NO. 44333-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant/Cross-Respondent,

v.

BART A. ROWLEY, SR.,

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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INTRODUCTION

Application of RCW 51.32.020's felony payment-bar potentially subjects workers to criminal prosecution and the stigma of significant reputational damage. It punishes workers with non-payment of all benefits to which they – and even their widows and children – are otherwise entitled. Such punishment cannot be meted-out absent proper due-process protections. Here, that means a criminal conviction or, at the very least, that the Department must prove the worker committed a felony beyond a reasonable doubt. *See* Bart Rowley's Cross Appeal.

The Department essentially asks this Court to re-try this case. But the trial court made findings that are supported by substantial evidence and that fully support its legal conclusions. That ends this Court's proper inquiry.

Beyond that, the Department asks this Court to substitute its own legal conclusions for those of the Board, which are entitled to great weight in this Court. The Department misreads the statute, proffers inapposite authority, and mischaracterizes the Board's actual rulings. It is not entitled to a reversal.

If the Court does not grant the cross appeal – which it should – then it should affirm. It should also award Rowley fees and costs.

STATEMENT OF THE CASE

The Department challenges only two findings, yet gives a lengthy and improperly argumentative Statement of the Case. As further discussed below, this Court construes the evidence and inferences in Bart Rowley's favor. The Department fails to do so.

A. It is undisputed that Bart Rowley was severely injured during an accident that occurred in the course of his employment as a truck driver.

On August 14, 2008, Bart A. Rowley was driving a truck in the course of his employment with Joseph B. Anderson. CP 639, 659, 709-11.[1] At that time, Anderson employed Rowley full time. CP 640. Rowley worked seven days a week, ten-to-twelve hours a day. CP 641. He has no recollection of his accident that day. *Id.*

It is undisputed that Rowley was injured when his truck left the highway overpass and fell onto the road below, with its trailer landing on its cab. CP 641-42, 659, 660, 662-63, 987. Rowley was in a coma for 40 days. CP 641. His spinal cord was severed, rendering him quadriplegic, and confining him to a wheelchair for the rest of his life. CP 642-43.

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[1] At the time of the hearing, Anderson was in receivership, so the "employer" was listed as Craig Mungas, Receiver for JOS; the parties stipulated "JOS" is the same as Anderson. CP 61, 645, 716-17.

Consistent we these undisputed facts, the trial court entered the following unchallenged Finding – a verity here[2] (CP 1183):

> 1.3 On or about August 14, 2008, [Rowley] . . . sustained an industrial injury during the course of his employment with JOS, when the truck-trailer he was driving left the road and crashed. As a result of this accident, he sustained extensive injuries.

Rowley had driven trucks for 33 years. CP 639. His employers routinely administered random drug tests, beginning in 1977. CP 644, 649-50. Rowley was never disciplined by any employer for failing a drug test. CP 645. His test results were always negative. *Id.*; CP 649-50.

B. The IAJ found the Department's evidence insufficient to establish a "felony" – even by a preponderance of the evidence.

The Department discusses at great length its allegations that Rowley was in possession of methamphetamine at the time of the accident. But as discussed *infra*, the question here is whether the trial court's findings are supported by substantial evidence, not whether the Department made allegations the trial court rejected. The Department's lengthy factual recitation is largely irrelevant.

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[2] *See, e.g.*, ***Humphrey Indus., Ltd. v. Clay St. Assocs.***, 176 Wn.2d 662, 675, 295 P.3d 231 (2013) (citing ***Davis v. Dep't of Labor & Indus.***, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980)).

What is relevant here is that the IAJ found that the Department failed to establish a felony by a preponderance of the evidence. *See* App. A. The IAJ found that although the Department "did a yeoman's job of trying to" prove a felony, the "record as a whole simply does not establish" one. CP 69. "Innuendos and boot strapping are not sufficient to establish [such an allegation,] even by a preponderance of the evidence." *Id.*

Specifically, "the testimony of the trooper on the scene of the accident [Trooper Roberts] and the nurses at the hospital [Nurses Comstock and Compton] were particularly persuasive." *Id.* Nurse Comstock did not even remember whether Rowley had clothes on when he came into the ER, acknowledging that his clothes were thrown in the trash and sent down the hall with housekeeping. *Id.* Even if a bag containing methamphetamine was later found in a hospital garbage bag – which is unclear – nothing establishes that Rowley ever possessed it. *Id.* Indeed, even that random bag later disappeared from evidence. CP 67. The IAJ did not find any other testimony "particularly persuasive." CP 69. As discussed below, these findings were well supported by the evidence.

1. Trooper Roberts.

The trooper on the scene, Trooper Roberts, did not cite Rowley. CP 1006. He did not do any field testing. CP 999-1000. He acknowledged that an alleged violation "is not a felony until the prosecutor decides to charge it." CP 1006. He was unaware that any felony charges were ever filed against Rowley. *Id.*

2. Nurse Comstock.

Nurse Comstock does not recall what role she played – charge nurse, triage, or covering for someone else – the day Rowley was wheeled into the ER, unconscious. CP 904-05, 931. She does not remember Rowley, and only vaguely remembers that he was "very sick." CP 900, 914, 919, 920. A "huge team of people" responded to this emergency, with many people doing many things at once. CP 900, 915-16.

Comstock does not recall whether Rowley had any clothes on when he arrived at the ER. CP 901, 922. Normally, patients' clothes are cut off either before or when they arrive at the ER, and any valuables are locked up, but she did not recall what happened in Rowley's case. CP 901-02, 908. Nurse Comstock does not recall who took off Rowley's clothes. CP 908, 918. She does not recall where they were thrown away. CP 902.

If drugs are found, that is normally reported to the ER group. CP 903-04. The group does not test anything that is found. CP 903. And unless an officer is right there at the moment, everything besides valuables is thrown in the trash. CP 902. The trash is not tagged or otherwise identified as belonging to a patient. CP 918.

Yet Nurse Comstock testified as follows:

> When we went through his clothes it was in his clothes. I do recall that. I don't recall what was in the bag or who disclosed or throw it away [*sic*] or any of that stuff that's written in the officer's notes.

CP 921. But then she clarified (*id.* at 921-22):

> I don't recall that it was in his pocket. I just – if it's in this note, then that would be where I got that recollection from. Anything I can recall came from this.

It is unclear which "note" her final "this" refers to, but she later acknowledged that she largely relied on chart notes for her recollection of what happened. CP 925. She also admitted that she did not recall who allegedly took a bag out of Rowley's clothes – and never would. CP 926-27.

Nurse Comstock did remember that an officer was "disruptive" and caused "significant delay." CP 905. He wanted "to be engaged in the care immediately irregardless of the acuity" of Rowley's condition. CP 905, 910, 920-21. The officer demanded Rowley's clothes and an alleged illicit drug, which they "didn't have

to produce to him." CP 906. He expected that they would have saved everything, "but that's not our general practice." *Id.* She did not recall the specifics of their conversation. CP 927.

Nurse Comstock told the officer that she could find the clothes if she "knew where they would go, because they had already been removed from the room, because the housekeepers are very diligent about cleaning those spaces." CP 906. But this same Nurse – who swore that she did not even remember whether Rowley had any clothes on – also testified:

> I don't remember what trash they were in. I don't remember what the color of the bags were. I don't remember what the clothes looked like. I just remember us pulling the clothes out, me finding the ones that were his and the Baggie that he was in question about, because it was distinctive.

CP 906-07. She nonetheless claimed that she was "certain" these were his items, even though she never testified that she had seen them on him or with him. *Id.* Indeed, she later clarified (CP 923):

> I'm sorry. I didn't mean – so I don't recall going through anything. I don't recall going through a bag that he would have – in that respect I don't recall going through the bag. I don't recall any of that.

Moreover, Comstock denied that she was the one who washed the bag's contents down the drain. CP 923-24. On the contrary, she has no idea what happened to whatever was in the

bag. CP 924. She recalls smiley faces on the bag, but she is not sure whether she or someone else found the bag. CP 924-25.

Nurse Comstock also noted that "significant negotiations" went on before she could "get into the trash to be able to pull it out," and before the housekeepers would help her go through the trash (both because it is not safe, and also because housekeepers are not permitted to allow nurses to rifle through the trash). CP 906-07, 926. She had earlier testified that the "significant delay" caused by the officer was perhaps "two hours." CP 905.

3. Nurse Compton.

Nurse Compton has no independent recollection of Rowley. CP 869, 879, 883-84. She does not even recall working that day. CP 879. Based on her chart notes, Officer Dexheimer gave her two vials, and she drew Rowley's blood into them. CP 871-72. She gave them to Officer Dexheimer. CP 873. Her limited testimony is entirely based on her chart notes. CP 879.

C. The Board found no clear, cogent, or convincing evidence of a "felony," and pointedly questioned the Department's "scant evidence" and weak "chain of custody."

The Board agreed with the IAJ's assessment of the facts. CP 16 (*see* App. B). It could not determine what was in the alleged bag. *Id.* It also found significant problems with the "chain of

custody." *Id.* The Board thus could not "find that [Rowley] actually possessed methamphetamine in his truck based on the scant evidence presented." *Id.* These findings too are well supported.

Specifically, in addition to the weaknesses in the nurses' testimony discussed above, the Board also found Officer Dexheimer's testimony problematic. *Id.* He is a Kent police officer trained as a DRE. CP 718-20. He talked at length about his training in a 12-step process for detecting drug influences, but then conceded that he could not use that process here because Rowley was unconscious. CP 721-30, 736-37. He could not get "a whole lot of information" from Rowley just by looking at him lying there. CP 737. He also admitted that the more limited his evaluation, the less reliable his results. CP 771.

According to Dexheimer, some nurse – he did not know which one – told him that Rowley had a "surprise" in his pocket on arrival. CP 736-37, 759-60, 761. He later suggested that Nurse Comstock found the bag in Rowley's pocket, but she denied that. *Compare* CP 761 *with* CP 921-22. He said the bag was found in the trash "out in the hallway," but Nurse Comstock testified that it was in a different room and that a great deal of "negotiation" went on – perhaps for hours – to get at it. *Compare* CP 744 *with* CP

905-07, 926. Unlike Nurse Comstock, he did not recall it having any smiley faces or other "logos" on it. CP 744.

The bag had "the residual called granules or crystal, type of a crystalling [*sic*] substance that looked to me like methamphetamine." CP 744-45. When asked why he thought that, he said "the way it was packaged" and it did not look like cocaine. CP 774. He did not explain whether or how one can identify methamphetamine just by looking at it. *Id.* He also did not test the substance. CP 766. And even though Nurse Comstock said that someone washed the contents of the bag down the sink, there was no water in the bag that Dexheimer said he received. CP 767.

Officer Dexheimer did check Rowley's pulse rate, which was "normal"; but he concluded that it nonetheless "would be consistent with" reactions to a large variety of drugs because Rowley was given morphine and valium. CP 741-42. He did not explain how to distinguish this reaction from a normal heart rate, or simply from a person suffering severe trauma. *Id.* He did not even know Rowley's "normal" heart rate. CP 762.

