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STATE OF WASHINGTON
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No. 91357-9

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner,

v.

BART A. ROWLEY, SR.,

Respondent.

ANSWER TO PETITION FOR REVIEW

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
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Attorney for Respondent

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

It is undisputed that Bart Rowley was severely injured in the course of his employment as a truck driver. The only tribunal to hear the testimony – the IAJ – found the Department's evidence insufficient to establish that Rowley was attempting or committing a "felony" at that time, even by a preponderance of the evidence. The Board found no clear, cogent, or convincing evidence of a felony, pointedly questioning the Department's "scant evidence" and weak "chain of custody." The trial court agreed with the Board.

The appellate court affirmed as to the burden and standard of proof. But it erroneously reversed because it (a) misinterpreted the trial court's finding and conclusion regarding a confirming lab test, and (b) misinterpreted the felony payment statute. Rowley does not seek review of these errors, or of the dismissal of his cross-appeal.

There is no basis for review in this Court. Every tribunal has correctly determined that the Department bears the burden of proof – and no decision of this Court holds to the contrary. Similarly, no "uncertainty" arises from placing the burden of proof on the party asserting a general statutory limitation. And the clear, cogent, and convincing standard of proof is well established for cases like this one. This Court should deny review.

STATEMENT OF THE CASE

A. It is undisputed that Bart Rowley was severely injured 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.[1] CP 639, 709-11. 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 memory of the accident. *Id.*

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.

Consistent with these undisputed facts, the trial court entered the following unchallenged Finding – a verity[2] here (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.

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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.

[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)).

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

The only judicial officer who heard testimony in this case -- the IAJ – found that the Department had failed to establish a felony even 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 [this allegation] even by a preponderance of the evidence." *Id.*

Specifically, "the testimony of the trooper [Roberts] on the scene of the accident and the nurses [Comstock and Compton] at the hospital 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 are well supported by the evidence.

1. Trooper Roberts issued no citation.

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 Compton remembered nothing.

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.

3. Nurse Comstock did not recall the crucial facts.

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, 951. 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 even 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. Nurse Comstock does not recall who (if anyone) took 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 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 told an 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 that she did not remember any of the crucial information (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, while she recalls smiley faces on the bag, she has no idea what happened to whatever was in the bag. CP 924-25.

C. The Board found no clear, cogent, or convincing evidence of a "felony," pointedly questioning the Department's "scant evidence" and weak "chain of custody" based on Officer Dexheimer's testimony.

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 questioned Officer Dexheimer's testimony. *Id.* A Kent police officer trained as a DRE, Dexheimer 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 718-30, 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, Officer Dexheimer 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's packaged" and it did not look like cocaine. CP 775. 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, 923.

Officer Dexheimer did check Rowley's pulse rate, which was "normal"; but he nonetheless concluded that it "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 you 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.

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

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

Although Rowley was unconscious, Dexheimer arrested him for DUI – a misdemeanor – and read him a "special evidence" warning.[3] CP 747, 763-64, 769, 773. Dexheimer admitted that when an unconscious individual's blood is drawn, he is entitled to an independent toxicological review of the samples. CP 764-65. Dexheimer further admitted that taking a sample in this manner is authorized when someone other than the driver suffers serious bodily injury, but here, no one but Rowley was so injured. 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

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

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 challenged below (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.

E. The appellate court affirmed as to the burden and standard of proof, but erroneously reversed because it (a) misinterpreted the trial court's finding and conclusion regarding a confirming lab test, and (b) misinterpreted the felony payment statute.

The appellate court affirmed as to the burden and standard of proof, but erroneously reversed because it misinterpreted the trial court's finding and conclusion regarding a confirming lab test. First, liberally construing the IIA – as it must – to ensure compensation to covered workers, the Board correctly placed the burden to prove a felony on the Department where, as here, the worker meets his burden to prove a right to compensation by showing he was injured in the course of his employment. Opinion at ¶¶ 13, 14 & 20 (App. D). In short, "[p]roof that an industrial injury occurred during the commission of a felony does not negate any element of an industrial insurance claim," so "the trial court properly treated the felony payment bar as an affirmative defense to be proved by the Department." *Id.* at ¶ 20.

Second, the appellate court held that the Board made a correct policy decision to require clear, cogent, and convincing evidence of a felony. *Id.* at ¶¶ 22, 24 & 26. It held that the trial court properly deferred to the agency's persuasive justification for requiring this standard of proof. *Id.* at ¶¶ 25, 26. In short, 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.'" *Id.* at ¶¶ 24-26.

Third,[4] the appellate court apparently misinterpreted the trial court's ruling that "absent a confirming laboratory test the Department did not prove the white substance in the baggie . . . was methamphetamine." *Id.* at ¶¶ 32, 33 (addressing CP 1184, C/L 2.3.c.). The appellate court appears to have concluded that the trial court erred as a matter of law. *Id.* But the trial court's conclusion merely repeats its Finding 1.5 (CP 1183) that ***absent*** a confirming laboratory test, the Department ***did not prove*** that the substance in the baggie was meth. CP 1183-84. This a mere statement of fact: the Department's evidence does not satisfy the burden of proof. As such, it is subject to review only for substantial evidence. As noted above, the IAJ found that the Department's bootstrapping and innuendo were insufficient to meet even a preponderance of the evidence

[4] The appellate court rejected Rowley's cross-appeal arguments, which he does not re-raise in this Court. Opinion at ¶¶ 29-31.

standard. App. A, CP 69, line 20. The appellate court simply applied the wrong standard of review.[5]

