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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.

BRIEF OF APPELLANT

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I. INTRODUCTION

This is a worker's compensation appeal by the Department of Labor & Industries (Department) challenging the allowance of a claim.

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 issued an order rejecting Bart Rowley's claim for benefits on the basis that he had been injured during the commission of a felony—the felony of possession of methamphetamine, a controlled substance in violation of RCW 69.50.4013. Rowley had the burden to show by a preponderance of the evidence that he was not committing a felony when he was injured. The Board of Industrial Insurance Appeals (Board), however, reversed the Department order, applying the heightened standard of proof of clear, cogent, and convincing evidence. The Board also placed the burden of proof on the Department. The trial court affirmed, deciding that it was the Department's 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.

This error was not harmless as 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 trial court's decision and asks that the Court remand the matter to the trial court to rehear the evidence de novo applying the correct standards.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The superior court erred when it entered its December 7, 2012 Finding of Fact No. 1.4.

Assignment of Error No. 2

The superior court erred when it entered its December 7, 2012 Finding of Fact No. 1.5.

Assignment of Error No. 3

The superior court erred when it entered its December 7, 2012 Conclusion of Law No. 2.3(a)

Assignment of Error No. 4

The superior court erred when it entered its December 7, 2012 Conclusion of Law No. 2.3(b)

Assignment of Error No. 5

The superior court erred when it entered its December 7, 2012 Conclusion of Law No. 2.3(c)

Assignment of Error No. 6

The superior court erred when it entered its December 7, 2012 Conclusion of Law No. 2.3(d)

Assignment of Error No. 7

The superior court erred when it entered its December 7, 2012 Conclusion of Law No. 2.4.

Assignment of Error No. 8

The superior court erred when it entered its December 7, 2012 Conclusion of Law No. 2.5.

Assignment of Error No. 9

The superior court erred when it awarded attorney fees to Rowley's attorneys in the amount of $20,767.69.

Assignment of Error No. 12

The superior court erred in entering its judgment, finding of fact, and conclusions of law dated December 7, 2012.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The standard of proof in industrial insurance appeals is by preponderance of the evidence. The appealing party bears the initial burden of establishing entitlement to benefits. Was Rowley required to show by a preponderance of the evidence that his injury did not occur while in the commission of a felony?

2. RCW 51.52.140 requires that the same practice as in all civil cases apply to Board and superior court proceedings. The trial court adopted the Board's refusal to weigh the officers' field tests without a confirming laboratory test. Does the absence of a laboratory test confirming that the substance in the plastic baggie was methamphetamine bar the Department from presenting evidence that a felony was committed under RCW 51.32.020 when the evidence shows that the methamphetamine was present?

3. Rowley presented no evidence that he did not possess methamphetamine at the time of his injury and the Department presented evidence that he was in possession of methamphetamine. Assuming that Rowley was required to show by a preponderance of the evidence that his injury did not occur while in the commission of a felony, did the trial court commit reversible error by using the incorrect standard of proof and placing the burden on the Department?

4. RCW 51.32.020 bars payments under the Industrial Insurance Act to any claimant who is injured while committing a felony. Did the Department have the authority to reject Rowley's claim under RCW 51.32.020 when Rowley's injury occurred while he was committing the felony crime of possession of methamphetamine?

IV. STATEMENT OF FACTS

A. Bart Rowley Was Injured When He Drove His Tractor Trailer Off an Overpass

Rowley was severely injured when he drove his truck-trailer off an overpass on northbound 599 on August 14, 2008. CP 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. The road which Rowley was traveling on was clear and dry the day of the accident. CP 989-90. Although no other vehicles were struck by Rowley's vehicle, another vehicle traveling southbound struck debris from Rowley's truck. CP 993-94. Rowley was unconscious immediately after the accident and remained in an induced coma for 40 days following the accident. CP 641.

Rowley was taken to Harborview Hospital in Seattle, where he was attended to by Nurse Mary Comstock and Nurse Jennifer Compton, as well as other doctors and nurses. CP 737-38.

B. Rowley Possessed Methamphetamine When He Was Involved In The Motor Vehicle Accident

Officer Donevan Dexheimer was sent to the hospital by state patrol dispatch because Rowley was suspected of being under the influence of an illicit substance at the time of the accident. CP 732. Officer Dexheimer is a trained drug recognition expert with the Kent Police Department, and specializes in drug impairments and impaired driving. CP 718-33. State

Patrol also dispatched Troopers Nicholas King and David Roberts to respond to the accident and conduct an investigation. CP 499-501, CP 984-85.