When asked for his opinion on whether Rowley was impaired, Officer Dexheimer forthrightly testified that he could not properly render a professional opinion (CP 751):

> I cannot form an opinion because I did not do enough of the evaluation. I can say that some of the things that I saw and learned of were consistent with a person under the influence of, in this case, seeing the stimulants [*sic*]. Like I said, I didn't do a full evaluation. I can't give a professional opinion about that.

He nonetheless expressed his "suspicions" at length, but the IAJ struck that testimony. CP 751-53. To leading questions, he answered that just Rowley's pulse being "high" (which he actually testified was "normal") and the "baggie" were enough for him to "form a suspicion that he was probably under the influence." CP 753. But he admitted that the nature of the accident alone was not enough to conclude that Rowley was "impaired." CP 753-54.

Dexheimer then assented to the Department's leading and conclusory assertion that "more likely than not" the accident occurred because Rowley was under the influence. CP 754. When later asked whether cross-examination had changed this opinion, he testified (CP 770-71):

> Yes. I mean no. I believe that's the case.

Although Rowley was unconscious, Dexheimer placed him under arrest for DUI – a misdemeanor – and read him a "special evidence" warning. CP 747, 764, 769, 773.[3] He admitted that an

[3] Although Dexheimer swore that he read Rowley "the implied consent warning" at CP 747, he denied doing so at CP 769.

unconscious individual who has his blood drawn in entitled to an independent toxicological review of the samples taken. CP 764. He further admitted that taking a sample from an unconscious person without consent is authorized when someone other than the driver suffers serious bodily injury, but here, no such injuries were suffered. CP 765.

Dexheimer gave the sample and the bag to Nicholas King, a Washington State Patrol officer. CP 749, 766. Trooper King had no independent recollection of this case. CP 945. Reading his own documentation did not refresh his recollection. *Id.*

King testified that Dexheimer gave him the blood vials, "as well as, apparently, a small baggie of crystal substance, which was determined to be ecstasy, methamphetamine." CP 948. Trooper King did not explain how it could be both. *Id.* He later cryptically mentioned that it was "field tested positive for methamphetamine," but when Rowley's counsel objected and sought a ***Frye*** hearing on this, the Department dropped the testimony. CP 955. The Department later "reopened" to ask about the test, but Trooper King again did not explain the reliability of the test. CP 969, 972-74. He did not explain how the substance could test as "ecstasy or

methamphetamine" if the test was reliable. *Id.* He also did not explain why he thought it was one, rather than the other. *Id.*

Trooper King misspelled Rowley's name as "Rawley" on the blood vials. CP 953. He also put the wrong number on the property disposition form. CP 954. He also misidentified the time as 2:30 a.m., rather than the actual time, 2:30 p.m. CP 954-55. The bag disappeared, and was never tested at the lab. CP 973-74.

D. The trial court agreed with the Board.

On review, the trial court made the two Findings that the Department challenges here (CP 1183 – *see* App. C):

> 1.4 Mr. Rowley was not engaged in the attempt to commit or the commission of a felony when he was injured on August 14, 2008.
>
> 1.5 The Board correctly determined that absent a confirming laboratory test the Department did not prove that the white substance in the baggie, found in Mr. Rowley's clothes, was methamphetamine.

Based on these (and the unchallenged) Findings, the trial court concluded that the "Board's January 30, 2012 Order is correct and is affirmed," entering several Conclusions of Law discussed *infra*. CP 1184. It also awarded Rowley fees and costs under RCW 51.52.130.

CROSS APPEAL

CROSS-APPELLANT'S ASSIGNMENT OF ERROR

The trial court erred in failing to require the Department to prove the commission of a felony beyond a reasonable doubt.

ISSUE PERTAINING TO ASSIGMENT OF ERROR

Where the Legislature expressly narrowed RCW 51.32.020 by changing the word "crime" to "felony," did the trial court err in ruling that the Department need not prove commission of a "felony" beyond a reasonable doubt?

CROSS-APPEAL ARGUMENT

As one of the Board Members opined, the Department's burden of proof should be beyond a reasonable doubt, due to the potential stigma and the punitive nature of the felony payment-bar. CP 17-18. This is the only evidentiary standard by which a "felony" can be established, and such a finding can legitimately occur only in a court of law under the full panoply of constitutional protections to which a criminal defendant is legally entitled, including the presumption of innocence. This Court should reject the trial court's conclusion to the contrary, and require a felony conviction. At the very least, the Department must prove beyond a reasonable doubt that a felony was committed.

A. The Legislature changed the word "crime" to "felony," plainly evincing its intent to narrow the statute.

The Board correctly ruled "that the legal standard to be used in felony benefit exclusion cases is the precise language of the felony provision found in RCW 51.32.020." CP 12. The Department does not challenge this ruling. That statute provides:

> If injury or death results to a worker from the deliberate intention of the worker himself or herself to produce such injury or death, or while the worker is engaged in the attempt to commit, or the commission of, a felony, neither the worker nor the widow, widower, child, or dependent of the worker shall receive any payment under this title.

The Board correctly noted that the "deliberate intention" clause and the "felony" clause are set off by "or" (CP 15) so the precise statutory language relevant in this case is as follows:

> If injury ... results to a worker ... while the worker is engaged in the attempt to commit, or the commission of, a felony, ... the worker ... shall [not] receive any payment under this title.

As the Department acknowledged below, this statute once used the word "crime," rather than "felony." CP 1048-49 (quoting Laws of 1927, ch. 310, § 5). In plain English, "felony" is a narrower term than "crime": a felony is but one of several specific classifications of crimes. *See, e.g.*, WEBSTER'S THIRD NEW INT'L DICT. 836. (1993) ("any crime for which the punishment in federal law may be death or imprisonment for more than one year"). The

Legislature's expressed intent to narrow the application of this statute solely to felonies strongly suggests that the narrow statutory definition of "felony" must apply here.

B. The felony payment-bar requires a felony conviction under our Superior Courts' exclusive original jurisdiction, where the statutory definition of "felony" requires proof beyond a reasonable doubt and a full panoply of criminal due process protections, such as the presumption of innocence, which properly places the burden of proof on the Department.

Washington's Superior Courts have exclusive, original jurisdiction to hear felony criminal matters under Const. art. IV, § 6. Nothing extends that jurisdiction to the Department or to the Board. The Legislature simply has no power to alter this jurisdictional provision. *See, e.g.*, ***State v. Posey***, 174 Wn.2d 131, 133, 272 P.3d 840 (2012). This Court should hold that the felony payment-bar requires a felony conviction. Due process requires no less.

Pursuant to this jurisdiction, "crimes" are also statutorily defined – and distinguished from "felonies" – in RCW 9A.04.040:

> 1) An offense defined by this title or by any other statute of this state, for which a sentence of imprisonment is authorized, constitutes a crime. Crimes are classified as felonies, gross misdemeanors, or misdemeanors.
>
> (2) A crime is a felony if it is so designated in this title or by any other statute of this state or if persons convicted thereof may be sentenced to imprisonment for a term in excess of one year. . . .

These statutory definitions provide that the only way to establish whether a felony has occurred is to refer specifically to the requirements for a conviction of that particular felony. That requires criminal due process in our Superior Courts.

That is, among the requirements for establishing ***any*** crime are the presumption of innocence and proof beyond a reasonable doubt of the specific elements of the crime (RCW 9A.04.100):

> (1) Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.

The presumption of innocence of course means that the State must always bear the burden of proof. *See, e.g.*, ***In re Winship***, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The accused is also entitled to receive a broad panoply of due process protections. These include the right to appropriate ***Miranda*** warnings, the right to remain silent, the right to counsel, the right to be informed of the charges against him, the right to a speedy and public trial before an impartial jury, the right to confront witnesses against him, the right to compel witnesses to appear in his favor, and so much more. *See, e.g.*, U.S. Const. amend. V, VI & VII; Const. art. I, §§ 22 & 25, and a great deal of precedent.

While the Department expends a great deal of effort discussing the legal niceties of proving "possession," the laws and cases it cites are criminal laws and cases.[4] If a criminal conviction is not required – and thus criminal due process protections do not apply – then criminal law precedents based upon that constitutional bulwark are not controlling. It is not sound legal reasoning to suggest that the Department or Board can apply criminal legal precedents in the context of a civil proceeding where none of the constitutional prerequisites validating those very precedents is being observed. For instance, it makes no sense to say that Mr. Rowley can somehow be "found" to have committed a "felony" by a preponderance of the evidence. That is legally impossible.

This Court should hold that the felony payment-bar requires a felony conviction. Anything less seriously jeopardizes injured workers' due process rights. These include the right not to incriminate one's self, a right the Department repeatedly flouts by asserting that Mr. Rowley bears the burden to prove that he did not commit a felony. Without criminal due process protections, a felony simply cannot be proven.

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[4] The only felony alleged here was possession of a controlled substance, a Class C felony under RCW 69.50.4013. Methamphetamine is a controlled substance. RCW 69.50.206.

C. Workers are entitled to full constitutional protections in these proceedings because they are subject to consequences that are potentially quite severe.

In short, workers cannot be "found" to have committed a "felony" absent a conviction pursuant to constitutionally sound procedures. As the Board acknowledged, application of the felony payment-bar potentially subjects workers to criminal prosecution and significant reputational damage. App. B, CP 14. It excludes otherwise proper benefits, a significant financial consequence. *Id.* In short, it "punishes the worker." *Id.* As one Board member concluded, both the "stigma" and the severity of punishment require criminal due process here. App. B, CP 18; *see also, infra* (argument re ***Mathews v. Eldridge*** and due process).

At the very least, this Court should hold that the Board must require the Department to prove beyond a reasonable doubt that a felony was committed. The Board applied "at least" a clear, cogent, and convincing standard. App. B, CP 14. But while that provides some protection for injured workers (in contrast to a mere "preponderance" standard) the legislative history and precedents discussed above require more.

RESPONSE TO DEPARTMENT'S APPEAL

A. The "ordinary" standards of review apply: substantial evidence for facts, and *de novo* for questions of law.

In addition to making some arguments (addressed *infra*) that do not pertain to this Court's standard of review (BA 16-17) the Department admits that the "ordinary" standards of review apply here. BA 17 (quoting RCW 51.52.140, and ***Rogers v. Dep't of Labor & Indus.***, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009)). It acknowledges that this Court reviews the trial court's findings, not the IAJ's or Board's. *Id.* (citing ***Rogers***, 151 Wn. App. at 179-81). But it fails to note that the trial court's unchallenged Findings are verities and that challenged findings are reviewed solely for substantial evidence. *See, e.g.*, ***Humphrey***, 176 Wn.2d at 675 (citing ***Davis***, 94 Wn.2d at 123).

