69739-1

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NO. 69739-1-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

COURTNEY ROBINSON,

Appellant,

v.

FOOTBALL NORTHWEST, LLC.,

Respondent.

APPELLANT'S BRIEF

William D. Hochberg
WSBA # 13510
Sara R. Smith
WSBA# 26374
222 Third Avenue North
Edmonds, WA 98020
(425) 744-1220

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1. The superior court erred in finding that Mr. Robinson did not have an employment contract, either explicit or implied, with the Seattle Seahawks for purposes of the Industrial Insurance Act. Clerk's Papers [hereinafter CP] at 45-47 *citing* Finding of Fact No. 5, No. 7, No. 9, No. 10, No. 11, No. 13, No. 15, and No. 22.

2. The superior court erred in finding that the Seahawks did not pay Mr. Robinson wages pursuant to RCW 51.08.178. CP at 46 *citing* Finding of Fact No. 16.

3. The superior court erred in finding that the Seahawks did not gain any benefit or value through Mr. Robinson's participation in the mini-camp tryout. CP at 46 *citing* Finding of Fact No. 20.

4. The superior court erred in finding that Mr. Robinson was not an employee of the Seahawks under RCW 51.08.180. CP at 47 *citing* Conclusion of Law No. 2.

5. The superior court erred in finding that Mr. Robinson was not in the course of employment under RCW 51.08.013, when he was injured on April 13, 2010 while participating in the Seahawks' mini-camp tryout. CP at 47 *citing* Conclusion of Law No. 3.

6. The superior court erred in finding that Mr. Robinson did not sustain an industrial injury within the meaning of RCW 51.08.100. CP at 47 *citing* Conclusion of Law No. 4.

7. The superior court erred in finding that RCW 51.08.178 is not applicable to the facts in this case. CP at 47 *citing* Conclusions of Law No. 5.

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Has Mr. Robinson demonstrated that he is was an employee of the Seahawks and covered under the Industrial Insurance Act by presenting evidence that showed: (1) the Seahawks exercised an

extreme degree of control over Mr. Robinson's movements while he was in Seattle at the Seahawks' invitation; (2) he received wages under RCW 51.08.178; (3) the mini-camp exposed Mr. Robinson to a high degree of risk; (4) Mr. Robinson's participation in the mini-camp provided a benefit to the Seahawks; and (5) an implied contract for workers' compensation purposes existed between the parties?

2. Has Mr. Robinson demonstrated that public policy behind the Industrial Insurance Act requires a finding that an injury during a try-out period is covered when that injury flows directly from employment activities or conditions?

STATEMENT OF THE CASE

Courtney Robinson is a former football player who played defensive back in college and was injured while participating in a mini-camp for the self-insured employer, Football Northwest d.b.a. the Seattle Seahawks. The mini-camp took place in Renton, Washington from April 13-15, 2010. Testimony of John Idzik, p. 18. Participation in this mini-camp was by invitation only. Testimony of Courtney Robinson, p. 49. The purpose of the mini-camp was to fill open spots on the team. *Id.* At the time that Mr. Robinson was invited to the mini-camp, there was an opening on the roster for a defensive back. Robinson, p. 24

Prior to extending an invitation to free agents, the Seahawks' team scouts extensively evaluate prospective players. Idzik p. 6. If an opening arises, the scouts recommend a player who fits the team's need at that

time. *Id.* An invitation to a mini-camp is then extended. There are two types of mini-camp invitations: a visit and a tryout. Idzik, p. 7. A visit consists of just a physical exam and an interview. *Id.* A tryout involves a physical exam and an interview, as well as fieldwork and physical drills. *Id.* Unlike a mini-camp visit, the mini-camp tryout involves a risk of injury. Idzik, p. 28.

The Seahawks extended an offer to Mr. Robinson to attend their mini-camp and tryout for a defensive back position on their team. Robinson, p. 30. After Mr. Robinson accepted the Seahawks' offer, the Seahawks made arrangements to host Mr. Robinson during the mini-camp. *Id.* Mr. Robinson was flown to Seattle, driven to the hotel, lodged in the hotel, driven to and from the Seahawks' facility and provided with meals, all at the expense of the Seahawks. *Id.* at 30-31. Mr. Robinson was provided with a highly detailed itinerary, which dictated how he would spend his time in Seattle, both during the mini-camp as well as during his off-hours. *Id.* at 33.

Prior to participating in the mini-camp, Mr. Robinson was interviewed by the Seahawks and given a physical examination by the Seahawks' team doctor. Robinson, p. 31-32. After completing the interview and passing the physical examination, Mr. Robinson was asked to participate in a variety of tryout exercises and to

demonstrate his skills. Robinson, p. 36. Before performing these drills at the Seahawks' facility, the Seahawks provided Mr. Robinson with all the equipment he needed for the tryout. Robinson, p. 31.

