NO. 44333-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE WASHINGTON,

Appellant/Cross-Respondent,

v.

BART A. ROWLEY, SR.,

Respondent/Cross-Appellant.

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. INTRODUCTION

Under RCW 51.32.020, if an injury results while a worker is engaged in the commission of a felony, the worker is not entitled to the benefits under the Industrial Insurance Act. The Department rejected Bart Rowley's claim for benefits because he was committing the felony of possessing methamphetamine at the time of his injury. On appeal to the Board, Rowley had the burden to show by a preponderance of the evidence that he was entitled to relief, which included showing he was not committing a felony when he was injured. But the Board placed the burden of proof on the Department, applied the heightened standard of proof of clear, cogent, and convincing evidence, and reversed the Department order. The trial court affirmed, agreeing with the Board that under RCW 51.32.020, the Department bore the burden to show by clear, cogent, and convincing evidence that Rowley was injured while committing a felony and the Department did not meet that burden.

Rowley argues that due process requires a felony conviction before the Department can deny Rowley's claim under the felony bar provision. In the alternative, Rowley argues that the Department must prove he committed felony possession of methamphetamine under the beyond a reasonable doubt standard or "at least" by the clear, cogent, and convincing evidence standard before it can deny him benefits. The Court

should reject these arguments because due process is satisfied under the *Mathews v. Eldridge* balancing test by holding Rowley to his statutory burden of showing he is entitled to benefits by a preponderance of the evidence, including that he did not possess methamphetamine. Moreover, there is no authority in the Industrial Insurance Act or case law that suggests either that a heightened standard of proof above the preponderance of the evidence standard applies, or that the initial burden should be on the Department.

This case cannot be reviewed for substantial evidence because of the legal errors with respect to the burden of proof. These errors were not harmless because ample evidence showed evidence of possession of methamphetamine. The trial court also erred in requiring a laboratory test to show that the substance Rowley possessed was methamphetamine, and in concluding that the Department could not reject a claim under RCW 51.32.050. The Department seeks reversal of the superior court's decision and asks that the Court remand the matter to the superior court to rehear the evidence de novo applying the correct standards.

II. ARGUMENT

A. Rowley Has The Burden To Establish A Prima Facie Case By The Preponderance Of The Evidence

RCW 51.52.050(2)(a) is unequivocal that Rowley bears the burden: "[i]n an appeal before the board, the appellant [here Rowley] shall have the burden of proceeding with the evidence to establish a prima facie case *for the relief sought in such appeal.*" (emphasis added); *see also* WAC 263-12-115(2)(a). Likewise, the case law establishes that appeals under Title 51 RCW are governed by the preponderance of the evidence standard and "[t]he burden rests on claimant to prove *every element* of his claim by a *preponderance of the evidence.*" *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942) (emphasis added). Rowley "must prove his claim by competent evidence." *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966). Notably Rowley does not deny that RCW 51.52.050(2)(a) requires him to establish a prima facie case for benefits. *See* Resp't's Br. 1-35. His error lies in reading the phrase "for the relief sought in such appeal" out of the statute. Only after Rowley establishes a prima facie showing that he did not possess methamphetamine at the time of the industrial injury does the burden shift to the Department to rebut his evidence.

1. Rowley must meet his initial burden to refute the Department's order denying him benefits based on his felonious conduct

Rowley's fundamental premise in support of his argument that the Department should carry the initial burden is equating a case arising

under RCW 51.32.020 with a criminal case. *See* Resp't's Br. 14, 16-19. But this is not a criminal case. Neither the Department nor the Board can convict Rowley criminally and thereby deprive him of his liberty. Rather this is a civil matter involving monetary payments arising under the Industrial Insurance Act.

Citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), Rowley states that the presumption of innocence means that the *State* must always bear the burden of proof, suggesting that the Department stands in here as the *State* would in a criminal proceeding. Resp't's Br. 17. However, *Winship* extended the reasonable doubt standard from felony prosecutions to juvenile criminal proceedings, not to civil proceedings involving monetary payments. *Winship*, 397 U.S. at 365. The *Winship* Court's reasoning was based on the notion that a proceeding in which a child may be found to be "'delinquent' and subjected to loss of his liberty for years is comparable in seriousness to a felony prosecution." *Id.* at 365-66 (internal quotations omitted). There is no comparable outcome here. There is no loss of liberty.

The trial court and Board decisions side-step RCW 51.52.050(2)(a) and case law by creating the equivalent of an affirmative defense. Neither those decisions nor Rowley provide a basis in the industrial insurance case law or statutes to support this approach. *See* CP 1199 (CL 2.3(b); CP 5;

Resp't's Br. 1-35. There is no authority in the Industrial Insurance Act that allows the initial prima facie showing to be limited to only establishing that an injury occurred in the course of employment, as Rowley suggests. The phrase "for the relief sought in such appeal" is broader, and encompasses a requirement that the claimant demonstrate why he or she is entitled to a reversal of the Department's decision. When the Department relies on RCW 51.32.020, the claimant's burden includes a showing that the injury did not occur during the commission of a felony. Nothing in RCW 51.32.020 or RCW 51.52.050(2)(a) authorizes or requires the burden to be shifted to the Department before Rowley satisfies his initial burden.

Had the legislature intended to create a statutory presumption in favor of the claimant or to limit the prima facie burden to showing simply that the claimant was injured in the course of employment, it would have done so. For example, in RCW 51.32.185, the legislature created a prima facie evidentiary presumption of occupational disease for firefighters. *See Raum v. City of Bellevue*, 171 Wn. App. 124, 152, 286 P.3d 695 (2012). That statute expressly states that the presumption of occupational disease may be rebutted by a preponderance of the evidence and lists several examples of evidence that can be used to rebut the presumption, such as

use of tobacco products, physical fitness and weight, and lifestyle. RCW 51.32.185(1).

The legislature also knows how to place the burden of proof on the Department. In RCW 51.52.050(2)(c), the legislature provided that the Department would "initially introduce all evidence in its case in chief" in willful misrepresentation cases. The legislature did not provide for such burden shifting provisions with respect to RCW 51.32.020 and the absence of any provision requiring it 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); *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984).