Finally, the appellate court also misinterpreted the felony-payment-bar statute. Opinion at ¶¶ 34-38. The Board had correctly concluded that the "Department cannot reject a claim under the felony provision of RCW 51.32.020," where the statute says that when the felony payment bar applies, the worker and his family shall not "receive any payment under this title." RCW 51.32.020; App. B, CP 13, 15, 16. This plain language does not empower the Department to deny a claim, but only to withhold payments. And this plain reading is consistent with the decisions of every tribunal that Rowley proved his right to benefits by showing an injury in the course of his employment, so the Department must bear the burden to prove a felony if it wishes deny him those benefits. The Board properly construed this plain language to ensure coverage, but the appellate court failed to do so.[6]

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[5] Mr. Rowley does not seek independent review of this error (*see* RAP 13.4(d)), but reserves his right to argue for the correct standard of review if this Court grants review.

[6] Again, Mr. Rowley does not seek independent review of this error, but reserves his right to argue proper statutory construction should this Court grant review.

REASONS WHY THE COURT SHOULD DENY REVIEW

A. Every tribunal has correctly determined that the Department bears the burden of proof – and no decision of this Court holds to the contrary.

As explained above, every tribunal to consider this action has determined that after Rowley established an injury in the course of his employment – thus proving his prima facie entitlement to benefits – the Department then bore the burden to prove he committed a felony in order to deny him those benefits. This Court has never held to the contrary. The Court should deny review.

Despite the obvious fact that this Court has never addressed this issue – much less issued a decision contrary to the appellate court's decision – the Department claims that it conflicts with "80 years" of this Court's precedents. Petition at 10-16. The Department cites no fewer than 13 opinions of this Court. *Id.* Not one of them stands for the proposition asserted by the Department.

Without analyzing each of those inapposite decisions, it should suffice to note the fallacy upon which the Department bases its erroneous argument for review. As the Department quotes, RCW 51.52.050(2)(a) says that in "an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish *a prima facie case for the relief sought in such appeal.*"

Petition at 10. Here, the "relief sought" is IIA benefits, and the "prima facie case" for that relief is proving injury in the course of employment. *See, e.g.*, Opinion at ¶¶ 13, 14 (citing RCW 51.52.050(2)(a); WAC 263-12-115(2); ***Knight v. Dep't of Labor & Indus.***, 181 Wn. App. 788, 795-96, 321 P.3d 1275, *rev. denied*, 181 Wn.2d 1023 (2014)). Even the Department does not claim that Rowley failed to prove an injury in the course of his employment. Opinion at ¶ 14.

The Department's faulty premise is that Rowley must show something more than a prima facie right to benefits. No authority supports this claim, and the Department's cited cases merely confirm Rowley's duty to prove a prima facie right to benefits. *See* Petition at 11-12 (citing numerous cases). The Department's apparent claim that Rowley should bear the nearly insurmountable burden to prove a negative – that he did *not* commit a felony – flies directly in the face of a great deal of authority requiring our courts to liberally construe the IIA so as to ensure worker benefits, "with doubts resolved in favor of the worker." Opinion at ¶ 12 (citing ***Dennis v. Dep't of Labor & Indus.***, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)).

The Department misstates the appellate Opinion by implying that it talks about "necessary" elements. Petition at 12-13. Rather,

the Opinion simply says that "[p]roof that an industrial injury occurred during the commission of a felony does not negate any element of an industrial insurance claim," so "the trial court properly treated the felony payment bar as an affirmative defense to be proved by the Department." Opinion at ¶ 20. This is correct because courts generally "treat a statutory exception as an affirmative defense to be proved by the party asserting it 'unless the statute reflects legislative intent to treat proof of the absence of the exception as one of the elements of a cause of action, or the exception operates to negate an element of the action.'" *Id.* at ¶ 19 & n.14 (citing ***Asplundh Tree Expert Co. v. Dep't of Labor & Indus.***, 145 Wn. App. 52, 61, 185 P.3d 646 (2008)).[7]

Finally, the Departments misses the mark with its arguments about the suicide and victims compensation cases, ***Mercer v. Dep't of Labor & Indus.***, 74 Wn.2d 96, 442 P.2d 1000 (1968); ***Willoughby v. Dep't of Labor & Indus.***, 147 Wn.2d 725, 57 P.3d 611 (2002); ***Schwab v. Dep't of Labor & Indus.***, 76 Wn.2d 784, 459 P.2d 1 (1969); and ***Stafford v. Dep't of Labor & Indus.***, 33 Wn. App. 231,

[7] The Department's attempt to distinguish ***Asplundh*** in a footnote (Petition at 13 n.3) misses the point: this is a *general rule*, so the appellate court was not stating our implying that ***Asplundh*** was directly controlling.

653 P.2d 1350 (1982). Petition at 13-15. As the appellate court noted, the issue in suicide cases like ***Mercer*** is whether an exception to the suicide bar applies, so the burden remains with the claimant. Opinion at ¶ 27. And in ***Stafford***, the appellate court concluded that the Legislature intended to depart from the general rule that one asserting a general statutory limitation (like the Department here) bears the burden of proof because that (different) statute's statement of legislative intent left the burden with the claimant. Opinion at ¶ 21. No such legislative intent exists here. *Id.*

B. No "uncertainty" arises from placing the burden of proof on the party asserting a general statutory limitation.

Contrary to the Department's claims at Petition 16-18, no "uncertainty" arises from placing the burden of proof on the Department here. As noted immediately above, it is black letter law that the party asserting a general statutory limitation bears the burden of proof. And this Court should not consider the Department's erroneous claim that the felony-payment-bar statute "is a specialized type of course of employment statute," both because it was never raised below and because the statute says no such thing. Simply put, the burden of proof in this case is not an issue of substantial public

interest because the Court of Appeals – like every other tribunal in this case – correctly applied black letter law.

