

No. 48852-3

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

Judson D. Forks

Appellant,

vs.

Encon Washington LLC

Respondent,

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Judson Forks, a temporary worker employed by Aerotek was injured while working at a facility owned and operated by Encon. Washington Courts agree that, for the purposes of workers' compensation, a worker is not an employee of a business unless the worker subjectively agrees to such a relationship. The trial court granted summary judgment for Encon by holding, as a matter of law, that Mr. Forks agreed to employment with Encon despite testifying that his sole employer was Aerotek. To do so, the trial court interpreted a document that Mr. Forks signed as part of his employment with Aerotek differently than both Aerotek and Mr. Forks interpreted it.

Mr. Forks respectfully requests that the Court reverse the trial court for two reasons: first, Mr. Forks unambiguously testified that his sole employer was Aerotek, not Encon. That alone is enough to present a question of fact to a jury. *Rideau v. Cort Furniture Rental*, 110 Wn.App. 301, 307-308, 39 P.3d 1006 (2002). And second, the document on which the trial court relied to grant summary judgment was a contract between Mr. Forks and Aerotek, not Encon. Furthermore, Aerotek and Mr. Forks agree about the interpretation of that document, which is different than the interpretation that the trial court applied and upon which Encon relied. For

those reasons, Mr. Forks respectfully requests that the Court vacate the trial court's order granting summary judgment and allow the case to proceed to trial.

II. IDENTITY OF APPELLANT

Appellant Judson Forks is an individual residing in Washington State.

III. ASSIGNMENTS OF ERROR

The trial court incorrectly granted summary judgment to Appellee Encon by ruling, as a matter of law, that Mr. Forks had consented to employment with Encon.

IV. STATEMENT OF THE ISSUES

1. Whether a worker has consented to employment with a specific employer when the employee testifies unequivocally that his sole employer was the general employer.
2. Whether an entity may interpret a contract to which it is not a party and to which the actual parties agree on a different interpretation to compel a worker to be its employee.

V. STATEMENT OF THE CASE

This is a premises liability workplace injury case. (CP 10), the Defendant, is a "full service specialty manufacturer providing engineering

precast prestressed concrete building solutions to the construction industry in the Pacific Northwest.” (CP 10). After it signed an agreement to deliver tunnel liners for the SR 99 Bored Tunnel Project, it required the assistance of many more employees. (CP 10). To remedy that need, it entered into a contract with Aerotek, a staffing agency who was also Mr. Forks’ employer. (CP 10).

Encon does not always use staffing agencies; occasionally, it is able to fulfill its workforce need simply by placing a sign on the street outside its office. (CP 112-113). The people who respond to the sign are direct employees of Encon. Nutter Dep. (CP 112). Aerotek, in contrast, provides temporary workers to Encon. Nutter Deposition (CP 112-113, 275-276). Although those workers remain employed by Aerotek, Mr. Forks concedes that workers whom Aerotek provides to Encon pursuant to its contract act under the direct control of Encon. In other words, Mr. Forks does not dispute that Encon is able to fulfill the first part of the two-part test set forth in *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979).

Judson Forks was a contract employee provided to Encon through Aerotek. Def. Br. 3. While he was working at Encon, he remained an employee of Aerotek. Schenk Dep. (CP 277). Aerotek paid Mr. Forks’

industrial insurance premiums. (CP 277). Encon did not. Schenk Dep. 10:25-11:3. When Mr. Forks was hurt, Aerotek paid for his medical treatment, just as it did for any Aerotek employee who works for a client like Encon. (CP 277-278). Aerotek withheld Mr. Forks' taxes. (CP 278). Aerotek cut his paychecks. (CP 278). And ultimately, if Mr. Forks or another employee is fired, Aerotek – not Encon – must terminate the employee. (CP 278-279).