This burden shifting scheme also contradicts case law holding claimants to strict proof for their requested relief that has been applied to other statutory bars contained in RCW 51.32.020 and to the similar crime victims' cases. *See Mercer v. Dep't of Labor & Indus.*, 74 Wn.2d 96, 101, 442 P.2d 1000 (1968); *Stafford v. Dep't of Labor & Indus.*, 33 Wn. App. 231, 653 P.2d 1350 (1982).

Rowley argues that the Department's cases are "simply inapposite" without citing any authority to support his "fair and balanced approach" nor explaining why he believes that the cases do not support the proposition that he has the burden to show all elements of his claim.

Resp't's Br. 30. Contrary to Rowley's assertions, the crime victims' cases have strong parallels to his case and he is simply incorrect that before 2011 the crime victims' statute did not contain the relevant language. Indeed, at the time of *Stafford*, RCW 7.68.070(3) specifically cross-referenced RCW 51.32.020: "RCW 7.68.070(3) incorporates as, one of its limitations, RCW 51.32.020, which bars worker's compensation benefits if an injury or death is caused by the worker's own deliberate intention." *Stafford*, 33 Wn. App. at 236. While it is true that the statute was amended in 2011 and now contains the language of RCW 51.32.020 verbatim, this change was not substantive given that the statute now contains the identical language that it once cross-referenced. Laws of 1973, 1st Ex. Sess., ch. 122, § 7, *amended by* Laws of 2011, ch. 346, § 401.

It is true that as Rowley claims no other case cited addresses a similar burden-shifting scheme. Resp't's Br. 30. Such is the case because there is no parallel example of the court imposing a burden-shifting scheme under Title 51 that requires the claimant to go first to establish a prima facie entitlement to benefits then requires the Department to mount an affirmative defense under the heightened standard of clear, cogent, and convincing evidence.

Here, the Board placed the burden on the Department and Rowley suggests that the Board's interpretation of Title 51 is entitled to deference. Resp't's Br. at 20, 23. While it is true that courts give deference to interpretations of Title 51 to the Board where appropriate, there is no ambiguous statute where deference is appropriate here. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991); *see Slaugh v. Dep't of Labor & Indus.*, No. 31081-7-III, 2013 WL 5860731, *6 (Wash. Ct. App. October 31, 2013). RCW 51.52.050 unambiguously places the burden on Rowley to show he is entitled to "the relief sought in [his] appeal." Moreover, because the Board members wrote three separate opinions, the decision and order amounts to the three separate Board members rendering their own completely different analyses. CP 11-19. Such contradictory analysis should be given no deference. The Board's interpretation also does not warrant deference here because its interpretation conflicts with the express language of RCW 51.52.050(2)(a) and the Board's own properly promulgated rule. *See Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 184, 157 P.3d 847 (2007). No deference is accorded to the Board if the interpretation conflicts with the statute. *See id.* at 184.

2. The preponderance standard of proof applies to Rowley's appeal because it applies to all initial claims for industrial insurance benefits by a worker

The courts have long recognized that the workers, like Rowley, must "by a clear preponderance of the evidence overcome the presumption in favor of the correctness of the decision of the department." *Guiles*, 13 Wn.2d at 610. Likewise, the Board recognizes that the claimants must prove their case by the preponderance of the evidence. *See In re Barbara Binion*, No. 01 14940, 2003 WL 21129939, *3 (Bd. Ind. Ins. Appeals Feb. 11, 2003); *In re Christine Guttromson*, No. 55 804, 1981 WL 375941, *2 (Bd. Ind. Ins. Appeals April 7, 1981) (significant decision). Rowley must prove that the felony bar does not apply by competent evidence. *Lightle*, 68 Wn.2d at 510. He is held to strict proof of *any* right to receive benefits. *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955).

Rowley cites to RCW 9A.04.100 to suggest that the reasonable doubt standard must apply to his case, simply because the elements from methamphetamine possession contained in RCW 69.50.4013 apply to his case. *See* Resp't's Br. 17. However, RCW 9A.04.100 expressly applies only to a person charged with a crime. The statute specifies that "[n]o person may be *convicted* of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt." RCW 9A.04.100 (emphasis added). Because Rowley is not being charged

with a felony, the burden of proof is not beyond a reasonable doubt. Rather in a civil case, where he only has a monetary interest in the outcome, a preponderance of the evidence is sufficient. *See Estate of Stalkup v. Vancouver Clinic, Inc., P.S.,* 145 Wn. App. 572, 591, 187 P.3d 291 (2008); *State v. Von Thiele*, 47 Wn. App. 558, 564, 736 P.2d 297 (1987).

Interests weightier than Rowley's monetary interest in benefits are likewise addressed under a preponderance standard. Indeed, the Washington State Supreme Court has recently held that the application of the preponderance standard satisfies due process in proceedings to commit a defendant charged with a felony to a mental health treatment facility during a competency restoration period and in proceedings to revoke the conditional release of a person acquitted of a crime by reasons of insanity. *State v. Hurst*, 173 Wn.2d 597, 599, 604-07, 29 P.3d 1023 (2012); *State v. Dang*, No. 87726-2, 2013 WL 5857963, *7 (Wash. October 31, 2013). Here, the deprivation of liberty is not even a risk for Rowley.

3. Rowley incorrectly analogizes the felony bar to the willful misrepresentation statute because the circumstances of willful misrepresentation are significantly different than those of the felony bar

Rowley argues that the Board was correct to analogize Rowley with its significant decision *In re Del Sorenson*, No. 89 2697, 1991 WL

87430 (Bd. Ind. Ins. Appeals Feb. 27, 1991). Resp't's Br. 25, 28. While it's not even clear that *Sorenson* remains good law for willful misrepresentation cases because RCW 51.32.240(5) has replaced the nine-element civil fraud test with another test, there are also significant differences between the fact pattern here and *Sorenson.*

The Department ordered Sorenson to pay back benefits and a 50 percent *penalty* based on willful misrepresentation. *Sorensen*, 1991 WL 87430 at *1. In other words, the Department demanded the repayment of benefits that Sorenson had already received, and likely already spent. *Sorenson* also suggests that the Department did not even meet its burden under a preponderance standard given the paucity of information provided at hearing showing that Sorenson was earning an income sufficient to be considered gainfully employed at a barbershop he operated while receiving time loss benefits. *Sorensen*, 1991 WL 87430 at *5-6. Finally, the Board analysis in *Sorenson* also does not directly contradict RCW 51.52.050(2)(c), which specifically requires the Department to proceed first in willful misrepresentation cases.