C. The clear, cogent, and convincing standard of proof is both appropriate and extremely well established.

Here too, the trial and appellate courts simply applied black letter law in deferring to the Board's policy decision to impose a clear, cogent, and convincing standard of proof. *See* Opinion at ¶¶ 22-28. This punitive statute imposes substantial stigma and economic punishment on workers who are otherwise entitled to receive benefits. *Id.* at ¶ 24. The heightened standard simply recognizes that these punishments require greater protections for workers. The appellate court properly affirmed, and there is no Supreme Court authority to the contrary. The Court should deny review.

CONCLUSION

For the reasons stated, the Court should deny review.

RESPECTFULLY SUBMITTED this 8th day of April, 2015.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** postage prepaid, via U.S. mail on the 8th day of April 2015, 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 Ciclerski

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

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

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

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:

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13 of 27 DOCUMENTS

THE DEPARTMENT OF LABOR AND INDUSTRIES, *Appellant*, v. BART A. ROWLEY, SR., *Respondent.*

NO. 71737-5

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

2014 Wash. App. LEXIS 3008

September 16, 2014, Oral Argument
December 22, 2014, Filed

PRIOR HISTORY: [*1] Appeal from Pierce County Superior Court. Docket No: 12-2-06549-2. Judge signing: Honorable Rosanne Nowak Buckner. Judgment or order under review. Date filed: 12/07/2012.

COUNSEL: For Appellant/Cross-Respondent: James P Mills, Office of the Attorney General - Tacoma, Tacoma, WA.

For Respondent/Cross-Appellant: Patrick Arthur Palace, Palace Law Offices, Tacoma, WA; Kenneth Wendell Masters, Masters Law Group PLLC, Bainbridge Island, WA.

JUDGES: Authored by J. Robert Leach. Concurring: Michael J. Trickey. Mary Kay Becker.

OPINION BY: J. Robert Leach

OPINION

¶1 LEACH, J. -- The Department of Labor and Industries (Department) appeals a trial court decision awarding Bart A. Rowley Sr. industrial insurance benefits and presents an issue of first impression. We must decide what burden of proof and standard of proof apply when the Department claims the felony payment bar of *RCW 51.32.020* prevents a worker from receiving benefits for an injury sustained in the course of employment.

¶2 Because courts liberally construe the Industrial Insurance Act, *Title 51 RCW*, to provide coverage and defer to the Board of Industrial Insurance Appeals (Board) in its area of expertise, we adopt the Board's conclusion that the Department has the burden of proving the felony payment bar [*2] by clear, cogent, and convincing evidence. But because the trial court erroneously required a laboratory test to establish a substance as a narcotic, we remand for further proceedings consistent with this opinion.

FACTS

¶3 Bart Rowley worked as a truck driver for 33 years and spent 6 years working for Joseph B. Anderson.[1] On August 14, 2008, Rowley signed into work at 7:30 a.m. Later that clear, dry morning, he inexplicably drove his tractor-trailer truck off an overpass on highway 599. The truck landed on the road below with the trailer on top of the cab. Paramedics took Rowley to the Harborview Hospital trauma center.

1 The employer on Department documents is listed as Craig Mungas Receiver for Jos (Sunset Machinery). Mungas was the court-appointed receiver for Joseph Anderson.

¶4 Kent Police Officer Donevan Dexheimer went to the Harborview Medical Center emergency room to investigate. Dexheimer, a certified drug recognition expert, had training to perform a 12-step drug influence evaluation. An emergency staff member told him about a "surprise" found in Rowley's pocket: a small plastic "baggie" with smiley faces on it. By the time Dexheimer arrived, hospital staff had placed Rowley's clothes [*3] in the trash. Staff also dumped the white substance in the baggie in the sink and placed the baggie in the trash. At Dexheimer's request, a nurse retrieved the baggie from the trash. The baggie was "in a trash bag, a large trash bag that contained several smaller garbage bags that contained Mr. Rowley's clothing." In the baggie, Dexheimer saw residue of a crystalline substance that from its packaging and appearance "looked to [him] like methamphetamine."

¶5 Dexheimer placed the unconscious Rowley under arrest for DUI (driving under the influence of an intoxicant). Dexheimer gave another nurse two vials to hold blood samples, which the nurse took from Rowley in Dexheimer's presence. Dexheimer labeled the samples and gave the vials and the baggie to Trooper Nicholas King. King performed a field test on the substance in the baggie and determined it was likely methamphetamine. Though the blood samples were sent to the state toxicology lab, the baggie was not. Subsequent toxicology testing of the blood samples revealed 0.88 milligrams per liter of methamphetamine.[2]

2 A state toxicologist testified at the administrative hearing that this was a "pretty high level" that would likely cause impairment. [*4]

¶6 Rowley sustained extensive injuries, including a severed spinal cord. He remained in an induced coma for 40 days following the accident and has no memory of events from several days before the accident until 40 days afterward. He remains partially paralyzed and confined to a wheelchair.

¶7 In an October 27, 2008, order, the Department rejected Rowley's industrial injury claim and required repayment of time-loss benefits in the amount of $3,542.88. The order cited *RCW 51.32.020*[3] as the basis for this rejection. Following Rowley's protest, the Department affirmed its order on January 13, 2009. Rowley appealed to the Board.