As a condition of his employment with Aerotek, he signed a Policies and Procedures Statement. (CP 27-71). Paragraph 14 reads as follows:

I will contact Aerotek as soon as possible if I am injured on an assignment so that the proper Workers' Compensation forms can be completed. I understand that these forms must be completed promptly to insure my claim. I agree that if I sustain a work-related injury at any time while employed by Aerotek, I will submit to an examination by a physician or physicians of Aerotek's selection (at Aerotek's expense) as often as may be reasonably requested, and as a result of certain events (for example, work related accidents, unusual behavior, etc.) I may be required to submit to a drug and alcohol screening test. I further understand and agree that, for Workers' Compensation purposes only, I will be considered an employee of Aerotek's client, and that workers' compensation benefits are my exclusive remedy with respect to any injury I incur while on assignment. In furtherance of the foregoing and in recognition that any work related injuries which might be sustained by you are covered by state Workers' Compensation statutes, and to avoid the circumvention of such state statutes, which may result from suits against the

Clients of Aerotek based on the same injury or injuries and to the extent permitted by law, YOU HEREBY WAIVE AND FOREVER RELEASE ANY RIGHTS YOU MAY HAVE to make claims or bring suit against the Client of Aerotek for damages based upon injuries which are covered under such Workers' Compensation statutes.

According to Aerotek, this paragraph simply requires Aerotek employees to file a workers' compensation claim with Aerotek rather than the client. (CP 291-292). It does not prohibit employees like Mr. Forks from filing any other lawful claim against a client. (CP 291-292).

On March 13, 2014, Mr. Forks was stationed at the beginning of a production line. (CP 185-186). It was Mr. Forks' job to load the jig with rebar. (CP 256). The jig would then slide down the production line to welders, then to concrete workers where the liners were finalized before being stored in the yard. (CP 255-256). After that, trucks moved the liners to the tunnel project in Seattle. (CP 149). A partial photograph of the production line appears at CP 249. Normally, the workers used electric tuggers to move the jigs around, but the tuggers would periodically break down. (CP 190-191). So on March 13, 2014, workers were using modified forklifts to move the tuggers. (CP 205). The tuggers worked like the forklifts except the forklifts required extra workers, such as Mr. Forks, to guide the jigs onto the rail lines that constituted the assembly line. (CP 193).

In addition, workers would normally use reinforced steel pins to hold the jigs in place as they loaded the rebar or welded it together. Forks Dep. 53:13-15. However, the pins would periodically get lost, so on March 13, workers were using rebar that was too small for the holes and less strong than the pins as replacements. (CP 206). As a forklift driver moved the jig into place, Mr. Forks – on the direction of an Encon supervisor – stood in front of the jig to help guide it onto the rail system. (CP 205). As the forklift operator moved the jig into place, the rebar pin snapped and the jig rotated towards the wall, trapping Mr. Forks against the wall. (CP 206). In an effort to free himself, Mr. Forks pushed with his left arm and suffered a winged scapula.

VI. SUMMARY OF ARGUMENTS

Since 1939, Washington Courts have agreed that, for purposes of workers' compensation, a worker is an employee of an employer if the employer can satisfy the following two-part test: (1) the employer has the right to control the servant's physical conduct in the performance of his or her duties, and (2) there is consent by the employee to the relationship. Mr. Forks agrees that Encon controlled his day-to-day duties but did so with the unequivocal understanding that Aerotek – not Encon – was his employer.

Besides testifying to as much at his deposition, other evidence also squares with Mr. Forks' understanding: Aerotek cut his paychecks, withheld his taxes, paid his workers' compensation premiums and supplied his medical care after he was injured. If Mr. Forks' work had proven unsatisfactory, Aerotek would have fired him.

In addition, as part of his employment with Aerotek, Mr. Forks signed a document that Encon interpreted – an interpretation that the trial court accepted – to mean that Mr. Forks had waived any right to bring suit against Encon for its negligence. However, Mr. Forks and Aerotek agree that that document only compels Mr. Forks to file workers' compensation claims with Aerotek rather than with a client like Encon.

Even if the document should be interpreted as Encon reads it, the parties to the contract – Mr. Forks and Aerotek – were not acting in accordance with it and thus, it should not be read as Encon urges. For those reasons, Mr. Forks respectfully requests that the Court vacate the trial court's order granting summary judgment and allow the case to proceed to trial.

