69739-1 69739-1

Case 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 FOOTBALL NORTHWEST, LLC

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I. INTRODUCTION

The entry of judgment by the Superior Court in favor of appellee Football Northwest, LLC ("Seahawks") and against appellant Courtney Robinson was proper in all respects. Substantial evidence supported each of the Superior Court's Findings of Fact, and its Conclusions of Law flowed from those findings. In sum, Mr. Robinson failed both factually and legally to show he was a Seahawks employee for purposes of Washington's Industrial Insurance Act ("IIA"), and thus his request for benefits under the IIA was properly denied. Substantial evidence and governing Washington law support fully the Superior Court's decision. The Superior Court's decision should be affirmed.

II. ASSIGNMENT OF ERROR

The Seahawks do not assign any error to the Superior Court's decision, and ask that it be affirmed in all respects.

III. STATEMENT OF THE CASE

A. Undisputed Facts.

The following Findings of Fact (alternatively "FOF") are not challenged by Mr. Robinson, and are therefore verities on appeal. [1]

On April 13, 2010, Mr. Robinson injured his knee while

[1] Brief of Appellant Robinson ("App. Br.") at 4 (assigning error); RAP 10.3(g); *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995).

participating in an off-season "mini camp" put on by the Seahawks. CP 45 (FOF ¶2). Robinson and fifteen other potential hires had attended the mini camp by invitation from the Seahawks. CP 45 (FOF ¶3). [2] Robinson was a "free agent" at the time of his invitation and participation in the mini camp. CP 45 (FOF ¶4).

Mr. Robinson tried out for at least two other teams before the Seahawks mini camp but had not been offered employment. CP 45 (FOF ¶8). [3] 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 is voluntary. CP 46 (FOF ¶14).

Mr. Robinson was given an itinerary for the mini camp, and was picked up from his hotel by the Seahawks and driven to the mini camp at the beginning of the day. CP 46 (FOF ¶17). After Robinson's contended knee injury, he was driven to the airport by Seahawks personnel. CP 46 (FOF ¶18).

Mr. Robinson did not gain any benefit or value by participating in

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[2] All told, 96 players attended the mini camp: 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.

[3] 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).

the mini camp. CP 46 (FOF ¶19). Of the sixteen people (including Robinson) who attended the Seahawks' mini camp in April 2010, five were approached with employment offers from the Seahawks which led to 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.*

B. 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 mini camp. 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 King County Superior Court. CP 44. The Honorable Regina Cahan, presiding without a jury, affirmed the Board. CP 44-50. Robinson appeals.

IV. <u>ARGUMENT</u>

A. Summary of Argument.

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. Mr. Robinson failed to demonstrate he satisfied that statute at the administrative level, before the Board, and before the Superior Court. Now, he seeks to have this Court reweigh the evidence for a fourth time in the hopes of obtaining a different result. However, this Court does not reweigh the evidence presented on appeal. Substantial evidence supports each of the Superior Court's factual findings and its legal conclusions flow directly from those facts. There is no basis for reversing the court below. The Superior Court should be affirmed in all respects.

B. Standard of Review.

"When deciding an appeal from a decision of the Board of Industrial Insurance Appeals, the superior court conducts a *de novo* review of the board's decision but relies exclusively on the certified board record." *Cantu v. Dep't of Labor & Indus.*, 168 Wn.App. 14, 20, 277 P.3d 685 (2012) (citing RCW § 51.52.115). Appeals from the Superior Court lie as in all other civil cases. RCW § 51.52.140. Accordingly, "review in workers' compensation cases is akin to [ ] review of any other superior court trial judgment[.]" *Rogers v. Dep't of Labor & Indus.*, 151 Wn.App. 174, 180, 210 P.3d 355 (2009). "[W]here the trial court has weighed the evidence, [appellate] review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment." *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982) (*en banc*; bracketed text added); *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (citation omitted; same). Findings of fact to which no error is assigned are verities on appeal. RAP 10.3(g); *Moreman*, 126 Wn.2d at 39.

"A party seeking to reverse a trial court's finding of fact must meet a difficult standard." *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn.App. 335, 339-40, 725 P.2d 463 (1986). If "substantial evidence" exists to support the trial court's findings, they will be affirmed. *Id.* "Substantial evidence" is not a demanding standard. It is simply "evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991), *cert. den.*, 503 U.S. 986 (1992) (citation omitted); *Joy v. Dep't of Labor & Indus.*, 170 Wn.App. 614, 619, 285 P.3d 187 (2012), *rev. den.*, 2013 WL 830001

(2013) (citation omitted).

Even though an appellate court "may view the evidence presented at trial differently from the finder of fact, [it] cannot substitute [its] judgment[.]" *Garrett Freightliners*, 45 Wn.App. at 340 (citation omitted; quotation corrected; bracketed text added for clarity). On review, this Court will view evidence "in the light most favorable to the party who prevailed in superior court" and will not "reweigh or rebalance the competing testimony and inferences[.]" *Rogers*, 151 Wn.App. at 180-181 (citation omitted). In short, when the evidence is disputed, "the standard for 'substantial evidence' is 'any reasonable view [that] substantiates [the trial court's] findings, even though there may be other reasonable interpretations.'" *Garrett Freightliners*, 45 Wn.App. at 340 (citation omitted; bracketed text in original).

"Questions of law and conclusions of law are reviewed de novo." *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) (*en banc*; citation omitted). In separating findings of fact from conclusions of law, findings of fact concern "whether evidence shows that something occurred or existed," whereas conclusions of law are determinations "made by a process of legal reasoning from facts in evidence." *State v. Niedergang*, 43 Wn.App. 656, 658, 719 P.2d 576 (1986) (citation omitted). Labels given by the trial court distinguishing findings of fact and conclusions of law are not determinative. *Id.* at 659. Nonetheless, although this Court may substitute its judgment for that of the Board on issues of law, great weight is given to the Board's interpretation of the law it administers. *Jones v. City of Olympia*, 171 Wn.App. 614, 621, 287 P.3d 687 (2012) (*citing Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn.App. 853, 858, 86 P.3d 826, *rev. den.*, 152 Wn.2d 1031 (2004)).

For purposes of the IIA, the existence of the elements necessary to show an employment relationship 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.*). As demonstrated immediately below, substantial evidence supports each of the Superior Court's challenged findings of fact.

C. Substantial Evidence Supports the Findings of Fact.

Appellant Robinson has assigned error to the following factual findings of the Superior Court: FOF 5, 7, 9, 10, 11, 13, 15, 16, 20, and 22. App. Br. at 4. In his brief, Robinson fails to address how these findings lack evidentiary support. Accordingly, Robinson's challenge to the

Superior 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). The Seahawks nevertheless address each Finding of Fact in turn. Each is supported by substantial evidence.

1. Substantial Evidence Supports Finding of Fact No. 5

FOF 5 reads:

> **The purpose of the mini-camp was for the Seahawks to see Mr. Robinson and fifteen others perform before proceeding with any offer of employment; the mini camp also gave Mr. Robinson and others an opportunity to meet Seahawks personnel and view Seahawks procedures before considering whether they wished to be employed with the Seahawks. [CP 45]**

Substantial evidence in the record supports FOF 5. As to the first clause, it is undisputed that the purpose of the April 2010 mini camp was for potential players like Robinson to have "a chance to show [their] skills and talents and what [they] have" to the Seahawks staff. Tr. 05/10, p. 8, lns. 11-26 (Seahawks Defensive Coordinator Gus Bradley) (bracketed text added). Robinson agreed. Tr. 04/21, p. 53-54, lns. 26-2.