The Department also makes some questionable legal arguments about what is at issue here (BA 17-18) but correctly notes that questions of law are reviewed *de novo*. *Id.* (citing ***Estate of Adams v. Great Am. Ins. Co.***, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997)). It also correctly acknowledges that this Court should give "great weight" to the Board's interpretation of the law it administers. BA 18 (citing ***Dep't of Labor & Indus. v. Allen***, 100 Wn. App. 526, 530, 997 P.2d 977 (2000)).

B. Both of the trial court's challenged Findings are well supported by substantial evidence.

Both of the trial court's challenged Findings[5] are well supported by substantial evidence. *See supra*, Statement of the Case. The first challenged Finding is that

> 1.4 Mr. Rowley was not engaged in the attempt to commit or the commission of a felony when he was injured on August 14, 2008.

CP 1183. This is plainly a question of fact.

The IAJ, the Board, and the Superior Court Judge, each found that the Department failed to prove Rowley was committing or attempting to commit a felony. The triers each questioned the testimony of the nurses and the officers. They chose to believe Rowley. This is sufficient evidence.

These are also unreviewable credibility determinations. *See, e.g.*, ***Morse v. Antonellis***, 149 Wn.2d 572, 574, 70 P.3d 125 (2003) ("Credibility determinations cannot be reviewed on appeal" (citing ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990))). The Court should affirm this finding.

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[5] As noted *supra*, the trial court's first Finding (that Rowley was injured in the course of his employment) is unchallenged. This unchallenged Finding is important because it directly supports the trial court's, Board's and IAJ's determinations that Rowley proved he was entitled to benefits. As a factual matter, the Department cannot deny a claim that is properly proven by unchallenged facts.

The Department reargues its version of the facts at BA 33-36 and 38-39, but these factual determinations were for the factfinder. The Department makes the unfounded assertion that the triers "disregarded" some of this testimony (BA 34), but on the contrary, they expressly found this testimony insufficient. *See, e.g.*, CP 69 ("nothing establishes even by a preponderance of the evidence that the claimant was in possession of any baggie of methamphetamines"; "Innuendos and boot strapping are not sufficient to establish [possession] even by a preponderance"); CP 16 ("We cannot determine what was in that baggie based on this hearing record"; "There are also problems with the chain of custody"). The evidence in the record plainly supports Finding 1.4.

The second challenged Finding is that

> 1.5 The Board correctly determined that absent a confirming laboratory test the Department did not prove that the white substance in the baggie, found in Mr. Rowley's clothes, was methamphetamine.

CP 1183.[6] Here too, the Board and the Superior Court Judge correctly determined that the testimony of the nurses and the officers did not justify a finding that Rowley possessed an illegal drug. The scant evidence and weak chain of custody are

[6] This could be viewed as a mixture of law and fact, but the legal aspect ("absent a confirming laboratory test") is addressed *infra*.

independently sufficient to support this Finding. The triers' findings that the Department's evidence was insufficient is supported by substantial evidence – they did not find the evidence persuasive.

The Court should affirm the trial court's findings. The Department mentions that it assigned error to these Findings, and then seems to suggest that they are incorrect because the trial court applied the wrong standard of proof. BA 36. But it again reargues its version of the facts. BA 36-38. To the extent that the Department is saying that these Findings are wrong only if the standard of proof is wrong, Rowley accepts the concession. As discussed below, however, applying "at least" the clear, cogent, and convincing burden of proof was not erroneous.

C. The trial court's Findings fully support its legal conclusions, which are entitled to "great weight" and are correct on the law.

The Department challenges six of the trial court's Conclusions of Law. BA 2-3. Each of them is well supported by the unchallenged and challenged (but supported) Findings. None of the Department's legal arguments overcome the "great weight" to which the Board's interpretation of the laws it administers is entitled. This Court should affirm.

1. As a matter of law, Rowley's injury did not occur while he was attempting to commit or committing a felony.

The Department challenges Conclusion of Law 2.3(a):

> Mr. Rowley's industrial injury did not occur while he was engaged in the attempt to commit, or in the commission of a felony, within the meaning of RCW 51.32.020;

CP 1184. This Conclusion is essentially the same as the trial court's Finding 1.4, which is in turn well supported by substantial evidence, as discussed above. The Department does not make any independent argument as to why this Conclusion is unsupported.[7] The Court should affirm this Conclusion.

2. The proper standard of proof is – if not beyond a reasonable doubt – then "at least" clear, cogent, and convincing evidence.

The Department also challenges Conclusion 2.3(b) regarding the standard of proof:

> The Department bore the burden of proving by clear, cogent and convincing evidence that Mr. Rowley's injury occurred when he was in the commission of a felony, within the meaning of RCW 51.32.020, which burden the Department did not meet;

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[7] The same is true for Conclusions 2.4 and 2.5, stating that the Board was right and the Department was wrong. App. C., CP 1184. There is no independent argument to respond to on those assignments of error.

CP 1184. The last portion of this Conclusion ("which burden the Department did not meet") again echoes Finding 1.4, and still is well supported. The Court should affirm this factual finding.

On the standard of proof, the Board determined that, "in this case of first impression," "the standard of proof to be used in felony payment bar appeals under RCW 51.32.020 is at least the same as the standard of proof in cases where the Department . . . seeks to prove intentional misrepresentation by a worker"; that is, "at least clear, cogent, and convincing evidence." CP 14 (citing ***In re Del Sorenson***, BIIA Dec. 89 2697 (1991)). This standard applies because, in these cases, the Department is attempting to deprive injured workers of benefits to which they would otherwise be entitled due to alleged "wicked conduct," subjecting them to "significant reputation damage, a potential for later criminal prosecution, and (as in the case at bar) significant financial consequences." *Id.* The felony payment-bar "punishes the worker" by denying him valuable benefits. *Id.* These consequences are "punitive and sufficiently analogous to cases of willful misrepresentation to require the heightened standard of proof we have long applied in" such cases. CP 15.

The Department's reasoning is plainly correct, as far as it goes. It is also consistent with the well-known three-factor ***Mathews*** balancing test for determining what process is due:

> (1) The importance of the private interest affected;
>
> (2) The risk of erroneous deprivation through the procedures used, and the probable value of any additional or substitute procedural safeguards; and
>
> (3) The importance of the state interest involved and the burdens which any additional or substitute procedural safeguards would impose on the state.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The U.S. Supreme Court has repeatedly stated "that due process is flexible and calls for such procedural protections as the particular situation demands." ***Morrissey v. Brewer***, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *see also* ***Cafeteria & Rest. Workers Union Local 473 v. McElroy***, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

Applying ***Mathews*** here, the private interest is workers' and their beneficiaries' substantial IIA benefits, together with their reputational interests, and the risks of criminal prosecution, all as noted by the Board. These interests are plainly weighty. They deserve "at least" the protection afforded by the clear, cogent, and

convincing standard. Indeed, as argued in the cross appeal, *supra*, they require the protection of proof beyond a reasonable doubt.

The risk of erroneous deprivation is manifest in this case. Despite the IAJ's finding to the contrary, one of the Board Members voted that the Department proved by a preponderance of the evidence that Rowley committed a felony. CP 18-19. If one Board Member could find this weak evidence sufficient under a preponderance of the evidence standard, the risk of erroneous deprivation of workers' rights is great. So far, three Board Members and a Superior Court Judge have all agreed that the Department's evidence is plainly not sufficient under "at least" a clear, cogent, and convincing standard. The standard of proof is thus potentially dispositive in this and other cases. The risk is great, and additional safeguards are necessary.

By contrast, the Department's interest is insignificant – this statute has been in place for a very long time, yet this is a case of first impression. While the Legislature plainly thinks that workers should not receive benefits when they are injured while committing (or attempting to commit) a felony, that is apparently so rare that it has never come up before. Workers are entitled to due process, including all the necessary appeals, so there is no significant

additional burden to requiring the Department to actually prove its case with sufficient evidence. Indeed, even though the Department claims it had no burden here, it plainly recognized that it had to produce witnesses and other evidence. There is no additional burden imposed by weighing that evidence under the burden of proof that will appropriately protect workers' rights.

The Department fails to address ***Mathews***[8] or any other relevant authority. BA 26-30. It cites numerous inapposite cases (*id.*), none of which are as close to this case as the ***Del Sorenson*** significant decision regarding willful misrepresentation cited by the Board (CP 14). The Board must treat workers as fairly as possible. *See, e.g.*, RCW 51.04.062 ("The legislature finds that Washington state's workers' compensation system should be designed to focus on achieving the best outcomes for injured workers"). This Court should give its analysis great weight, and affirm that "at least" the clear, cogent, and convincing evidence standard applies. App. B, CP 15. And as argued in Rowley's cross appeal, it should require proof beyond a reasonable doubt.

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[8] Because the Department failed to brief or argue ***Mathews*** below, it should not be able to raise this argument for the first time in its reply. *See, e.g.*, ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

3. The Department bears the burden of proof.

The Department also challenges (at BA 18-26) Conclusion 2.3(b) regarding who bore the burden of proof:

> The Department bore the burden of proving . . . that Mr. Rowley's injury occurred when he was in the commission of a felony . . . .

CP 1184. This Conclusion simply follows from the Board's decision that the felony payment-bar is analogous to a willful-misrepresentation situation, and thus requires similar due process protections, as discussed above. App. B, CP 14-15.

Without addressing due process, the Department argues that a worker appealing the Department's order has the initial burden to show that its decision was wrong. BA 20-22. As further discussed *infra*, however, the Board correctly determined (a) that workers must simply prove they were injured in the course of employment and (b) that nothing in felony payment-bar statute – which bars only payments, not claims – shifts the burden to workers to prove an additional entitlement to payment. App. B, CP 14-15; *see infra*, Arg. § C.5. Once the worker has established a *prima facie* claim, the burden shifts to the Department to show that the worker is not entitled to payment of that claim due to a felony. App. B, CP 15.

Under this fair and balanced approach, the cases the Department cites are simply inapposite. BA 20-22, 25-26.[9] None of them addresses a similar burden-shifting scheme, or a similar procedural situation in which the Department attempts to strip workers of payments to which they are entitled based on alleged misconduct. *Id.* This Court should affirm.

4. The Department's weak evidence failed to prove that Rowley ever possessed methamphetamine, notwithstanding its misrepresentation of what the Board ruled.

The Department challenges Conclusion 2.3(c):

> Absent a confirming laboratory test the Department did not prove the white substance in the baggie, found in Mr. Rowley's clothes, was methamphetamine;

CP 1184. Again, this is largely a factual finding labeled as a Conclusion of Law. Mislabeled Findings are still findings. *See, e.g.*, ***Willener v. Sweeting***, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). And the evidence still supports this finding.