VII. ARGUMENT

A. Standard of Review

The trial court may grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). “A motion for summary judgment presents a question of law reviewed de novo.” *Osborn v. Mason County*, 157 Wn.2d 18, 22, 137 P.3d 197 (2006). In so deciding, the Court must “construe the evidence in the light most favorable to the nonmoving party.” *Id.* Summary judgment is appropriate if – but only if – from all the evidence, reasonable persons could reach but one conclusion. *Wilson v. Steinbeck*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) (superseded by statute on other grounds by *Faust v. Albertson*, 167 Wn.2d 531, 222 P.2d 1208 (2009)).

B. Washington’s workers’ compensation statute seeks to minimize the economic loss arising from on-the-job injuries

The point of Washington’s workers’ compensation statute is to reduce to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010. To that end, the industrial insurance act generally abolishes all personal injury actions by workers against their employers. RCW 51.04.010. There are, however, exceptions. One exception allows an injured worker to seek damages from liable third persons, “not in a worker’s same employ” even

if “benefits and compensation are provided” by the industrial insurance act. RCW 51.24.030. Hence, when a worker under the employ of a temporary employment agency is injured while working for a different company, the industrial insurance act does not necessarily protect the second company from liability.

Confronted with an employer who sought to evade liability under the industrial insurance act, the Court – in perhaps the first case to visit the subject – rendered the special employer liable. In *Lunday v. Dept of Labor & Industries*, 200 Wash. 620, 94 P.2d 744 (1939), the claimant was the widow of a man who had died as a result of complications following surgery to repair an injury he suffered while on the job. There, the claimant worked for a delivery-truck lessor who contracted with a grocery store to deliver free groceries for the store. *Id.* at 622, 94 P.2d at 745. Although the case turned on the question of whether the work was extrahazardous, the analysis proves instructive here:

An employer who directs his servant to work for another is regarded in law as the general employer, and the one for whom he works as a special employer, and the relation of employer and employee, in the circumstances, exists between both of them and the employee himself. If the employee is under the exclusive control of the special employer in the performance of work which is a part of his business, he is, for the time being, his employee; yet, at the one and the same time, he is the employee of the general employer, as well as the employee of the special employer.

And he may, under the common law of master and servant, look to the former for his wages and the latter for damages for negligent injuries; so under the Workmen's Compensation Act he may so far as its provisions are applicable, look to the one or to the other, or to both, for compensation for injuries due to occupational hazards.

Id. at 624, 94 P.2d at 745-746. *Lunday* offered three lessons that proved relevant in future cases: first, even as early as 1939, the Court understood that an employer may not insulate itself from liability by placing other entities between itself and the employer. Second, general employers, like Aerotek, will pay an injured employee's wages while the special employer – Encon – must pay "damages for negligent injuries." *Id.* Finally, as the *Novenson* court recognized 40 years later, without the *Lunday* court's interpretation of the statute, "the workman would have been unable to receive benefits under the industrial insurance act." *Novenson*, 91 Wn.2d at 552.

Even when an employee mistakes the relationship between him or herself and the negligent entity, the employee's subjective understanding of that relationship controls. In *Fisher v. City of Seattle*, 62 Wn.2d 800, 384 P.2d 852 (1963), the employee did not understand that his employer was a subsidiary of the entity that caused his injury; he assumed that the entities were unaffiliated. *Id.* at 802.

Standard Stations, Inc. hired Mr. Fisher as a service station attendant. *Id.* at 801. After he suffered an injury at work, Mr. Fisher brought suit against the City of Seattle, Standard Stations, the Standard Oil Company of California, and Western Operations, Inc. *Id.* Although the three private entities were separate corporations, Western Operations and Standard Stations were wholly owned subsidiaries of the Standard Oil Company of California. *Id.* After Mr. Fisher suffered his injury, he testified in an affidavit that because he was hired and paid by Standard Stations, “he was led to believe that only Standard Stations was his employer.” *Id.* at 802. He had no knowledge of the interwoven nature of the three entities: “[h]e further stated that he was never informed he was working for Western Operations, that he knew nothing of the agreements between the three corporations, and that he did not know that Western Operations prepared Standard Stations’ paychecks and paid industrial insurance premiums for Standard Stations’ employees.” *Id.* at 802.