It is also clear from the record that neither the Seahawks *nor*

Robinson consented to an employment relationship at the time of the April 2010 mini camp. 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). 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.

Robinson's participation in the mini camp was voluntary. Tr. 04/21, p. 23, lns. 11-19 (Robinson's agent/attorney Lyle Masnikoff); p. 49, lns. 5-7 (Robinson); Tr. 05/10, p. 9, lns. 1-3 (Bradley); Idzik Dep., p. 10, lns. 14-17 ("It's purely voluntary on the part of the player."). Robinson was not required to attend the mini camp or stay for its duration. Idzik Dep., p. 18, lns. 19-21. There is no evidence in the record that leaving the mini camp early would have resulted in any adverse consequences for Robinson, as Robinson had not been promised a position with the Seahawks and the Seahawks held two other mini camps in 2010 alone which Robinson could have also attended. Tr. 04/21, p. 15, lns. 15-18; p. 20, lns. 7-9 (Masnikoff); 05/10, p. 8, lns. 4-6; p. 13, lns. 19-22 (Bradley); Idzik Dep., p. 12, lns. 1-6; p. 17, ln. 25; p. 20, lns. 19-21.

Mr. Robinson did not receive any compensation for his participation in the mini camp. CP 46 (FOF ¶19) (unchallenged); Tr. 04/21, p. 65, ln. 21, Ex. 2 (email stipulation); p. 31, lns. 14-17; p. 56, lns. 21-23 (Robinson). He did also 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.

Robinson was not promised a position on the Seahawks at the conclusion of the mini camp. Tr. 04/21, p. 20, lns. 7-15 (Masnikoff); Tr. 05/10, p. 10, lns. 23-25; p. 13, lns. 19-22 (Bradley); Idzik Dep., p. 12-13, lns. 1-2. Nor did Robinson receive any training at the mini camp. Tr. 04/21, p. 48, lns. 19-20 (Robinson: did not come to "learn to play football"). 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 also voluntarily executed a "Free Agent Tryout Waiver and Release of Liability." CP 46 (FOF ¶14) (unchallenged); Tr. 04/21, p. 54, lns. 3-6, Ex. 1. 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.* Additionally, Robinson's non-employment status was discussed 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 followed from Mr. Masnikoff 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). Yet, Mr. Robinson 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.

The best Robinson could muster on direct examination was that he believed it "very likely" that he "was going" to enter into a contract with the Seahawks at the end of the mini camp, 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 mini camp; correct? A. Correct."). Substantial evidence supports the finding that neither Mr. Robinson nor the Seahawks consented to an employment relationship.

The second clause of FOF 5 is not genuinely disputed. Substantial evidence also supports this portion of the finding. *See* Tr. 05/10, p. 8, lns. 11-26 (Bradley); Tr. 04/21, p. 53-54, lns. 26-2 (Robinson: mini camp was an opportunity to "show [his] skills to the Seahawk staff"); Idzik Dep., p. 12, lns. 9-12 (mini camp a "chance to acquaint ourselves with him, to try him out; and at the end… make our evaluation").

Substantial evidence supports FOF 5.

2. Substantial Evidence Supports Finding of Fact No. 7

FOF 7 reads:

> **Mr. Robinson accepted the invitation to the Seahawks mini-camp with the understanding and knowledge that his participation was voluntary and he could have gone home anytime, as he did not have a contract with the Seahawks. [CP 45]**

Substantial evidence supports this finding as well. As to the first clause, as discussed above, attendance at the mini camp was voluntary. Tr. 04/21, p. 23, lns. 11-19 (Masnikoff); p. 49, lns. 5-7 ("Q…You were not required to attend the mini camp, were you? A. No."). Players at the mini camp were not subject to Seahawks (or NFL) rules and 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.

As to the second clause, again, Masnikoff testified that attendance at the mini camp was "strictly voluntary." Tr. 04/21, p. 23, lns. 11-19. Robinson and Idzik affirmed. Tr. 04/21, p. 49, lns. 5-7; Idzik Dep., p. 10, lns. 14-17; p. 18, ln. 4 ("voluntary for everyone").

As to the third clause, Mr. Robinson himself stated he did not have a contract with the Seahawks, though he "hoped" to sign one. Tr. 04/21, p. 49, lns. 2-4. Messrs. Masnikoff and Idzik affirmed that Mr. Robinson did not have a contract with the Seahawks. Tr. 04/21, p. 15, lns. 2-14 (Masnikoff); Idzik Dep., p. 18, lns. 22-24.

Substantial evidence supports FOF 7.

3. Substantial Evidence Supports Finding of Fact No. 9

FOF 9 reads:

> **On April 30, 2009, a year before the Seahawks mini-camp, Mr. Robinson had tried out for the Philadelphia Eagles, an offer of employment had been made, the parties had negotiated the particulars of employment and ultimately the parties had executed a standard National Football League player contract form which created an employment relationship and contained the particulars thereof. [CP 45]**

Substantial evidence supports this finding. Masnikoff testified that NFL contracts must be in writing and cannot be oral. Tr. 04/21, p. 15, lns. 2-14; *see also* Idzik Dep., p. 11, lns. 23-25; p. 14-15, lns. 8-12; p. 18, lns. 22-24. NFL contracts must be based on a specific form. Idzik Dep., p. 14, lns. 19-24; p. 15-16, lns. 22-12, Ex. 3. Mr. Robinson had previously executed a contract with the Philadelphia Eagles, as he and Mr. Masnikoff testified. Tr. 04/21, p. 15, lns. 12-19 (Masnikoff); p. 52, lns. 21-24 (Robinson). Robinson was "familiar with [the] procedure" of signing an NFL contract. Tr. 04/21, p. 15, lns. 12-19 (Masnikoff). Masnikoff, Robinson's sports agent, who is also a workers' compensation attorney, was also "familiar" with NFL contracts. Tr. 04/21, p. 9, lns. 5-10; p. 10, lns. 1-2; lns. 11-12; p. 11-12, lns. 23-4; p. 16, lns. 13-14. Accordingly, the only logical inference is that Mr. Robinson previously signed the NFL form contract attached as Exhibit 3 to John Idzik's deposition. Based on his previous experience, Robinson understood that a signed contract meant employment as an NFL player, whereas some oral suggestion did not.

Substantial evidence supports FOF 9.

4. Substantial Evidence Supports Finding of Fact No. 10

FOF 10 reads:

> **Prior to attendance at the Seahawks mini-camp in April, 2010, Mr. 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 45]**

As described in detail above, substantial evidence is present in the record to support this finding. *See* § IV.C.1., 3., *supra*; *e.g.*, CP 46 (FOF ¶14); Tr. 04/21, p. 54, Ex. 1 (player acknowledges he "is not an employee of the Seattle Seahawks[.]"); Idzik Dep., p. 10, lns. 18-24 ("...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.").

5. *Substantial Evidence Supports Finding of Fact No. 11*

FOF 11 reads:

> **Prior to attendance at the Seahawks mini-camp in April, 2010, Mr. Robinson knew that the National Football League and the Seahawks had well established and formalized employment procedures in place, and that pursuant to such procedures, an employment relationship was not created between prospective players and teams until an offer of employment was made, complete employment particulars were negotiated and agreed, and both the prospective player and the team had executed a standard National Football League player contract form creating an employment relationship and containing the particulars thereof. [CP 46]**

Again, substantial evidence supports this finding of fact. *See* § IV.C.1., 3., *supra*; *e.g.*, Tr. 04/21, p. 15, lns. 12-19 (Masnikoff); p. 52, lns. 21-24 (Robinson); Tr. 04/21, p. 15, lns. 2-14 (Masnikoff); Idzik Dep., p. 11, lns. 23-25; p. 14-16, lns. 8-12, Ex. 3; p. 18, lns. 22-24. Based on his previous experience, Mr. Robinson was well aware of the formality required of signing an NFL players' contract form before an employment relationship was established. *See also* CP 47 (FOF ¶21) (unchallenged: the "execution of a standard National Football League player contract" led to "creation of employment relationships").