The defense back drills, which Mr. Robinson was participating in, were conducted by the Seahawks' Head Coach, Pete Carroll. Robinson, p. 36. As Coach Carroll threw the ball during a drill, Mr. Robinson, who was part of the drill, caught his foot in the ground, injuring his knee. Robinson, p. 36. The Seahawks put him on the sidelines with ice on his knee for the remainder of the practice, after which the Seahawks took him to the team's trainer for medical evaluation. Robinson, p. 40. Mr. Robinson later rejoined the rest of the players for dinner, where the Seahawks informed him they were cancelling his tryout and sending him home that night. Robinson, p. 42. Even though Mr. Robinson had been scheduled to stay through April 15th and was in a great deal of pain, the Seahawks told him that he would be dropped off at the hotel where he was to gather his things and fly home that night. Robinson, p. 42-43. The Seahawks arranged for a change in his flight schedule as well as transportation to the airport. Robinson, p. 44.

On June 7, 2010, Mr. Robinson filed an application for workers' compensation benefits for the injury to his right knee. The Department of Labor and Industries denied his claim on July 20, 2010, on the basis that Mr. Robinson was not an employee of the Seahawks at the time of his injury. Mr. Robinson timely protested this decision, which was affirmed on October 1, 2010. Mr. Robinson appealed the Department's decision to the Board of Industrial Insurance Appeals. The IAJ affirmed the Department's Order of October 1, 2010, and the Board subsequently denied Mr. Robinson's Petition for Review on October 7, 2011.

Mr. Robinson appealed the Board's decision to the King County Superior Court where a trial was held before the Honorable Judge Regina Cahan on October 19, 2012. Judge Cahan upheld the Board's decision and entered Findings of Fact and Conclusions of Law, as well as Judgment in this matter on October 29, 2012. Mr. Robinson timely filed an appeal of Judge Cahan's decision to this Court.

SUMMARY OF THE ARGUMENT

There is substantial evidence, case law and public policy consideration to support the finding that Mr. Robinson should be considered an employee of the Seattle Seahawks for workers'

compensation purposes. During his tryout with the Seahawks, the evidence shows: (1) the Seahawks exercised complete control over Mr. Robinson's actions; (2) Mr. Robinson received wages under RCW 51.08.178; (3) the mini-camp tryout exposed Mr. Robinson to a high degree of risk; (4) Mr. Robinson's participation in the tryout provided a benefit to the Seahawks; and (5) an implied contract for workers' compensation purposes existed between the parties.

Additionally, Washington State case law interpreting RCW 51.08.180, specifically the decisions of *In Re: Kimberly J. Bemis,* BIIA Dec. 90 5522 (1992) (Significant Decision) and *Clausen v. Dept' of Labor & Industries*, 15 Wn.2d 62, 29 P.2d 777 (1942) as well as the liberal mandate espoused in *Harry v. Buse Timber Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011 (2009) support a finding that Mr. Robinson is a covered injured worker.

Finally, case law from other jurisdictions including Alaska and California, as well as public policy considerations set out in *Larson's Workers' Compensation Law Volume 2,* support a finding that an injury during a tryout period is covered under workers' compensation laws when that injury flows directly from employment activities or conditions.

STANDARD OF REVIEW

RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising under the Industrial Insurance Act. RCW 51.52.115 states:

> The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110.... In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attaching the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed....

Judicial review in the Court of Appeals is governed by RCW 51.52.140 which provides an "[a]ppeal shall lie from the judgment of the superior court as in other civil cases." *Du Pont v. Dep't of Labor and Indus.*, 46 Wn.App. 471, 476, 730 P.2d 1345 (1986). Therefore, it follows that this Court "must determine whether the trial court's findings [...] are supported by substantial evidence and whether the conclusions of law flow therefrom." *Massachusetts Mut. Life Ins. Co. v. Dep't of Labor & Indus.*, 51 Wn.App. 159, 162, 752 P.2d 381 (1988).

The Court of Appeals reviews the superior court's decision in a workers' compensation appeal *de novo* to determine whether substantial evidence supports its findings and whether its conclusions of law flow from the findings. "Substantial evidence" is evidence sufficient to

persuade a fair-minded, rational person of the truth of a matter. *Ferencak v. Dep't of Labor & Indus.*, 142 Wn.App. 713, 175 P.3d 1109 (2008).

The appellate court may substitute its own judgment for that of the agency regarding issues of law. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). While the court may defer to an agency's interpretation of a statute, such an interpretation is not binding. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 813, 16 P.3d 583 (2001). It is the providence of the judicial branch to say what the law is and to determine the purpose and meaning of statutes. *Id.* Statutory interpretation is a question of law and, as such, is reviewed *de novo*. *Id.* at 807. In reviewing a statute, the primary goal is to carry out the legislative intent behind the statute. *Id.* (*citing Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)).