As to the legal aspect of this Conclusion, the Department argues that the "trial court adopted the Board's holding that it would not weigh the evidence without a laboratory test confirming the

[9] As it did below, the Department relies on the crime-victims cases. Those cases address completely different statutory language. *See, e.g.*, BA 25 n.8 (crime-victims statute was not similar to RCW 51.32.020 until 2011 amendments). Those cases are thus inapposite. *See also* CP 1071 (Rowley distinguished crime-victims statute and cases below).

identity of the substance." BA 30. This is a serious and troubling misstatement[10] of what the Board ruled:

> [T]here is a significant problem of proof. We cannot determine what was in that baggie ***based on this hearing record***. [Discussion of specific evidence omitted.] . . .
>
> There are also problems with the chain of custody of the reported baggie. [Discussion of specific evidence omitted.] . . .
>
> We ***decline to find that the Department proved*** by at least clear, cogent, and convincing evidence that the white substance was methamphetamine ***based merely on a field test and conjecture*** without laboratory confirmation. At a minimum, alleged narcotics must be tested in a laboratory ***before we will uphold a denial of payment of industrial insurance benefits under RCW 51.32.020 in an alleged narcotics possession case***.

App. B, CP 16 (paragraphing and emphases added). The Board did not "hold" that it would not weigh the evidence. It weighed the evidence, and found it insufficient. It also advised the Department that in the future, it will expect to see at least a proper laboratory confirmation before it will find "felony" possession. This measured ruling is a far cry from refusing to weigh the evidence.

This misstatement of the Board's ruling renders the remainder of the Department's argument on this issue a complete

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[10] The Department cites "CL 2.3(d); FF 1.5", and "CP 1199," which is the trial court's Conclusions attached to the Notice of Cross Appeal. BA 30. The Department fails to cite anything for the proposition that the Board "held" that it would not weigh the evidence. That assertion is false.

red herring. BA 30-36. As noted above, the Department merely reargues its version of the facts. *Id.* The trial court found the facts based on substantial evidence. The Department's misstatements do not change that.

5. The Department may not reject a claim based on the felony payment-bar statute.

Finally, the Department challenges Conclusion 2.3(d):

> The Department could not reject a claim under the felony provision of RCW 51.32.020.

App. C, CP 1184. This ruling is based on a plain reading of the salient portions of the statute:

> If injury ... results to a worker ... while the worker is engaged in the attempt to commit, or the commission of, a felony, neither the worker nor the widow, widower, child, or dependent of the worker **shall receive any payment under this title**. [Emphasis added].

App. B, CP 13 (quoting RCW 51.32.020) (ellipses added). Aside from the fact that it works a veritable corruption of blood,[11] the statute otherwise simply forbids "**payment**." It does not empower anyone to deny a claim for benefits. *Id.* The Board is correct.

The Department apparently argues that the statute is ambiguous. BA 40-47. It did not argue this below. CP 1046-50. It may not raise this new argument here for the first time. RAP 2.5(a).

[11] *Cf., e.g.*, ***State v. Young***, 63 Wn. App. 324, 327-29, 818 P.2d 1375 (1991) (explaining that Const. art. I, § 15 forbids corruption of blood).

In any event, the Department is wrong. Its first argument is based on the premise that the Board's reading "makes no sense" because a worker who is injured while committing a felony is not entitled to any benefits, so the Department should not have to accept the claim. BA 42. But it makes perfect sense: until it proves that the worker committed a felony in proper legal proceedings, the Department may not deny the claim. As here, workers are simply entitled to due process.

The Department's second premise is apparently that the Board's reading "conflicts" with other statutes requiring payments. BA 43-45. This argument is frivolous. If a statute bars payment due to the commission of a felony, it obviously can be harmonized with all other statutes requiring payments: they no longer apply.

Finally the Department argues (somewhat oddly at the end of its brief) that this is *not* a case of first impression, citing ***In re Robert T. Mathieson, Dec'd***, BIIA Dec. 7099, 1958 WL 56109 (1958). BA 40, 46. But that case was decided under a statute that was amended in numerous relevant ways, as the Department itself points out at BA 44 & 46 n.17. The Department also notes that ***Mathieson*** was decided primarily on other grounds, so the ruling it

relies on is *dicta*. BA 40 n.13. In any event, as the most recent ruling from the Board, ***Rowley*** is plainly controlling.

D. Rowley is entitled to an award of attorney fees and costs under RCW 51.52.130, both below and here.

The Department challenges the trial court's fee award solely on the basis that the Department should prevail here. BA 47. That is not a basis for reversing an award of fees in the trial court – where Rowley prevailed – and the Department cites no cases suggesting that it is. *Id.* But Rowley should prevail here, so the fee award should be affirmed in any event. Rowley also requests fees and costs in this Court pursuant to RCW 51.52.130(1) and RAP 18.1. The Court should so order.

CONCLUSION

For the reasons stated above, this Court should hold that under the felony payment-bar statute, after a worker makes out a *prima facie* claim, the Department bears the burden of proof beyond a reasonable doubt, or by at least clear, cogent, and convincing evidence, that the worker was committing or attempting to commit a felony when injured. It should affirm the trial court.

RESPECTFULLY SUBMITTED this 5th day of September, 2013.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT/CROSS-APPELLANT** postage prepaid, via U.S. mail on the 5th day of September 2013, to the following counsel of record at the following addresses:

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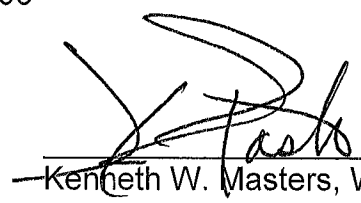

Kenneth W. Masters, WSBA 22278

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BART A. ROWLEY, SR.) DOCKET NO. 09 12323
)
CLAIM NO. AH-12490) PROPOSED DECISION AND ORDER

INDUSTRIAL APPEALS JUDGE: Kathleen A. Stockman

APPEARANCES:

Claimant, Bart A Rowley, Sr., by
Palace Law Offices, per
Matt Midles, Roosevelt Currie, Jr., Blake I Kremer, Scott R. Grigsby, and
Christopher S Cicierski

Employer, Craig Mungas Receiver for JOS,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Lynette Weatherby-Teague, Senior Counsel

The claimant, Bart A. Rowley, Sr., filed an appeal with the Board of Industrial Insurance Appeals (Board) on March 9, 2009, from an order of the Department of Labor and Industries (Department) dated January 13, 2009. In this order, the Department affirmed its order dated October 27, 2008 that stated the worker received time-loss compensation of $2,777.88, was entitled to time-loss compensation of $765; therefore, the worker must pay Labor and Industries $3,542 88 assessed from August 18, 2008 through October 17, 2008. The order stated that the overpayment resulted because the claim is rejected for some reason other than those listed for automated rejection orders, and the claim has been rejected; claim is rejected based on RCW 51.32.020 which states if injury or death results to a worker from the deliberate intention of the worker himself . . . while the worker is engaged in the attempt to commit, or the commission of, a felony . . . shall not receive any payment under this title. The Department order is **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

On April 30, 2009, the parties agreed to include the Jurisdictional History in the Board's record. That history establishes the Board's jurisdiction in this appeal.

All prehearing and hearing rulings are affirmed except as noted below. All rulings that were deferred are overruled and denied except as noted below.

In the transcript of Brian Capron at the February 24, 2011 hearing, the objection on page 31, lines 4 and 20, are overruled, and the answers are taken out of colloquy; and the objections on page 55, line 21, and page 57, lines 3 and 18, are overruled.

The claimant's motion to strike the testimony of Nicolas King is denied. Even if the testimony of Trooper King was stricken, my ruling would be the same.

The Department's Motion to Dismiss is denied for reasons as noted below.

At the hearing, the parties stipulated that "Craig Mungas, Receiver for Joe Anderson" is the same entity as reflected in the Jurisdictional History as Craig Mungas, Receiver for JOS (Sunset Machinery)."

At the hearing on July 20, 2010, the parties stipulated that Mr. Rowley was injured as a result of a motor vehicle accident that occurred on or about August 12, 2008.

The deposition of Jennifer K. Compton, R.N., taken on March 16, 2011, is published. All objections and motions are overruled and denied.

Deposition Exhibit No. 1 is remarked as Board Ex No. 3. The claimant's oral testimony is allowed; therefore, this exhibit is rejected.

The deposition of Mary C Comstock, R.N., taken on March 16, 2011, is published All objections and motions are overruled and denied. Ms. Comstock reserved signature, but the record shows that more than 30 days have elapsed since the receipt of her deposition and no report of irregularities or errors have been received. Therefore, pursuant to CR 32 (d)(4), any irregularities or errors are deemed waived.

The deposition of Trooper Nicholas King, taken on April 4, 2011, is published. All objections and motions are overruled and denied except as follows: the objection on page 21, line 11, is sustained, and the objections and motions to strike on page 10, lines 15 and 16, are sustained and granted

Deposition Exhibits 1-5 are remarked as Board Ex. Nos 4-8, respectively The objections to these exhibits are sustained and Board Ex. Nos. 4-8, are rejected.

The deposition of Trooper David C. Roberts taken on April 4, 2011, is published. All objections and motions are overruled and denied except as follows. the objections on page 31, line 17; and page 32, lines 10, 23, and 25, are sustained; the objections and motions to strike on page 17, lines 11 and 13; are sustained and granted, and the motion to strike on page 33, line 1, is granted

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ISSUES

Whether the claim should be allowed; and whether the Department was correct in requesting the claimant pay the Department $3,542.88 for an overpayment assessed from August 18, 2008 through October 17, 2008

EVIDENCE

The claimant, Bart A. Rowley, Sr., testified that he was born on June 7, 1959, and resides at a skilled nursing facility at Lakewood Health Care. Mr Rowley testified that on August 14, 2008, he worked as a truck driver for Joseph B. Anderson. Mr. Rowley stated that he worked as a truck driver for 33 years, and 6 of those years were for Joseph B. Anderson.

Mr. Rowley testified that in August 2008, he worked seven days a week for approximately 10-12 hours a day, and normally started work at 7 a m. According to the claimant, he does not recall anything about his accident on August 14, 2008, or about the events leading up to the accident Mr. Rowley stated that he was in a coma for 40 days, and then was not very coherent for about 1-2 weeks. Mr. Rowley stated his injuries following the accident included a severed spinal cord, incontinence, cannot walk, does not have any feeling from his belly button down, has a frozen shoulder, and is quadriplegic. Mr. Rowley stated he has been in a wheelchair since November 2008. Mr Rowley testified that during his employment, he was subjected to drug testing, and had random drug testing every 3-6 months. Mr. Rowley understood that his tests were negative.

On cross-examination, Mr Rowley stated that he did not recall two days before the accident Mr. Rowley testified that the first he remembers is at least 40 days after the accident. According to Mr Rowley, to the best of his knowledge, he never tested positive from his urine tests.

Bonnie Xiggores testified that in August 2009, her employer was Craig Mungas, Receiver for Joe Anderson, a concrete recycler and truck hauling. Ms. Xiggores stated she has been the office manager for the past 16 years. According to Ms. Xiggores, as the office manager, she took care of the entire payroll and all the paperwork for the company.

Ms. Xiggores testified that Mr. Rowley worked as truck driver from Craig Mungas, Receiver for Joe Anderson, and Ex. No. 1 is the claimant's time card for the week starting August 11, 2008. Ms. Xiggores noted that the claimant usually started work at 7.30 a.m , but she noted that he signed that he started work at 7 a.m. on August 14, 2008. According to Ms. Xiggores, she filled in the time the claimant ended work as 11:30 a.m based on the report of the time of his accident.