Contrary to Rowley's assertion that like the willful misrepresentation statute RCW 51.32.020 is punitive, the statute simply recognizes that acts under RCW 51.32.020 bar entitlement to benefits. *Contra* Resp't's Br. 25; *see Schwab v. Dep't of Labor & Indus.*, 76 Wn.2d

784, 791-92, 653 P.2d 1350 (1969). Indeed, RCW 51.32.020 treats the surviving beneficiaries of a worker who commits suicide identically. The legislature is not punishing the beneficiaries of workers who committed suicide, but discouraging such conduct in the first place. Similarly, the legislature discourages a worker from committing a felony to obtain workers' compensation benefits. Here, the legislature does not intend to punish workers who commit felonies while on the job, but instead intends to discourage felonious conduct at work in the first place.

Finally, requiring the Department to carry the initial burden of proof in willful misrepresentation cases not only comports with RCW 51.52.050(2)(c)'s directive, it also comports with the fact that the Department is disgorging received benefits and assessing a fifty percent penalty. Here Rowley has not received any benefits and he is not assessed a penalty.

B. The Appeal Process For Workers' Compensation Claims Provides Rowley Adequate Due Process Under The Preponderance Of The Evidence Standard

Rowley suggests that due process requires a conviction in his case before the felony bar may be applied, or in the alternative, that the preponderance standard of review—applicable to all claims for benefits under the Industrial Insurance Act—would violate Rowley's due process

rights if this Court applied the preponderance standard to a review of whether the felony bar applies to Rowley. Resp't's Br. 16-19, 26-27.[1]

Due process requires notice and an opportunity to be heard. *See Johnson v. Dep't of Fish & Wildlife,* ___Wn. App.___, 305 P.3d 1130, 1134 (2013). Rowley does not assert that he failed to receive adequate notice of the Department rejecting his claim and the basis of the rejection. The Department provided him an order that specifically laid out the basis for its denial of benefits. CP 275-76. He had the right to exercise reconsideration by the Department, which he exercised. CP 70, 76; RCW 51.52.050(1). All workers who seek benefits, but who are denied benefits by the Department, have the opportunity to contest the Department's decision before the Board of Industrial Insurance Appeals. RCW 51.52.060, .102. Such a worker has the opportunity to present evidence, to have the appeal heard by an independent tribunal, and to appeal the Board's determination to superior court. RCW 51.52.102, .104, .106, .110. Rowley received the right to be heard, both in reconsideration at the Department and the subsequent appeal to the Board. CP 275.

Rowley appears to argue that the Department cannot address his due process arguments because the Department did not argue it in its

[1] It is hard to understand why Rowley cross-appealed on these issues given the fact that he is not aggrieved—he prevailed below. RAP 3.1 ("Only an aggrieved party may seek review by the appellate court."); *see Madison v. State*, 161 Wn.2d 85, 109-10, 163 P.3d 757 (2007).

opening brief, and he also argues that because the Department did not argue *Mathews* below, it cannot now do so. Resp't's Br. 28, 28 n.8. However, due process is an issue raised by Rowley, not by the Department's appeal. The trial court did not rule based on due process. *See* CP 1197-1200. Notably, Rowley did not brief the *Mathews* factors below. CP 1062-75. The Department does not have the burden to show that the preponderance standard of proof meets due process in Rowley's case; it is Rowley's burden to show a constitutional violation. *See Sch. Dists' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010) (a statute's "challenger must prove that the statute is unconstitutional beyond a reasonable doubt"). Rowley cites no authority for the proposition that an appellant cannot defend against arguments raised solely by the respondent, and his arguments should be disregarded. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any case, the preponderance standard of review satisfies due process.

1. The *Mathews v. Eldridge* factors show that applying the preponderance of the evidence standard does not violate Rowley's procedural due process rights

Rowley received all the process he was due under the three-factor test from *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *Contra* Resp't's Br. 26-28. Due process is a flexible

concept and calls for different procedural protections in different situations. *Mathews*, 424 U.S. at 334. In considering whether constitutional due process is satisfied—whether the procedures are adequate, the court considers (1) the private interest impacted by the government action, (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) the government interest, including the additional burden that added procedural safeguards would entail. *Id.* at 335.

a. Rowley's private interest is not weighty because workers do not have a property interest until their claims are allowed

The first factor considered is that of the private interest involved. *See Mathews*, 424 U.S. at 335. The private interest factor is not as "weighty" as Rowley claims. *Contra* Resp't's Br. 26. A claimant alleging deprivation of due process must first establish a legitimate claim of entitlement to the life, liberty, or property at issue. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 732, 57 P.3d 611 (2002). However, the right to disability benefits does not vest until determination of a compensable industrial injury. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 475, 843 P.2d 1056 (1993); *Willoughby*, 147 Wn.2d at 733; *see also Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 675, 175

P.3d 1117 (2008) (workers have vested rights to industrial insurance benefits *after* the Department has allowed their claims). A finding of a compensable injury includes a determination that the injury was not precluded by RCW 51.32.020. *See Willoughby*, 147 Wn.2d at 733, n. 5 ("A finding of a compensable injury includes a determination that the injury was not self-inflicted. *See* RCW 51.32.020."). In other words, Rowley does not have a vested right in disability benefits if he is excluded from coverage because he was injured in the commission of a felony. *See Harris*, 120 Wn.2d at 475; *Willoughby*, 147 Wn.2d at 733, n.5.

This understanding is consistent with United States Supreme Court case law. The Supreme Court has recognized that a worker in a workers' compensation case must possess a valid claim in order to have a property interest. *See American Mfr. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60-61, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999). In *Sullivan*, the worker claimed a property interest in disputed medical bills before a determination that the medical treatment was reasonable and necessary. *Id.* at 59. The *Sullivan* Court held that the property interest for the worker did not attach until the worker "prove[d] that the employer [was] liable for a work-related injury" and treatment was reasonable and necessary. *Id.* at 60-61. Here Rowley does not have a compensable injury and the property interest does not attach.