The Industrial Insurance Act (IIA), Title 51 RCW, was designed to provide "sure and certain relief" to injured workers while limiting employer liability for industrial injuries. *Dennis v. Dep't of Labor & Indust.,* 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). "Any doubts or ambiguities in the language of the IIA must be resolved in favor of the injured worker in order to minimize 'the suffering and economic loss' that may result from work related injuries." *Harry v. Buse Timber Sales,* 166 Wn.2d 1, 9, 201 P.3d 1011 (2009), *citing McIndoe v. Dep't of Labor &*

Indus., 144 Wn.2d 252, 256, 26 P.3d 903 (2001) and *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001) "('Where reasonable minds can differ over what Title 51 RCW provisions mean..., the benefit of the doubt belongs to the injured worker.')" In this matter, the facts are not in substantial dispute. Rather, this case involves questions of law and policy operating upon established facts.

ARGUMENT

A. The superior court erred in denying Mr. Robinson's appeal because it failed to find that Mr. Robinson was an employee of the Seahawks for purposes of the Industrial Insurance Act.

The Industrial Insurance Act "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. The Washington State Supreme Court recently affirmed this mandate in *Harry v. Buse Timber & Sales, Inc.*, holding that "any ambiguity in the language of the [Industrial Insurance Act] must be resolved in favor of the injured worker." *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 9, 201 P.3d 1011 (2009).

The employer-employee relationship is defined by statute, *see* RCW 51.08.180-195 (defining "worker" and "employee"), and further

clarified by case law. Although Mr. Robinson did not sign a standard National Football League (NFL) player contract prior to attending the mini-camp, that fact does not mean he was not an employee for purposes of workers' compensation. This is because under workers' compensation law, an employment contract may be either express or implied. *Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 69, 29 P.2d 777 (1942) and *In re Kimberly J. Bemis*, BIIA Dec. 90 5522 (1992) (Significant Decision).

In *Clausen*, the claimant died while cutting timber pursuant to a county permit that allowed needy families to cut timber within an area that was to be cleared for an airport. *Clausen*, 15 Wn.2d at 65. Mr. Clausen was not paid for his work, the hours he worked were not tracked, and he had to use his own tools. The only benefit Mr. Clausen received was the wood itself, which he could carry home at his own expense. *Id.* at 67. The Washington Supreme Court held that Mr. Clausen was not an employee of the county and thus was not entitled to workers' compensation, stating the following non-dispositive factors in considering whether an employee/employer relationship exists: (1) the right to control and discharge; (2) payment of wages; and (3) the contractual relationship, whether express or implied. *Id.* at 69. The Court gave particular weight to the degree of control the county held over Mr. Clausen, which was very

little. Once the county issued a permit, the interaction between the parties ceased. *Id.* at 66.

The Board of Industrial Insurance Appeals (BIIA) looked to these same *Clausen* factors in the Significant Decision *In re Kimberly J. Bemis*, where the Board had to decide the very issue in the present case: whether an individual injured in a pre-employment testing program is an employee for workers' compensation purposes. In *Bemis*, the Board relied on the following elements: "the right of control and discharge, payment of wages, and the contractual relationship, whether express or implied." *Bemis* at 11.

1. Control

In *Bemis*, the claimant willingly applied to be a flight attendant and in order to be considered for hire, Ms. Bemis was required to participate in Alaska Airlines' training program. *Bemis* at 3. Although attendance was compulsory, participation in the program did not guarantee employment with the airline. *Id.* However, if Ms. Bemis did not participate in or complete the program, she would not be hired. *Id.* Once in the program, the prospective employer had control of her activities, from the schedule that was set to the tasks that she was to perform. Absence from the course, even for a medical reason, was grounds for summary dismissal. *Id.*

The *Bemis* case is similar to that in *Laeng v. Workmen's Comp. Appeals Bd.,* 6 Cal.3d 771, 494 P.2d 1 (1972), where the claimant participated in an agility test as part of a tryout for the position of refuse crew worker and was injured. Although the claimant willingly applied for the job and participated in the tryout, the court still found that the employer exercised a degree of control over the claimant such that an employer/employee relationship formed. The court held that an applicant at a tryout was also in the service of an employer, "for during the tryout the applicant subjects himself to the employer's control, and the employer, in turn, assumes responsibility for directing the applicant's activities." *Laeng*, 6 Cal.3d 771, at 782. The court noted "the control exercised by the employer in this context parallels the degree of control that is frequently identified as the hallmark of the employment relationship" and "when the employer uses this control or authority to direct an applicant to undertake an arduous or potentially hazardous tryout task...the situation exhibits the coalescence of both the 'service' of the applicant and the 'benefit' to the employer." *Id.*

In the instant case, Mr. Robinson was scouted by the Seahawks and invited to attend the mini-camp tryout when a position for a defensive back became open. In order to have an opportunity to be employed by the Seahawks, attendance at this mini-camp was compulsory. As part of the

mini-camp, the Seahawks selected the flight Mr. Robinson took, the airline on which he flew, the hotel he stayed in, the days he was to attend the camp, the car service that would transport him, the food he was going to eat, and a strict itinerary dictating where he needed to be and when. Prior to his tryout, the Seahawks' team doctor examined Mr. Robinson. During his tryout, he was provided with Seahawk equipment, told what drills to perform, and when injured, was treated by a team doctor. Shortly after his injury, Mr. Robinson was told that he needed to check out of his hotel and leave that same night, even though he had been originally scheduled to stay another day. Although Mr. Robinson asked that he be allowed to remain as he was in a great deal of pain, the Seahawks changed his flight and he was ordered to leave that night.