Donevan Dexheimer testified that he has been employed by the City of Kent Police Department for almost 18 years. According to Officer Dexheimer, he specializes in drug impaired

and impaired driving, and is a state-certified drug recognition expert (DRE) and a drug recognition instructor. Officer Dexheimer noted that there is a 12-step program as part of a full DRE exam or a full drug influence evaluation including doing a psychophysical test, breath alcohol reading, interviewing the arresting officer, etc. He noted that there are seven general categories of drugs including central nervous systems (CNS) depressants, CNS stimulants, hallucinogens, disassociate anesthetics, narcotic analgesics, inhalants, and cannabis He noted that methamphetamine is a central nervous system stimulant. Officer Dexheimer noted that conscious people behave one of two ways generally they are either a little bit manic, agitated, angry, tense and very volatile kind of behaviors, or if they are coming off of their binge from the methamphetamine, they can have a hard time staying awake, droopy eyelids, bloodshot eyes, lethargic. He testified they look for high blood pressure, raised body temperature, raised pulse rate, muscle twitches, eyelid tremors, and exaggerated movements with their hands.

Officer Dexheimer testified that he came into contact with the claimant in August 2008, as part of his duties as DRE. Officer Dexheimer stated that he was told that there had been an accident, and that they were taking the person to Harborview. According to Officer Dexheimer, on August 14, 2008, he went to Harborview to the trauma room where Mr. Rowley was being treated, and he was intubated and appeared to be unconscious Officer Dexheimer testified that either Nurse Comstock or Nurse Compton told him that he had a "surprise" in his pocket when he arrived Officer Dexheimer stated that the only thing he did was get the claimant's pulse and overheard some conversation between the nurses about tests that they had done. He noted that Nurse Comstock helped him find the claimant's clothes and a baggie with some suspected methamphetamine residue in it He noted that the claimant's blood was drawn. He also noted that the claimant's pulse was 88, and he had been given valium and morphine. Officer Dexheimer stated that the baggie was in a trash bag that contained several smaller garbage bags that contained Mr. Rowley's clothing. He believed that the trash bag was in the hallway. He did not recall if the baggie had any logos on it, but noted that the plastic itself was clear, and inside of the baggie was white residue, a type of crystallizing substance that looked like methamphetamine. He noted that the little one-inch square baggie is the number one most common way to package illicit drugs, and most closely resembled methamphetamine. Officer Dexheimer stated he gave the blood samples and the baggie to Trooper King.

Officer Dexheimer stated that he could not form an opinion regarding whether the claimant was impaired by drugs. When asked because of the nature of the accident and the truck veering

off it it was likely that methamphetamines caused the claimant to be impaired, Officer Dexheimer answered that he could not say for certain without knowing anything more about him, but certainly it was a possible cause. On follow-up, Officer Dexheimer stated that it was more likely than not that the accident occurred because the claimant was under the influence of methamphetamine. He noted that he arrested the claimant for driving under the influence

On cross-examination, Officer Dexheimer noted that he does not know who found the baggie, noted that the contents of the baggie had been washed down the sink, and had been thrown into the hospital garbage. He noted that the garbage bag was inside of a bag with other garbage bags down the hallway. Officer Dexheimer noted that Nurse Comstock found the garbage bag and baggie and gave them to him. All he knows is that he got a bag from Nurse Comstock. He agreed that the claimant had been given morphine sulfate and valium.

Officer Dexheimer agreed that the 12-step assessment cannot be done on an unconscious person. He agreed that unconscious patients make testing more inaccurate.

Brian Capron testified that he works for the Washington State Toxicology Laboratory, is a Forensic Specialist 5, and is responsible for reviewing all of the control data produced by the toxicologists in the lab Mr. Capron testified that he has a certified blood alcohol permit, and is authorized to perform testing of biological fluids for the presence of drugs for samples that come through the mail.

Mr. Capron stated that on August 18, 2008, he received two tubes of blood regarding the claimant, and noted that they were marked "Rawley," but the request for analysis was marked "Rowley. Mr Capron stated that he did a drug screen on the blood and noted that the testing was positive for methamphetamine, morphine sulfate, diazepam, nicotine, and caffeine. Mr. Capron testified that methamphetamine is a central nervous system stimulant and increases the blood pressure and pulse He noted that there are two phases of this drug. The upside of methamphetamine has euphoria and increased pulse and blood pressure lasing 4-8 hours, and the downside of the drug has paranoia and fatigue. He noted that the claimant's methamphetamine level was 88 milligrams/liter Mr Capron noted that morphine is used as a narcotic analgesic, and valium is used to calm people. He agreed that the claimant had a stimulant, a depressant, and a narcotic in his system. Mr. Capron opined that it was difficult to say when the drug was ingested because people metabolize drugs at different rates. Mr. Capron opined that based on the level of methamphetamines in the claimant, he was likely impaired and under the influence at the time of his accident. Mr. Capron agreed that the blood draw was two hours after the accident,

On cross-examination, Mr. Capron noted that Erin Kolbrich performed the testing He agreed that he reviewed and signed the test certification of her August 18, 2008 testing on January 27, 2010, because Ms. Kolbrich left the Washington State Patrol. He agreed that coffee can increase one's pulse, as well as nicotine.

David C. Roberts testified that he works for the Washington State Patrol, and was the first one on the scene of the claimant's accident on August 14, 2008 According to Trooper Roberts, there was a collision involving a tractor-trailer or commercial vehicle, and he completed an investigation. He noted that because he was the first officer on the scene, he was responsible for putting together the collision packet and any charges that were to be filed. Trooper Roberts stated that they were going to charge the claimant with violation of the Controlled Substance Act for possession of methamphetamine and that by then they had the blood results back.

Trooper Roberts noted that he saw the claimant at approximately 11.45 a.m. He noted that the claimant drove off road, jumped his semi down off the overpass, and the trailer had smashed into the cab, landing on the road below Trooper Roberts noted that the traffic and weather were dry, daylight, road was straight and level, and the speed limit was 60 miles per hour.

Trooper Roberts stated that he waited until the blood test came back before he decided what charges were going to be filed Trooper Roberts testified that once he got the blood results back and it indicated the claimant was impaired, he filed charges of DUI. He testified that he also felt it was appropriate to file felony charges because when they receive evidence indicating a person is under the influence of drugs such as cocaine and methamphetamines, it automatically makes it a violation of the Controlled Substance Act and is a felony case.

Trooper Roberts stated that he filled out the felony packet, and would not have gone through all the work to put it all together if it was not a felony report Trooper Roberts agreed that it is not a felony until the prosecution decided to charge it. Trooper Roberts did not know if the prosecutor filed felony charges He agreed that he had not been called to testify in any case regarding Mr. Rowley

Nicholas King stated that he has worked for the Washington State Patrol for 11 years. Trooper King stated that depending on the type of evidence you gather or find, you need to use specific or required type of evidence documentation and procedure forms. He noted that for blood, you have a blood toxicology form where you indicate specialized testing that is needed to be done at an outside source toxicology lab. He stated that transfer disposition forms are used when

evidence is transferred. Trooper King stated that CAD is a data base entry that notes times that is noted about specific evidence.

Trooper King stated that he went to the hospital and Office Dexheimer gave him blood vials and a small baggie of a crystal substance that was ecstasy, methamphetamine He filled out the forms, got the blood, went to the office, documented the evidence, and entered it in the evidence locker.

On cross-examination, Trooper King agreed his knowledge of the plastic baggie is limited to the information from Officer Dexheimer. Trooper King stated that the baggie was put into the locker as evidence, and that he tested it with an NIK test. He noted that the two blood vials and the baggie were in the property evidence report, and that only the two blood vials were in the transfer-disposition report, noting that the baggie was not in the transfer disposition report. Trooper King agreed that he spelled the claimant's name as "Rawley," not "Rowley," and that he used the wrong property number and the time of day as 2 a.m instead of 2 p.m

Mary C. Comstock, RN, testified that she is a nurse and is currently the associate director for the Center for Clinical Excellence and is the patient safety person at the University of Washington Medical Center. Ms. Comstock stated that previously she worked for Harborview Medical Center in the emergency department as the assistant manager, and worked in the emergency room since 2003. According to Ms Comstock, a huge team of people, including a trauma team and an emergency room team, respond to incoming trauma patients. Ms. Comstock noted that all clothes are removed from trauma cases Ms. Comstock noted that whatever is taken from patients gets searched for valuables the valuables are locked up, and everything else is disposed She noted that there is no way to tell if methamphetamines are found on a person

Ms. Comstock testified that she worked in the emergency room in August 2008 when Mr. Rowley came to Harborview She did not recall whether he came in clothed or unclothed. Ms. Comstock stated the claimant was sick, and she recalled a disruptive scenario with a police officer wanting all of the claimant's clothes that had been disposed of and had been put in the garbage. She stated that the officer also wanted to be engaged in the care. She noted that it was irregular because officers are not allowed to intervene in the middle of care. Ms. Comstock stated she went to the cleaning staff and asked to go through the garbage, found the claimant's clothes, and gave a smiley faced baggy to the police officer.

On cross-examination, Ms. Comstock agreed that it was difficult to say how many patients they see per day in the emergency room because the numbers fluctuate. She agreed that when

she went to find the claimant's clothes, the baggie was in his clothes. She stated that they dispose of things in baggies because they do not want to have the contents in the rooms Ms. Comstock stated that she does not recall what happened to the contents of the baggie because the patient was her first concern.

Jennifer K. Compton, RN, testified that she is a nurse and has worked in the emergency department at Harborview Medical Center for approximately four years Ms Compton testified she reviewed chart notes from August 14, 2008, regarding Mr Rowley. Ms. Compton agreed that she prepared chart notes and noted that Officer Dexheimer of the Kent Police Department gave her two blood tubes, and she filled them with blood from the claimant. Ms. Compton stated the blood was drawn at approximately 2 o'clock and then she handed the blood vials to the police officer.

On cross-examination, Ms Compton testified that the numbers of patients in the emergency room varies from day to day, and depends on what area you are working She agreed it is not uncommon to have difficulty drawing blood and agreed it is not indicative of a person who is using drugs.

DISCUSSION

The claimant, as the appealing party, has the burden of showing that he is entitled to the benefits he seeks. Mr. Rowley, the claimant, appealed the Department order that rejected his claim because the Department asserted that the injury resulted from the deliberate intention of Mr Rowley himself while he was engaged in the attempt to commit, or in the commission of, a felony The parties agreed that the claimant sustained severe injuries when he was involved in a motor vehicle accident in August 2008. The parties intensely litigated whether the claimant was in possession of methamphetamines on or about August 14, 2008, when his truck went off the road and crashed.