Substantial evidence supports FOF 11.

6. Substantial Evidence Supports Finding of Fact No. 13

FOF 13 reads:

> **In the Free Agent Tryout Waiver, both parties acknowledge that an employment relationship will not exist between the free agent and prospective player ("Player" herein) and the Seattle Seahawks ("Club" herein), and that the Player will not be an employee of the Club. [CP 46]**

The plain language of the Waiver and substantial evidence supports FOF 13. The Waiver is titled "*Free Agent* Tryout Waiver and Release of Liability Between Seattle Seahawks ("Club") and [written: Courtney Robinson] ("Player") for the Year 2010." Tr. 04/21, p. 54, Ex. 1 (emphasis added). The Waiver also reads, in pertinent part, "[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). Thus, FOF 13 is essentially just a recitation of the plain terms of the Waiver.

Moreover, Robinson's status as a free agent is not disputed. CP 45 (FOF ¶4) ("Mr. Robinson was a free agent at the time of the invitation to the mini-camp."); Idzik Dep., p. 11, lns. 18-25; p. 19, lns. 22-14; Tr. 04/21, p. 54, lns. 22-25 (Robinson). Robinson's testimony was that the meaning of "free agency" is he "is not an employee of the Seattle Seahawks." Tr. 04/21, p. 56, lns. 2-6. Additionally, Robinson's non-employment status and the meaning of the Waiver was discussed with Robinson verbally. Idzik Dep., p. 10, lns. 18-24 ("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.").

Substantial evidence supports FOF 13.

7. Substantial Evidence Supports Finding of Fact No. 15

FOF 15 reads: **"Mr. Robinson voluntarily executed the Free Agent Tryout Waiver on April 12, 2010, stating he was not an employee of the Seahawks."** CP 46. Substantial evidence supports this finding.

First, Robinson has conceded FOF 14, which reads, in part, "[e]xecution of the Free Agent Tryout Waiver is voluntary[.]" CP 46. Second, there is no evidence anywhere in the record that Mr. Robinson was coerced, improperly influenced, or that his decision to sign the Waiver was anything other than voluntary. Mr. Robinson is an adult, who had previous contractual dealings with an NFL team. Tr. 04/21, p. 15, lns. 12-19 (Masnikoff); p. 52, lns. 21-24 (Robinson). He was also represented at the time he signed the Waiver 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. Mr. Robinson's signature on the Waiver was voluntary.

There is no basis for a challenge to FOF 15. Substantial evidence supports this finding.

8. Substantial Evidence Supports Finding of Fact No. 16

FOF 16 reads: **"The Seahawks did not pay Mr. Robinson wages or per diem, but they paid for his air-fare, transportation, lodging and provided him food while at the tryout during the mini-camp."** CP 46. Substantial evidence supports this finding of fact.

There is no basis for challenging this finding as Mr. Robinson stipulated to this finding prior to the Board hearing. CP 46 (FOF ¶19); Tr. 04/21, p. 65, ln. 21 (email stipulation). The stipulation notwithstanding, a wealth of other evidence supports this finding.

Mr. Robinson testified clearly that the Seahawks paid for his airfare, transportation, lodging, and provided food. Tr. 04/21, p. 30-31, lns. 10-13. Mr. Robinson also testified in two separate places 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) (unchallenged) ("Mr. Robinson did not gain any benefit or value by participating in the tryout during the mini camp.").

Additional evidence supports FOF 16. Mr. Robinson did not fill out tax forms for any payments or the reporting of such to federal authorities. Tr. 04/21, p. 56, lns. 10-12 (Robinson). His agent, Mr. Masnikoff, also made clear that 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:

> Q. Okay. Now, does the collective bargaining agreement control the compensation that a free agent tryout gets?
>
> A. Yes. It's controlled by CBA, by NFL rules. If you bring a player in for a tryout, you can pay for his travel expenses and room and board if - while he's in town. But that's the extent of what you can give a tryout.

Idzik Dep., p. 16, lns. 14-19. Conversely, players actually under contract with the Seahawks are reimbursed on a *per diem* basis for their participation in mini camps. Idzik Dep., p. 19-20, lns. 21-18.

Substantial evidence supports FOF 16.

9. Substantial Evidence Supports Finding of Fact No. 20

FOF 20 reads: **"The Seahawks did not gain any benefit or value by Mr. Robinson's participating in the tryout during the mini-camp."** CP 46. Substantial evidence supports this finding.

The mini camp was of short duration, only 3 days. *See* "Free Agent Tryout Waiver and Release of Liability" Tr. 04/21, p. 54, Ex. 1. 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.

Moreover, Mr. Robinson was not performing any essential function for the Seahawks by trying out for the team. He was not playing in a game or training for one. Tr. 04/21, p. 48, lns. 19-20 (Robinson). Approximately 96 players attended the mini camp. Idzik Dep., p. 25-26, lns. 17-6. That number includes multiple players for every position. When Mr. Robinson dropped out of the mini camp, 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).

In short, it was not critical for the Seahawks that Mr. Robinson accept their invitation to the mini camp, and the Seahawks gained no significant benefit from Mr. Robison's attendance. Substantial evidence supports FOF 20.

10. Substantial Evidence Supports Finding of Fact No. 22

Finally, FOF 22 reads:

> **Mr. Robinson was not an employee of the Seattle Seahawks during his tryout in the April 2010 mini-camp, therefore he was not in the course of employment while he participated in the tryout during the mini-camp. [CP 47]**

The absence of an employer-employee status is discussed in detail above in § IV.C.1. There is substantial evidence to support FOF 22.

D. Robinson Was Not an Employee of the Seahawks.

1. Test for Employment Relationship

The sole issue in this case is whether or not Mr. Robinson was an employee of the Seahawks and thus a "worker" under the IIA. *See* CP 47 (Conclusion of Law, alternatively "COL," ¶2: "Mr. Robinson was not an employee of the Seattle Seahawks on April 13, 2010 within the meaning of RCW 51.08.180."). Accordingly, determining the test under which this Court should analyze whether an employment relationship existed between the Seahawks and Robinson is critical.

A workers' compensation claimant bears the burden of establishing his eligibility for benefits. *Jenkins v. Dep't of Labor & Indus. of the State of Wash.*, 85 Wn.App. 7, 12, 931 P.2d 907 (1996). In order to receive workers' compensation benefits under the IIA, a claimant must prove that he is a "worker" injured "in the course of his [ ] employment." RCW § 51.32.010. A "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 [ ] *employment.*" RCW § 51.08.180 (emphasis added). Although the Act is liberally construed "in favor of persons who come within the act's terms," (*Berry*, 45 Wn.App. at 884), the Act's liberal construction "does not apply to defining who those persons might be" (*id.*). *See also Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 68, 129 P.2d 777 (1942) ("persons who claim rights [under the IIA] should be held to strict proof of their right to receive [its] benefits[.]") (bracketed text added for clarity).