3 *RCW 51.32.020* states,

> 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.

¶8 On July 8, 2011, an industrial appeals judge (IAJ) reversed the Department's order, concluding that 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 [*5] commission of, a felony, within the meaning of *RCW 51.32.020*." The Department appealed the IAJ's order. On January 30, 2012, in a split decision, the Board likewise reversed the Department's January 13, 2009, order, concluding that "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*."

¶9 The Department appealed to Pierce County Superior Court, which affirmed the Board's decision on December 7, 2012. The superior court adopted the Board's legal conclusion that "[t]he 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." The court also concluded, "Absent a confirming laboratory test the Department did not prove the white substance in the baggie, found in Mr. Rowley's clothes, was methamphetamine." The Department appeals.

STANDARD OF REVIEW

¶10 In workers' compensation cases, this court reviews a superior court judgment as it does in other civil cases.[4] This means that we examine the record to see if substantial evidence supports the trial court's factual [*6] findings and then review, de novo, whether the trial court's conclusions of law flow from those findings.[5] When the trial court has applied the wrong standard for the sufficiency of the evidence or burden of proof, this court remands to the trial court for the trial court to apply the correct standard.[6]

4 *RCW 51.52.140.*
5 *Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180, 210 P.3d 355 (2009).*
6 *Spring v. Dep't of Labor & Indus., 96 Wn.2d 914, 920-21, 640 P.2d 1 (1982).*

ANALYSIS

¶11 In this case we address three issues in the order identified: (1) what burden of proof and standard of proof apply when the Department claims the felony payment bar of *RCW 51.32.020*, (2) can the Department prove the identity of an alleged controlled substance without a laboratory test, and (3) does the felony payment bar authorize the Department to deny a claim or only payments?

¶12 Washington's Industrial Insurance Act reflects a legislatively imposed compromise between employers and workers.[7]

> In exchange for limited liability the employer would pay on some claims for which there had been no common law liability. The worker gave up common law remedies and would receive less, in most cases, than he would have received had he won in court in a civil action, and in exchange would be sure of receiving that lesser amount without having to fight for it.[8]

Because the Industrial Insurance Act is remedial in [*7] nature, courts liberally construe its provisions "in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker."[9]

7 *Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 469, 745 P.2d 1295 (1987).*
8 *Dennis, 109 Wn.2d at 469.*
9 *Dennis, 109 Wn.2d at 470.*

¶13 A worker who applies for benefits must prove an injury in the course of employment.[10] If the Department denies the claim, the injured worker may appeal to the Board.[11] At this appeal, the worker has the burden of establishing a right to compensation.[12] If a worker's injury occurs while the worker is in the commission of a felony, the act's felony payment bar prevents the worker from receiving benefits.[13]

10 *RCW 51.52.050(2)(a)*; *WAC 263-12-115(2)*; *Knight v. Dep't of Labor & Indus., 181 Wn. App. 788, 795-96, 321 P.3d 1275 (2014), petition for review filed*, No. 90587-8 (Wash. Aug. 5, 2014).
11 *RCW 51.52.050(2)(a).*
12 *RCW 51.52.050(2)(a).*
13 *RCW 51.32.020.*

¶14 The parties do not dispute that Rowley's injury occurred in the course of his employment. However, the Department alleged that Rowley possessed methamphetamine when injured and ordered Rowley to repay the time-loss compensation previously paid to him. Possession of methamphetamine is a felony under the Uniform Controlled Substances Act, *chapter 69.50 RCW.*

¶15 In Rowley's appeal, the Board concluded that once a worker has established a prima facie case, the burden shifts to the Department "to prove by at least clear, cogent, and convincing [*8] 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." The superior court affirmed this legal conclusion.

¶16 The Department disagrees with this interpretation of *RCW 51.32.020.* It contends that Rowley must make an initial prima facie showing both that he was injured in the course of employment and that he was not engaged in the commission of a felony when injured. It also asserts that the preponderance of the evidence standard of proof applies rather than the clear, cogent, and convincing standard.

¶17 On cross appeal, Rowley makes three arguments. First, he contends that a worker establishes a prima facie entitlement to benefits by showing that an injury occurred in the course of employment. Next, he claims that when the Department asserts the felony payment bar, it must prove a felony conviction. Alternatively, he claims the Department must prove beyond a reasonable doubt that a worker's injury occurred during the commission of a felony.

¶18 We agree with the superior court: the Department must prove facts establishing the felony payment bar by clear, cogent, and convincing evidence.

¶19 We first address the burden [*9] of proof. As noted by the Board, felony payment bar appeals differ from ordinary industrial insurance appeals. The felony payment bar creates a statutory exception to the general rule that the Industrial Insurance Act provides benefits for a covered worker suffering an industrial injury. Courts treat a statutory exception as an affirmative defense to be proved by the party asserting it "unless the statute reflects legislative intent to treat proof of the absence of the exception as one of the elements of a cause of action, or the exception operates to negate an element of the action."[14]

14 *Asplundh Tree Expert Co. v. Dep't of Labor & Indus., 145 Wn. App. 52, 61, 185 P.3d 646 (2008).*