Western Operations moved for summary judgment arguing that – as did Encon below – that Standard Stations (like Aerotek) was Western Operations’ agent and thus, the Workers’ Compensation Act barred Mr. Fisher’s claim. *Id.* at 803. Although the Court agreed that Western Operations was vicariously liable for the negligence of Standard Stations’

employees, that vicarious liability did not bar Standards Stations from liability. *Id.* at 804. It explained that, for purposes of vicarious liability, “it made no difference whether there was a mutual agreement” because the doctrine “w[as] used generally for the adjustment of rights between the master and a third party due to activities carried on by the servant.” *Id.*

In workers’ compensation, however, “the important question here is: Did the workman consent with the ‘employer’ to the status of ‘employee?’” *Id.* Hence, an employment relationship in the workers’ compensation context required *mutual* consent. *Id.* Here is the reason why:

The reason for the difference between the two concepts is readily explained by the difference between the nature of the two liabilities involved. The end product of a vicarious liability case is not an adjustment of rights between employer and employee on the strength of their mutual agreement, but a unilateral liability of the master to a stranger. The sole concern of the vicarious liability rule, then, is with the master: did he accept and control the service that led to the stranger’s injury? If he did, it is of no particular importance between him and the stranger whether the servant enjoyed any reciprocal or contractual rights *vis-à-vis* the master. Accordingly, the Restatement of Agency says plainly that the master must consent to the service, but nowhere requires that the servant consent to serve the master of (sic) even know who he is.

Compensation law, however, is a mutual agreement between the employer and employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between the employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon

a worker an employee status to which he has never consented would not ordinarily harm him of valuable rights under the compensation act, notably the right to sue his own employer for common law damages.

Id. 804-805 (*citing* 1 Larson, Workmen's Compensation Law § 47.10 (1952)). Hence, "under the same set of facts, an employer-employee relation may or may not exist depending upon the purpose for which the determination is desired. Thus, a workman might be deemed an 'employee' for the purpose of vicarious liability of a master to a third party while, under the same set of facts, he may not be an 'employee' for purposes of workmen's compensation issues." *Id.* at 805.

Because Mr. Fisher filed an affidavit stating he had no knowledge of the relationship between Western Operations and Standard Stations, he had not consented to an employment relationship with Western Operations. *Id.* at 806. As a result, the Workers' Compensation Act did not prohibit Mr. Fisher from filing a claim against Western Operations. *Id.* *Fisher*, therefore, stands for the proposition that the worker's subjective understanding controls. Even when a worker such as Mr. Fisher is wrong in his belief that an entity is not his employer, his subjective understanding of the relationship controls because he has not consented to the mutual relationship that *Fisher* requires. *Id.* at 805.

Fisher stated implicitly the test that the Court in *Novenson* set forth specifically: “[f]or 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.” *Id.* at 553.

C. Mr. Forks testified unequivocally that his sole employer was Aerotek, not Encon; that testimony is determinative

Mr. Forks, like Mr. Novenson before him, never consented to an employer-employee relationship with Aerotek; that fact is determinative. In *Novenson*, like Mr. Forks here, worked for a temporary employment agency called Kelly Labor of Northwest, Inc. *Id.* at 551. Kelly Labor sent Mr. Novenson to Spokane Culvert where he was injured. *Id.* Spokane Culvert, like Western Operations before it, *Fisher*, 62 Wn.2d at 803 and Encon here, (CP 10), argued that it was Mr. Novenson’s employer and thus immune from liability under the Workers’ Compensation Act, a contention with which the trial court agreed. *Novenson*, 91 Wn.2d at 552.

At the outset, the Court noted many of the factors that are present here: Kelly, like Aerotech, “is in the business of providing casual labor to customers who need temporary workers.” *Id.* at 552; (CP 275). “Kelly, as an employer, must of course, do all those things every employer is required to do, such as employee reporting, payment of industrial

insurance premiums, internal revenue withholding, and general bookkeeping and accounting concerning these daily laborers.” *Novenson*, 91 Wn.2d at 552-553; (CP 277-279). “Kelly charges its customers, such as Spokane Culvert, for the service of its employees.” *Novenson*, 91 Wn.2d at 553. Although Encon found that fact significant, (TP 7:17-20), the Court paid it little mind: “The fact that such charges include the industrial insurance premiums paid to the Department of Labor and Industries is, we find, of no moment in the present inquiry. The fees charged by any contractor normally cover its costs of doing business and would include such expenses.” *Novenson*, 91 Wn.2d at 553.

