71737-5

NO. 91357-9

SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner,

v.

BART A. ROWLEY,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES PETITION FOR REVIEW

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I. INTRODUCTION

In a case involving an injured worker who crashed his truck while driving impaired on methamphetamine, the Court of Appeals made a fundamental mistake regarding the burden of proof in a workers' compensation case that threatens to obviate 80 years of precedence by this Court. Since 1933, this Court in numerous decisions has emphasized that one who has appealed a decision of the Department bears the burden of establishing that the Department's decision was erroneous, and has emphasized that workers appealing such orders are held to "strict proof of their right to receive benefits." The Legislature enshrined this longstanding principle into statute in 1975: it directs that a party appealing a Department order has "the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such an appeal." RCW 51.52.050; Laws of 1975, 1st Ex. Sess., ch. 58, §1.

Turning the controlling authority upside down, the Court of Appeals mistakenly held that the Department has the burden to show that its order is correct when the Department denied a worker benefits under RCW 51.32.020 because the worker was in the course of committing a felony at the time of his injury. This decision conflicts with this Court's many decisions placing the burden on the appealing party. Determining who bears the burden of proof and what the standard of proof is in a

workers' compensation case presents an issue of substantial public interest because these issues affect the multitude of workers' compensation appeals yearly. Furthermore, the logic of the Court of Appeals' decision here is not limited to cases involving workers who are injured while committing felonies, but may be extended to any case where the Department denies a worker benefits based on a statutory bar.

II. IDENTITY OF PETITIONER AND DECISION

The Department petitions for review of the published decision of Division One of the Court of Appeals, *Department of Labor & Industries v. Rowley*, __ Wn. App. __, 340 P.3d 929 (2014), filed December 22, 2014 (copy attached), reconsideration denied on February 4, 2015.

III. ISSUES PRESENTED FOR REVIEW

1. RCW 51.52.050 provides that a party appealing a Department order bears "the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such an appeal." Does Rowley bear the burden to show by a preponderance of the evidence at the Board of Industrial Insurance Appeals that his injury did not occur while in the commission of a felony?

2. Assuming the burden was on the Department, does the normal civil standard of preponderance of the evidence apply?

IV. STATEMENT OF THE CASE

A. Rowley Possessed Methamphetamine When He Was Involved In a Motor Vehicle Accident

While driving with methamphetamine in his system, Rowley was severely injured when he drove his truck-trailer off an overpass on north-bound 599. CP 791-818, 641-42, 987-88. The truck veered off the straight and level road at full speed and landed on the roadway below the overpass. CP 744, 989. Rowley was taken to Harborview Hospital in Seattle, where he was attended to by medical staff. CP 737-38.

Officer Donevan Dexheimer, a trained drug recognition officer, was sent to the hospital because Rowley was suspected of being under the influence of an illicit substance. CP 718-33, 732. State Patrol also dispatched Troopers Nicholas King and David Roberts to respond to the accident and conduct an investigation. CP 499-501, 984-85.

When Officer Dexheimer arrived Nurse Jennifer Compton told him that Rowley had a "surprise" in his pocket when he had arrived in the emergency room—a baggie with a smiley face containing off-white granules. CP 737, 744-47. Rowley's clothes had been removed and most of the contents found in the baggie had been dumped into the sink. CP 906, 923. Rowley's clothes and the baggie had been placed in a trash bag in the hallway. CP 744. Nurse Mary Comstock took Officer Dexheimer to

the trash where Rowley's clothes and the baggie had been taken. CP 760-61. Nurse Comstock retrieved the baggie with the smiley face and gave it to Officer Dexheimer. CP 761. Officer Dexheimer examined the substance in the bag and determined that the substance in the baggie appeared to be methamphetamine: it was packed in a one-inch square baggie—the most common way to package illicit drugs; the residual in the bag were granules, the type of crystals typical of methamphetamine; and, the coloration was off-white—typical of methamphetamine. CP 745.