This case took on a life of its own. The claimant was represented by numerous attorneys at the same law firm after several attorneys left the law firm. Many motions were filed and many issues were raised. I have reviewed this case numerous times, have reviewed all of the motions and objections, and I must conclude that based on the record as a whole, the preponderance of the evidence simply does not establish that injury resulted from the deliberate intention of Mr. Rowley himself while he was engaged in the attempt to commit, or in the commission of, a felony. The claimant presented evidence to establish that the sustained severe injuries on or about August 14, 2008, during the course of his employment as a truck driver with Craig Mungas Receiver for JOS (Sunset Machinery).

The Department then did a yeoman's job of trying to show that the claimant should be denied compensation because his injury resulted from the claimant's deliberate intention while he was engaged in the attempt to commit, or in the commission of, a felony regarding possession of methamphetamines. The parties appear to not dispute that felony charges were never filed against Mr. Rowley in this matter. Also, the parties do not appear to dispute that methamphetamines in the blood stream does not equate to possession The Department attempted to combine a plethora of evidence to show by a preponderance of the evidence, a lower standard than the criminal standard, that the claimant must have been in possession of methamphetamines

The record as a whole simply does not establish that Mr Rowley's injury resulted from the deliberate intention of Mr. Rowley himself while he was engaged in the attempt to commit, or in the commission of, a felony. Again, I have reviewed the evidence and find the testimony of the trooper on the scene of the accident and the nurses at the hospital were particularly persuasive. The nurse who took care of Mr Rowley clearly testified that she did not recall if he came to the hospital with clothes on or not She also clearly testified that patients are the top priority at the hospital, not trying to secure any items that come in with them. Nurse Comstock clearly stated that all of the claimant's clothes were placed in a trash can and sent down to another location with housekeeping Although nursing staff went through the hospital trash for the officer, the evidence shows that even if methamphetamines were in the hospital garbage bag, nothing establishes even by a preponderance of the evidence that the claimant was in possession of any baggie of methamphetamines. Innuendos and boot strapping are not sufficient to establish even by a preponderance of the evidence that the claimant's injury resulted from the deliberate intention of Mr. Rowley himself while he was engaged in the attempt to commit, or in the commission of, a felony. Clearly, the preponderance of the evidence shows that the claimant sustained an industrial injury while working for the trucking company and is entitled to industrial insurance benefits.

FINDINGS OF FACT

1. On August 19, 2008, the claimant, Bart A. Rowley, Sr., filed an Application for Benefits alleging he sustained an industrial injury on August 14, 2008, during the course of his employment with Craig Mungas Receiver for JOS (Sunset Machinery). On October 27, 2008, the Department issued an order that stated the worker received time-loss compensation of $2,777.88, was entitled to time-loss compensation of $765; therefore, the worker must pay Labor and Industries $3,542.88 assessed from August 18, 2008 through October 17, 2008. The order stated that the overpayment resulted because the claim is rejected for some reason other than those listed for automated rejection orders. The claim has been rejected; claim is

rejected based on RCW 51 32.020 which states if injury or death results to a worker from the deliberate intention of the worker himself . . . while the worker is engaged in the attempt to commit, or the commission of, a felony . . . shall not receive any payment under this title.

On December 22, 2008, the claimant filed a protest and request for reconsideration of the Department order dated October 27, 2008. On January 13, 2009, the Department affirmed its October 27, 2008 order. On March 9, 2009, the claimant filed a Notice of Appeal to the Department order dated January 13, 2009 with the Board of Industrial Insurance Appeals. On April 7, 2009, the Board granted the claimant's appeal to the Department order dated January 13, 2009, assigned it Docket No. 09 123123, and ordered further proceedings be held

2. On or about August 14, 2008, Bart A Rowley, Sr., the claimant, sustained an industrial injury during the course of his employment with Craig Mungas Receiver for JOS, when the truck-trailer he was driving left the road and crashed. As a result of this accident, he sustained extensive injuries

3. On or about August 14, 2008, the injuries sustained by Bart A. Rowley, Sr., did not result from the deliberate intention of Mr. Rowley himself while he was engaged in the attempt to commit, or in the commission of, a felony.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. On or about August 14, 2008, Bart A. Rowley, Sr., the claimant, sustained an industrial injury during the course of his employment with Craig Mungas Receiver for JOS, within the meaning of RCW 51 08.100.

3 The claimant's injury did not result from the deliberate intention of Mr. Rowley himself while he was engaged in the attempt to commit, or in the commission of, a felony, within the meaning of RCW 51.32.020.

4. The order of the Department of Labor and Industries, dated January 13, 2009, is incorrect and is reversed. This claim is remanded to the Department with instructions to issue an order that allows the claim.

DATED: JUL 08 2011

Kathleen A. Stockman
Industrial Appeals Judge
Board of Industrial Insurance Appeals

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BART A. ROWLEY, SR.) DOCKET NO. 09 12323
)
CLAIM NO. AH-12490) DECISION AND ORDER

APPEARANCES:

Claimant, Bart A. Rowley, Sr , by
Palace Law Offices, per
Thaddeus D. Sikes, Matt Midles, Roosevelt Currie, Jr , Blake I Kremer,
Scott R Grigsby, and Christopher S Cicierski

Employer, Craig Mungas Receiver for JOS,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Lynette Weatherby-Teague, Assistant

The claimant, Bart A Rowley, Sr , filed an appeal with the Board of Industrial Insurance Appeals on March 9, 2009, from an order of the Department of Labor and Industries dated January 13, 2009 In this order, the Department affirmed its order dated October 27, 2008, in which it demanded that the claimant pay the Department $3,542 88 The Department determined that Mr Rowley was entitled to time-loss compensation benefits totaling $765, but the Department paid $2,777 In its order the Department stated that the overpayment resulted because the claim was rejected for some reason other than those listed for automated rejection orders, that is that the claim was rejected based on RCW 51 32.020 that states "If injury or death results to a worker from the deliberate intention of the worker himself . while the worker is engaged in the attempt to commit, or the commission of, a felony . . shall not receive any payment under this title." The Department order is **REVERSED AND REMANDED**

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order issued on July 8, 2011, in which the industrial appeals judge reversed and remanded the Department order dated January 13, 2009

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. The industrial appeals judge reached the correct result Mr Rowley's injury is covered by the Industrial Insurance Act and payments are

not barred under RCW 51 32.020, the felony payment bar We have granted review, however, to accomplish the following: First, we clarify that the legal issue in this case is not whether Mr Rowley's industrial insurance claim should be allowed. It should. The issue is whether Mr. Rowley should be barred from receiving payments under this claim Second, we clarify that there is no requirement that a worker must be convicted of a felony in superior court for the RCW 51 32.020 felony payment bar to apply. The Board is empowered to make this determination for industrial insurance purposes. Third, we clarify that when determining whether the felony provision of RCW 51 32 020 applies, the standard of proof as to whether a felony occurred is at least clear, cogent, and convincing evidence Fourth, we also clarify that the legal standard to be used in felony benefit exclusion cases is the precise language of the felony provision found in RCW 51.32.020, and we have accordingly amended the Findings of Fact and Conclusions of Law

Bart A Rowley, Sr., the claimant, drove his tractor-trailer semi truck, off an overpass onto the road below on August 14, 2008, at about 11.30 a m. The accident occurred on a clear, dry day, and there were no skid marks observed on the road. In the accident, Mr. Rowley's spinal cord was severed, and he was in a coma for 40 days after the accident. He is now a quadriplegic

Immediately after the accident, paramedics took Mr. Rowley to the Harborview Hospital trauma center. An emergency room nurse found a small plastic baggie with a smiley face on it in his clothing ("the baggie") The baggie contained a white crystalline substance. An ER worker dumped most of the white substance in the sink. An ER worker put the clothing and the baggie in a trash bag, and sent it down the hall with other trash.

A police officer arrived at the ER to investigate. A nurse informed the officer Mr. Rowley had a "surprise" in his pocket when he arrived, a small plastic baggie At the officer's urging, the nurse dug the baggie out of the trash down the hall. The officer thought the substance in the bag looked like methamphetamine. Another nurse drew the claimant's blood and placed it in vials supplied by the police officer The officer next gave the baggie and the two vials to a state trooper. The trooper placed the unconscious claimant "under arrest" in the ER The trooper performed a field test and determined it was likely "ecstacy, methamphetamine." The trooper then placed the blood vials and the baggie in an evidence locker The State Toxicology Lab received the vials of blood, but never received the baggie. A blood test showed Mr Rowley's blood held 0 88 milligrams of methamphetamine per liter, a level described as likely impairing by a testifying toxicologist. The baggie disappeared, and was never tested by a laboratory to identify its contents. Mr. Rowley

recalls nothing for four days before the accident through 40 days after the accident when he emerged from the coma Mr Rowley was never charged with a crime. He filed an industrial injury claim. Citing RCW 51 32 020, the Department rejected the claim on grounds that Mr Rowley was engaged in the attempt to commit, or the commission of, a felony when he was injured

Can a claim be rejected under RCW 51.32.020?

The Department rejected Mr Rowley's industrial insurance claim. Both the Department of Labor and Industries and our industrial appeals judge characterized the issue in this case as whether Mr. Rowley's claim should be allowed or rejected under RCW 51.32.020 At the outset we must address whether claim allowance is even at issue under RCW 51 32 020 That statutory section provides, in relevant part, as follows.

> If injury or death results to a worker from the deliberate intention of the worker himself or herself to produce such injury or death, or while the worker is engaged in the attempt to commit, or the commission of, a felony, neither the worker nor the widow, widower, child, or dependent of the worker **shall receive any payment under this title.** [Emphasis added].

The Department rejected Mr Rowley's industrial insurance claim solely on grounds that he allegedly committed a felony while he was injured. The plain language of the statute, however, shows claim allowance or rejection is not the appropriate determination under RCW 51.32.020. Rather, the statute only provides that where a worker commits a felony or attempts to commit a felony and is injured, only the worker, widow, widower, child, or dependent of the worker cannot receive payment under the Act. The statute does not indicate a claim will be disallowed Claims fall within coverage of the Industrial Insurance Act when a worker is injured in the course of employment. It is undisputed that Mr. Rowley was driving his semi-trailer on a delivery for his employer in the course of his employment when he was injured. We hold that the Department cannot reject a claim under the felony provision of RCW 51.32 020. The Department should have allowed the claim. The proper inquiry is whether Mr. Rowley is barred from receiving industrial insurance payments under RCW 51 32 020

Is a conviction required before the Department may deny benefits payments under RCW 51.32.020?