When Officer Dexheimer arrived he was told "there was a surprise" in Rowley's pocket. CP 737. Rowley's clothes had been removed by the time Officer Dexheimer arrived and most of the contents found in the baggie had been dumped into the sink and rinsed down the drain. CP 906, 923. Rowley's clothes and the baggie had been thrown into a large trash bag in the hallway outside of the ER. CP 744. Nurse Comstock could not recall if Rowley came into the hospital with his clothes on or not, but she recalled that when they went through his clothes, the baggie was in his clothes and that the baggie of white substance had smiley faces on it. CP 921-29. Nurse Comstock took Officer Dexheimer to the trash where Rowley's clothes were 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 based on his considerable experience and drug recognition expert training, he determined that the substance in the baggie appeared to be methamphetamine. CP 745.[1] He believed that it was methamphetamine because: it was packed in a one-inch square baggie—the most common

[1] The possession of *any* amount of methamphetamine is a felony under RCW 69.50.4013.

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.

Officer Dexheimer also observed Rowley, as part of his investigation. He observed that Rowley's pulse rate was high even though he was given sedatives that should have brought his heart rate down, and noted that the high heart rate was consistent with methamphetamine use. CP 741-43. Officer Dexheimer testified that the nature of the accident was consistent with someone coming "down" from a stimulant high, as these people have a tendency to fall asleep at the wheel and drive until they hit something. CP 751-52. Officer Dexheimer opined Rowley's veering off the road was more likely than not due to his impairment from methamphetamine. CP 754. Based on the totality of the information observed and reported to Officer Dexheimer, Officer Dexheimer arrested Rowley. CP 754-55.[2] Officer Dexheimer provided Trooper King with the plastic baggie containing the crystal residue when he arrived to conduct his investigation. CP 502.

Trooper Nicholas King field tested the substance in the baggie using a commercial NIK® testing kit and he followed the proper

[2] Ultimately, the Pierce County Prosecutor's Office elected not to pursue charges in the matter. CP 643. Rowley suffered significant injuries, including permanent paralysis below the mid-abdomen as result of the accident. CP 642.

procedure and protocols for testing kit. CP 524-27. The substance from the baggie tested positive for methamphetamine. CP 527.[3]

C. The Presence of Methamphetamine Was Confirmed By A Blood Test Showing Rowley Was Under the Influence of the Drug At The Time of The Accident

As part of the investigation, Officer Dexheimer also had Rowley's blood drawn and taken to the state laboratory for testing. CP 749-50. Rowley's blood was drawn by Nurse Compton and given to Officer Dexheimer. CP 871-73. Officer Dexheimer gave the vials of blood to Trooper King who took them to the Washington State Patrol office to be forwarded to the Washington State Toxicology Laboratory. CP 508-11.

Brian Capron, a forensic specialist employed by the Washington State Toxicology Laboratory, testified that the blood test results demonstrated Rowley had a high amount of methamphetamine in his blood the day of his accident. CP 791-818. The amount that Rowley had in his system was consistent with his impairment and the accident on that day. CP 803-04.

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

[3] The baggie, and any laboratory tests that may have been performed, were not submitted at the Board hearing. Trooper King submitted it to Washington State Patrol's evidence system, but he could not say what happened to baggie thereafter. CP 517-18.

an October 27, 2008 order. *See* CP 16; CP 242. The order specifically stating that the basis for the rejection was RCW 51.32.020. CP 242. Rowley protested the order. CP 69. The Department affirmed that order on January 13, 2009. CP 69. Rowley appealed to the Board. CP 76-77.

D. Board Proceedings

At the Board, Rowley presented his case-in-chief to prove entitlement to benefits.[4] He initially presented only the testimony of himself. CP 709. 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 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. The Department's counsel also asked him directly about whether he knew

[4] Rowley was represented by multiple counsel from the same firm during the appeal process, but it was not until Rowley filed an untimely "motion for summary judgment" six months *after* his hearings had already started in this matter that he argued for a heightened standard of proof. CP 264-71. During the hearings before Rowley's untimely motion for summary judgment, Rowley conceded that the preponderance of the evidence standard applied, though he asserted that it was the Department's burden. CP 657.

whether he had possession of methamphetamine at the time of the accident:

> Q. Mr. Rowley, you have no recollection of whether or not you may or may not have had meth in your possession the day of your accident, correct?
>
> A. I don't remember anything about the day of the accident.