The *Novenson* court had little difficulty in deciding that Spokane Culvert controlled Mr. Novenson’s daily work. The important question was, as it is here, whether Mr. Novenson consented to an employer-employee relationship with Spokane Culvert. The Court summarized the policy considerations set forth in *Fisher*. “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 554. If an employment relationship 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 workman.” *Id.* at 555.

The Court also took into account the following additional facts: Mr. Novenson had worked for another labor broker in another city and was familiar with the way such arrangements worked. *Id.* at 557 (Wright, C.J. dissenting). He understood his superior at Spokane Culvert was a Spokane Culvert employee, not a Kelly Labor employee. *Id.* On the morning of his injury as well as the day before, Mr. Novenson specifically requested that he be placed with Kelly Labor. *Id.* And while working at Spokane Culvert, no supervisory employee from Kelly looked after Mr. Novenson’s work, his only supervision came from Spokane Culvert employees, and Spokane Culvert’s employees directed both the location and function of his work. *Id.* Nevertheless, the Court found that Mr. Novenson had not consented to an employer-employee relationship with Spokane Culvert. *Id.* at 552.

The Court ended its opinion by describing the cost-benefit analysis an employer such as Spokane Culvert or Encon must undertake before hiring workers from a temporary staffing agency such as Kelly Labor or Aerotech:

For whatever reason, Spokane Culvert found it advantageous to contract with Kelly to provide it with

temporary workers. As opposed to permanent employees of Spokane Culvert, Kelly laborers were not placed on its payroll, nor were they eligible for company benefits. Spokane Culvert seeks the best of two worlds minimum wage laborers not on its payroll, and also protection under the workmen's compensation act as though such laborers were its own employees. Having chosen to garner the benefits of conducting business in this manner, it is not unreasonable to require Spokane Culvert to assume the burdens. A potential burden, in this instance, may well be the application of RCW 51.24.010, which permits a common law action for negligence.

Id. at 555.

An employee's subjective belief alone is enough to raise genuine issues of material fact. In *Rideau*, the Court stated that "[a]n employee's subjective belief as to the existence of an employer-employee relationship is material to the issue of consent." *Id.* at 308.

Mr. Rideau was hired by a temporary employment agency called Occupational Resource Management (ORM). *Id.* at 303. Like Aerotek, "ORM hired, fired, and compensated all of its employees, paid industrial insurance premiums, and withheld taxes from the employees' paychecks." *Id.* at 303; (CP 277-279). In addition, ORM, like Aerotek, provided employees with a handbook that "governed its employee's conduct, even while they worked temporary jobs at other companies." *Rideau*, 110 Wn.App. at 302; (CP 280).

Mr. Rideau, like Mr. Forks here, “stated that he considered ORM to be his sole employer,” although Mr. Rideau had “accepted a job with Cort from ORM.” *Id.* at 308. “Th[at] fact alone raises the question of whether Rideau consented to the role of ‘employee’ to Cort and whether a mutual agreement existed.” *Id.* at 307-308.

Mr. Forks also considered Aerotek to be his sole employer. In the present case, Mr. Forks testified as follows:

Q: Are you currently employed?

A: I am.

Q: And where do you work?

A: I work at Aerotek.

Q: And what is Aerotek?

A: Aerotek is a staffing company

Q: And do you actually work at Aerotek, or do you just get employed through them?

A: I actually work for them. I get employed through them.

Q: And so – and how long have you been working at Aerotek?

A: I’ve been working at Aerotek for two and a half years.

Q: And it’s my understanding that you were working for them at the time of this incident at the Encon facility; correct?

A: Yes sir.