As in *Bemis* and *Laeng,* other than the decision to participate in the tryout in the hopes of securing a position with the team, Mr. Robinson had no control over his person from the time that he stepped on the plane to fly to Seattle. Additionally, even after his tryout was over, the Seahawks continued to exert control over him, insisting he leave the city at it's request and refusing to pay for another night in the hotel. This is the same control that was exerted in *Bemis* and more than sufficient to meet the *Clausen* standard of control.

2. Wages

Under RCW 51.08.178, "the term 'wages' shall include the reasonable value of board, housing, fuel, or other consideration of like nature." The seminal case on this issue is *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001), where health care benefits were recognized as "wages" for purposes of workers' compensation law, making it clear "wages" do not have to be purely monetary. Thus, as a matter of both statute and case law, the meals, lodging, on-site medical care and transportation the Seahawks provided to Mr. Robinson constituted "wages" as defined by RCW 51.08.178. Idzik, at 19.

The compensation Mr. Robinson received from the Seahawks is virtually identical to that received by the claimant in *Bemis*. Like Mr. Robinson, Ms. Bemis did not receive wages and like Mr. Robinson, she did receive room and board during the training session. The only difference is that while Mr. Robinson's meals were provided by the Seahawks, Ms. Bemis received an $8.00 per diem to pay for lunch. To argue that this per diem is somehow different from the provision of meals is a distinction without a difference. Under the workers' compensation wage statute, Mr. Robinson received compensation from the Seahawks in

consideration for participating in the mini-camp. The Superior Court erred by not finding this compensation constituted wages under the statute.

Furthermore, it is not relevant that Mr. Robinson was not paid these benefits directly and did not fill out a Form W-2 or Form I-9. Under federal law, whether a claimant is paid wages directly is irrelevant; compensation paid to third parties on behalf of another still constitutes income (i.e. wages). *See, e.g., Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 49 S.Ct. 499, 73 L.Ed. 918 (1929) (income includes taxes paid by the employer on behalf of the employee); *McCann v. United States*, 81-2 USTC para. 9689 (U.S. Court of Claims 1981) (income includes amounts paid by employer on behalf of employee and employee's spouse for travel, lodging, and meals). Filling out a Form W-2 or Form I-9 is not a prerequisite for having income under federal law. 26 U.S.C. § 61 ("[G]ross income means all income *from whatever source derived.*")(emphasis added).

3. Exposure to a High Degree of Risk

In *Bemis*, the Board noted one of the factors in determining the existence of an implied contract is "the risks to which the applicant is exposed." *Bemis* at 14. The Board relied on *Smith v. Venezian Lamp Co.*, 168 N.Y.S.2d 764, 5 A.D. 12 (1957), where the claimant was injured while in the course of an unpaid tryout for a lamp polishing position. In

finding the claimant was entitled to worker's compensation, the court held:

> where a tryout involves an operation that would be ordinarily viewed as hazardous under the Workmen's Compensation Law a special employment exists...A tryout is for the benefit of the employer, as well as the applicant, and if it involves a hazardous job we see no valid reason why the applicant should not be entitled to the protection of the statute.

Smith, 5 A.D.2d, at pp. 13-14. The *Laeng* court elaborated on this finding, citing Larson's Treatise on workers' compensation law for the proposition that "'since work[er]'s compensation law is primarily interested in the question when the risks of the employment begin to operate, it is appropriate, quite apart from a strict contract situation, to hold that an injury during a try-out period is covered, when that injury flows directly from employment activities or conditions.'" *Laeng,* 6 Cal.3d at 782, *citing* 1 Larson, Workmen's Compensation Law (1968) § 26.20, p. 452.16. Additionally, in light of the liberal construction afforded workers' compensation legislation and "the purpose of protecting individuals from special risks inherent in employment," coverage may at times "properly precede the actual formation of an employment contract when these special risks are present at an earlier stage." *Id.* at 782.

Professional football is an extremely dangerous employment and mini-camp tryouts, such as the one that Mr. Robinson participated in, can

be just as dangerous as an actual game. As sports agent and attorney, Lyle Masnikoff, testified, many players sustain career-ending injuries during these mini-camps. Testimony of Lyle Masnikoff, p. 24. The Seahawks were well aware of the dangers of these camps. Mr. Idzik, the Seahawks' Vice-President of Football Administration, testified that "...anytime [*sic*] a player takes the field, there's a risk of injury because you're going through movement skills. And sometimes in ... mini-camps, you're going through full-speed drills." Idzik, p. 28, *see also* Deposition of Paul C. "Gus" Bradley, p. 16-17.