No Washington statute specifically defines an employment relationship for purposes of the IIA. However, in making such determinations, for the past 30 years, Washington courts have consistently applied the two-part test articulated in *Novenson v. Spokane Culvert & Fabricating Co,* 91 Wn.2d 550, 553 (1979). *See Bennerstrom,* 120 Wn.App. at 856 (applying *Novenson*).

As the *Novenson* court stated:

> For purposes of workmen's compensation, 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.

91 Wn.2d at 553; *Bennerstrom*, 120 Wn.App. at 856; *see also Rideau*, 110 Wn.App. at 302. [4] "The right of control is not the single determinative factor in Washington. A mutual agreement must exist between the employee and employer to establish an employee-employer relationship." *Novenson,* 91 Wn.2d at 553. "Whether a situation satisfies both prongs is a question of fact, and there must be clear evidence of a mutual agreement

[4] The Seahawks are aware that the Department takes the position that there is an additional *element* to this test, namely that wages must be paid in order for there to be an employment relationship. Department Brief at 8. The Seahawks have been unable to find support that payment of wages is an *element* of the *Novenson* employment test, though certainly it is one of the seven *factors* discussed in *Bennerstrom*, 120 Wn.App. at 863 for satisfying the "control" element, and one of the three *factors* discussed in *Clausen*, 15 Wn.2d at 69. Both cases and their applicability are discussed, *infra*. If the additional element of "payment of wages" is required, it is yet another impediment to Mr. Robinson's assertion of employee status, as no wages were paid to him. Further discussion of wages follows below.

between the employee and employer." *Rideau*, 110 Wn.App. at 302; *Smick*, 35 Wn.App. at 277 (same).

There being substantial evidence supporting each of the Superior Court's Findings of Fact, there is ample evidence supporting its Conclusion of Law that Robinson was not an employee of the Seahawks. CP 47 (COL ¶2).

2. *Neither Robinson nor the Seahawks Consented*

Taking the *Novenson* elements in reverse order, it is clear that neither the Seahawks, nor Robinson consented to an employment relationship. The *Bennerstrom* case, cited above, neatly fits with the facts of this case with regard to the "consent" element.

In *Bennerstrom*, this Court affirmed the Superior Court's grant of summary judgment, finding no employment relationship between the plaintiff Bennerstrom and defendant Department of Social and Health Services ("DSHS"). 120 Wn.App. 872. Bennerstrom had contracted with DSHS to provide in-home care to his ailing mother. *Id.* at 856-57. DSHS paid Bennerstrom through the "COPES" program, which used federal and state funds to pay in-home service providers for Medicaid clients who would otherwise be placed in a nursing home. *Id.* at 857. Pursuant to a written agreement with DSHS, Bennerstrom was paid wages by DSHS and completed a W-2 with DSHS. *Id.* at 857, 861.

While under contract with DSHS, Bennerstrom was injured when he was struck by a car while on the way to the Library to conduct research as part of a continuing education process under the COPES program. *Id.* Bennerstrom requested benefits under the IIA. *Id.* At the level of the Superior Court, DSHS moved for summary judgment, and the Superior Court granted DSHS' motion. *Id.* Bennerstrom appealed. *Id.*

On appeal, this Court found several factors persuasive in determining that neither DSHS nor Bennerstrom had consented to an employment relationship. First, Bennerstrom's contract with DSHS stated in two places that Bennerstrom certified he was not an employee with DSHS. *Id.* 859-860 (*citing Clausen*, 15 Wn.2d at 69: "A contract, whether express or implied, is an important factor to consider in determining whether an employment relationship exists."). Second, there was no evidence in the record that prior to his injury Bennerstrom disavowed his written acknowledgement in the contract that he was not an employee. *Id.* at 860. Third, Bennerstrom was also verbally informed that he was not an employee of DSHS at his initial training and received another document stating that he was not a DSHS employee. *Id.* Fourth, Bennerstrom also wrote a letter indicating he was not a DSHS employee. *Id.*

However, as contrary indicia, Bennerstrom raised the fact that (1) DSHS had created a service plan for his mother; (2) DSHS had the ability to monitor Bennerstrom's care; and (3) DSHS issued W–2 forms and paychecks to Bennerstrom. *Id.* at 860-61 (Bennerstrom citing *In Re: Sylvia J. Booth*, BIIA, Dec. No. 92–6148 (1995)). This Court rejected each of those indicia and Bennerstrom's cited case law.

This Court rejected Bennerstrom's arguments and supporting case law, because in *Booth* "there was no indication… of an express contract or other documents that explicitly disavow an employment relationship between the parties." *Bennerstrom*, 120 Wn.App. at 861. This Court also noted that DSHS' ability to create a service plan, monitor Bennerstrom's care of his mother, or issue paychecks to him had nothing to do with *Bennerstrom's* consent to an employment relationship. *Id.* This Court accordingly affirmed summary judgment in favor of DSHS.

The facts in this case militate even more strongly against the finding of "consent" than in *Bennerstrom.* At the time of his injury, Mr. Robinson was a "free agent," meaning, as Robinson testified, he "[was] not an employee of the Seattle Seahawks." *See, e.g.*, CP 45 (FOF ¶4); Tr. 04/21, p. 56, lns. 2-6. Unlike Bennerstrom, Robinson did not receive any compensation for his participation in the mini camp -- either wages or *per diem.* CP 46 (FOF ¶19); Tr. 04/21, p. 64-65 (email stipulation); p. 31, lns. 14-17; p. 56, lns. 21-23 (Robinson). Unlike Bennerstrom, Robinson did not fill out a W-2 "or any other employment related documents" indicating any employment status with the Seahawks. Tr. 04/21, p. 56, lns. 10-12 (Robinson); Idzik Dep., p. 18-19, lns. 25-5. Unlike Bennerstrom, Mr. Robinson was not receiving wages and was not on the Seahawks' payroll. Tr. 04/21, p. 20, lns. 7-15 (Masnikoff); Tr. 05/10, p. 10, lns. 23-25; p. 13, lns. 19-22 (Bradley); Idzik Dep., p. 12-13, lns. 1-2.

Like Bennerstrom, Robinson voluntarily executed a "Free Agent Tryout Waiver and Release of Liability," stating that he was (1) a free agent and (2) that he "is not an employee of the Seattle Seahawks[.]" CP 46 (FOF ¶14); Tr. 04/21, p. 54, Ex. 1. Finally, like Bennerstrom, Robinson's non-employment status was discussed with him verbally. Idzik Dep., p. 10, lns. 18-24.

On the strength of *Bennerstrom*, it is clear there was no "consent" to the employment relationship in this case. In light of the absence of the "consent" element of the *Novenson* test, the Superior Court should be affirmed.

3. The Seahawks Did Not "Control" Robinson

Because there was no consent by the Seahawks or Robinson to an employment relationship, the Court need not go further in its analysis. However, even assuming, *arguendo*, there was "consent" on the part of the Seahawks and Robinson to an employment relationship, the Seahawks lacked the requisite "control" over Robinson to satisfy that prong of the *Novenson* test.

Because Robinson was attending the NFL equivalent of a job interview, the factors typically considered as to the "control" element of the *Novenson* test become difficult to apply. For example, among the factors that this Court typically examines to determine control are:

> (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. 853, 863 (2004) (*citing Scott R. Sonners, Inc. v. Dep't of Labor & Indus.*, 101 Wn.App. 350, 358, 3 P.3d 756 (2000)).

