up his rights to common law tort damages. Idzik Testimony, p. 11. While Mr. Robinson could have walked away at that moment, he knew that unless he

signed this paper, he would never have the opportunity to become a football player with the Seahawks. Id.; Certified Appellate Board Record (CABR), Ex. 1. Mr. Robinson's entire career focus was to become a professional football player. There are only 32 NFL teams and Mr. Robinson knew there were limited opportunities for employment as a defensive back. In order for Mr. Robinson to achieve his dream, he had to sign this waiver and he did. Id. However, he did not, nor could he legally, sign away his rights to workers' compensation.

C. Mr. Robinson's Tryout With The Seahawks Meets Both Prongs Of The *Novenson* Test.

There appears to be disagreement between the Respondents as to which test actually applies in determining the existence of an employer/employee relationship. The Department argues that *Clausen, Bemis* and *Bennerstrom* provide the correct test, while the Seahawks assert *Novenson* is correct, having supplanted *Clausen* and its progeny. Department, p. 9; Football Northwest, p. 23, 34; *Bennerstrom v. Department of Labor & Industries*, 120 Wn.App. 853, 86 P.3d 826, *rev. den.*, 152 Wn.2d 1031 (2004); *Clausen v. Dep't of Labor & Indust,* 15 Wn.2d 62, 29 P.2d 777 (1942); *In Re Kimberly J. Bemis*, BIIA Dec. 90 5522 (1992). Whatever the test, as previously briefed at length, Mr. Robinson has met it.

However, while the Respondents may disagree on the test, one thing they both argue is that per *Novenson*, the Seahawks did not control Mr. Robinson and both parties must consent to the employer-employee relationship in order to find coverage. Department, p. 23; Football Northwest, p. 24. While the right to control is clear, the parties are wrong in their interpretation of *Novenson*'s consent prong.

The purpose behind finding consent is to protect the employee from being forced into a relationship to which he has not consented. When setting out the test, the Supreme Court in *Bolin* looked to whether "there is consent by the employee to this relationship." *Bolin*, 114 Wn.2d at 73. Later, in *Bennerstrom*, the court noted that "the point of inquiry whether the putative employee consented to the relationship is that **an employee gives up valuable rights, among them the right to sue the employer,** by being subject to the workers' compensation act." *Bennerstrom,* 120 Wn.App. at 861 (emphasis added). The reason to look to the employee's consent is that frequently employers, such as those in *Novenson* and *Doty,* are looking to find workers' compensation coverage in order to avoid liability under common law. In both cases, the courts did not support the employer's actions, and instead found in favor of the employee.

In this case, the Seahawks have already limited their liability under common law by forcing Mr. Robinson to sign a waiver in order to have any chance of a future as a football player. CABR, Ex. 1. Now, they are trying to exempt themselves from having to provide compensation through workers' compensation, effectively denying Mr. Robinson any recourse whatsoever. This is not only contrary to the consent provision in *Novenson*, but to public policy and the purposes of the IIA. Furthermore, the facts in Mr. Robinson's case clearly support a finding that he has met the two-prong *Novenson* test.

1. Right to Control

As the court in *Bolin* pointed out, the employer's right to control and the employee's consent to this control are dispositive of an employment relationship. *Bolin*, 114 Wn.2d at 73. Unlike in *Bennerstrom,* where DSHS contracted with the claimant for services but did not have the right to control his actions, the Seahawks controlled every aspect of Mr. Robinson's physical person, from the moment Mr. Robinson stepped onto the plane in Connecticut, to the moment he was dropped off on crutches back at the airport in Seattle. See *Bennerstrom*, 120 Wn.App. 853.

Not only did Mr. Robinson not have to pay for or provide anything other than his physical skills, the Seahawks controlled every aspect of his

time. When it came to the mini-camp, the only decision Mr. Robinson made was whether to accept the Seahawks' invitation or not. Given that Mr. Robinson wanted a career in football and the only path to this career was to accept an invitation to camp, this was not really a choice at all.