Citing the Board's order, Rowley contends that applying the felony bar implicates the workers' private interest in avoiding "criminal prosecution and significant reputational damage." Resp't's Br. 25. Neither Rowley nor the Board explains how the Department's invocation of the felony bar subjects Rowley to criminal prosecution here. As in all civil proceedings, claimants may invoke their Fifth Amendment privilege against self-incrimination in workers' compensation appeal proceedings in which they testify—Rowley could have done so here. *See In re Cheri's Pet Grooming*, No. 89 5939, 1991 WL 246745, *2 (Bd. Ind. Ins. Appeals June 10, 1991) (significant decision). Moreover, it is Rowley's *conduct* that risks criminal prosecution, not the Department's actions.[2] Finally, Rowley also could have moved to stay proceedings at the Board if he faced criminal charges because the Board may grant a stay if there are parallel criminal and civil proceedings. *See King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 350, 16 P.3d 45 (2000). He did not elect to stay proceedings at the Board.

The private interest at stake with regard to potential reputational damage is not sufficient to justify a heightened standard of proof, as almost any civil proceeding has the potential to result in reputational

[2] Because the three-year statute of limitation on possession has now run, Rowley faces no risk of criminal prosecution for the conduct. *See* RCW 9A.04.080(1)(h). Indeed, because the incident occurred August 14, 2008, the statute of limitations ran before the Board even issued its decision and order. CP 17, 641-42.

damage. For example, accusations of rape in a civil matter, would, if successful, damage the reputation of the defendant, yet the civil standard of proof is used. *Cf. Carlton v. Vancouver Care LLC*, 155 Wn. App. 151, 169, 231 P.3d 1241, 1250 (2010). Likewise, the Securities and Exchange Commission can seek sanctions and penalties based on allegations of fraud under a preponderance of the evidence. *See Steadman v. Sec. & Exch. Comm'n*, 450 U.S. 91, 94, 104, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981) (absent countervailing constraints, Congress may implement the preponderance of the evidence standard to determine whether an individual violated anti-fraud provisions of federal securities law). Rowley cites no authority for the proposition that mere reputational damage means that a different standard of review is constitutionally mandated, and this Court should disregard his argument. *See Cowiche Canyon*, 118 Wn.2d at 809.

Rowley attempts to recast his private interest argument as the Department excluding him from "otherwise proper benefits," which he claims "punishes the worker." Resp't's Br. 19. But Rowley mischaracterizes the legislature's action in enacting RCW 51.32.020: he is not *entitled* to benefits in the first place. This "statutory bar between cause and a proximately related result" is similar to other statutory exclusions in Title 51 such as those for domestic servants, partners or sole

proprietors, and employees of common carriers involved in interstate commerce. *See Schwab*, 76 Wn.2d at 791-92; RCW 51.12.020(1), (5); RCW 51.12.095(1). Certainly, Rowley may challenge the Department's determination that he is not entitled to benefits, but the record demonstrates that Rowley had that opportunity.

b. The risk of erroneous deprivation for Rowley is minimal because of the significant procedural safeguards provided to injured workers under the Industrial Insurance Act

The second factor is the risk of erroneous deprivation through the procedures used. *Mathews*, 424 U.S. at 335. The risk of erroneous deprivation under the preponderance standard is minimal here and therefore favors the Department. The focus of this factor is whether the review procedures are adequate to provide the fact finder with sufficient information to make the correct determination, which includes ensuring that the appealing party has sufficient information about what the agency relied on in making its decision. *See Mathews*, 424 U.S. at 343-45. In *Mathews*, the Court found due process was adequate without an evidentiary hearing, or even an oral presentation to the decision maker. *Id.* Rather than address the sufficiency of the multiple procedures Rowley availed himself of here, Rowley argues that because the dissenting Board judge found "*this* weak evidence sufficient under the preponderance of the evidence standard, the

risk of erroneous deprivation of workers' rights is great." Resp't's Br. 27 (emphasis added). His argument fails. First, as discussed below, ample evidence shows that Rowley possessed the methamphetamine at the time of the injury. *See* Part II.D *infra*. Second, every other workers' compensation claimant carries the burden to show he or she is entitled to benefits under the standards Rowley apparently rejects as failing due process. Taking his argument to its logical conclusion, claimants of *any* benefits would be entitled to have the Department refute their claims by clear, cogent, and convincing evidence in order to meet minimum due process.

The United States Supreme Court has recognized that due process may be satisfied by the preponderance of the evidence standard even when there are significant financial interests or social consequences at stake. *See Rivera v. Minnich*, 483 U.S. 574, 575, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987) (holding that, in an action to compel child support, due process does not require a burden beyond a preponderance of the evidence standard to prove paternity); *Vance v. Terrazas*, 444 U.S. 252, 266, 100 S. Ct. 540, 62 L. Ed. 2d 461 (1980) (holding that due process does not require a burden beyond a preponderance of the evidence standard at an expatriation proceeding).

Rowley had pre-deprivation notice through the Department's order. *See Johnson*, 305 P.3d at 1134. Rowley had administrative hearings

before the Board where he was represented by counsel and submitted evidence, where he presented the testimony he deemed appropriate to support his case, and where he had the opportunity to cross-examine the Department's witnesses. *See Johnson*, 305 P.3d at 1134. He had the right to appeal to superior court. RCW 51.52.110. Given the panoply of protections afforded Rowley, any risk of erroneous deprivation is slight.

c. The public interest weighs heavily against creating additional barriers to applying the felony bar

The third *Mathews* factor is a question of balancing the public interest with whether due process requires a particular procedural safeguard before an administrative decision. *See Mathews*, 424 U.S. at 347. The Department's interests here—and the interest of the public—are two-fold.

First, the Department is both the front-line agency that enforces the Industrial Insurance Act and the trustee of the industrial insurance funds. *Van Hess v. Dep't of Labor & Industries*, 132 Wn. App. 304, 310-11, 130 P.3d 902 (2006). As a trustee to the industrial funds, the Department has a significant interest in protecting the funds against improper claims for benefits, particularly those that will be costly such as Rowley's. Denying Rowley's request to require a conviction and holding him to his burden by preponderance of the evidence allows the Department in its role as the trustee to industrial insurance funds to ensure that only qualified persons

receive benefits due under law. Additional procedural safeguards beyond what are necessary to comport with due process only increase the likelihood that unentitled claimants will receive benefits to which they are not entitled.