¶20 The legislative history for the felony payment bar in *chapter 51.32 RCW* provides no indication of any legislative intent to treat the absence of felonious conduct as an element of an industrial insurance claim. Proof that an industrial injury occurred during the commission of a felony does not negate any element of an industrial insurance claim. Thus, we conclude that the trial court properly treated the felony payment bar as an affirmative defense to be proved by the Department. We note that this allocation of the burden of proof furthers the general policy of construing the Industrial Insurance Act liberally "in order [*10] to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker."[15]

15 *Dennis, 109 Wn.2d at 470.*

¶21 Citing *Stafford v. Department. of Labor & Industries*,[16] the Department asks this court to analogize the felony payment bar to the burden of a crimes victim compensation act[17] (CVCA) claimant. *Stafford* does not support the Department's position. In *Stafford*, the court decided that a CVCA claimant had the burden of proving the innocence of the crime victim. We find significant the analysis used by the court. It acknowledged the general rule that one asserting the benefits of a general limitation of a statute has the burden of proof.[18] It used the language of the legislature's statutory statement of intent as a lens to inform its construction of the relevant statute and concluded the legislature intended to deviate from the general rule and place on the claimant the burden of proving the victim's innocence.[19] The Department has not identified any parallel statement of legislative intent to support its request that we also deviate from the recognized general rule.

16 *33 Wn. App. 231, 653 P.2d 1350 (1982).*
17 *Ch. 7.68 RCW.*
18 *Stafford, 33 Wn. App. at 236.*
19 *Stafford, 33 Wn. App. at 236.*

¶22 We next address the standard of proof. The preponderance of the evidence standard [*11] of proof usually applies in industrial insurance appeals.[20] No general principle or fixed rule exists for deciding when to require more than a preponderance of the evidence to prove something. Without any one guiding principle or rule, Washington courts have required proof of facts by clear, cogent, and convincing evidence in over 30 different types of cases.[21] These cases include those involving "involuntary mental illness commitment, fraud, 'some other quasi-criminal wrongdoing by the defendant' as well as the risk of having one's 'reputation tarnished erroneously.'"[22] For the most part, when these cases do not involve the loss of liberty or deprivation of a property interest, they reflect a policy decision.

20 *Olympia Brewing Co. v. Dep't of Labor & Indus., 34 Wn.2d 498, 504, 208 P.2d 1181 (1949).*
21 *See* 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 301.3, at 200-06 & nn.5-41 (5th ed. 2007).
22 *Bang D. Nguyen v. Dep't of Health Med. Quality Assurance Comm'n, 144 Wn.2d 516, 524-25, 29 P.3d 689 (2001)* (quoting *Addington v. Texas, 441 U.S. 418, 424, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)).*

¶23 For example, in *American Products Co. v. Villwock*,[23] the court held that emancipation of a minor must be proved by clear, cogent, and convincing evidence because the right and duty of a parent "to exercise parental control and to provide parental care and support, is of such paramount importance and necessity, and is so thoroughly recognized in law and by society in general." [*12]

23 *7 Wn.2d 246, 268, 109 P.2d 570 (1941).*

¶24 Here, the Board made a policy decision about the standard of proof based upon the consequences of a felonious conduct finding,

> [A]n 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*.[24]

24 *In re Rowley, No. 09 12323, 2012 WL 1374566, at *4 (Wash. Bd. of Indus. Ins. Appeals Jan. 30, 2012).*

¶25 While not controlling, the construction and application of a statute [*13] by an administrative agency charged with its enforcement often provides a valuable aid to the courts and should be given great weight.[25] This includes consideration of how the agency "'fill[ed] in the gaps'" to effect a general statutory scheme, so long as the "agency does not purport to 'amend' the statute."[26]

25 *Hama Hama Co. v. Shorelines Hearings Bd., 85 Wn.2d 441, 448, 536 P.2d 157 (1975).*
26 *Hama Hama Co., 85 Wn.2d at 448.*

¶26 Here, the legislature has not provided any standard of proof for the felony payment bar under *RCW 51.32.020*. Consistent with the purpose of the Industrial Insurance Act, the policy of liberal construction of the act, and other decisions of the Board involving the standard of proof, the Board adopted a clear, cogent, and convincing standard of proof. It provided a sound analysis for its decision that recognizes the significant differences and consequences between a felony payment bar appeal and an ordinary industrial insurance appeal. The trial court appropriately deferred to the expertise of the Board on this issue. Because we find the Board's justification for its decision persuasive, we hold that the State must prove the facts supporting the felony payment bar under *RCW 51.32.020* by clear, cogent, and convincing evidence to deny a worker industrial insurance benefits the worker should otherwise receive.

¶27 The Department [*14] contends that *Mercer v. Department of Labor & Industries*[27] requires a different result because it involved the same statute. In addition to barring benefits for workers while in commission of a felony, *RCW 52.32.020* also bars benefits for beneficiaries of workers who commit suicide. In *Mercer*, the court held the claimant had the burden of establishing by competent medical evidence that the decedent acted under an incontrollable impulse or while in a delirium when he committed suicide. The Department claims that *Mercer* means all claimants must affirmatively prove that the bars to compensation in *RCW 52.32.020* do not apply. However, in *Mercer*, the parties did not dispute the decedent's suicide.[28] Instead, the claimant asserted that an exception to the suicide bar applied. Consistent with our analysis, the court allocated the burden of proof to the party claiming an exception, the claimant.[29] Thus, *Mercer* provides no support for the Department's position.