When he arrived to conduct the investigation, Trooper King field-tested the substance in the baggie using a commercial testing kit, and it tested positive for methamphetamine. CP 527. The baggie, and any laboratory tests that may have been performed, were not submitted at the Board hearing. Trooper King submitted it to the State Patrol's evidence system, but he could not say what happened to baggie. CP 517-18.

As part of the investigation, Officer Dexheimer also had Rowley's blood drawn and taken to the state laboratory for testing. CP 749-50. Brian Capron, a forensic specialist employed by the Washington State Toxicology Laboratory, testified that Rowley had a high amount of methamphetamine in his blood the day of his accident. CP 791-818.

Because the industrial injury occurred while Rowley committed the felony of possession of methamphetamine, a controlled substance in

violation of RCW 69.50.4013, the Department rejected Rowley's claim by an October 27, 2008 order. *See* CP 16, 242. The order specifically stated that the basis for the rejection was RCW 51.32.020. CP 275. Rowley protested the order. CP 69. The Department affirmed that order on January 13, 2009. CP 69. Rowley appealed to the Board of Industrial Insurance Appeals. CP 76-77.

B. Although Aware of RCW 51.52.050, the Board Placed the Burden of Proof on the Department

At the Board, Rowley presented his case-in-chief to prove entitlement to benefits. Rowley's testimony as to what occurred at the time of his injury was minimal, as he could not remember any of the events that had occurred during a period of time ranging from one week before the accident to 40 days after the accident. CP 647-48. He did testify that to the best of his knowledge that he had random urine tests and had never tested positive for drugs before the day of the accident. CP 649-50. However, on cross-examination he admitted he never saw any medical records related to the drug tests on the day of the accident and did not actually know whether he tested positive in the hospital. CP 656.

After Rowley rested his case, the Department presented Officer Dexheimer, Trooper King, Trooper Roberts, Nurse Compton, Nurse Comstock, and the state toxicologist specialist, Brian Capron. CP 63-68.

Applying the preponderance of the evidence standard, the industrial appeals judge issued a proposed decision and order that determined that the evidence did 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." CP 69-70 (emphasis added). The Department filed a petition for review, noting that the law does not require the Department to establish that the worker specifically *intended* to commit a felony at the time of the injury.

The Board granted review. The Board issued a decision and order with three separate opinions. CP 11-19. The three-member Board agreed that the law did not require a criminal conviction during the commission of a crime. CP 13-14. However, the Board shifted the burden of proof to the Department, and it applied a higher standard of proof. CP 15. Of the three members, none applied the identical standard of proof. CP 15-19. One applied the clear, cogent, and convincing standard. CP 14. Another member signed the "majority" opinion, but then wrote a concurring opinion applying the standard of proof of beyond a reasonable doubt. CP 17-18. The third member dissented and argued that the preponderance of the evidence applied and that there was ample evidence to support either by preponderance or by clear, cogent, and convincing evidence that Rowley was in the possession of methamphetamine. CP 18-19. Ultimately, the

Board applied the clear, cogent, and convincing evidence standard and reversed the Department order. CP 14.

The Board further decided that RCW 51.32.020 did not give the Department the authority to reject Rowley's claim. CP 13. Lastly, the Board created a bar to presenting evidence of possession without a confirming laboratory test. CP 16.

C. The Superior Court and Court of Appeals Rejected the Argument That RCW 51.52.050 Placed the Burden of Proof on Rowley at the Board

The Department appealed to Pierce County Superior Court. The Department argued that RCW 51.52.050 placed the burden of proof on Rowley at the Board and that the clear, cogent, and convincing standard did not apply. CP 1040-46. The superior court affirmed the Board, adopting findings of fact and conclusions of law consistent with the Board's findings of fact and conclusions of law. CP 1182-85.