It is without argument that during his tryout, Mr. Robinson was conducting drills similar to those that he would perform on the football field during a game. Idzik at 42. As in *Bemis, Smith,* and *Laeng*, the performance of these tasks not only flowed directly from employment activities or conditions, but they also involved a high degree of risk. By engaging in this tryout, Mr. Robinson participated in an activity that was prescribed by the employer and occurred in the service of the employer, and is thus covered under Washington's workers' compensation act.

4. Benefit to the Employer

In *Bemis*, one of the factors for determining whether an employer-employee relationship exists was whether the activity in question provides a benefit to the employer. *Bemis* at 14. This factor was first set out in

Smith v. Venezian Lamp Co., supra, a decision heavily relied upon by the BIIA. Where the claimant was injured during the course of an unpaid tryout, the *Smith* court held "a tryout is for the benefit of the employer, as well as the applicant, and if it involves a hazardous job we see no valid reason why the applicant should not be entitled to the protection of the statute." *Bemis* at 13-14, quoting *Smith.*

The BIIA further elaborated on the question of whether an employer benefits from an applicant's tryout through its reliance on *Laeng.* In *Laeng,* the Court held that a tryout which "requires the performance of special skills, relevant to the potential employment, 'is for the benefit of the employer...' since the applicant's efforts permit the employer to select workers who are likely to be better suited for the available position." *Laeng* at 781. The Court found the agility test served "the same purpose as an on-the-job trial performance; since the employer is free to select whatever type of tryout he prefers...such a tryout will be more of a 'benefit' to him than any alternative test." *Id.* at 781-782. In *Laeng*, the tryout had been designed to correlate with the skills that would be required in the ultimate job. As the court noted, "this is hardly surprising since the value of any specialized 'tryout' test generally lies in its ability to reproduce, or highlight, actual working conditions." *Laeng* at 783.

Mr. Robinson's situation is analogous to that in *Laeng*. Not only did he participate in a tryout that mimicked the ultimate job he was seeking, the Employer acknowledged it received a benefit in having Mr. Robinson and others participate in the tryout. Idzik, at 39. The mini-camp tryout, as opposed to the mini-camp interview, gave the Seahawks the opportunity to see how Mr. Robinson interacted with other team members, to evaluate his skills in-person and in game-like situations, and to determine if he brought skills to the table that would help to improve the Seahawk team. Idzik at 6, 10, 12. Along with receiving the benefit specified in *Laeng*, the mini-camp tryout also provided the Seahawks with the opportunity to better compare players' performances and skill-sets. In addition, the Seahawks saved substantial time and money by not having to visit each player individually, review their performance one-by-one, and attempt thereby to compare their abilities against each other.

5. Implied Contract

It is undisputed that Mr. Robinson and the Seahawks did not create an express contract for hire. However, an implied contract for hire can still be found to exist when consideration is given to certain factors. In *Bemis,* the Board laid out three factors for determining whether an implied contract exists. These are (1) the risks to which the applicant is exposed, (2) the control exercised by the employer, and (3) the benefit to the

employer. *Bemis* at 14. As discussed previously, the risks that a football player encounters are significant when he is on the field, whether it is in a mini-camp or an actual game. Additionally, these risks are controlled by the employer, who dictates the types of drills and practices that will be performed, as well as the conditioning the player will undertake. In a situation where the player is part of a mini-camp tryout, the employer exercises even more control over the player by choosing the hotel, transportation, meals and schedule. Finally, in having this control over the player, the employer receives a tremendous benefit. In Mr. Robinson's case, he was exposed to the risk of physical harm and was, in fact, harmed. During the mini-camp, the Seahawks exercised control over Mr. Robinson and benefitted from it. Therefore, although not explicit, an employer-employee relationship between Mr. Robinson and the Seahawks was developed and an implied contract was formed.

B. The Superior Court erred in failing to consider the tryout exception in Workers' Compensation law.

While the issue of a mini-camp tryout may be one of first impression, there is sufficient case law in Washington State and other jurisdictions to provide support for the finding that a mini-camp tryout involves such risk by the applicant and control by the employer that an

exception to the general requirement of a contract for hire exists. In a mini-camp tryout, where a prospective employee undertakes risky activities at the behest of the potential employer, an employer-employee relationship may be found even though an explicit contract does not exist. In his *Treatise on Workers' Compensation*, Larson states that "[s]ince worker's compensation law is primarily interested in the question when the risks of the employment begin to operate, it is appropriate, quite apart from the strict contract rule, to hold that an injury during a try-out period is covered, when that injury flows from employment activities or conditions." *Larson's Workers' Compensation Law,* Volume 2, Chapter § 26.02[6], p. 26-8 (2012). This is because there is recognition that certain employments carry a risk above and beyond that seen generally.