Every aspect of Mr. Robinson's participation in the mini-camp was controlled by the Seahawks, including the meals he ate, the hotel he stayed in, the equipment he used, the drills he ran, and the doctor who examined him. Testimony of Courtney Robinson, p. 30-36. His time was not his own. Id., p. 33. The Seahawks provided him with a detailed itinerary that told him what he was supposed to do, and where and when he was supposed to do it. Id. When he put on equipment, this was equipment owned and maintained by the Seahawks. Id., p. 31. When he ran drills, these were at the direction of the Seahawks' head coach, Pete Carroll. Id. p. 35-36. When he was injured, he was sent to the team doctor, not the emergency room. Id., p. 40. After being examined and treated, Mr. Robinson was told to shower up, get ice, and then attend the next event on the itinerary, which was a meeting for defensive backs. Id. Even though Mr. Robinson had originally intended to stay for the length of the mini-camp, he was approached during his dinner with the team, told "he needed to leave," and that he would have "an hour once he was dropped off to the hotel to gather [his] things and leave." Id., p. 42. When Mr. Robinson

protested, stating that he was in a lot of pain and that he was scheduled to stay through the 15th, the Seahawks informed him that was not an option and he needed to fly home that night. Id., p. 44. Mr. Robinson's "one day hotel stay" was not by choice.

The only decision that Mr. Robinson made regarding mini-camp was his decision to attend. Once he agreed, the Seahawks had complete control over him and the tryout process, from the day he stepped on the plane to the moment they changed his itinerary and unilaterally ended his tryout. As an undrafted free agent, Mr. Robinson did not have many options at his disposal. When the Seahawks extended an invitation to him, he knew that this might be his last opportunity to make an NFL team. As it turned out, it was.

2. Consent

While both the Department and the Seahawks are fond of citing *Bennerstrom*, the fact that *Bennerstrom* dealt with an explicit contract for hire makes it inapplicable. *Bennerstrom v. Dep't of Labor & Indus.,* 120 Wn.App. 853. In *Bennerstrom,* the claimant specifically waived workers' compensation coverage in his contract for hire. *Bennerstrom*, at 859. Additionally, not only did Mr. Bennerstrom sign this contract, which explicitly stated multiple times that he was not an employee, he never

disavowed this relationship, and even went so far as to reaffirm non-employment status in a subsequent letter to DSHS. *Bennerstrom,* at 860.

What makes Mr. Robinson's situation so different is not only the fact he signed a liability waiver rather than a contract, but the circumstances surrounding its execution. Whereas Mr. Bennerstrom entered into a legal contract at his behest, initiative and timeframe, Mr. Robinson did not have the same luxury. *Id.* at 857; Idzik Testimony, p. 10-11. Rather, the waiver of liability was forced on Mr. Robinson after he arrived at the Seahawk's training facility. Idzik Testimony, p. 11, CABR, Ex. 1. Consequently, if the court chooses to view the waiver as a contract, then it can only be viewed as an unconscionable contract of adhesion.

Drafted and printed on a standard form by the Seahawks, the Tryout Waiver presented to Mr. Robinson began with the words: *"Whereas _____, (herein known as "Player") who is not an employee of the Seattle Seahawks (herein known as "Club"), has a desire to participate in various exercises and/or mini-camp sessions...."* CABR, Ex. 1. The purpose of having Mr. Robinson sign the tryout waiver was to exempt the Seahawks from personal liability in the event Mr. Robinson was injured. The waiver also stated that if Mr. Robinson refused to sign, he would not be allowed to tryout for the Seahawks. CABR, Ex. 1. Having already traveled from Connecticut and eager to begin his tryout,

Mr. Robinson simply filled in his name and signed the waiver. Having just traveled over 2,000 miles in pursuit of his dream to become a professional football player, Mr. Robinson was eager to show the Seahawks what he could do. Robinson Testimony, p. 27, 54. He wanted to be a professional football player and knew that unless he signed this waiver, he did not have a chance of ever playing for the Seahawks. For Mr. Robinson, not signing the waiver was not an option. He was without bargaining power so when presented with the waiver, Mr. Robinson simply signed his name and proceeded with the tryout.

When it comes to finding the existence of an employer-employee relationship, the courts have repeatedly focused on the intent of the employee as well as the actions of the employer. *Novenson v. Spokane Culvert,* 91 Wn.2d 550, 588 P.2d 1174 (1979)*; Bennerstrom v. Dep't of Labor & Indus.,* 120 Wn.App. 853, 86 P.3d 826, *rev. den.*, 152 Wn.2d 1031 (2004). The courts have also been hesitant to close off all avenues of legal redress, especially when one has already been closed. *Bolin v. Kitsap Co.,* 114 Wn.2d 70, 73-74, 785 P.2d 805 (1990). While Mr. Robinson may have consented to waive his ability to pursue a tort action, he did not intend to waive his right to workers' compensation. The waiver of liability did not constitute a contract for hire, either implicitly or

explicitly. It was simply a waiver of Mr. Robinson's right to sue the Seahawks for liability under common law.

The two-prong test set out in *Novenson* and *Bolin* requires a finding of control and consent. When that test is applied to the facts in Mr. Robinson's case, it can only lead to one conclusion. The total control by the Seahawks, in combination with Mr. Robinson's consent to this control, led to an employer-employee relationship for which coverage should be found.