The Department appealed to the Court of Appeals. The Department argued again that RCW 51.52.050 and Supreme Court case law place the burden of proof on party appealing the Department order. App. Br. 19-24. The Department also argued that the normal civil standard of proof applied, not clear, cogent, and convincing evidence. App. Br. 26-30. Division One rejected these arguments and affirmed the superior court in part and reversed in part. *Rowley*, 340 P.3d at 931. The Court of Appeals

believed that the Department had the burden to show by clear, cogent, and convincing evidence that Rowley committed a felony. It likened RCW 51.32.020 to an affirmative defense. *Id.* It disagreed with the superior court that the Department had to provide a confirming laboratory test to show possession of a controlled substance and remanded to determine whether the Department had proven that Rowley committed a felony. *Id.* at 936.[1] Rowley moved for reconsideration, which the Court of Appeals denied on February 4, 2015.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Department denied Rowley industrial insurance benefits because he was committing a felony at the time that he was injured. RCW 51.32.020 precludes a claimant who was injured while committing a felony from receiving benefits:

> If an 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.)

For the first time in industrial insurance law, the Court of Appeals

[1] Although it applies the incorrect burden and standard of proof, the Court of Appeals was correct when it concluded that the matter should be remanded for consideration of whether the Department can establish the identity of a controlled substance without a confirming laboratory test; it was also correct that the Department has the authority to reject claims under RCW 51.32.020. *Rowley*, 340 P.3d at 936-37.

places the burden of proof on the Department to show that its decision to deny benefits was correct. While the Legislature places the initial burden of proof on the Department in willful misrepresentation cases, for all other cases it places the burden on the appealing party. RCW 51.52.050(2)(a), (c). This Court should grant review under RAP 13.4(b)(1) because not only does the Court of Appeals' decision conflict with RCW 51.52.050's mandate, it conflicts with many decisions that require a claimant to prove entitlement to benefits based on a claim that the Department order is incorrect. *Zoff v. Dep't of Labor & Indus.*, 174 Wash. 585, 586, 25 P.2d 972 (1933); *Kirk v. Dep't of Labor & Indus.*, 192 Wash. 671, 674, 74 P.2d 227 (1937); *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942); *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 5, 163 P.2d 142 (1945); *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds by Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958); *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955); *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966); *Mercer v. Dep't of Labor & Indus.*, 74 Wn.2d 96, 101, 442 P.2d 1000 (1986).

Furthermore the decision reached this incorrect result by creating a novel rule with no support in the case law or the relevant statutes: under the decision, the burden of proof is on the Department when it denies ben-

efits based on a statute that does not "negate" a "necessary" element of a compensable claim, while the burden is on the appealing party if a statute "negates" such an element. *Rowley*, 340 P.3d at 933-34, 936. This novel rule creates uncertainty for the Department, employers, and workers about who has the burden of proof for a host of statutes contained in Title 51, as the distinction between statutes that "negate" elements and those that do not is one that the Court of Appeals created out of whole cloth. Such a significant change is question of substantial public interest that should be resolved by this Court. RAP 13.4(b)(4).

A. The Court of Appeals Decision Conflicts with 80 Years of Supreme Court Case Law Placing the Burden on the Claimant to Show a Department Order Is Incorrect

It is a fundamental tenant of workers' compensation law that the burden is on the party appealing a Department order to prove it is incorrect. RCW 51.52.050(2)(a). RCW 51.52.050(2)(a) provides for a Board appeal "[w]henever the department has taken *any* action or made *any* decision relating to any phase of administration of this title. . . ." (emphasis added). "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.*" RCW 51.52.050(2)(a) (emphasis added). The Legislature adopted this longstanding principle from case law

in its original form in 1975. Laws of 1975, 1st Ex. Sess., ch. 58, §1.[2] In 1987, the Legislature added a provision in willful misrepresentation cases that requires the Department to "initially introduce all evidence in its case in chief." Laws of 1987, ch. 151 §1; RCW 51.52.050(2)(c). The statutory scheme shows that the Legislature intended to hold the worker to the burden of proof in all cases except when the Department alleges benefits were received through willful misrepresentation. The Legislature did not provide for such burden shifting provisions with respect to RCW 51.32.020 and the absence of any provision requiring the departure from RCW 51.52.050(2)(a) shows the Legislature did not intend such a result. *See In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