(CP 162-163). Under existing precedent, Mr. Forks’ subjective belief that Encon was not his employer exposes Encon to liability. *Novenson*, 91 Wn.2d at 555. Additional evidence of the type the *Novenson*

and *Rideau* courts found noteworthy also exists here: Aerotek paid Mr. Forks worker's compensation premiums. (CP 278); *Novenson*, 91 Wn.2d at 553 ("Kelly has an employer number with the Department of Labor and Industries and is a single employer entity for workmen's compensation purposes."). Aerotek cut his paychecks. (CP 278); *Rideau*, 110 Wn.App. at 302. Aerotek withheld his taxes. (CP 278); *Rideau*, 110 Wn.App. at 302. When Mr. Forks was hurt, Aerotek paid for his medical treatment. (CP 278). If Mr. Forks were to be fired, Aerotek, not Encon, would terminate the relationship. (CP 279); *Rideau*, 110 Wn.App. at 302. Mr. Forks applied to Aerotek, not Encon, although Encon can and does occasionally hire people directly off the street. (CP 112-113).

For these reasons, Mr. Forks respectfully submits that the trial court's grant of Encon's motion for summary judgment was improper.

D. Mr. Forks did not waive his right to sue.

When Mr. Forks was hired on with Aerotek, he had to sign a policies and procedures agreement which contained the following paragraph:

I will contact Aerotek as soon as possible if I am injured on an assignment so that the proper Workers' Compensation forms can be completed. I understand that these forms must be completed promptly to insure my claim. I agree that if I sustain a work-related injury at any time while employed by Aerotek, I will submit to an examination by a physician or physicians of Aerotek's selection (at Aerotek's expense) as often as may be reasonably requested, and as a result of

certain events (for example, work related accidents, unusual behavior, etc.) I may be required to submit to a drug and alcohol screening test. I further understand and agree that, for Workers' Compensation purposes only, I will be considered an employee of Aerotek's client, and that workers' compensation benefits are my exclusive remedy with respect to any injury I incur while on assignment. In furtherance of the foregoing and in recognition that any work related injuries which might be sustained by you are covered by state Workers' Compensation statutes, and to avoid the circumvention of such state statutes, which may result from suits against the Clients of Aerotek based on the same injury or injuries and to the extent permitted by law, YOU HEREBY WAIVE AND FOREVER RELEASE ANY RIGHTS YOU MAY HAVE to make claims or bring suit against the Client of Aerotek for damages based upon injuries which are covered under such Workers' Compensation statutes.

Aerotek argued below – and the trial court agreed – that the above paragraph rendered clean facts:

To conclude, this is not a complicated issue, but I honestly think – even though a lot of these cases say this is an issue of fact, they say it is an issue of fact if there is no clear evidence. Here, there is absolutely clear evidence. I mean, I don't think this case – you know, the facts in this case don't get much cleaner. There is a clear signature, and he has agreed to this employee/employer relationship with Encon. He agreed to consent – that I will be – I understand that I am an employee of Aerotek's client, here Encon.

(TR 9:7-17). Even if the paragraph is as clear as Encon argued it is, the actual parties to the contract – Mr. Forks and Aerotek – agree as to its meaning: that the paragraph simply requires Aerotek employees to file workers' compensation claims with Aerotek rather than the client. (CP

288-289). It does not prohibit an employee from filing an otherwise lawful claim. (CP 288-289).

In any case, the parties to the contract – Aerotek and Mr. Forks – were not acting in accordance with it. Although the contract states that Mr. Forks agreed to be an employee of Encon for workers’ compensation purposes only, that is not what occurred in reality. Aerotek – not Encon – paid Mr. Forks’ workers compensation premiums. (CP 278). Aerotek – not Encon – satisfied Mr. Forks’ workers compensation claim. (CP 278). And Aerotek – not Encon – paid Mr. Forks’ wage. (CP 278). In other words, to the extent the agreement *does* force Mr. Forks into an employee relationship with Encon, neither Encon nor Aerotek were acting in accordance with the agreement. Hence, the terms that Encon wishes to enforce prove unenforceable here.