D. The Court Should Adopt The Tryout Exception In Finding Coverage Extends To Mr. Robinson's Situation.

1. There is legal precedent for finding a tryout exception to the traditional employment contract.

Mr. Robinson agrees that whether an employment relationship exists should be decided on the specific facts of each case. Department, p. 7, citing *Clausen v. Department of Labor and Industries,* 15 Wn.2d 62, 69 P.2d 777 (1942); see also Football Northwest, p. 42 (making the argument that all cases cited are distinguishable based on their specific facts). Given the public policy behind the Industrial Insurance Act, the adoption of the tryout exception is perfectly consistent with the specific facts of Mr. Robinson's case.

As previously stated, the tryout exception is an exception to the general rule that a contract for hire must exist before benefits can be awarded. *Childs v. Kalgin Island Lodge*, 779 P.2d 310, 314 (Alaska 1989). Courts in the neighboring jurisdictions of California and Alaska have both adopted this reasoning, with Alaska affirming its commitment in *Cluff v. Nana-Marriott*, 892 P.2d 164 (Alaska 1995). In determining a matter of employment, the court reiterated that "when an employer exposes **potential** employees to risks inherent in a tryout period and the applicant is under his direction or control, **any** injury resulting during such a period is compensable as a matter of law." *Cluff*, 892 P.2d at 171, citing *Childs v. Kalgin*, 779 P.2d at 314 (emphasis added). The court went on to explain that "the tryout exception is aimed at making sure that compensation benefits are provided once the risks of employment begin to operate where there is no contract for hire." *Id.* at 173, citing *Laeng v. Workmen's Compensation Appeals Bd.,* 6 Cal.3d 771, 100 Cal Rptr. 377, 494 P.2d 1 (1972).

When asked to consider whether the stress that caused Cluff's injury would have met the tryout exception, the court found it would, stating that because the stress test was "designed to mimic the activities she would have engaged in if employed by NANA," the tryout exception was applicable. *Id.* at 173-174. Additionally, the court held that "it can be

fair for an employee to give up the right to sue in tort when participating in a tryout **only if the employee knows that she is applying for a job and participating in a tryout.**" *Id.* at 174 (emphasis added).

It is without dispute that Mr. Robinson was engaged in a tryout with the Seahawks when he was injured. Idzik Testimony, p. 7. It is also without dispute that a tryout involves a physical exam and interview, as well as fieldwork and physical drills, and that these drills were a chance for Mr. Robinson to show off his skills as a defensive back, the position he was trying out for. Robinson Testimony, p. 24, 30, 36. Finally, it is without dispute that when the Seahawks demanded that Mr. Robinson give up his right to sue in common law, both parties knew Mr. Robinson was applying for a job with the Seahawks and participating in a tryout. Football Northwest, p. 28.

2. Given the nature of a football tryout, public policy dictates adoption of the tryout exception in Mr. Robinson's case.

Applying for a job as a football player is unlike applying for almost any other job. First, there is no application process. Mr. Robinson did not send off his resume to the Seahawks. Rather, he had to wait for the Seahawks to contact him when a position for defensive back opened up and an invitation to tryout was extended to him. Idzik Testimony, p. 18. Second, if a player is invited to tryout, he undergoes both an interview and

a physical exam, followed by fieldwork and physical drills. Because of these physical drills, it is acknowledged that a mini-camp tryout brings with it a risk of injury. Idzik, p. 28; Testimony of Lyle Masnikoff, p. 24; Testimony of Gus Bradley, p. 17-18. In the *Tryout Waiver* Mr. Robinson signed, the parties acknowledged it was "possible to ***sustain serious injury*** during the course of said exercises and workouts" and that even "***death***" could result from participation in the mini-camp. CABR, Ex. 1 (emphasis added). Unfortunately for Mr. Robinson, this possibility became a reality. Finally, once he had arrived at the Seahawk facility, the only way that Mr. Robinson could proceed with his tryout and his dream of signing with the team was to sign a waiver of liability. Id. As stated in the *Tryout Waiver*, "without execution of this Waiver and Release of Liability, the Seattle Seahawks would not have allowed Player to participate in a tryout with the Club, nor would have allowed Player to participate in Club's mini-camp." *Id.*