Consistent with the Legislature's intent in RCW 51.52.050, this Court has held that appealing claimants must prove the Department order incorrect and it has held them to strict proof of their right to receive their requested relief. *Zoff*, 174 Wash. at 586 ("The decision of the department was prima facie correct, and the burden was upon the one attacking that decision to overcome the same by evidence."); *Kirk*, 192 Wash. at 674 ("Persons entitled to the benefits of the act should be favored by a liberal

[2] The original statute read: "[w]henever the department has taken any action or made any decision relating to any phase of the administration of this title the workman, beneficiary, employer, or other person aggrieved thereby may appeal to the board and *said appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such an appeal.*" (emphasis added).

interpretation of its provisions, but for this very reason they should be held to strict proof of their title as beneficiaries." (quotation omitted)); *Guiles*, 13 Wn.2d at 610 ("We are mindful of the rule that the burden rests on claimant to prove every element of his claim by a preponderance of the evidence."); *Hastings*, 24 Wn.2d at 5 ("The first rule is that the decision of the department is prima facie correct and the burden of proof is upon the party attacking the decision."); *Olympia Brewing Co.*, 34 Wn.2d at 505 ("We have again and again declared that, while the act should be liberally construed in favor of those who come within its terms, persons who claim rights thereunder should be held to strict proof of their right to receive the benefits provided by the act."); *Cyr*, 47 Wn.2d at 97 ("persons who claim rights thereunder should be held to strict proof of their right to receive the benefits provided by the act." (quotation omitted)); *Lightle*, 68 Wn.2d at 510 ("We have held that a liberal construction of the act does not dispose of the requirement that a claimant must prove his claim by competent evidence."); *Mercer*, 74 Wn.2d at 101 (claimant must make a "prima facie case").

The Court of Appeals' decision introduces the idea that there are "necessary" elements to an industrial insurance claim—thus, creating an artificial distinction between those that are "necessary" and those that are not. *Rowley*, 340 P.3d at 935-36. The decision provides that if a statute precludes a worker from receiving benefits by negating a *necessary* element

of a compensable claim, then the burden of proof is on the appealing party. Conversely, if the statute expressly precludes a worker from receiving benefits but it does not negate the existence of a "necessary" element of a claim, then the burden of proof is on the Department. Neither the Industrial Insurance Act, nor the case law that has grown up around the proper interpretation of it, provides any foundation for the idea that some statutory bars to receiving benefits relate to an "necessary" element while others do not, nor is there any support for the idea that this distinction determines whether the burden of proof is on the Department or an appealing party.[3]

The decision likens RCW 51.32.020's statutory ban on benefits to an "affirmative defense". However, this analogy is inapt: the Department is the only entity with original jurisdiction to adjudicate workers' compensation claims. *See* RCW 51.04.010, .020; *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539-40, 886 P.2d 189 (1994); *see also Matthews v. Dep't of Labor & Industries,* 171 Wn. App. 477, 491, n. 12, 288 P.3d 630 (2012). When it issues an order that finds a worker ineligible for benefits based on a statute, it is not asserting an affirmative defense, it is adjudicating the worker's entitlement or non-entitlement to benefits under the Act. RCW

[3] The Court of Appeals cites to *Asplundh Tree Expert Co. v. Department of Labor & Industries*, 145 Wn. App. 52, 61, 185 P.3d 646 (2008), to support its theory regarding affirmative defenses. This is not an Industrial Insurance Act case but one under RCW 49.17. RCW 49.17.120(5)(a) sets forth a separate statutory defense that defeats the finding of WISHA violation if there is unpreventable employee misconduct and unequivocally places the burden on the employer to make such a showing.