27 *74 Wn.2d 96, 442 P.2d 1000 (1968).*
28 *Mercer, 74 Wn.2d at 101.*
29 *Mercer, 74 Wn.2d at 98.*

¶28 The Department also points to statutory exclusions in *RCW 51.12.020* to show that a claimant has the burden to establish that he or she does not fall within these exclusions.[30] However, these exclusions negate employment status or deal with an employer's exempted status under the [*15] Industrial Insurance Act, thus undermining a necessary element of a prima facie case, covered employment status. In contrast, the felony payment bar does not negate proof of a worker's covered employment status.

30 *Bennerstrom v. Dep't of Labor & Indus., 120 Wn. App. 853, 871, 86 P.3d 826 (2004)* (summary judgment in favor of Department of Social and Health Services when the claimant did not consent to an employment relationship); *Hanquet v. Dep't of Labor & Indus., 75 Wn. App. 657, 662, 879 P.2d 326 (1994)* (while the claimant had the burden of proof, he "cannot reasonably be expected to prove the negative of every one of the nine possible exclusions"); *Berry v. Dep't of Labor & Indus., 45 Wn. App. 883, 885, 729 P.2d 63 (1986)* (trial court upholds Department denial of claim when partner is expressly excluded from coverage in statute); *Stelter v. Dep't of Labor & Indus., 147 Wn.2d 702, 711, 57 P.3d 248 (2002)* (when claimant's employer was exempt from Industrial Insurance Act, summary judgment was reinstated to affirm denial of claim).

¶29 We next address Rowley's arguments on cross appeal about the standard of proof. Rowley claims that the felony payment bar only applies if the Department proves a felony conviction. Alternatively, he contends that the Department must prove beyond a reasonable doubt the facts supporting the felony payment bar. We disagree with both contentions.

¶30 Although this case involves alleged criminal conduct, it is a civil case governed by civil law.[31] Generally, Washington [*16] courts do not require proof of a conviction to establish criminal conduct in a civil case.[32] Washington's slayer statute bars those who have willfully and unlawfully participated in killing another person from receiving any benefit as a result.[33] An action under the slayer statute is civil, and the determination of whether a slaying was willful and unlawful must be made in civil court independently of the result of any criminal case.[34] A party can offer a criminal conviction as evidence, but the lack of a criminal conviction does not foreclose the possibility of one acting unlawfully and falling under the civil slayer statute.[35] Rowley offers no persuasive reason why the same rule should not apply here.

31 *RCW 51.52.140.*
32 *In re Estate of Kissinger, 166 Wn.2d 120, 122-23, 206 P.3d 665 (2009).*
33 *Ch. 11.84 RCW.*
34 *Kissinger, 166 Wn.2d at 132.*
35 *Kissinger, 166 Wn.2d at 128.*

¶31 Alternatively, Rowley argues that due process requires that the Department should have to prove felonious conduct beyond a reasonable doubt. Rowley relies upon *Mathews v. Eldridge*[36] to support this claim. With the elevated standard of proof applied by the Board and the trial court, an administrative hearing, and a trial de novo in superior court, Rowley received greater procedural protections than most civil litigants. His due process claim borders on frivolous.

36 *424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).*

¶32 Next, we address the Department's [*17] challenge to the superior court's conclusion of law that "absent a confirming laboratory test the Department did not prove the white substance in the baggie, found in Mr. Rowley's clothes, was methamphetamine." The Department contends that it can satisfy the clear, cogent, and convincing standard of proof for the identity of the white substance without a laboratory test. We agree.

¶33 In a criminal prosecution, without a laboratory test, the State can establish beyond a reasonable doubt the identity of a controlled substance with lay testimony and circumstantial evidence.[37] The same types of evidence can satisfy the lesser standard of clear, cogent, and convincing evidence. The Board and trial court erred by requiring a laboratory test to establish the identity of the substance allegedly possessed by Rowley.

37 *State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).*

¶34 Finally, we address the Department's challenge to the trial court's conclusion of law that the "Department could not reject a claim under the felony provision of *RCW 51.32.020*," suggesting that the Department may only reject payments. The Department argues that this parsing of claims versus payments contradicts the plain meaning of the statute. Rowley responds that the trial court did not err and [*18] that *RAP 2.5(a)* prevents the Department from raising this issue for the first time on appeal.

¶35 The Department argued to the trial court that the plain language of *RCW 51.32.020* allowed the Department to properly reject Rowley's claim. The Department properly challenges the trial court's conclusion of law on appeal.[38]

38 *RAP 2.5(a).*

¶36 The relevant portion of the statute containing the felony payment bar reads,

> 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.[39]

39 *RCW 51.32.020.*

¶37 The Department must be able to reject claims when payments are prohibited. Under the Industrial Insurance Act, the Department has powers expressly granted as well as implied powers.[40] When the legislature charges an agency with a specific duty but does not specify the means of accomplishing that duty, the agency has implied authority to accomplish that duty.[41] If a claimant is found to be in the commission of a felony during an industrial injury, the claimant may not collect "any payment under this title."[42] The unambiguous language of the statute that empowers the Department to deny [*19] all payments under *Title 51 RCW* implies the Department's power to deny the underlying claim should a statutory bar to payment apply.

40 *Tuerk v. Dep't of Licensing, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994).*
41 *Tuerk, 123 Wn.2d at 124-25; Ortblad v. State, 85 Wn.2d 109, 117, 530 P.2d 635 (1975).*
42 *RCW 51.52.020.*

¶38 The Department cites *In re Mathieson,*[43] a 1958 Board decision, to show that the term "payment" refers to all benefits and coverage. *Mathieson* held that a widow was not entitled to any "benefits" because her husband had died while driving under the influence of alcohol, a crime that placed him under the purview of the statutory bar at the time.[44] The Department also notes that the trial court's interpretation would require the Department to pay for medical and vocational benefits since these are not direct payments to the worker. We agree with the Department's assertion that the legislature intended the felony payment bar of *RCW 51.32.020* to exclude workers engaged in felonious conduct from any industrial insurance "coverage." This means the Department has the implied authority to deny that worker's claim.