In this case, "work" had not yet begun. Robinson was attending the NFL equivalent of a pre-employment interview. He was not playing in an actual game or engaged in pre-season training -- the "employment of [the] employer," as it were. RCW § 51.08.180. Accordingly, *de facto*, the Seahawks could not meet a number of the *Bennerstrom/Sonners* control factors, including (1) control of any "work;" (3) settting pay or "hours of work;" (4) providing "day to day" supervision; (6) directing what "work" was to be done; or (7) conducting safety training. The lack of these factors weigh against finding an employment relationship in this case.

Because the instant case concerns pre-employment activity, it is helpful to examine pre-employment law with similar factual scenarios. The case of *In Re: Darlene R. Cate* is helpful. BIIA Dec. 00 20324 (2002), *aff'd sub. nom.*, *Cate v. Laidlaw Transit, Inc.*, 117 Wash. App. 1068 (2003) (unpublished appellate opinion). *Cate* differed from this case insofar as it concerned a pre-employment *training* program. However, its discussion of "control" in the pre-employment context is useful.

As the Board held in *Cate*,

> In order for this Board to determine that the relationship was one of an employer/employee under the Act, we must find it entailed consent *to a substantial quantum of employer control* [a] *for the purpose of identifiable and meaningful benefit to the employer in the furtherance of its business interests* [b] *and consideration in return to the trainee in the form of actual compensation and/or virtual promise of hire and/or payment of wages or substantial independent value of the training itself. See Bemis* and *Parsons*. Since Ms. Cate failed to establish any of these elements by a preponderance of the evidence, this Board, like the Department, cannot substantiate an employer/employee relationship[.]

Id. at *6 (emphasis added; bracketed letters added for clarity).

Preliminarily, as discussed, this case is not one of pre-employment training, like in *Cate*, providing a further basis for finding no employment relationship. The Seahawks lacked "control" over Robinson in the ordinary sense of the word. Attendance at the mini camp was purely voluntary, and Robinson was free to leave at any time. Tr. 04/21, p. 23 lns. 11-19

(Masnikoff); p. 49, lns. 5-7 (Robinson); Idzik Dep., p. 10, lines 14-17. Mr. Robinson was not being "trained." Tr. 04/21, p. 48, lns. 19-20 (Robinson). Absence from the mini camp was not a bar to future employment with the Seahawks, including employment via participation in another mini camp. Idzik Dep., p. 17, ln. 25. Further, because Mr. Robinson did not have a contract with the Seahawks, he was not subject to the mandatory rules and discipline procedures of the Seahawks or the NFL. Tr. 04/21, p. 15, lns. 2-14 (Masnikoff); Idzik Dep., p. 17, lns. 19-21; p. 46-47, lns. 23-18.

The "control" factors laid out in *Cate* are lacking as well. The first factor -- whether there was any benefit to the Seahawks -- is lacking. Mr. Robinson's participation did not expand a pool of applicants vital to the Seahawks' survival. Tr. 04/21, p. 19, lns. 19-26; Idzik Dep., p. 9, lns. 7-12. A large number of highly qualified applicants already existed (Tr. 04/21, p. 51, lns. 1-4) growing by over a thousand applicants each year (Idzik Dep., p. 7 lns. 9-17) for only 32 NFL teams. Robinson was not performing any essential function for the Seahawks by trying out for the team. There were approximately 96 players who attended the mini camp, including multiple players for each position. Idzik Dep., p. 25-26, lns. 17-6. When Mr. Robinson dropped out of the mini camp, there was no need to replace him. Idzik Dep., p. 26, lns. 7-21. Mr. Robinson did not fill any "particular need" or present any "unique skills" to the Seahawks. Idzik Dep., p. 20-21, lns.

22-3. The Seahawks also did not have a "special need" for his position. Tr. 05/10, p. 13, lns. 12-14 (Bradley). Accordingly, the Seahawks obtained no meaningful benefit by having Robinson participate in the mini camp.

The second *Cate* factor -- benefit to Mr. Robinson -- is also lacking. Robinson has conceded he did not gain any benefit or value by participating in the mini camp. CP 46 (FOF ¶19) (unchallenged). Additionally, Robinson received no wages or *per diem*. CP 46 (FOF ¶19); Tr. 04/21, p. 64-65 (email stipulation); p. 31, lns. 14-17; p. 56, lns. 21-23 (Robinson); see further discussion, *infra*. Importantly, Robinson was not promised a job "upon completion" of the mini camp. Tr. 04/21, p. 20, lns. 7-15 (Masnikoff); Tr. 05/10, p. 10, lns. 23-25; p. 13, lns. 19-22 (Bradley); Idzik Dep., p. 12-13, lns. 1-2. Robinson also did not receive the benefit of any "training." Tr. 04/21, p. 48, lns. 19-20 (Robinson). The mini camp was an opportunity for Robinson to "show his skills" so he could be evaluated for potential hire, not to train him for a position on the team. Tr. 04/21, p. 53-54, lns. 26-2; Idzik Dep., p. 12, lns. 9-12.

In the absence of either of the *Cate* factors, the lack of any "control" by the Seahawks over Robinson is manifest. As all of the *Cate* factors are lacking, as well as at least five of the seven *Bennerstrom/Sonners* factors, it is clear there was no "control" exercised over Robinson sufficient to satisfy that element of the *Novenson* test. Thus, Robinson failed to establish an employment relationship with the Seahawks. The Superior Court should be affirmed.

E. Robinson Fails to Satisfy His Own Test.

1. Robinson's Proposed Five Factor Test

Ignoring the *Novenson* test, Robinson proposes a five factor test for this Court to apply. App. Br. at 9. Citing principally to *In re Kimberly J. Bemis*, BIIA Dec. 90 5522 (1992), he proposes the following five factors for the Court to consider in weighing employment status: (1) control (App. Br., p. 14-16); (2) payment of wages (*id.*, p. 17-18); (3) exposure to a high degree of risk ("tryout exception") (*id.* 15; 18-30); (4) benefit to the employer (*id.* 20-22); and (5) evidence of an implied contract (*id.* 22-26). Robinson's proposed five factor test is found nowhere in Washington law. "Benefit to the employer" has been discussed in detail above. *See* §§ IV.C.9.; IV.D.3., *supra* (discussing *Bennerstrom* and *In Re: Cate*). The Seahawks analyze the remaining four factors below.

2. Bemis Portion

Three of Robinson's proposed factors, "control," "payment of wages," and "evidence of an implied contract," are derived from the Board decision in *In Re: Bemis*, BIIA Dec. 90 5522 (1992). The test for employment status in *Bemis* consisted of three factors, "of which no single feature... is determinative[:] [1] the right of control and discharge, [2] payment of wages, and [3] the contractual relationship, whether express or implied." *Id.*, *5 (bracketed numbers and punctuation added).

The three factor *Bemis* test was derived from the *Clausen* case. 15 Wn.2d 62. However, the *Clausen* test has long been supplanted by the test announced in *Novenson*, discussed above. To clarify why the *Novenson* test and not the *Bemis/Clausen* test is the appropriate test to apply here, a brief discussion of the history of the law concerning the employment relationship is warranted.

Clausen concerned a decedent who died while cutting timber pursuant to a permit issued by Spokane County. 15 Wn.2d at 66. Clausen's widow argued that since he was performing the timber cutting pursuant to a permit issued by Spokane County, Clausen was its employee. *Id.* at 64-65. In laying out factors to consider to determine if an employment relationship existed, the court stated, "[i]t is impossible to lay down a rule by which the status of a person *performing a service for another* can be definitely fixed as an employee. *Id.* (emphasis added). The court then went on to state the three non-dispositive factors it considered persuasive, "[1] the right of control and discharge, [2] payment of wages, and [3] the contractual relationship, whether express or implied[.]" *Id.* (bracketed numbers added). *Clausen* was then relied on in *Bemis*. BIIA Dec. 90 5522, *4-5.