Second, 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.

Rowley argues that the Department's interest here is insignificant based on its assertion that this is a case of first impression before the Board and therefore "is apparently so rare that it has never come up before." Resp't's Br. 27. Rowley apparently asserts that the issue has never come up before at the Board or otherwise based on his incorrect assertion that *In re Robert Mathieson, Dec'd*, No. 7099, 1958 WL 56109, *1 (Bd. Ind. Ins. Appeals Jan. 28, 1958) (significant decision), is dicta on the point. Resp't's Br. 33-34. The Board *did* reach the question in *Mathieson* and it is not dicta as Rowley contends:

> Although the board is convinced that petitioner's claim was properly rejected on the ground that the deceased was not in the course of his employment at the time of his death, the statute (RCW 51.52.106) requires the board's decision "shall contain findings and conclusions as to each contested issue of fact and law" and *therefore consider the department's contention that the petitioner is not entitled to relief on the further ground that the deceased workman was engaged in the commission of a crime at the time of his death.*

Id. at *6 (emphasis added).

In any case, it does not follow that because *Mathieson* is the only prior Board significant decision that this issue has not come up before. The Department adjudicates thousands of claims each year where no appeal is taken to the Board. *See Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 165, 937 P.2d 565 (1992) (Talmadge, J., concurring) ("In an average year, 180,000 claims are filed with the Department, which initially handles those claims."). Of those appealed to the Board, most are decided in proposed decision and orders under RCW 51.52.104, which are not available electronically, and only some result in decisions by the Board. In addition, the lack of a published case, or even a claim for benefits itself, does not mean that statute does not serve a purpose. The statute itself is a barrier to claimants who have engaged in felonious conduct seeking benefits to which they are not entitled because it discourages them from filing in the first place.

In support of his argument about the government interest at stake, Rowley asserts that the Department "plainly recognized that it had to produce witnesses and other evidence" at the hearing. Resp't's Br. 28. That is simply not the case. Indeed, the Department moved for dismissal under CR 41(b)(3) after Rowley failed to present a prima facie case at the Board. CP 657-58. Although the Department did not renew its motion after the industrial appeals judge allowed Rowley to reopen his case-in-chief, the Department did not need to present any evidence if Rowley did not meet his prima facie burden under RCW 51.52.050(2)(a) and WAC 263-12-115(2)(a).[3]

Rowley's procedural due process arguments fail under a weighing of the *Mathews* factors. The mere fact that the ordinary civil standard is applied to a claimant's appeal from a decision of the Department, with regard to the worker's right to benefits under the Industrial Insurance Act, does not establish that Rowley would be deprived of his due process if it was applied to him.

2. Rowley is not entitled to the due process protections associated with the risk of loss of life or liberty attendant to a criminal conviction

[3] Due to numerous factors, including multiple changes in counsel at the same firm representing Rowley, at the point that the case was reopened for additional evidence after the CR 41 motion to dismiss was denied, the active hearing proceedings had already been ongoing for more than a year. CP 68.

Rowley argues that due process requires a criminal conviction before the Department may apply the felony bar. Resp't's Br. 16, 18. Rowley also provides a laundry list of "due process protections" that he suggests must be provided here before he can be denied industrial insurance coverage under the felony bar, including *Miranda* warnings, the right against self-incrimination, right to counsel, the right to be informed of charges against him, right to speedy jury trial, the right to confront witnesses, the right to compel witnesses, and "so much more." Resp't's Br. 17 (citing U.S. Const. amend. V, VI & VII; Const. art. I, §§ 22 & 25 and "a great deal of precedent."). However, he fails to cite any specific authority to support his argument that this "broad panoply" must be applied to Rowley's industrial insurance appeal. To adequately present a constitutional argument, a party must cite to authority and present argument. RAP 10.3(a)(6); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994); *Nor-Pac Enters., Inc. v. Dep't of Licensing*, 129 Wn. App. 556, 570-71, 119 P.3d 889 (2005). Rowley's "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion" here. *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970), *quoted in State v. Blilie*, 132 Wn.2d 484, 493 n. 2, 939 P.2d 691 (1997).

Rowley also argues that the "Department repeatedly flouts" his right against self-incrimination. Resp't's Br. 18. Rowley confounds his constitutional rights in criminal proceedings with his rights in a parallel civil proceeding. The purpose of the right against self-incrimination is to protect the witness from compulsory disclosure of criminal liability, and a refusal to testify may not be introduced against the defendant at criminal trial as substantive evidence of guilt. *See, e.g., Griffin v. California*, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); *State v. Burke*, 163 Wn.2d 204, 221-22, 181 P.3d 1 (2008). However, this is a civil matter and Rowley had every right to decline to answer questions based on his right against self-incrimination in proceedings before the Board. *See In re: Cheri's Pet Grooming*, 1991 WL 246745 at *2.

Furthermore, it is well-settled law in this state that "[w]hen a witness in a civil suit refuses to answer a question on the ground that his answer might tend to incriminate him, . . . the trier of facts in a civil case is entitled to draw an inference from his refusal to so testify." *See King*, 104 Wn. App. at 355-56. Here, Rowley did not invoke his right against self-incrimination, but had he wanted to he could have.

In any case, Rowley simply is not entitled to the additional protections necessary for a criminal conviction because the protections provided by the adjudication at the Department and the appeal to the Board

under the standard of preponderance of evidence provided ample due process.

Finally, Rowley conclusorily asserts that due process requires the burden of proof to be placed on the Department. Resp't's Br. 29. He provides no discussion or analysis and for this reason the Court should not consider his arguments. *See Havens*, 124 Wn.2d at 169; *Nor-Pac Enters.*, 129 Wn. App. at 570-71. In any event, for the reasons discussed above, this is not required by *Mathews* or any other authority.

C. The Trial Court Improperly Refused To Weigh The Evidence Without A Confirming Laboratory Test

The trial court adopted the Board's holding that it would not consider evidence of narcotics without a laboratory test confirming the identity of the substance. Conclusion of Law (CL) 2.3(d); Finding of Fact 1.5; CP 1199. While Rowley claims at 30-31 that the Department misstates what the Board ruled, the plain language of the Board's decision and order repudiates his assertion:

> 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 benefits under RCW 51.32.020 in an alleged narcotics possession case.