43 *No. 7099, 1958 WL 56109 (Wash. Bd. of Indus. Ins. Appeals Jan. 28, 1958).*
44 *Mathieson, 1958 WL 56109, at *7-8.*

¶39 When the Department appeals, the worker can recover attorney fees under *RCW 51.52.130(1)* if the worker's "right to relief is sustained." Because we must remand this matter to the trial court to decide if the Department presented sufficient evidence [*20] to prove Rowley possessed methamphetamine, we deny Rowley's fee request.

CONCLUSION

¶40 Because courts liberally construe the Industrial Insurance Act to provide coverage, we adopt the Board's conclusion that the Department has the burden of proving the felony payment bar of *RCW 51.32.020* by clear, cogent, and convincing evidence. Because the trial court erroneously required a laboratory test to establish the identity of the substance allegedly possessed by Rowley, we remand for further proceedings consistent with this opinion.

BECKER and TRICKEY, JJ., concur.

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 51.52.050
Service of departmental action — Demand for repayment — Orders amending benefits — Reconsideration or appeal.

(1) Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, or if the worker, beneficiary, employer, or other person affected thereby chooses, the department may send correspondence and other legal notices by secure electronic means except for orders communicating the closure of a claim. Persons who choose to receive correspondence and other legal notices electronically shall be provided information to assist them in ensuring all electronic documents and communications are received. Correspondence and notices must be addressed to such a person at his or her last known postal or electronic address as shown by the records of the department. Correspondence and notices sent electronically are considered received on the date sent by the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia. However, a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

(2) (a) Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.

(b) An order by the department awarding benefits shall become effective and benefits due on the date issued. Subject to (b)(i) and (ii) of this subsection, if the department order is appealed the order shall not be stayed pending a final decision on the merits unless ordered by the board. Upon issuance of the order granting the appeal, the board will provide the worker with notice concerning the potential of an overpayment of benefits paid pending the outcome of the appeal

and the requirements for interest on unpaid benefits pursuant to RCW 51.52.135. A worker may request that benefits cease pending appeal at any time following the employer's motion for stay or the board's order granting appeal. The request must be submitted in writing to the employer, the board, and the department. Any employer may move for a stay of the order on appeal, in whole or in part. The motion must be filed within fifteen days of the order granting appeal. The board shall conduct an expedited review of the claim file provided by the department as it existed on the date of the department order. The board shall issue a final decision within twenty-five days of the filing of the motion for stay or the order granting appeal, whichever is later. The board's final decision may be appealed to superior court in accordance with RCW 51.52.110. The board shall grant a motion to stay if the moving party demonstrates that it is more likely than not to prevail on the facts as they existed at the time of the order on appeal. The board shall not consider the likelihood of recoupment of benefits as a basis to grant or deny a motion to stay. If a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW 51.32.240.

(i) If upon reconsideration requested by a worker or medical provider, the department has ordered an increase in a permanent partial disability award from the amount reflected in an earlier order, the award reflected in the earlier order shall not be stayed pending a final decision on the merits. However, the increase is stayed without further action by the board pending a final decision on the merits.

(ii) If any party appeals an order establishing a worker's wages or the compensation rate at which a worker will be paid temporary or permanent total disability or loss of earning power benefits, the worker shall receive payment pending a final decision on the merits based on the following:

(A) When the employer is self-insured, the wage calculation or compensation rate the employer most recently submitted to the department; or

(B) When the employer is insured through the state fund, the highest wage amount or compensation rate uncontested by the parties.

Payment of benefits or consideration of wages at a rate that is higher than that specified in (b)(ii)(A) or (B) of this subsection is stayed without further action by the board pending a final decision on the merits.

(c) In an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

[2011 c 290 § 9; 2008 c 280 § 1; 2004 c 243 § 8; 1987 c 151 § 1; 1986 c 200 § 10; 1985 c 315 § 9; 1982 c 109 § 4; 1977 ex.s. c 350 § 75; 1975 1st ex.s. c 58 § 1; 1961 c 23 § 51.52.050. Prior: 1957 c 70 § 55; 1951 c 225 § 5; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1947 c 247 § 1, part; 1911 c 74 § 20, part; Rem. Supp. 1947 § 7676e, part. (iii) 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. (iv) 1923 c 136 § 7, part; 1921 c 182 § 10, part; 1917 c 29 § 3, part; RRS § 7712, part. (v) 1917 c 29 § 11; RRS § 7720. (vi) 1939 c 50 § 1, part; 1927 c 310 § 9, part; 1921 c 182 § 12, part; 1919 c 129 § 5, part; 1917 c 28 § 15, part; RRS § 7724, 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.]

WAC 263-12-115
Procedures at hearings.

(1) **Industrial appeals judge.** All hearings shall be conducted by an industrial appeals judge who shall conduct the hearing in an orderly manner and rule on all procedural matters, objections and motions.

(2) **Order of presentation of evidence.**

(a) In any appeal under either the Industrial Insurance Act, the Worker and Community Right to Know Act, or the Crime Victims Compensation Act, the appealing party shall initially introduce all evidence in his or her case-in-chief except that in an appeal from an order of the department that alleges fraud or willful misrepresentation the department or self-insured employer shall initially introduce all evidence in its case-in-chief.