The problem with the *Bemis* Board's reliance on *Clausen* is that the Board ignored *Clausen*'s statement that Mr. Clausen was "performing a service for another" when he was killed, as well as the court's focus on "control and discharge." These issues should have alerted the *Bemis* Board that when *Clausen* was decided (in 1942), the Washington Supreme Court looked to principles of *respondeat superior* in determining the existence of an employment relationship, usually in the context of differentiating between employees and independent contractors. *See*, *e.g.*, *Hubbard v. Dep't of Labor & Indus.*, 198 Wn. 354, 358 (1939) ("ultimate test" is "right to control"). Indeed, whether or not the decedent was an employee or independent contractor was the specific issue confronted in *Clausen*. 15 Wn.2d at 68. *Clausen* itself had nothing to say about *pre-employment training* (much less pre-employment evaluations) and whether such activity created an employment relationship, the issue in *Bemis*.

As time went on, the focus of the Washington Supreme Court began to shift from analyzing *respondeat superior* principles to analyzing the nature of the agreement between worker and employer. *See*, *e.g.*, *Wilkie v. Department of Labor & Indus.*, 53 Wn.2d 371, 334 P.2d 181 (1959). Eventually, *Hubbard*, *Clausen*, and their progeny were supplanted by the two prong test set out in *Novenson*. 91 Wn.2d at 553. The Board now applies the *Novenson* two prong test as well. *See*, *e.g.*, *In Re: Chris J.*

Thrush, BIIA Dec. 09 21463, *3 (2010) ("the courts and the Board have followed the two-part test set forth in *Novenson*"); *In Re: David C. Boyles*, BIIA Dec. 98 12803, *3 (1999) (applying *Novenson*). Accordingly, the *Bemis/Clausen* factors are not the appropriate test to determine employment status. The *Novenson* test controls.

3. Robinson Does Not Satisfy the Bemis/Clausen Test

Even assuming, *arguendo*, the *Bemis/Clausen* factors applied, Robinson would still not satisfy those factors. Again, the *Bemis/Clausen* non-dispositive factors are: "[1] the right of control and discharge, [2] payment of wages, and [3] the contractual relationship, whether express or implied." *Bemis*, BIIA Dec. 90 5522, *5; *Clausen*, 15 Wn.2d at 69.

In *Bemis,* Ms. Bemis was required to attend a five week training program with Alaska Airlines. BIIA Dec. 90 5522, *2. The training program was mandatory. *Id*. Trainees who completed the program "were guaranteed employment with Alaska Airlines." *Id*. Absence from any portion of the program was grounds for termination for the trainee and rescission of the guarantee of employment with Alaska Airlines. *Id*. at *5. Trainees received a cash *per diem* of $8.00 per day for which Alaska Airlines did not require receipts to validate that money was used for meals. *Id*. at *2. In addition, trainees received "[t]he value of the training course itself," for which they were not responsible for any "fees" or "tuition" related thereto. *Id.* at *6.

First, the *Bemis* Board found that Alaska Airlines exercised a "high degree of control" over its trainees. *Id.* at *5. The factors militating in favor of control were that (1) "[a]ttendance [for five weeks] was mandatory" for the trainees (*id.* at *2); (2) absence from the program resulted in termination from the program and revocation of guaranteed employment (*id.* at *5); (3) trainers and equipment were provided by Alaska Airlines (*id.* at *6).

Similar factors are not present in this case. Robinson's attendance at the three-day mini camp was voluntary. Tr. 04/21, p. 23, lns. 11-19; p. 49, lns. 5-7; Idzik Dep., p. 10, lns. 14-17. He had no guarantee of employment at the end of the mini camp. Tr. 04/21, p. 15, lns. 2-14; p. 20, lns. 7-15; p. 33, lns. 1-3; p. 49, lns. 2-4; Tr. 04/21; Idzik Dep., p. 18, lns. 22-24. Even if it could be said Robinson could be "dismissed" for non-attendance, there is no evidence that such a "dismissal" would result in a bar to future employment with the Seahawks, or that Robinson could not/would not be invited to a future mini camp. Idzik Dep., p. 17, ln. 25. Also, the Seahawks did not provide any "training." Tr. 04/21, p. 48, lns. 19-20. Rather, the mini camp was an opportunity for Robinson to "show his skills" so he could be evaluated for *potential* hire. Tr. 04/21, p. 53-54, lns. 26-2. The first *Bemis* factor is not present.

Second, the *Bemis* Board found Ms. Bemis had received the equivalent of wages, because she was paid a cash *per diem* of $8.00 for which she did not have to provide receipts (BIIA Dec. 90 5522, at *2) and "[t]he value of the [training] course itself" (*id.* at *6) (bracketed text added). Here, Robinson received no wage or *per diem.* Tr. 04/21, p. 31, lns. 14-16; p. 56, lns. 21-23. He also received no training. Tr. 04/21, p. 48, lns. 19-20. Robinson concedes that he did not gain any benefit or value by participating in the mini camp. CP 46 (FOF ¶19) (unchallenged).

Mr. Robinson was flown to Seattle, placed in a hotel, and provided meals. Tr. 04/21, p. 30-31, lns. 10-13. However, payment of the hotel bills, airfare, and meals had no substantial independent value to Robinson. Unlike the *per diem* in *Bemis*, Robinson did not receive the value of these items in cash. *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.").

Additionally, the cost of these items were paid directly to someone else (e.g. the hotel), not Robinson. Of course, room and board could be paid to someone else and still have a substantial benefit to the worker. If, for example, the worker did not have to pay for his or her own housing because someone else was providing it for them on an ongoing basis, the worker would incur a benefit. Such was not the case here. Mr. Robinson's one day hotel stay did not make it unnecessary for Mr. Robinson to maintain his home in Connecticut. His housing expense remained the same. The same is true of airfare. Payment of airfare to the airline did not benefit Mr. Robinson. Had he chosen not to attend the mini camp with the Seahawks, he would have incurred no airfare. He chose to attend, and he still incurred no airfare. Meals were provided to him, but meals alone were not the "substantial independent value" required by *Bemis*. *See Cate*, BIIA Dec. 00 20324 at *6. It was the combination of the *per diem* pay and the value of the training course that the *Bemis* Board found to be the analogue of "wages."

Robinson attempts to characterize his arguments regarding "wages" as a statutory mandate by citing RCW § 51.08.178. App. Br. at 17-18. However, the Washington Supreme Court has found that § 51.08.178 does not "definitively establish a definition of what constitutes 'wages.'" *Doty*, 155 Wn.2d at 541. *Doty* rejected a claim that a $6 per call and $10 per drill stipend paid to volunteer firefighters would qualify as wages under the IIA. *Id.* at 542. Additionally, *Doty* characterized the payment of premiums as part of the Volunteer Firefighters Relief Act as "reimbursement for expenses incurred in the performance of duties," not "wages." *Id.* at 543 (distinguishing *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001)).

Accordingly, Robinson's receipt of airfare and meals is more properly considered "reimbursement for expenses incurred" rather than "wages." *Id.* In any event, Robinson's statutory arguments put the cart before the horse. Section 51.08.178's wage calculation applies to "workers" already covered under the Act, not as a means to define an individual as a covered "worker." *Doty*, 155 Wn.2d at 544 ("In *Cockle*... we dealt with... the calculation of benefit payments, not the disputed classification of an injured individual.").