CP 7 (emphasis added).

The suggestion that the Board merely "advised the Department that in the future, it will expect to see at least a proper laboratory confirmation before it will find 'felony' possession" is contradicted by the very facts at issue in this case. *Contra* Resp't's Br. 31.

Here, it is the trial court's decision that is reviewed, but the court's adoption of the various rulings of the Board without further comment shows that the trial court adopted the Board's ruling excluding circumstantial evidence of narcotic possession without a confirming laboratory test. CP 1199 (CL 2.3(c)). Rowley claims that the trial court's conclusion of law is "largely" a finding of fact. Resp't's Br. 30. As the conclusion clearly stated that "*[a]bsent a confirming laboratory test*," the Department did not prove the substance was methamphetamine, it was a legal conclusion because it states that the Department is required to have laboratory test confirming the illicit substance in order to prevail. CP 1184 (CL 2.3(c)).

Without addressing any of the Department's cases addressing circumstantial evidence in possession cases, Rowley dismisses the case law set forth in the Department's opening brief addressing the evidentiary standards based on the notion that if there is no criminal conviction necessary, it is not controlling. *See* Resp't's Br. 18. But Rowley cannot refute that criminal law and civil law *both* allow the consideration of

circumstantial evidence. *State v. Gosby*, 85 Wn.2d 758, 766, 539 P.2d 680 (1975); 6A *Washington Practice: Washington Pattern Jury Instructions: Civil* 1.03, at 29 (6th ed. 2012) ("The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other."). While Rowley provided no evidence that he was not in possession of methamphetamines on the day of the accident, the Department provided compelling circumstantial evidence that he possessed the illicit substance at the time: the testimony of Officer Dexheimer, who identified the substance removed from Rowley's baggie as methamphetamine; the testimony of Trooper King, who field tested the substance in the baggie using a commercial NIK® testing kit that identified the substance as methamphetamine; and, finally, the blood test results demonstrating that Rowley had a high amount of methamphetamine in his blood the day of his accident, which is circumstantial evidence of possession. CP 524-27, 719-45, 791-818. If the trial court weighed the circumstantial evidence of possession here, rather than excluding it as a matter of law, it could have concluded that Rowley possessed methamphetamine at the time of his injury.

D. Substantial Evidence Review Does Not Apply Here Because The Trial Court Committed Reversible Error

Without addressing harmless error analysis, Rowley proposes that this Court should simply apply the substantial evidence standard of review and construe "the evidence and inferences" in his favor. Resp't's Br. 2, 3, 21-23, 32. While it is true that the appellate court generally reviews a trial court's decision in an industrial insurance appeal under the substantial evidence standard, when the trial court has applied the wrong standard regarding sufficiency of the evidence and burden of proof, the appellate court remands to the trial court for the trial court to apply the correct standard. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009); *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 921, 640 P.2d 1 (1982). The question here is whether it was harmless error when the trial court affirmed the Board's decision to place the burden on the Department, apply the clear, cogent, and convincing evidence standard to the Department, and hold that it would not consider the Department's evidence of felony possession without a lab test. "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995). That is simply not the case here.

Rowley argues that the "triers" of fact "chose to believe Rowley" and that this is "sufficient evidence." Resp't's Br. 21. The analysis of the below fact finders is not "evidence" and in any case, only the dissenting Board member actually considered the evidence using the correct burden and standard of proof. Rowley seems to imply that the Department must be held to the industrial appeals judge's ruling in the *proposed* decision and order. Resp't's Br. 3-4, 22. Although the industrial appeals judge issued the proposed order using the correct standard of proof, she made her determination based on the flawed analysis 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 (emphasis added). Rowley does not dispute that there is no requirement to show a deliberate intent to injure oneself along with a commission of a felony. Resp't's Br. 15. In any event, the Department was entitled to have the Board and trial court consider the case using the correct standard of review. RCW 51.52.104, .115.

Rowley further asserts that the unchallenged finding of fact (that Rowley was injured in the course of employment) somehow supports the trial court's determination that Rowley proved his entitlement to benefits related to the felony bar. Resp't's Br. 21, n. 5. The Department order did

not reject the claim on the basis that Rowley's actions removed him from the course of employment and, for that reason, it could not challenge his entitlement based on course of employment. *See Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994). This does not preclude the Department from asserting the felony bar here, as it has since the initial denial of Rowley's claim.

In addition, contrary to Rowley's assertion, the Department's iteration of the facts is a fair and accurate representation of the record. *See* App. Br. 5-14. On the other hand, Rowley's statement of facts is misleading, omits significant pieces of evidence, and largely reargues the industrial insurance appeals judge's *proposed* decision and order. *See, e.g.*, Resp't's Br 2 (Contrary to his assertion, Rowley was only temporarily a quadriplegic after the accident—he unfortunately remains paralyzed below the mid-abdomen. CP 642.); Resp't's Br. 3 (Rowley suggests that he had drug tests consistently for 33 years and never tested positive—ignoring the fact that his self-serving testimony about the testing by the employers related to 2003 and later, was limited to his "understanding," and that he simply did not know whether he tested positive for methamphetamine on the *day of* the accident. CP 644-56.);[4]

[4] Rowley's testimony to his "understanding" about the results of previous drug tests long before the incident was the entirety of his case-in-chief addressing the felony bar. CP 644-46.