(b) In all appeals subject to the provisions of the Washington Industrial Safety and Health Act, the department shall initially introduce all evidence in its case-in-chief.

(c) After the party with the initial burden has presented his or her case-in-chief, the other parties may then introduce the evidence necessary to their cases-in-chief. In the event there is more than one other party, they may either present their cases-in-chief successively or may join in their presentation. Rebuttal evidence shall be received in the same order. Witnesses may be called out of turn in contravention of this rule only by agreement of all parties.

(3) **Objections and motions to strike.** Objections to the admission or exclusion of evidence shall be in short form, stating the legal grounds of objection relied upon. Extended argument or debate shall not be permitted.

(4) **Rulings.** The industrial appeals judge on objection or on his or her own motion shall exclude all irrelevant or unduly repetitious evidence and statements that are inadmissible pursuant to WAC 263-12-095(5). All rulings upon objections to the admissibility of evidence shall be made in accordance with rules of evidence applicable in the superior courts of this state.

(5) **Interlocutory appeals to the board - Confidentiality of trade secrets.** A direct appeal to the board shall be allowed as a matter of right from any ruling of an industrial appeals judge adverse to the employer concerning the confidentiality of trade secrets in appeals under the Washington Industrial Safety and Health Act.

(6) **Interlocutory review by a chief industrial appeals judge.**

(a) Except as provided in subsection (5) of this section interlocutory rulings of the industrial appeals judge are not subject to direct review by the board. A party to an appeal or a witness who has made a motion to quash a subpoena to appear at board related proceedings, may within five working days of receiving an adverse ruling from an industrial appeals judge request a review by a chief industrial appeals

judge or his or her designee. Such request for review shall be in writing and shall be accompanied by an affidavit in support of the request and setting forth the grounds for the request, including the reasons for the necessity of an immediate review during the course of conference or hearing proceedings. Within ten working days of receipt of the written request, the chief industrial appeals judge, or designee, may decline to review the ruling based upon the written request and supporting affidavit; or, after such review as he or she deems appropriate, may either affirm or reverse the ruling, or refer the matter to the industrial appeals judge for further consideration.

(b) Failure to request review of an interlocutory ruling shall not constitute a waiver of the party's objection, nor shall an unfavorable response to the request preclude a party from subsequently renewing the objection whenever appropriate.

(c) No conference or hearing shall be interrupted for the purpose of filing a request for review of the industrial appeals judge's rulings; nor shall any scheduled proceedings be canceled pending a response to the request.

(7) **Recessed hearings.** Where, for good cause, all parties to an appeal are unable to present all their evidence at the time and place originally set for hearing, the industrial appeals judge may recess the hearing to the same or a different location so as to insure that all parties have reasonable opportunity to present their respective cases. No written "notice of hearing" shall be required as to any recessed hearing.

(8) **Failure to present evidence when due.** If any party is due to present certain evidence at a hearing or recessed hearing and, for any reason on its part, fails to appear and present such evidence, the industrial appeals judge may conclude the hearing and issue a proposed decision and order on the record, or recess or set over the proceedings for further hearing for the receipt of such evidence.

(9) **Offers of proof in colloquy.** When an objection to a question is sustained an offer of proof in question and answer form shall be permitted unless the question is clearly objectionable on any theory of the case.

(10) **Telephone testimony.** At hearings, the parties may present the testimony of witnesses by telephone if agreed to by all parties and approved by the industrial appeals judge. For good cause the industrial appeals judge may authorize telephone testimony over the objection of a party after weighing the following nonexclusive factors:

- The need to weigh a witness's demeanor or credibility.
- Difficulty in handling documents and exhibits.
- The number of parties participating in the hearing.
- Whether any of the testimony will need to be translated.
- Ability of the witness to travel.
- Feasibility of taking a perpetuation deposition.
- Availability of quality telecommunications equipment and service.

When telephone testimony is permitted, the industrial appeals judge presiding at the hearing will swear in the witness testifying by phone as if the witness appeared live at the hearing. For rules relating to telephone deposition testimony, see WAC 263-12-117.

[Statutory Authority: RCW 51.52.020. WSR 14-24-105, § 263-12-115, filed 12/2/14, effective 1/2/15; WSR 08-01-081, § 263-12-115, filed 12/17/07, effective 1/17/08; WSR 03-02-038, § 263-12-115, filed 12/24/02, effective 1/24/03; WSR 00-23-021, § 263-12-115, filed 11/7/00, effective 12/8/00; WSR 91-13-038, § 263-12-115, filed 6/14/91, effective 7/15/91; WSR 84-08-036 (Order 17), § 263-12-115, filed 3/30/84. Statutory Authority: RCW 51.41.060(4) and 51.52.020. WSR 83-01-001 (Order 12), § 263-12-115, filed 12/2/82. Statutory Authority: RCW 51.52.020. WSR 82-03-031 (Order 11), § 263-12-115, filed 1/18/82; Order 9, § 263-12-115, filed 8/8/75; Order 7, § 263-12-115, filed 4/4/75; Order 4, § 263-12-115, filed 6/9/72; General Order 3, Rule 7.5, filed 10/29/65; General Order 2, Rule 7.4, filed 6/12/63; General Order 1, Rule 5.10, filed 3/23/60. Formerly WAC 296-12-115.]

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ANSWER TO PETITION FOR REVIEW

Case: *Department of Labor & Industries v. Rowley*

Case Number: 91357-9

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THANK YOU.

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