51.52.050 establishes that the appealing party has the burden to show "a prima facie case for the relief sought in such appeal", namely an appeal of "*any* action or . . . *any* decision relating to any phase of administration of this title." This does not parse out actions subject to an affirmative defense and actions not subject to one, rather it is "any action".

In fact, in cases involving the suicide bar, also found in RCW 51.32.020, the Court has recognized that a claimant must show that the suicide bar does not apply. *Mercer*, 74 Wn.2d at 101; *see Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733, n. 5, 57 P.3d 611 (2002) ("A finding of a compensable injury includes a determination that the injury was not self-inflicted. *See* RCW 51.32.020."). It is part of the claimant's proof, like proving causation. *See Schwab v. Dep't of Labor & Indus.*, 76 Wn.2d 784, 791-92, 653 P.2d 1350 (1969) ("Rather it appears that we have inclined more toward looking upon RCW 51.32.020 as erecting a statutory bar between cause and a proximately related result.").

In *Mercer*, this Court affirmed the trial court's dismissal based on the claimant's failure to establish a prima facie showing that RCW 51.32.020 did not bar relief because she did not establish by competent medical evidence that the decedent acted under an incontrollable impulse. *Mercer*,

74 Wn.2d at 101.[4] Under *Mercer*, *Willoughby*, and *Schwab* where the Department determines that a worker is ineligible to receive benefits under RCW 51.32.020, the claimant must prove that the Department erred.[5]

The issue in a workers' compensation case is whether the Department order was correct. In a Board appeal, the Board decides the issues raised in the order—the appeal is an appeal of "*any* action or . . . *any* decision relating to any phase of administration of this title." RCW 51.52.050(2)(a); *Woodard v. Dep't of Labor & Indus. of Wash*, 188 Wash. 93, 95, 61 P.2d 1003 (1936); *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). The claimant must show that that the order about "any action" is incorrect. *Zoff*, 174 Wash. at 586; *Kirk*, 192 Wash. at 674; *Guiles*, 13 Wn.2d at 610; *Hastings*, 24 Wn.2d at 5; *Cyr*, 47

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[4] The Court of Appeals decision claims that its ruling is consistent with *Mercer* because the parties did not dispute the decedent's *suicide*, but this misses the gravamen of the *Mercer* analysis—while it was undisputed that worker took his own life, the parties in *Mercer* disputed whether the worker *deliberately* took his own life based on the question of whether the injury leading to his death occurred because the worker "acted under an incontrollable impulse or while in delirium." *Rowley*, 340 P.3d at 935; *see Mercer*, 74 Wn.2d at 101. Because the *Mercer* Court upheld the dismissal, it recognized that the burden was not on the Department. *See Mercer*, 74 Wn.2d at 98.

[5] Similarly, in *Stafford*, a case about crime victims compensation, an act administered under workers' compensation appeal standards, the Court held that "[s]trict proof of one's right to CVC benefits demands a showing that the victim of a criminal act comes within the statute's terms and is not excluded by its limitations." *Stafford v. Dep't of Labor & Indus.*, 33 Wn. App. 231, 236-37, 653 P.2d 1350 (1982); *see also Knight v. Dep't of Labor & Indus.*, 181 Wn. App. 788, 796, 321 P.3d 1275 (claimant's burden to show that he was not intoxicated and outside of scope of employment), *review denied* 339 P.3d 635 (2014); *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 19 Wn. App. 800, 804, 578 P.2d 59 (1978) (burden on survivor to show decedent was not on frolic at time of death).

Wn.2d at 97; *Lightle*, 68 Wn.2d at 510; *Mercer*, 74 Wn.2d at 101. Here the order said that the claim was rejected based on the felony bar contained in RCW 51.32.020 —simply put Rowley must rebut this.

This Court should grant review because the decision conflicts with the many cases requiring the claimant prove the order incorrect and *Mercer*'s, *Willoughby*'s, and *Schwab*'s interpretation of RCW 51.32.020.