In the *Laeng* decision, the Court concluded that "the fundamental purpose of workmen's compensation is to protect individuals from the 'special risks' of employment." *Laeng*, 494 P.2d at 8-9. In *Childs v. Kalgin Island Lodge*, the Court went further, holding that "when an employer exposes potential employees to risks inherent in a tryout period and the applicant is under his direction or control, any injury resulting during such a period is compensable as a matter of law." *Childs v. Kalgin Island Lodge*, 779 P.2d 310, 315 (Alaska S.Ct 1989), (referencing *Laeng*, 494 P.2d 8-9, *Mansfield Enters., Inc. v. Warren,* 154 Ga.App. 863, 270

S.E.2d 72, 74 (1980); *Moore v. Gundelfinger,* 56 Mich.App. 73, 223 N.W.2d 643, 648 (1974); *Smith v. Venezian Lamp Co*, 168 N.Y.S.2d at 766. The courts have also found that the location of the tryout matters. In *Lotspeich v. Chance*, the Court found that where "the physical examination was conducted on the employer's premises, not for the benefit of the applicant, but wholly for the benefit of the employee," the claim fell under worker's compensation law. *Lotspeich v. Chance Vought Aircraft*, 369 S.W.2d 705, 709 (1963).

Most job interviews do not include a tryout and if they do, it is the rare tryout that provides a "special risk." However, when the tryout involves a risk that places the applicant in a zone of danger, as in the case of a lamp polisher, a refuse worker, or a professional football player, this risk can result in injury.[1] In the case of a professional football player, the player's career and physical well being can be ended by an injury that is the result of running drills at the direction of the employer. It is inconceivable that a football team would sign a player to a contract without first seeing that player in action first hand. Thus, in order to even

[1] Federal workers' compensation law recognizes a special "zone of danger" for workers employed in areas involving a high degree of risk. These workers are covered by workers' compensation while within the area where the obligations of employment create a zone of danger out of which injury arises, because absent the employment, the workers would not have been present in the zone of danger. *O'Keefe v. Smith*, 380 U.S. 359, 85 S.Ct. 1012 (1965); *Kalama Services, Inc. v. Director, OWCP*, 380 U.S. 359 (9th Cir. 2004). The parallels to Mr. Robinson's case are compelling.

have a chance to play football, a player is required to perform drills and tests. He simply does not have a choice. A player who does not participate in a tryout will not be given the opportunity to play football professionally. The mini-camp tryout is a requirement for a career in football and as all parties agree, this tryout carries inherent risk.

The courts have not put forth a blanket policy regarding the tryout exception. Rather, each decision has been made on a case-by-case basis. In general, where the tryout has involved a great degree of risk, the courts have granted this exception and found that an employer-employee relationship exists. *See Bemis, Laeng* and *Smith, supra*. Mr. Robinson's circumstances falls into this exception. Not only does his profession involve a high degree of risk, but in order to have an opportunity to be a part of this profession, he was required to put himself in a zone of danger and undertake this risk. As a result, he was injured. This injury flowed directly from activities that mimicked actual football conditions, and was not only incurred at the direction of the employer, but on the employer's premises. There could not be any better example of a situation fitting the tryout exception and an employer-employee relationship should be found.

C. The Seahawks' attempt to escape liability under the Industrial Insurance Act and tort law is an affront to both the workers' compensation law and public policy of Washington State.

There is no dispute that Mr. Robinson signed a form entitled *Free Agent Tryout Waiver*. Certified Appellate Board Record (CABR) Exhibit 1. In signing the Waiver form, Mr. Robinson waived his right to tort claims. He also agreed that he was not an employee *per NFL rules*. While the Employer points to these two facts as dispositive of the employee-employer relationship, in actuality both of these factors are irrelevant in determining whether a contract existed for the purposes of workers' compensation.

RCW 51.04.060 states that "no employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void." For purposes of the Industrial Insurance Act, NFL rules do not dictate whether an employment relationship exists because a claimant cannot waive his right to workers' compensation benefits by signing a statement declaring that he is not an employee. With this waiver, the Seahawks are attempting to avoid all liability for on-the-job injuries sustained by its employees.

This position advocated by the Seahawks defeats the very purpose of workers' compensation. Workers' compensation is the grand compromise where employees giving up their rights to substantial damages at trial in exchange for sure and certain relief "without having to fight for it." *Stertz v. Industrial Ins. Com'n of Washington,* 91 Wash. 588, 590, 158 P. 256 (1916); RCW 51.04.010. The Seahawks cannot both deny sure and certain relief through workers' compensation while at the same time denying any right to redress in tort. In putting forth the *Tryout Waiver*, the Seahawks are attempting to completely exempt themselves from any coverage whatsoever. This flies in the face of not only the workers' compensation statute but also the public policy of protecting workers' when they engage in inherently dangerous activities *at the behest of the would be employer.*

As stated in *Larson*, there are certain times when the risks of employment require a reading outside the strict contract situation. These times are limited and rare. Public policy does not dictate that a prospective attorney, who is flown to Seattle, put up in a hotel and provided with meals during an interview process be covered in the same way that a football player, who puts on a helmet and subjects himself to game situation drills, should be. A lawyer is not going to suffer a career-ending injury in an interview. A football player very well may. There are

specific employments—refuse worker, flight attendant, football player—where the attempt to secure employment involves inherent risk. This risk flows directly from the sought after employment.