The Respondents have argued that trying out for a football team is no different than a lunch interview for a secretary or attorney, or almost any other profession. Department, p. 27. However, this argument fails in its very basic assertion. The vast majority of interviews do not involve a physical examination at the employer's facility by the employer's doctor, the use of specialized equipment, and a physical tryout that mimics the

actual work. Additionally, Respondents fail to acknowledge it is the rare interview that has the potential to result in a career-ending injury, or even death, to the prospective employee. If an office assistant trips and falls on the carpet while attending an interview, this does not end his career. Finally, it is the rare interview that requires a prospective employee to sign a liability waiver prior to the interview. While that same office assistant might not be able to receive workers' compensation for falling, he would still have legal recourse through a negligence suit against his prospective employer. Even the Department agrees, stating that "an interviewee should [not] be forced to give up common law remedies against the prospective employer merely because he or she receives a free lunch." Department, p. 22. Thus, the Respondents' comparison of an athletic tryout to a secretarial interview, or almost any other interview, is not only comparing apples to oranges, but is diminishing the very real risk that an athlete faces when attempting to secure employment.

3. Liberal construction of the IIA mandates adoption of the tryout exception in Mr. Robinson's situation.

While the Respondents have attempted to distinguish Washington's Industrial Insurance Act from those in tryout exception jurisdictions, there is simply no basis for this. The Seahawks focus specifically on California, however, California and Washington provide

broad coverage under their laws. Football Northwest, p. 43. In fact, Washington's coverage is so broad that all employments are covered unless specifically excluded under the Act. Just as California seeks to "protect individuals from any 'special risks' of employment," the IIA recognizes there is "hazard in all employments" and thus "embraces" all employments not excluded. *Laeng v. Workmen's Comp. Appeal Board*, 6 Cal 3d 771, 774, 494 P.2d 1 (1972); RCW 51.12.010. There is no extra coverage in the workers' compensation laws of Alaska, New York or California that distinguish them from Washington's IIA. Rather, it is the courts' liberal application of these laws, along with recognition that where a tryout involves "hazardous" operations a "special employment exists" justifying benefits, that has resulted in the tryout exception being applied. *Smith v. Venezian Lamp Co.*, 168 N.Y.2d 764, 766, 5 A.D.2d 12 (1957).

There is nothing in Washington's IIA that supports denial of benefits where a prospective employee is required to engage in a tryout that involves physical risk prior to the offer of a contract for hire. Additionally, when that prospective employee's livelihood depends on his physical health, public policy dictates that if that health is put at risk, the prospective employee should have the ability to seek recompense, either through tort or workers' compensation. Where the tort door has been shut, the workers' compensation door should remain open. To paraphrase

Novenson, the Seahawks have sought the best of both worlds—inviting prospective employees to engage in a physically risky tryout and requiring them to sign a tort waiver while at the same time, denying them workers' compensation. *Novenson*, 91 Wn.2d at 555. Having "chosen to garner the benefits of conducting business in this manner, it is not unreasonable to require [them] to assume the burdens." *Id.*

E. *Doty v. Town of South Prairie* Is Distinguishable Because Doty Was A Volunteer.

Both the Department and the Seahawks rely on *Doty v. Town of South Prairie* as support for their argument that Mr. Robinson is not covered under the IIA. However, *Doty* is easily distinguishable, most notably for the fact it dealt with whether volunteers are employees under the Industrial Insurance Act. *Doty v. South Prairie*, 155 Wn.2d at 531. Key to the court finding she was not an employee was Doty's status as a volunteer. In looking to the stipend she received as a volunteer, the courts acknowledged its "bare analysis of the monetary wages provided may be insufficient." However, as the court was being asked to determine whether *volunteers* were covered under the Act, "wages, broadly defined as remuneration for services performed, **remains a crucial distinguishing feature between volunteers and employees and/or workers under the IIA**." *Doty,* 155 Wn.2d at 543 (emphasis added).

Neither Mr. Robinson nor the Respondents have ever asserted that Mr. Robinson's tryout with the Seahawks was for the purposes of becoming a volunteer football player. Furthermore, as the *Doty* Court acknowledged, its language regarding wages applies more to the facts in *Doty*, rather than lending itself to precedential value in other matters. *Id.* In fact, the Court points out that in *Bolin*, it made no inquiry into the sufficiency of wages in finding jurors were covered. *Id.* Thus, as the Respondents have relied on *Doty* for support, this support is misplaced.

CONCLUSION

For the reasons stated above, Mr. Robinson respectfully requests the Court reverse the order from the superior court, remand the case to the Department of Labor and Industries to allow this claim, and order payment of reasonable attorney fees and costs.

Respectfully submitted this 10 day of May, 2013.

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I certify that either an original or copy of the document(s) attached hereto was mailed, postage prepaid, first class mail to the parties referenced above this 10th day of May, 2013.

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