Bemis found only that the combination of *per diem* and the value of the training program, pursuant to an agreement for guaranteed employment, was a sufficient analogue to meet the "payment of wages" factor. As stated, Robinson received no *per diem* and did not receive any training. He admits he did not gain any benefit or value by participating in the mini camp. CP 46 (FOF ¶19) (unchallenged). Neither was he prospectively guaranteed employment upon completion of the mini camp. Robinson does not meet the second *Bemis/Clausen* factor.

The *Bemis* Board appeared confused as to how to address the third factor. When the *Clausen* court announced that the third factor to consider was "the contractual relationship, whether express or implied," it provided no further commentary on how that final factor was to weigh in the determination of whether or not there was an employment relationship. 15 Wash. 2d at 69-71. The *Clausen* court did not analyze the effect of there being an express or implied contract, the court merely concluded after analyzing the first two factors that "no contract, either express or implied, was shown in this case[.]" *Id.* at 73. The *Bemis* Board avoided analysis of this third factor and simply concluded that Alaska Airlines' "guarantee [of employment]," along with its "control," and "consideration paid" added up to an "implied contract of employment at the onset of training." BIIA Dec. 90 5522, *6 (bracketed text added).

The terms of any express agreement is clearly relevant to the parties' intent to create an employment relationship. *See Bennerstrom*, 120 Wn.App. at 860, n11 (discussing "consent" prong of *Novenson* and the import of the parties' agreement; *citing Clausen*, 15 Wn.2d at 69). In this case, as in *Bennerstrom*, Robinson and the Seahawks' express agreement stated both that he was a "free agent" and that he was *not* an employee. Tr. 04/21, p. 54, Ex. 1. The verbal explanation to him of these same terms would also weigh against the existence of an employment relationship. Idzik Dep., p. 10, lns. 18-24. The third *Bemis/Clausen* factor therefore also weighs against finding an employment relationship.

The *Bemis/Clausen* test would not apply in this case. Even assuming, *arguendo*, that it does, when the evidence elicited in this case is analyzed, all of the *Bemis/Clausen* factors weigh against finding that there was an employment relationship between Robinson and the Seahawks. Even if any one of the *Bemis/Clausen* factors had weighed in favor of an employment relationship, the Board or the Superior Court would still be justified in finding no employment relationship as no single factor of the *Bemis/Clausen* test is dispositive. *Bemis*, BIIA Dec. 90 5522, *5; *Clausen*, 15 Wn.2d at 69. The Superior Court should be affirmed.

4. There Is No Tryout Exception in Washington and Exposure to a High Degree of Risk Does Not Create an Employment Relationship

Finally, the Seahawks address Robinson's proposed third factor, "high degree of risk," also referred to as the "tryout exception." App. Br. at 9; 15; 18-30. As discussed above, an employment relationship does not exist in Washington for the purposes of the Act until a claimant is "engaged in the employment of an employer." RCW § 51.08.180. In short, Washington does not recognize *pre-employment* coverage under the Act. In cases like *Bemis* or *In Re: Richard A. Parsons*, BIIA Dec. 95 5039 (1997), the Board found it necessary for there to be a guarantee of employment at the end of a training period in order to imply an effective contract of employment at the beginning of training. As stated in *Cate*,

> We view the immediacy generally existing between the training programs and regular work, as established both in *Bemis* (on-call status guaranteed) and in *Parsons* (all trainees hired historically and/or actual start date for the claimant established), highly significant to a determination of whether there was an employment agreement inherent in the agreement to train.

BIIA Dec. 00 20324 at *5 (finding no employment relationship). Not surprisingly, Robinson has failed to cite a single case in Washington where an employment relationship has been established because a potential hire attended a job interview.

Unable to locate Washington law supporting his position, Robinson turns to out-of-state cases to support a supposed "tryout exception" to the requirement that employment status be established prior to a claimant's entitlement to benefits. App. Br. at 15 (*citing Laeng v. Workmen's Comp. Appeal Bd.*, 6 Cal.3d 771, 494 P.2d 1 (1972); 18-20 (*citing Smith v. Venezian Lamp Co.*, 168 N.Y.S.2d 764, 5 A.D.2d 12 (1957); 24-25 (*citing Childs v. Kalgin Island Lodge*, 779 P.2d 310 (Alaska 1989); *Mansfield Enterprises, Inc. v. Warren*, 154 Ga. App. 863, 270 S.E.2d 72 (1980); *Moore v. Gundelfinger*, 56 Mich. App. 73, 223 N.W.2d 643 (1974); *Lotspeich v. Chance Vought Aircraft*, 369 S.W.2d 705 (Tex. Ct. App. 1963)). Each case Robinson cites is distinguishable and, in any event, Robinson proposes a rule contrary to the plain language of RCW §

51.08.180 and the test for employment status set by the Washington Supreme Court in *Novenson.* [5]

Robinson first cites to *Laeng*, 6 Cal.3d 771. In *Laeng*, claimant Laeng was injured while maneuvering through an obstacle course as part of qualifying for a position as city refuse worker. *Id.* at 774. The obstacle course consisted of an elevated, horizontal telephone pole, a climbing wall, a series of bars, and several raised logs. *Id.* at 774, 775. Laeng fell from a raised, horizontal telephone pole and severely fractured his right foot. *Id.* at 774. The *Laeng* court stated that it would not be guided by the "common law contractual doctrine" but instead by "the purposes of the legislation at issue." *Id.* The court found that the purpose of the California worker's compensation act was to "protect individuals from any 'special risks' of employment." *Id.* Accordingly, the court found, when an employer exposes an applicant under his control and direction to such risks, any resulting injury becomes properly compensable under California's compensation law. *Id.* The court also noted the broad coverage afforded by California's worker's compensation laws: "every person in the service of an employer under any appointment or contract of hire or

[5] Of note, the *Bemis* Board did *not* rely on any of these cases to show an *employment relationship*. Rather, it was only *after* the Board found an employment relationship that it analyzed *Smith*, *Laeng*, and *Moore* to determine if Ms. Bemis had been injured "in the course of her employment" under RCW § 51.08.013. *Bemis*, BIIA Dec. 90 5522, *6-7.

apprenticeship, express or implied, oral or written[.]" *Id.* at 776-77 (*citing* Cal. Lab. Code § 3351).

Robinson next cites to *Smith v. Venezian Lamp Co.*, 168 N.Y.S.2d 764. In *Smith*, claimant Smith sought a job as a lamp polisher. *Id.* at 765. The defendant Venezian informed the claimant they would "try him out." Smith attempted to polish a lamp by means of a buffing machine. *Id.* The lamp slipped off the spool, struck the claimant and caused him injury. *Id.*

After his injury, Venezian filed an employer's first report of injury with the Compensation Board, in which it stated that it was the employer, that Smith was employed as a polisher, and that Smith was being given a trial to test experience to establish base pay. *Id.* at 766. The court found such statements persuasive, stating, "[i]t has been held that statements made by an employer in its first report of injury constitute admissions and have some probative force." *Id.* (citation omitted). The court also found that where a tryout involves a "hazardous" operation, that "a special employment exists" justifying benefits. *Id.* (citation omitted).