In demanding that football players sign a waiver in order to tryout with the team, the Seahawks are trying to escape complete liability for the risks that these players encounter in a tryout situation, and this is an affront to public policy and workers' compensation laws. This waiver should be recognized for what it is—an attempt to deny Mr. Robinson his rights under the Industrial Insurance Act—and it should not be allowed to stand.

ATTORNEYS' FEES AND COSTS

Mr. Robinson respectfully requests his attorneys' fees and costs pursuant to RAP 18.1 and RCW 51.52.130:

> If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. [...]

RCW 51.52.130. Further, an award for attorneys' fees under RCW 51.52.130 shall be calculated without regard to the worker's overall recovery on appeal, and shall not exclude fees for work done on

unsuccessful claims. *Brand v. Dep't of Labor and Indus.*, 139 Wn.2d 659, 670, 989 P.2d 1111 (1999). Mr. Robinson respectfully requests, should this Court reverse or modify the order of the court below, that the order awarding fees and costs specifically includes fees and costs incurred before both this Court and the superior court.

CONCLUSION

Mr. Robinson suffered an industrial injury during a mini-camp tryout for the Seattle Seahawks. The Seahawks, who were looking for a defensive back for the team, invited Mr. Robinson to this mini-camp. The Seahawks made all the arrangements for Mr. Robinson's trip and provided him with lodging, transportation, and meals. Mr. Robinson had to observe a strict itinerary that was put together by the Seahawks, and he had to participate in an interview and submit to a physical by the team doctor before he was allowed to participate in the mini-camp. When he did finally run through drills, the drills were performed wearing the Seahawk's equipment, on the Seahawk's training field and under the direction of the Seahawks' coaches. When Mr. Robinson was injured, he was immediately discharged from the mini-camp and was sent home on an earlier flight.

Pursuant to the IIA and for purposes of workers' compensation, the Seahawks paid Mr. Robinson wages, exercised complete control over his person, and entered into an implied employment contract with him, either through these actions or through the tryout exception. Mr. Robinson's participation in the Seahawks' mini-camp tryout resulted in an employer-employee relationship under our workers' compensation statute and his claim should be allowed.

Respectfully submitted this 8th day of March, 2013.

THE LAW OFFICE OF WILLIAM D. HOCHBERG

Rachel K. Hendon, WSBA #43683
William D. Hochberg, WSBA #13510
Attorney for Courtney Robinson

Sara R. Smith, WSBA #26374
Attorney for Courtney Robinson

DECLARATION OF MAILING
King County Superior Court No.: 11-2-37291-0-KNT
Court of Appeals Case No.: 69739-1-1

ORIGINAL E-FILED WITH:

Court of Appeals, Division 1
ATTN: Richard D. Johnson
Court Administrator/Clerk
600 University St.
One Union Square
Seattle, WA 98101

COPIES TO:

Craig Koji Connors
Bauer Moynihan & Johnson LLP
2101 4th Ave. Suite 2400
Seattle, WA 98121

Ms. Annika M. Scharosch
Attorney General's Office
1116 West Riverside Avenue
Spokane, WA 99201

I certify that either an original or copy of the document(s) attached hereto was mailed, postage prepaid, first class mail to the parties referenced above this 8th day of March, 2013.

By: Lillian Kaufer
Lillian Kaufer

. 26 USC § 61 - Gross income defined

- USC-prelim
- US Code
- Notes
- Updates
- Authorities (CFR)

USC*Prelim* is a preliminary release and may be subject to further revision before it is released again as a final version.

Current through Pub. L. 112-143, except 112-141. (See Public Laws for the current Congress.)

(a) **General definition**
Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.
(b) **Cross references**
For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following).

RCW 51.04.010
Declaration of police power — Jurisdiction of courts abolished.

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration 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. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

[1977 ex.s. c 350 § 1; 1972 ex.s. c 43 § 1; 1961 c 23 § 51.04.010. Prior: 1911 c 74 § 1; RRS § 7673.]

RCW 51.04.060
No evasion of benefits or burdens.

No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

[1977 ex.s. c 350 § 3; 1961 c 23 § 51.04.060. Prior: 1911 c 74 § 11; RRS § 7685.]

RCW 51.08.178
"Wages" — Monthly wages as basis of compensation — Computation thereof.

(1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of the injury:

(a) By five, if the worker was normally employed one day a week;

(b) By nine, if the worker was normally employed two days a week;

(c) By thirteen, if the worker was normally employed three days a week;

(d) By eighteen, if the worker was normally employed four days a week;

(e) By twenty-two, if the worker was normally employed five days a week;

(f) By twenty-six, if the worker was normally employed six days a week;

(g) By thirty, if the worker was normally employed seven days a week.