B. Applying the Burden of Proof Is an Issue of Substantial Public Interest Because the *Rowley* Court's New Rule Creates Uncertainty for the Department, Employers, and Workers

Because the Court of Appeals invented the concept that there are some statutes that are necessary elements to an industrial insurance claim and some that are not, it will be nearly impossible for the Department, the Board, or workers and employers to make a reasoned decision between when a statutory ban to benefits negates an element and when it does not. The Court of Appeals appears to have accepted Rowley's argument that the course of employment provisions contained in RCW 51.32.010 are *necessary* elements of the industrial insurance claims, but the felony bar provision is not. *See Rowley*, 340 P.3d at 936-937, 933. But the felony bar statute, which is a specialized type of course of employment statute, is no different. Under RCW 51.32.020, someone who is committing a felony is *not* acting in authorized manner at the time of injury, and thus was not acting in the course of employment at the time of the injury. Because there is no meaningful dis-

tinction between these two statutes with regard to whether they negate an element of a claim or not, workers, employers, and the Department have no guidance to determine when a statute is a "necessary" element and when it is not.

Title 51 contains numerous statutes that dictate that a given individual has no entitlement to workers' compensation benefits. Review is warranted because the *Rowley* Court's adoption of an affirmative defense construct in workers' compensation appeals potentially affects not only workers who were injured while in the commission of a felony, but workers or employers challenging other statutory bans. *See* RAP 13.4(b)(4). As only a small illustration, such provisions could potentially include the bar to receiving compensation if a worker has voluntary retired, the one-year deadline to file an injury claim, the two-year deadline to file an occupational disease claim, the requirement that a worker who selects a lump sum payment in lieu of vocational retraining cannot receive subsequent time loss compensation or pension absent a showing of worsening, the ban on benefits for non-cooperation, the reduction of benefits for offenders, the "over seven" limitation on payment benefits upon the reopening of a claim, and the reduction of benefits for payment of social security benefits. *See, e.g.*, RCW 51.28.050, .055; RCW 51.32.040, .060(6); .099(4)(b), .160, .220, .225,

Creating the new rule that there are some statutes that are necessary elements to a workers' compensation claim that a worker must prove and some that are not and therefore the Department must prove them, will lead to protracted litigation and evidentiary disputes as to who bears the burden of proof. The Industrial Insurance Act represents a compromise between business and labor, each forfeiting certain rights in exchange for the "sure and certain relief" provided by the Act. RCW 51.04.010; *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002). Such "sure and certain relief" demands certainty about the appeal process, particularly who bears the burden of proof.

C. This Court Should Accept Review Because a Heightened Standard of Proof of Clear, Cogent, and Convincing Evidence Conflicts with Supreme Court Precedent and Will Reward Felonious Behavior

This Court has long applied the preponderance of the evidence standard to workers' compensation appeals. *Guiles*, 13 Wn.2d at 610. The Court of Appeals decision conflicts with this rule by applying the standard of clear, cogent, and convincing evidence to Rowley's appeal relying on the Board's circuitous "policy decision". *Rowley*, 340 P.3d at 935. Even assuming that the Department has the burden, the ordinary standard of proof should apply. To do otherwise conflicts with *Guiles* and merits review. Moreover, because this is a type of course of employment

statute, the same standard of proof for both should apply.

That this case involves criminal conduct is not relevant to the standard of proof. Civil suits under preponderance of the evidence frequently address the same conduct that can be criminally charged. "In a criminal case, proof must be beyond a reasonable doubt to satisfy due process; in a civil case, a preponderance of the evidence is sufficient." *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.,* 145 Wn. App. 572, 591, 187 P.3d 291 (2008); *In re Disciplinary Proceeding Against Peterson*, 180 Wn.2d 768, 787-88, 329 P.3d 853 (2014) (Certified Professional Guardian Board's use of preponderance standard adequately protected guardian's property interest in a disciplinary proceeding for misconduct); *Carlton v. Vancouver Care LLC*, 155 Wn. App. 151, 169, 231 P.3d 1241 (2010) (civil claim involving rape only needs proof by a preponderance).