Resp't's Br. 5 (Rowley attempts to confuse the evidence on Rowley's possession of the baggie—however, Officer Dexheimer described in detail how he obtained the baggie and why he identified it as methamphetamine, and Nurse Comstock testified that she took the officer to the trash where Rowley's clothes had been taken and she pulled his clothes out of the trash and located the "distinctive" baggie with smiley faces on it. CP 744-747; 904-907.); Resp't's Br. 12 (Rowley downplays Trooper King's testimony when he described the field testing completed with the NIK® testing kit—however, Trooper King testified unequivocally that the residue in the baggie testified positive for methamphetamine. CP 969-73.).[5]

The Department points to the facts of this case, not to merely "reargue" the facts, but to establish that if a fact finder applied the correct standard of proof and applied it to the correct party, it could find that Rowley was injured while committing the felony of methamphetamine possession. *See Estate of Randmal v. Pounds*, 38 Wn. App. 401, 405, 409, 685 P.2d 638 (1984) (reversing summary judgment for further proceedings because the trial court applied the incorrect standard of proof of clear, cogent, and convincing standard to summary judgment proceedings). Indeed, this record shows facts that would prove by a

[5] It should be noted that although Rowley's counsel repeatedly made *Frye* objections throughout the proceedings, Rowley never sought a *Frye* hearing in this matter. Rowley has waived a *Frye* challenge.

preponderance of the evidence that Rowley was in the commission of a felony at the time he was injured; the trial court's errors regarding the burden of proof and laboratory test prejudiced the Department and materially affected the outcome of the trial. *See* App's Br. 36-40. Accordingly, this Court must remand for a new trial.

E. RCW 51.32.020 Does Not Require The Conviction Of A Felony To Bar Rowley From Industrial Insurance Benefits

Without citing to any language in the statute, Rowley argues that the felony clause in RCW 51.32.020 requires a felony conviction. Resp't's Br. 16.[6] Nothing in RCW 51.32.020 suggests Rowley must be convicted of possession or that he even must be charged with a felony. RCW 51.32.020 provides that if injury or death results "while the worker is engaged in the attempt to commit, or the commission of, a felony" neither the worker nor beneficiary shall receive any payment under Title 51.

To apply, the statute requires that the person be injured in the attempt or in the commission of a felony. RCW 51.32.020. It does not require a criminal charge or a conviction; rather it is triggered by the *act* of

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[6] In Section A, Rowley appears to simply restate the positions the Department set forth in its opening brief. Resp't's Br. 15-16. Because the question before the Board was whether Rowley was in the commission of the felony possession of methamphetamine under RCW 69.50.4013, it makes no difference to this Court's analysis whether "the narrow statutory definition of felony" applies here or not. Likewise Rowley's discussion distinguishing "crimes" from "felonies" is not pertinent. Resp't's Br. 16-17.

the person. The statute expressly looks to the "attempt to commit" or the "commission" of the felony. RCW 51.32.020.[7] This looks to the action of the worker or, in other words, the conduct of the person.

Under the canon of statutory construction expressio unius est exclusio alterius, to express one thing in a statute implies the exclusion of the other and "[o]missions are deemed to be exclusions." *Williams*, 147 Wn.2d at 491. Had the legislature intended to require a conviction in order for RCW 51.32.020 to apply, it would have drafted the statute to include such a requirement. The legislature knows how to deny benefits to individuals who have been convicted of crimes. In RCW 51.32.040(3)(a), the legislature provided that "[a]ny worker . . . while confined in, any institution under conviction and sentence shall have all payments of compensation canceled during the period of confinement."[8] Where the legislature uses certain statutory language in

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[7] Indeed, the legislature's use of the language "attempt to commit" a felony shows that no conviction is necessary because the language implies the legislature envisioned situations where a worker would not be eligible for benefits when a felony is attempted, but not completed because of the injury itself. For example, if a worker attempts to injure a public servant during the course of employment, but fails and only injures himself, he would be guilty of a felony if he had succeeded in injuring the public servant, but is only guilty of a gross misdemeanor; nevertheless, he would still be ineligible for industrial insurance benefits. *See* RCW 9A.36.031; *see also* RCW 9A.28.020(3)(d).

[8] Although the *Willoughby* Court held that RCW 51.32.040(3)(a)'s denial of permanent partial disability awards to incarcerated individuals was unconstitutional, the Department may continue to deny time loss compensation during the period of incarceration. *Willoughby*, 147 Wn.2d at 742; *In re Gene Palmer, II*, Nos. 017 21701 & 07 21702, 2010 WL 3543075, *6 (Bd. Ind. Ins. Appeals June 10, 2010); *In re Jack Stein*, No. 06 20588, 2008 WL 5663975, *3-4 (Bd. Ind. Ins. Appeals Sept. 8, 2008).

one instance, and different language in another, there is a difference in legislative intent. *United Parcel Serv.*, 102 Wn.2d at 362.

Under RCW 51.32.020, the Department need not demonstrate that Rowley was *convicted* of a crime in order for that statute to preclude him from receiving benefits under the Industrial Insurance Act. Rather, the relevant issue is whether the evidence establishes that the character of his actions or conduct at the time of his injury was criminal in nature and more specifically, whether the elements of the possession felony were met here. To leave eligibility for benefits under the Industrial Insurance Act, to the prosecutors, who chose not to charge Rowley for reasons only they know, undermines the clear legislative intent to exclude those who injure themselves while engaging in felonious conduct from coverage under the Industrial Insurance Act. *See* RCW 51.32.020. Under Rowley's argument, county prosecutors would effectively be charged with the authority to determine industrial insurance benefits. Prosecutors simply cannot collaterally assert the Department's interests. *See State v. Johnson*, 96 Wn. App. 813, 817-18, 981 P.2d 25 (1999); *see also Lopez-Vasquez v. Dep't of Labor & Indus.*, 168 Wn. App. 341, 276 P.3d 354 (2012).

The Court should reject Rowley's argument that because Washington superior courts have original jurisdiction to convict felons under the Washington State Constitution, the legislature somehow lacks

authority to exclude claimants injured during the course of a felony from coverage under Title 51. *See* Resp't's Br. 16 (citing Const. art. IV, § 6). Rowley's citation to *State v. Posey*, 174 Wn.2d 131, 133, 272 P.3d 840 (2012) is inapposite. Resp't's Br. at 16. *Posey* simply addresses whether the legislature can vest juvenile courts with the original jurisdiction that belongs to the superior courts under article IV, section 6 of the Washington State Constitution. *Id.* at 133.

Here, RCW 51.32.020 does not charge the Department with the task of charging and convicting Rowley with criminal possession of methamphetamine. The Industrial Insurance Act vests the Department with authority to determine whether Rowley's felonious conduct excludes him from coverage under the Act. *See* RCW 51.04.020; RCW 51.32.020. Indeed, only the Department has exclusive original jurisdiction and authority to adjudicate claims for industrial insurance benefits. *See Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970).