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. As consideration of like nature to board, housing, and fuel, wages shall also include the employer's payment or contributions, or appropriate portions thereof, for health care benefits unless the employer continues ongoing and current payment or contributions for these benefits at the same level as provided at the time of injury. However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

(2) In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern.

(3) If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker's monthly wages.

(4) In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.

[2007 c 297 § 1; 1988 c 161 § 12; 1980 c 14 § 5. Prior: 1977 ex.s. c 350 § 14; 1977 ex.s. c 323 § 6; 1971 ex.s. c 289 § 14.]

Notes:

Application -- 2007 c 297 § 1: "Section 1 of this act applies to all wage determinations issued on or after July 22, 2007." [2007 c 297 § 2.]

Severability -- Effective date -- 1977 ex.s. c 323: See notes following RCW 51.04.040.

Effective dates -- Severability -- 1971 ex.s. c 289: See RCW 51.98.060 and 51.98.070.

RCW 51.52.110
Court appeal — Taking the appeal.

Within thirty days after a decision of the board to deny the petition or petitions for review upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the final decision and order of the board upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the appeal is denied as herein provided, such worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal to the superior court. If such worker, beneficiary, employer, or other person fails to file with the superior court its appeal as provided in this section within said thirty days, the decision of the board to deny the petition or petitions for review or the final decision and order of the board shall become final.

In cases involving injured workers, an appeal to the superior court shall be to the superior court of the county of residence of the worker or beneficiary, as shown by the department's records, or to the superior court of the county wherein the injury occurred or where neither the county of residence nor the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county. In all other cases the appeal shall be to the superior court of Thurston county. Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board. If the case is one involving a self-insurer, a copy of the notice of appeal shall also be served by mail, or personally, on such self-insurer. The department shall, in all cases not involving a self-insurer, within twenty days after the receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed at issue. If the case is one involving a self-insurer, such self-insurer shall, within twenty days after receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed to be at issue. In such cases the department may appear and take part in any proceedings. The board shall serve upon the appealing party, the director, the self-insurer if the case involves a self-insurer, and any other party appearing at the board's proceeding, and file with the clerk of the court before trial, a certified copy of the board's official record which shall include the notice of appeal and other pleadings, testimony and exhibits, and the board's decision and order, which shall become the record in such case. No bond shall be required on appeals to the superior court or on review by the supreme court or the court of appeals, except that an appeal by the employer from a decision and order of the board under *RCW 51.48.070, shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay: PROVIDED, HOWEVER, That whenever the board has made any decision and order reversing an order of the supervisor of industrial insurance on questions of law or mandatory administrative actions of the director, the department shall have the right of appeal to the superior court.

[1988 c 202 § 49; 1982 c 109 § 6; 1977 ex.s. c 350 § 80; 1973 c 40 § 1. Prior: 1972 ex.s. c 50 § 1; 1972 ex.s. c 43 § 36; 1971 ex.s. c 289 § 24; 1971 c 81 § 122; 1961 c 23 § 51.52.110; prior: 1957 c 70 § 61; 1951 c 225 § 14; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

Notes:

Rules of court: Cf. Title 8 RAP, RAP 18.22.

***Reviser's note:** RCW 51.48.070 was repealed by 1996 c 60 § 2.

Severability -- 1988 c 202: See note following RCW 2.24.050.

RCW 51.52.115
Court appeal — Procedure at trial — Burden of proof.

Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other tnan, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the superior court shall refer the same to the department with an order directing it to proceed in accordance with the findings of the court: PROVIDED, That any award shall be in accordance with the schedule of compensation set forth in this title. In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court.

[1961 c 23 § 51.52.115. Prior: 1957 c 70 § 62; 1951 c 225 § 15; prior: (i) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (ii) 1949 c 219 § 6; 1939 c 184 § 1; Rem. Supp. 1949 § 7697-2.]

RCW 51.52.130
Attorney and witness fees in court appeal.

(1) If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

(2) In an appeal to the superior or appellate court involving the presumption established under RCW 51.32.185, the attorney's fee shall be payable as set forth under RCW 51.32.185.

[2007 c 490 § 4; 1993 c 122 § 1; 1982 c 63 § 23; 1977 ex.s. c 350 § 82; 1961 c 23 § 51.52.130. Prior: 1957 c 70 § 63; 1951 c 225 § 17; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

Notes:

Effective dates -- Implementation -- 1982 c 63: See note following RCW 51.32.095.

RCW 51.52.140
Rules of practice — Duties of attorney general — Supreme court appeal.

Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal advisor of the department and the board.

[1961 c 23 § 51.52.140. Prior: 1957 c 70 § 64; 1951 c 225 § 19; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

Notes:

Rules of court: Method of appellate review superseded by RAP 2.1, 2.2.