But more fundamentally, the Court of Appeals decision rewards felonious conduct by imposing a heightened standard of proof. By making it more difficult for the Department to prove that RCW 51.32.020 applies, individuals who have committed felonies will gain benefits. RCW 51.32.020 discourages workers from committing felonies in the work place. This is in accord with the state's interest in creating a safe work place. *See* Const. Art. II, § 35 (mandating that the Legislature shall pass laws for the protection of people working in dangerous employments). It is an important

public interest to prevent violence and other unsafe conditions that arise from felonious conduct in the work place. It is also an important public interest to not spend public resources rewarding such conduct.

VI. CONCLUSION

The Court of Appeals decision conflicts with well-established Supreme Court case law and disrupts the long held rule that claimant must prove that the Department order is incorrect. No reasoned way exists to apply the Court of Appeals' theory that there are some statutes that are necessary elements and some that are not and this will disrupt a multitude of workers' compensation appeals by causing uncertainty and confusion. This Court should grant review to correct the Court of Appeals fundamental mistake.

RESPECTFULLY SUBMITTED this 19th day of February, 2015.

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PROOF OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that the document to which this proof of service is attached, Department of Labor & Industries Petition for Review, was delivered as follows:

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Desirae Jones

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Legal Assistant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES, Appellant, v. BART A. ROWLEY, SR., Respondent.	)	NO. 71737-5 DIVISION ONE PUBLISHED OPINION FILED: December 22, 2014

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.

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 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

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.

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 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

[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.

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."

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]

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.

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

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

$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.

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 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."

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

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[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.

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

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 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]

ANALYSIS

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

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[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).

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?

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 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]

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

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[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.

[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).

commission of a felony, the act's felony payment bar prevents the worker from receiving benefits.[13]

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.

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 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.

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.

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[13] RCW 51.32.020.

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.

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

We first address the burden 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]

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

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

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 to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker."[15]

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

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[15] Dennis, 109 Wn.2d at 470.
[16] 33 Wn. App. 231, 653 P.2d 1350 (1982).
[17] Ch. 7.68 RCW.
[18] Stafford, 33 Wn. App. at 236.

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.

We next address the standard of proof. The preponderance of the evidence standard 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.

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[19] Stafford, 33 Wn. App. at 236.

[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)).

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."

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]

While not controlling, the construction and application of a statute by an administrative agency charged with its enforcement often provides a valuable aid

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

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

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]

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.

The Department 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

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[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.

[27] 74 Wn.2d 96, 442 P.2d 1000 (1968).

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.

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

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[28] Mercer, 74 Wn.2d at 101.

[29] Mercer, 74 Wn.2d at 98.

[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).

or deal with an employer's exempted status under the 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.

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.

Although this case involves alleged criminal conduct, it is a civil case governed by civil law.[31] Generally, Washington 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

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[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.

falling under the civil slayer statute.[35] Rowley offers no persuasive reason why the same rule should not apply here.

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.

Next, we address the Department's 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.

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

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[35] Kissinger, 166 Wn.2d at 128.
[36] 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
[37] State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

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.

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 that RAP 2.5(a) prevents the Department from raising this issue for the first time on appeal.

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]

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]

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[38] RAP 2.5(a).
[39] RCW 51.32.020.

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 all payments under Title 51 RCW implies the Department's power to deny the underlying claim should a statutory bar to payment apply.

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

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[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.

[43] No. 7099, 1958 WL 56109 (Wash. Bd. of Indus. Ins. Appeals Jan. 28, 1958).

[44] Mathieson, 1958 WL 56109, at *7-8.

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.

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 to prove Rowley possessed methamphetamine, we deny Rowley's fee request.

CONCLUSION

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.

Leach, J.

WE CONCUR:

Trickey, J. Becker, J.