As did Aerotek here, an employer may unilaterally amend or revoke policies or procedures. *Gagliardi v. Denny’s Restaurants, Inc.*, 117 Wn.2d 426, 434, 815 P.2d 1326 (1991). It may do so even when the employer does not expressly reserve the right to make such changes from the outset. *Id.* The sole requirement is that the employer provide the employee with reasonable notice of the change. *Id.* at 502, an action that occurred here when Mr. Forks received his first paycheck showing that

Aerotek, not Encon, was paying his wage and withholding his taxes. In any case, changing a contract does not require actual notice or documentation as long as the parties act in accordance with the new changes. *Saluteen-Mashersky v. Countrywide Financial Corp.*, 105 Wn.App. 846, 854, 22 P.3d 804 (2001) (“In determining the mutual intention of contracting parties, the unexpressed, subjective intentions of the parties are irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations.”).

Instead, the trial court accepted an interpretation of the agreement that would essentially allow Encon to contract away the balance set forth in the Workers’ Compensation Act: it would allow Encon to reap the reward of employment by insulating it from negligence lawsuits without burdening Encon with the requisite responsibilities in exchange. *Novenson*, 91 Wn.2d at 555 (“Spokane Culvert seeks the best of two worlds minimum wage laborers not on its payroll, and also the protection under the workmen’s compensation act as though such laborers were its own employees.”) Those responsibilities – the payment of workers’ compensation premiums, the payment of wages, and the like – would fall solely to Aerotek. Such an interpretation does not square with the public policy supporting the Act. RCW 51.04.010 (The administration of the

common law system governing the remedy workers against employers “has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public.”).

It must also be noted that Encon is not even a party to the contract it cites. Only Aerotek and Mr. Forks are. And the two parties agree about the meaning of the paragraph. As Aerotek testified in its deposition:

Q: If an employee is injured on the job, does Aerotek prohibit them from filing a claim against the client?

A: No, there’s not prohibition. I guess to clarify, it’s an expectation that it should come through Aerotek to address the workers’ compensation concerns.

Q: So the expectation is simply that if someone’s hurt on the job and they need to claim – they need to file a workers’ comp claim, they do it with – through Aerotek rather than the client?

A: Correct.

...

Q: [I]n Aerotek’s mind, paragraph 14 simply requires the employee to file a workers’ comp claim with Aerotek rather than the client; is that correct?

A: Correct.

Q: (By Mr. Froehling) It does not prohibit – or correct me if I’m wrong, it does not prohibit the employee from filing any other lawful claim against the client; is that correct?

THE WITNESS: Not to my knowledge.

(CP 288, 291).

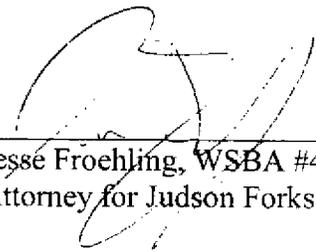
In other words, the parties to the contract agree about the meaning of the contract. It simply requires Mr. Forks to file his workers’ compensation claim through Aerotek, not its client. Nothing in the

contract prohibits Mr. Forks from taking the action he has taken: filing a lawful claim against Encon.

VIII. CONCLUSION

The issue of Mr. Forks' consent cannot be decided by the court on summary judgment in favor of Encon. Since proving Mr. Forks' consent to the employment relationship is a necessary part of proving Encon was Mr. Forks' employer for purposes of immunity under the Act, Encon's summary judgment motion should have been denied. For those reasons, Mr. Forks respectfully requests that the Court vacate the trial court's grant of summary judgment and allow Mr. Forks his day in court.

RESPECTFULLY SUBMITTED this 12th day of August, 2016.

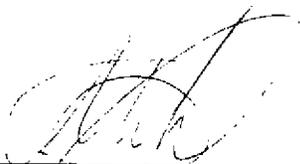


Jesse Froehling, WSBA #47881
Attorney for Judson Forks

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I served the foregoing document to the Court of Appeals, Division II, Greg Wallace and Sidney Tribe via first class mail and email.

Dated this 12th day of August, 2016

A handwritten signature in black ink, appearing to read 'Michael Moeller', written over a horizontal line.

Michael Moeller

FROEHLING LAW OFFICE

August 12, 2016 - 3:22 PM

Transmittal Letter

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Opening Brief

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