F. The Department May Reject A Claim Under RCW 51.32.020 Because It Has The Authority To Deny All Benefits Under the Industrial Insurance Act

The trial court incorrectly ruled that the Department may not reject a claim under RCW 51.32.020. CP 1199. Rowley asserts that the Department is asserting a new argument that the statute is ambiguous. Resp't's Br. 32. The Department does not make this argument; it

maintains, as it did below, that the plain language of statute allows the Department to deny claims. CP 1046 ("However, the plain language of RCW 51.32.020 provides that a claimant who has committed a felony 'shall [not] receive any payment under this title.' Under this plain language, the Department properly rejected Mr. Rowley's claim for benefits."). Indeed, the statute states unambiguously that if "an injury or death 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*." RCW 51.32.020 (emphasis added).[9] It does not state that the Department must pay industrial insurance benefits until Rowley is convicted of a crime as he suggests. Resp't's Br. 33 ("But it makes perfect sense: until it proves that the worker committed a felony in proper legal proceedings, the Department may not deny the claim.").

The practical effect of Rowley's reading of the statute would be for the Department to pay out unentitled workers full benefits until their final appeals in criminal matters. Under Rowley's argument, the Department would always accept claims, pay benefits, and then years later after the

[9] This statute does not "work[] a veritable corruption of blood" as Rowley suggests. Resp't's Br. at 32. The legislature may impose requirements based on felonious conduct. *Cf. State v. Young*, 63 Wn. App. 324, 329, 818 P.2d 1375 (1991).

final appeal, seek collection of overpayments. Again, this is not a result that the legislature could have intended.

Assume a delivery driver under the influence of alcohol causes a serious accident while on his normal delivery route for his employer. Both the driver in another vehicle and the intoxicated driver are seriously injured. After a jury trial, the intoxicated driver is subsequently convicted of vehicular assault and sentenced to incarceration. He appeals the jury verdict based on an allegedly flawed jury instruction. Under Rowley's argument, he would be entitled to receive medical benefits, time loss compensation, and permanent partial disability awards, until there was a final decision in his case. When his appeals are exhausted, the Department would then be required to demand an overpayment, years after the benefits were paid out. This cannot be the result the legislature intended.

RCW 51.32.020 is a bar to any benefits under the Industrial Insurance Act. *See Baker v. Dep't of Labor & Indus.*, 57 Wn. App. 57, 59-60, 786 P.2d 821 (1990). While it is true that the statute does not explicitly direct the Department to reject Rowley's claim, it does not preclude the Department for doing so. While the Department is a creature of a statute, it has both the powers expressly granted to it by the Industrial Insurance Act and the powers that that Act *necessarily implies* that it has.

See Tuerk v. Dep't of Licensing, 123 Wn.2d 120, 864 P.2d 1382 (1994); *see also Ortblad v. State*, 85 Wn.2d 109, 117, 530 P.2d 635 (1975). Here, the Department must be able to reject a claim if no payments are payable under the claim.

The felony bar's silence on rejection is the common formula for the denial of benefits under the Industrial Insurance Act. *See* RCW 51.12.020(1), (5); RCW 51.12.095(1). The courts have also regularly allowed the Department to reject claims when no benefits are appropriate. *Stetler v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 704, 57 P.3d 248 (2002) (the Department denied the claim on the ground that the worker was excluded from mandatory coverage because he worked for an interstate carrier and it had not elected to provide it); *Bennerstrom v. Dep't of Labor & Indus.,* 120 Wn. App. 853, 857, 867-68, 86 P.3d 826 (2004) (the Department order rejected the claimant's claim because the claimant was excluded from coverage as a domestic servant); *Berry v. Dep't of Labor & Indus.*, 45 Wn. App. 883, 883-84, 729 P.2d 63 (1986) (the Department rejected the claim because the claimant was a partner not entitled to coverage).

The Board's reading of the RCW 51.32.020—implicitly adopted by the trial court—suggests that a person injured in the course of a commission of a crime could still be eligible for medical benefits and

vocational benefits since these are not denoted in the list of benefits it says are excluded as payments. CP 15, 1199. Rowley concedes that this is not correct, stating that these statutes would "no longer apply." Resp't's Br. 33. If these statutes no longer apply, then the Department should be able to reject the claim because no benefits are available.

Finally, Rowley argues that the Board's decision in Rowley should be "controlling," even if the Board has issued wholly contradictory decisions addressing the same statute. Resp't's Br. 34. None of the Board's decisions here are controlling. *See* RCW 51.52.115. The *past* decisions of the Board of Industrial Insurance Appeals on workers' compensation claims are nonbinding, persuasive authority for the Court of Appeals when a statute is ambiguous. *See O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005); *Slaugh*, 2013 WL 5860731, *6. The Board considers all of its past decisions and order as persuasive precedent unless there are "articulable reasons" for not doing so. *In re Diane Deridder*, No. 98 22312, 2000 WL 1011049, *2 (Bd. Ind. Ins. Appeal May 30, 2000). It makes no sense for this Court to give deference to the decision on appeal instead of *Mathieson*, a decision that stood for fifty years, in light of the Board's failure to provide any "articulable reasons" for departing from its previous analysis. *Deridder*, 2000 WL 1011049 at *2.

Moreover, RCW 51.32.020 is not ambiguous and the Board's interpretation should not be deferred to for this reason. But even it were ambiguous on the question of whether the claim should be rejected, this Court should reject the Board's interpretation and defer to the Department's interpretation. When there is a conflict in interpretation between the Department and the Board, the Department is entitled to deference as the front-line agency charged by the legislature to administer the statute. *See Slaugh*, 2013 WL 5860731, *7; *see also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004).

G. Rowley Cannot Receive Attorney Fees and Costs If He Does Not Prevail On the Merits

Rowley apparently suggests that he should be entitled to attorney fees and costs regardless of whether he prevails here. *See* Resp't's Br. 34. However, RCW 51.52.130(1) only allows fees in cases where the Department has appealed, if the worker's "right to relief is sustained." Because he should not prevail here and because this Court should reverse the trial court's decision, he should not receive attorney fees or costs for his work here or at the trial court.

III. CONCLUSION

The Department asks this Court to remand this matter to the superior court for a new trial.

RESPECTFULLY SUBMITTED this 6th day of November, 2013.

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