Robinson next cites to *Childs*, 779 P.2d 310. In *Childs*, claimant Childs, a professional pilot, sought employment with the defendant Lodge as a pilot and guide. *Id.* at 311. Childs conducted two interviews. *Id.* Childs testified at the second interview he was offered employment, which he accepted. *Id.* Childs came to the Lodge's office the next day and was added to the Lodge's insurance coverage. *Id.* Childs was then introduced to other Lodge employees, and fueled and prepared a plane for flight, signing for payment of the fuel on behalf of the Lodge. *Id.* Childs also set up a maintenance schedule for the Lodge's planes and programs for pilot selection. *Id.* Childs also gassed and prepared a second plane, paying with a Lodge check. *Id.* Childs was also instructed to prepare a marketing program for the lodge, and Childs made several phone calls in furtherance of that program. *Id.* Childs then bought some fishing rods for the Lodge at a sporting goods store and again paid with a company check. *Id.* While driving back from the sporting goods store in his putative boss' car, he was involved in an accident and injured. *Id.* The Superior Court found no employment relationship. *Id.*

The Supreme Court of Alaska reversed the Superior Court, finding that it had failed to consider whether, in light of the evidence of offer and acceptance by the Lodge to Childs, and the work performed by Childs on behalf of the Lodge, either an express or implied contract had been formed. *Id.* at 314. As to the tryout exception, the court, citing *Laeng*, found that a tryout exception may have applied, but additional fact finding was required on that issue. It then remanded the matter back to the Board for such fact finding. *Id.* at 315. [6]

Robinson next cites the *Warren* case. 154 Ga. App. 863 In *Warren*, the decedent Lashley was killed during a robbery at the defendant/respondent's store. *Id.* Lashley had worked at the store for two days prior to the shooting and had been recommended for a position by the store's manager. *Id.* Lashley had worked the cash register, stocked shelves and waited on customers. *Id.* The Board allowed benefits. *Id.* After reversal by the Superior Court requesting additional fact finding, the Georgia Court of Appeals affirmed the Board. *Id.* at 74. The appeals court affirmed the reversal because the "unimpeached" evidence supported "a master-servant relationship; that the employer received the benefit of the deceased's services; and that rendition of services valuable to another implied a promise to pay the reasonable value thereof." *Id.* Nowhere did the appeals court discuss the tryout exception.

Robinson also cites *Moore*, 56 Mich. App. 73. In *Moore*, claimant

[6] The Alaska Supreme Court's citation to *Laeng* is misleading. The *Laeng* court decided, because the facts were not in dispute, that Laeng was entitled to compensation "as a matter of law." *Laeng*, 6 Cal. 3d at 783 ("In view of the uncontradicted facts we hold the injury compensable as a matter of law."). The *Childs* court's citation portrays the *Laeng* decision as much broader than it is. *Moore*, 56 Mich. App. at 80, discussed *infra*, makes the same error.

Moore had recently finished a beautician's course and was contacted at her home regarding employment with defendant Gundelfinger. *Id.* at 74-75. Moore performed two satisfactory hair styling tests and was then promised employment with Gundelfinger, which Moore accepted. *Id.* at 75. Returning home in defendant's car, Moore was injured in a collision. *Id.* Citing *Smith* and *Laeng* (*supra*), the Michigan Court of Appeals found a tryout exception could apply, but remanded the matter to the Board for additional fact finding. *Id.* at 83.

Finally, Robinson also cites to the *Lotspeich* case. 369 S.W.2d 705. *Lotspeich* has nothing to do with a tryout exception. In that case, the Texas appeals court determined that plaintiff Lotspeich's employment began on June 16, 1952, the same date she underwent an employment-related medical examination. *Id.* at 707. Accordingly, summary judgment was granted for employer Chance when Lotspeich sued, alleging Chance's doctor's failure to diagnose her tuberculosis. *Id.* at 707. The court's discussion of the location of the examination was completely extraneous, because Lotspeich was already determined to be an employee of Chance at the time of the examination and thus barred from suing Chance.

Each of these cases are distinguishable. First, those actually addressing a tryout exception are contrary to Washington law. Under RCW § 51.08.180, a claimant is only covered by the IIA if he "is engaged in the employment of an employer." There can be no employment until the two pronged test of *Novenson* is met. There is no tryout exception to *Novenson*'s consent or control elements. The Supreme Court of California cannot overrule the Supreme Court of Washington.

Second, the cases cited are inapposite. In each, either the court did not discuss the tryout exception or imposed it only when the worker engaged in the tryout was encountering the "special risks" of employment. *See*, *e.g.*, *Laeng*, 6 Cal.3d 774. Here, Robinson was not encountering the "special risks" of employment. Under NFL rules, the mini camp 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. Truly analogous facts to *Laeng* or *Smith*, *et al.* demonstrating "special risks" of employment would have been present had the Seahawks asked Robinson to play, without pay, in a full-pads, full-contact, full-speed NFL game to see if he was a desirable hire, just as the claimant in *Laeng* had to negotiate a curiously onerous, timed obstacle course (far more difficult than his expected job duties), and the claimant in *Smith* had to perform the actual "hazardous" job duties of operating an industrial lamp buffer. Robinson never came remotely close to the "special risks" encountered by NFL players in a full-contact, regular season game.

Even if Washington adopted a tryout exception, it would not apply in this case.

Third, the modern, majority view rejects the tryout exception recognized in *Laeng*, *Smith*, and their progeny. *Laeng*, alone, has been rejected in Alabama, Colorado, Connecticut, and Oklahoma. *Boyd v. City of Montgomery*, 515 So. 2d 6, 7 (Ala. Civ. App. 1987); *Younger v. City & County of Denver*, 810 P.2d 647, 651 (Colo. 1991) (*en banc*); *Bugryn v. State*, 97 Conn. App. 324, 904 A.2d 269 (2006); *Cust-O-Fab v. Bohon*, 876 P.2d 736, 737 (OK Civ. App. 1994). Other states, including Louisiana, Maine, Missouri, New Jersey, and Oregon, have explicitly rejected the reasoning underlying *Laeng* and *Smith*, *et al.* and have refused to recognize a pre-employment exception to coverage for worker's compensation. *Sellers v. City of Abbeville*, 458 So. 2d 592, 594 (La. Ct. App. 1984), *writ den.*, 462 So. 2d 1248 (La. 1985); *Standring v. Skowhegan,* 870 A.2d 128, 130 (Me. 2005); *Leslie v. Sch. Services & Leasing, Inc.*, 947 S.W.2d 97, 99 (Mo. Ct. App. 1997); *Smith v. Adler's Millinery*, 122 N.J.L. 236, 237, 4 A.2d 782 (Sup. Ct. 1939); *Dykes v. State Acc. Ins. Fund*, 47 Or. App. 187, 190, 613 P.2d 1106 (1980); *BBC Brown Boveri v. Lusk,* 108 Or.App. 623, 816 P.2d 1183 (1991); *see also*, Department Brief at 23-31. Even Alaska and New York have narrowed their own recognition of the tryout exception, refusing to apply it in "lent servant" and pre-employment physical contexts, respectively. *Cluff v. Nana-Marriott*, 892 P.2d 164, 171 (Alaska 1995); *Rastaetter v. Charles S. Wilson Mem'l Hosp.*, 436 N.Y.S.2d 47, 48, 80 A.D.2d 608 (1981). In short, more modern cases from the majority of jurisdictions disfavor the tryout exception. There is no reason for Washington to adopt the minority position, especially in light of the express test for qualification under the IIA set forth in RCW § 51.08.180 and *Novenson*.

V. CONCLUSION

For the reasons stated, the Superior Court should be affirmed.

Respectfully submitted this Wednesday, April 10, 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on Wednesday, April 10, 2013, a copy of the Brief of Respondent, Football Northwest, LLC, was served on all counsel of record by U.S. Mail Postage Prepaid.

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Santana Strange