Mr Rowley maintains that a worker must be convicted of a felony before the Department may deny payments to him under RCW 51.32.020 He also argues that the Board lacks authority to determine whether a worker committed a felony under RCW 51.32.020. We disagree. The

language of the statute is plain and unambiguous. Had the Legislature intended to require a felony conviction in superior court, the Legislature would have required a felony conviction We decline to read this additional language into the Act. We hold the felony provision of RCW 51 32.020 does not require that the worker be convicted of a felony in superior court to bar a worker from receiving payment. It requires only a finding that the worker was engaged in conduct, or attempting to engage in conduct, that would meet the statutory elements of a felony under federal or state criminal law at the time of the injury When the Legislature passed RCW 51 32 020, it empowered the Board to decide whether a worker was engaged in a felony act when the industrial injury occurred

Standard of proof and procedure

It appears from our review of the record that our industrial appeals judge used the preponderance of the evidence as the standard of proof We hold in this case of first impression that the standard of proof to be used in felony payment bar appeals under RCW 51 32.020 is at least the same as the standard of proof in cases where the Department or self-insured employer seeks to prove intentional misrepresentation by a worker The standard of proof is at least clear, cogent, and convincing evidence. *In re Del Sorenson*, BIIA Dec., 89 2697 (1991) (The Department of Labor and Industries bears the burden to prove willful misrepresentation by clear, cogent, and convincing evidence in appeals under RCW 51 32 240).

As a general rule, the standard of proof in industrial insurance appeals is the preponderance of the evidence *Olympia Brewing Co v Department of Labor & Indus* , 34 Wn.2d 498, 504 (1949) Felony payment bar appeals, however, are different from ordinary industrial insurance appeals In felony payment bar appeals, the worker has suffered an industrial injury covered by the Industrial Insurance Act, and the Department seeks to deprive the worker of benefits to which he or she would otherwise be entitled but for the allegation of wicked conduct. Moreover, an injured worker subjected to the felony provision of RCW 51.32.020 could also be subject to significant reputation damage, a potential for later criminal prosecution, and (as is the case at bar) significant financial consequences, such as an overpayment of benefits received prior to a determination that the worker committed the felony The felony payment bar in RCW 51.32 020 punishes the worker who committed or attempted to commit a felony when injured inasmuch as it denies the worker and his or her beneficiaries the right to receive payments for time-loss compensation, permanent partial disability, and permanent total disability, under an otherwise allowed claim. The consequences of a

finding of felony commission are punitive and sufficiently analogous to cases of willful misrepresentation to require the heightened standard of proof we have long applied in cases where the Department or self-insured employer alleges a worker committed intentional misrepresentation under RCW 51.32 240

Accordingly, where the Department invokes the felony payment bar, the claimant must present evidence first. Once the claimant meets his or her burden to make a prima facie case for allowance of his or her claim, the burden then shifts to the Department to prove by at least clear, cogent, and convincing evidence that the worker was injured while engaged in the attempt to commit or the commission of a felony as defined under state or federal criminal law. If the Department meets that burden, the worker and his beneficiaries shall not receive payments for time-loss compensation, loss-of-earning-power, permanent partial disability, permanent total disability, or similar payments

Legal standard under the felony provision of RCW 51.32.020

In the Findings of Fact and Conclusions of Law of the Proposed Decision and Order, our industrial appeals judge wrote that Mr Rowley's injury "**did not result from the deliberate intention of Mr. Rowley himself while he was engaged in the attempt to commit, or in the commission of, a felony.**" PD&O at 10 [Emphasis added.] This same language appeared in the Department order under appeal. The statute provides, "If injury or death results to a worker from the deliberate intention of the worker himself or herself to produce such injury or death, or while the worker is engaged in the attempt to commit, or the commission of, a felony, neither the worker nor the widow, widower, child, or dependent of the worker shall receive any payment under this title." RCW 51 32 020. We believe that in writing the legal standard this way, the industrial appeals judge and the Department inadvertently mingled phrases from two different exclusions found in the same sentence of the statute The first provision, the suicide or self-injury provision, bars payments to workers where the worker deliberately intends to produce an injury or death in the course of employment. The second provision, the felony payment bar, begins with the word **or**, as in "**or** while the worker is engaged in the attempt to commit, or the commission of, a felony .." [Emphasis added.] Accordingly, we modify the Findings of Fact and Conclusions of Law to comport with the legal standard as stated in RCW 51.32.020 Stated correctly, the legal standard in felony payment bar cases is whether the worker suffered an injury while he or she was engaged in the attempt to commit, or the commission of, a felony

Is Mr. Rowley barred from receiving benefits under RCW 51.32.020?

Although the evidence shows Mr. Rowley may have been impaired by drugs on August 14, 2008, driving under the influence of a controlled substance is not a felony. It is a gross misdemeanor. RCW 46 61 502(5). Possession of methamphetamine on the other hand is a felony. RCW 69.50.4013. The remaining issue is whether Mr Rowley committed the felony of possession of methamphetamine. The Controlled Substances Act provides, in relevant part, as follows:

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by the chapter
>
> Methamphetamine is a controlled substance. RCW 69.50.206.

Did Mr Rowley possess a baggie containing methamphetamine on August 14, 2008, when he drove off the over pass? Here there is a significant problem of proof. We cannot determine what was in that baggie based on this hearing record Although Mr Rowley likely used methamphetamine, this Board cannot find that he actually possessed methamphetamine in his truck based on the scant evidence presented. One officer testified that he thought the remnant white substance looked like methamphetamine, but he did not explain why There was a type of field test that showed it was likely "ecstacy, methamphetamine," but the trooper who tested it did not elaborate on the reliability of the field test or why it is that it could be both ecstacy and methamphetamine. There are also problems with the chain of custody of the reported baggie. One nurse found it. Someone dumped the contents in the sink, and another nurse put it in the trash down the hall. Later, a nurse dug it out of the trash. We decline to find that the Department proved by at least clear, cogent, and convincing evidence that the white substance was methamphetamine based merely on a field test and conjecture without laboratory confirmation. At a minimum, alleged narcotics must be tested in a laboratory before we will uphold a denial of payment of industrial insurance benefits under RCW 51 32 020 in an alleged narcotics possession case. The evidence fails to show Mr. Rowley committed or attempted to commit a felony while he was injured on August 14, 2008. Consequently, the Department order must be reversed and the claim must be remanded with direction to allow the claim and pay benefits in accordance with the Industrial Insurance Act.

FINDINGS OF FACT

1 On April 30, 2009, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes

2 On or about August 14, 2008, Bart A. Rowley, Sr., the claimant, sustained an industrial injury during the course of his employment with Craig Mungas Receiver for JOS, when the truck-trailer he was driving left the road and crashed As a result of this accident, he sustained extensive injuries.

3 Mr. Rowley was not engaged in the attempt to commit or the commission of a felony when he was injured on August 14, 2008

CONCLUSIONS OF LAW

1 Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. On or about August 14, 2008, Bart A. Rowley, Sr., the claimant, sustained an industrial injury during the course of his employment with Craig Mungas Receiver for JOS, within the meaning of RCW 51 08.100

3 Mr. Rowley's industrial injury did not occur while he was engaged in the attempt to commit, or in the commission of, a felony, within the meaning of RCW 51.32.020.

4 The order of the Department of Labor and Industries, dated January 13, 2009, is incorrect and is reversed This claim is remanded to the Department with instructions to issue an order that allows the claim, and to pay benefits in accordance with the law and the facts

Dated: January 30, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS

DAVID E. THREEDY Chairperson

FRANK E FENNERTY, JR Member

SPECIAL CONCURRING OPINION

I agree that the Department must allow Mr Rowley's industrial insurance claim. I also agree that RCW 51.32.020 does not bar his right to receive payments based on the evidence presented. I agree with my colleague that the Department failed to offer clear, cogent, and convincing evidence

8

that Mr. Rowley committed a felony. I respectfully disagree with my colleague's interpretation of RCW 51.32.020 on the standard of proof, however. The Department's burden of proof in felony payment bar appeals RCW 51 32.020 should be the higher standard of proof beyond a reasonable doubt The felony bar provision bars the payment to workers who commit a felony at work. The standard of proof in felony cases is beyond a reasonable doubt. RCW 9A 04 100 The stigma of concluding that a worker committed a felony and the consequences of such a conclusion are severe. This higher burden must be used in the courts before concluding a person committed a felony, and there should be no difference at this tribunal I also believe the reference to "attempt" in the statute is a reference to the crime of felony attempt, something that must also be adjudicated using the standard of beyond a reasonable doubt.

Dated: January 30, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS

FRANK E. FENNERTY, JR Member

SPECIAL DISSENTING OPINION

I agree with the majority's analysis and conclusions regarding whether a claim can be rejected under RCW 51 32.020, whether a conviction is required before the Department or Board can deny benefits under RCW 51 32 020, and the procedure to be followed. However, I disagree regarding the standard of proof and whether Mr Rowley is barred from receiving benefits. Accordingly, I respectfully dissent.

The Board should decide these appeals using the preponderance of the evidence as the standard of proof. In the passing RCW 51 32 020, the Legislature empowered the Board to decide by the preponderance of the evidence whether a worker was engaged in a felony act when the industrial injury occurred Cases holding that the preponderance of the evidence standard is the standard of proof in workers' compensation cases are legion *Olympia Brewing Co. v. Department of Labor & Indus* , 34 Wn.2d 498, 504 (1949) There is no indication in the statute or elsewhere that the Legislature intended that the standard of proof be any different in this context.

The present appeal turns on whether Mr. Rowley possessed methamphetamine during his accident Possession of methamphetamine is a felony RCW 69 50.4013 and RCW 69.50.206.

Here, there is ample circumstantial evidence of methamphetamine possession in this case to conclude, by the preponderance of the evidence or by the even the higher standard of clear, cogent, and convincing evidence, that Mr Rowley was in possession of methamphetamine when he was injured. The evidence shows that at the time of his injury, Mr Rowley had an impairing level of methamphetamine in his blood Evidence of assimilation of a substance in the blood is circumstantial evidence of prior possession of that substance *State v. Dalton*, 72 Wn App. 674, 676 (1994) Although insufficient by itself to support a criminal conviction, when combined with other corroborating evidence of sufficient probative value, evidence of assimilation into the blood can be sufficient to prove possession even under the beyond a reasonable doubt standard used in criminal cases. Here, the evidence shows Mr Rowley had a suspicious, single vehicle accident on a clear, dry day, in daylight with no skid marks. He had intoxicating levels of methamphetamine in his blood at the time of the injury. He had a smiley-faced baggy containing a substance identified by a field test to be methamphetamine The Kent police officer, a drug recognition expert, thought it looked like methamphetamine, and after the accident, placed an unconscious, hospitalized Mr Rowley under arrest I believe the laboratory evidence that Mr Rowley had significant methamphetamine in his blood, coupled with the other corroborating evidence at least satisfies the preponderance of the evidence standard of proof that Mr Rowley possessed methamphetamine when he drove his vehicle off the overpass onto the road below

Mr. Rowley should be barred from receiving industrial insurance benefits as provided by RCW 51.32 020, because he was engaged in the commission of a felony when injured

Dated January 30, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS

JACK S ENG Member

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

DEPARTMENT OF LABOR AND INDUSTRIES, Plaintiff, v. BART ROWLEY, SR. Defendant.	NO. 12-2-06549-2 FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT **Clerk's Action Required**

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	BART ROWLEY
2. Judgment Debtor:	DEPARTMENT OF LABOR AND INDUSTRIES
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. ~~Statutory~~ Attorney Fees:	20,767.49 PP
6. Costs:	$0
7. Other Recovery Amounts:	$0

8. Principal Judgment Amount shall bear interest at 0% per annum.

9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

10. Attorney for Judgment Creditor:	KENNETH MASTERS AND PATRICK PALACE
11. Attorney for Judgment Debtor:	LYNETTE WEATHERBY-TEAGUE

ORIGINAL

OFFICE OF THE ATTORNEY GENERAL
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Tacoma, WA 98401
(253) 593-524

APP C

This matter came on regularly before the Honorable ROSANNE BUCKNER, in open court on NOVEMBER 2, 2012. The Plaintiff, DEPARTMENT OF LABOR AND INDUSTRIES (Department), appeared by its counsel, ROBERT M. MCKENNA, Attorney General, per LYNETTE WEATHERBY-TEAGUE; Assistant Attorney General, the Defendant, BART ROWLEY, appeared by its counsel, PATRICK PALACE and KENNETH MASTERS, attorneys at law. The Court reviewed the records and files herein, including the Certified Appeal Board Record, and briefs submitted by counsel, and heard argument of Counsel. Therefore, being fully informed, the Court makes the following:

I. FINDINGS OF FACT

1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) on July 20, 2010, February 23, 2011, and February 24, 2011; the testimony of other witnesses was perpetuated by deposition.

Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on July 8, 2011 from which the Department filed a timely Petition for Review on or about August 23, 2011. On January 30, 2012 the Board, having considered the Department's Petition for Review, granted review and issued its Decision and Order on January 30, 2012.

The Department thereupon timely appealed the Board's January 30, 2012 order to this Court.

1.2 The Board had jurisdiction to grant the appeal, as set out in the Board's Finding of Fact 1.

1.3 On or about August 14, 2008, Bart A. Rowley, Sr., the claimant, sustained an industrial injury during the course of his employment with JOS, when the truck-trailer he was driving left the road and crashed. As a result of this accident, he sustained extensive injuries.

1.4 Mr. Rowley was not engaged in the attempt to commit or the commission of a felony when he was injured on August 14, 2008.

1.5 The Board correctly determined that absent a confirming laboratory test the Department did not prove that the white substance in the baggie, found in Mr. Rowley's clothes, was methamphetamine.

Based upon the foregoing Findings of Fact, the Court now makes the following:

II. CONCLUSIONS OF LAW

2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

2.2 This Court reviews questions of law de novo. The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 and 2, of the January 30, 2012 Order of the Board.

2.3 This Court concludes that the Board did not err as a mater of law in holding that:

a. Mr. Rowley's industrial injury did not occur while he was engaged in the attempt to commit, or in the commission of a felony, within the meaning of RCW 51.32.020;

b. The Department bore the burden of proving, by clear, cogent and convincing evidence that Mr. Rowley's injury occurred when he was in the commission of a felony, within the meaning of RCW 51.32.020, which burden the Department did not meet;

c. Absent a confirming laboratory test the Department did not prove the white substance in the baggie, found in Mr. Rowley's clothes, was methamphetamine;

d. The Department could not reject a claim under the felony provision of RCW 51.32.020.

2.4 The Board's January 30, 2012 Order is correct and is affirmed.

2.5 The January 13, 2009 Department order is incorrect and is reversed.

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters judgment as follows:

III. JUDGMENT

3.1 The January 30, 2012 Board of Industrial Insurance Appeals order which reversed the Department of Labor and Industries January 30, 2012 order, be and the same is hereby affirmed.

3.2 The Mr. Rowley is awarded, and the Department is ordered to pay, costs and disbursements herein in the amounts of $ ~~—~~ for transcription of depositions used at trial.

3.3 A reasonable fee for the services of Mr. Rowley's attorneys before this Court is $ 29767.99 . ~~If, as a result of the Court's decision the accident fund or medical aid fund is affected, Mr. Rowley's attorneys' fees shall be paid out of the Department's administrative fund per RCW 51.52.130.~~

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3.4 The Defendant is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

DATED this 7 day of December 2012.

JUDGE ROSANNE BUCKNER

Presented by:
ROBERT M. MCKENNA
Attorney General

LYNETTE WEATHERBY-TEAGUE
WSBA #15131
Assistant Attorney General

FILED
DEPT. 6
IN OPEN COURT
DEC - 7 2012
Pierce County Clerk
By DEPUTY

Copy to:

KENNETH W. MASTERS
WSBA # 22278
Attorney for Plaintiff

PATRICK A. PALACE
WSBA #21396
Attorney for Plaintiff

RCW 9A.04.040
Classes of crimes.

(1) An offense defined by this title or by any other statute of this state, for which a sentence of imprisonment is authorized, constitutes a crime. Crimes are classified as felonies, gross misdemeanors, or misdemeanors.

(2) A crime is a felony if it is so designated in this title or by any other statute of this state or if persons convicted thereof may be sentenced to imprisonment for a term in excess of one year. A crime is a misdemeanor if it is so designated in this title or by any other statute of this state or if persons convicted thereof may be sentenced to imprisonment for no more than ninety days. Every other crime is a gross misdemeanor.

[1975 1st ex.s. c 260 § 9A.04.040.]

RCW 9A.04.100
Proof beyond a reasonable doubt.

(1) Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.

(2) When a crime has been proven against a person, and there exists a reasonable doubt as to which of two or more degrees he or she is guilty, he or she shall be convicted only of the lowest degree.

[2011 c 336 § 349; 1975 1st ex.s. c 260 § 9A.04.100.]

RCW 51.04.062
Findings.

The legislature finds that Washington state's workers' compensation system should be designed to focus on achieving the best outcomes for injured workers. Further, the legislature recognizes that controlling pension costs is key to a financially sound workers' compensation system for employers and workers. To these ends, the legislature recognizes that certain workers would benefit from an option that allows them to initiate claim resolution structured settlements in order to pursue work or retirement goals independent of the system, provided that sufficient protections for injured workers are included.

[2011 1st sp.s. c 37 § 301.]

RCW 51.32.020
Who not entitled to compensation.

If injury or death results to a worker from the deliberate intention of the worker himself or herself to produce such injury or death, or while the worker is engaged in the attempt to commit, or the commission of, a felony, neither the worker nor the widow, widower, child, or dependent of the worker shall receive any payment under this title.

If injury or death results to a worker from the deliberate intention of a beneficiary of that worker to produce the injury or death, or if injury or death results to a worker as a consequence of a beneficiary of that worker engaging in the attempt to commit, or the commission of, a felony, the beneficiary shall not receive any payment under this title.

An invalid child, while being supported and cared for in a state institution, shall not receive compensation under this chapter.

No payment shall be made to or for a natural child of a deceased worker and, at the same time, as the stepchild of a deceased worker.

[1995 c 160 § 2; 1977 ex.s. c 350 § 39; 1971 ex.s. c 289 § 42; 1961 c 23 § 51.32.020. Prior: 1957 c 70 § 27; prior: (i) 1927 c 310 § 5, part; 1919 c 131 § 5, part; 1911 c 74 § 6, part; RRS § 7680, part. (ii) 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

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.]

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.]

RCW 69.50.206
Schedule II.

(a) The drugs and other substances listed in this section, by whatever official name, common or usual name, chemical name, or brand name designated, are included in Schedule II.

(b) Substances. (Vegetable origin or chemical synthesis.) Unless specifically excepted, any of the following substances, except those listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone, and their respective salts, but including the following:

(i) Raw opium;

(ii) Opium extracts;

(iii) Opium fluid;

(iv) Powdered opium;

(v) Granulated opium;

(vi) Tincture of opium;

(vii) Codeine;

(viii) Dihydroetorphine;

(ix) Ethylmorphine;

(x) Etorphine hydrochloride;

(xi) Hydrocodone;

(xii) Hydromorphone;

(xiii) Metopon;

(xiv) Morphine;

(xv) Oripavine;

(xvi) Oxycodone;

(xvii) Oxymorphone; and

(xviii) Thebaine.

(2) Any salt, compound, isomer, derivative, or preparation thereof that is chemically equivalent or identical with any of the substances referred to in subsection (b)(1) of this section, but not including the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves including cocaine and ecgonine, and their salts, isomers, derivatives, and salts of isomers and derivatives, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(5) Concentrate of poppy straw (The crude extract of poppy straw in either liquid, solid, or powder form which contains the phenanthrene alkaloids of the opium poppy.)

(c) Opiates. Unless specifically excepted or unless in another schedule, any of the following synthetic opiates, including its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation, dextrorphan and levopropoxyphene excepted:

(1) Alfentanil;

(2) Alphaprodine;

(3) Anileridine;

(4) Bezitramide;

(5) Bulk dextropropoxyphene (nondosage forms);

(6) Carfentanil;

(7) Dihydrocodeine;

(8) Diphenoxylate;

(9) Fentanyl;

(10) Isomethadone;

(11) Levo-alphacetylmethadol, also known as levo-alpha-acetylmethadol, levomethadyl acetate, or LAAM;

(12) Levomethorphan;

(13) Levorphanol;

(14) Metazocine;

(15) Methadone;

(16) Methadone—Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;

(17) Moramide—Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid;

(18) Pethidine (meperidine);

(19) Pethidine—Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;

(20) Pethidine—Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;

(21) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;

(22) Phenazocine;

(23) Piminodine;

(24) Racemethorphan;

(25) Racemorphan;

(26) Remifentanil;

(27) Sufentanil;

(28) Tapentadol.

(d) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) Methamphetamine, its salts, isomers, and salts of its isomers;

(3) Phenmetrazine and its salts;

(4) Methylphenidate;

(5) Lisdexamfetamine, its salts, isomers, and salts of its isomers.

(e) Depressants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Amobarbital;

(2) Glutethimide;

(3) Pentobarbital;

(4) Phencyclidine;

(5) Secobarbital.

(f) Hallucinogenic substances.

Nabilone: Some trade or other names are (±)-trans3-(1,1-dimethlheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzol[b,d]pyran-9-one.

(g) Immediate precursors. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:

(1) Immediate precursor to amphetamine and methamphetamine:

(i) Phenylacetone: Some trade or other names phenyl-2-propanone, P2P, benzyl methyl ketone, methyl benzyl ketone.

(2) Immediate precursors to phencyclidine (PCP):

(i) 1-phenylcyclohexylamine;

(ii) 1-piperidinocyclohexanecarbonitrile (PCC).

The controlled substances in this section may be added, rescheduled, or deleted as provided for in RCW 69.50.201.

[2010 c 177 § 3; 1993 c 187 § 6; 1986 c 124 § 4; 1980 c 138 § 2; 1971 ex.s. c 308 § 69.50.206.]

RCW 69.50.4013
Possession of controlled substance — Penalty — Possession of useable marijuana or marijuana-infused products.

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

(3) The possession, by a person twenty-one years of age or older, of useable marijuana or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law.

[2013 c 3 § 20 (Initiative Measure No. 502, approved November 6, 2012); 2003 c 53 § 334.]

MASTERS LAW GROUP

September 05, 2013 - 4:20 PM

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