CP 648.

At the conclusion of Rowley's testimony, Rowley rested his case and the Department made a motion to dismiss for failure to make a prima facie case under CR 41(b)(3). CP 657-58.

After the Department moved to dismiss the claimant's case, Rowley asked to reopen his case to call additional witnesses, and was given permission to call additional witnesses. CP 239.

Rowley elected to call one additional employer witness. CP 208-09. Bonnie Xiggores testified that Rowley was working as a truck driver for Craig Mungas, the receiver for Joe Anderson, the day of his accident. CP 710. She had no direct knowledge of the events other than the fact that Rowley was working for the employer at the time. CP 708-17.

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

The industrial appeals judge issued a proposed decision and order on July 8, 2011, 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. The industrial appeals judge applied the preponderance of the evidence standard. CP 69-70. 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: rather, it is sufficient to show by preponderance of the evidence that the Rowley was injured while he was in the course of committing a felony under RCW 51.32.020. CP 41-48.

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. 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 where the Department "invokes the felony payment bar, the claimant must present evidence first. Once the claimant meets his or her burden to make a prima facie case for allowance of his or her claim, the burden 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 by state or federal criminal law." CP 15. 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 ("At a minimum, alleged narcotics must be tested in a laboratory before we will uphold a denial of payment of industrial insurance benefits under RCW 51.32.020 in an alleged narcotics possession case."). In a special dissenting opinion, one Board member asserted that the Board's authority in these appeals is to examine evidence using the preponderance of the evidence standard of proof, 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.[5]

E. Court Proceedings

The Department appealed to Pierce County Superior Court, where the case was tried to the bench. 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.

Accordingly, the trial court determined 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. Finding of Fact (FF) 1.4; Conclusion of Law (CL) 2.3(a). It concluded the Department bore the burden of proving, by clear, cogent, and convincing evidence that Mr. Rowley's injury occurred when he was in the commission of a felony within the meaning of RCW 51.32.020, and the Department failed to meet that burden. CL 2.3(b). The court concluded that absent a confirming laboratory test the Department did not prove the white substance in the baggie, found in Rowley's clothes, was

[5] Despite three different burdens of proof from the three Board members, the Board has designated this decision as a tentative significant decision. *See* Board of Industrial Insurance Appeals Tentative Significant Decisions Page, http://www.biia.wa.gov/Tentative_Sig_Dec/tentative_sigdec.htm (last visited May 10, 2013). The Board designates a decision significant when it considers it to have "an analysis or decision of substantial importance to the board in carrying out its duties." WAC 263-12-195.

methamphetamine. CL 2.3(c); *see also* FF 1.5. Finally, the trial court concluded that the Department could not reject a claim under the felony provision of RCW 51.32.020. CL 2.3(d). This appeal follows. CP 1186-88.

V. SUMMARY OF ARGUMENT

The Department rejected Rowley's workers' compensation claim because he was engaged in the felony of possession of methamphetamine while he was injured and therefore is barred by the statutory felony bar contained in RCW 51.32.020. When Rowley appealed the Department's decision, Rowley had the initial burden of proof to show that he was entitled to benefits, including showing that the felony bar did not apply. The case law requiring a claimant prove entitlement to benefits, the language of Industrial Insurance Act (RCW 51.52.050(2)(a)), and the analogous crime victim's case law show it is Rowley's initial burden to make a prima facie case that the felony bar does not apply.

Instead, the Board and trial court incorrectly applied the clear, cogent, and convincing evidence standard of proof to the evidence presented by the Department. The preponderance of the evidence applies in workers' compensation appeals. RCW 51.52.140 applies the practice in civil proceedings to proceedings at the Board and trial court in workers'

compensation cases. Neither the Board nor trial court provided the authority to support such a departure from RCW 51.52.140 and case law.

The trial court and Board also refused to consider the Department's evidence that Rowley possessed in methamphetamine, a felony under RCW 69.50.4013. The trial court applied higher evidentiary standards than would apply in the criminal context. In either the criminal or civil context, a witness who demonstrates an expertise acquired either by education or experience may give an opinion as to the identity of an illicit substance. The Department presented the testimony of two witnesses who identified the substance in Rowley's baggie as methamphetamine based on their training, experience, and a commercial field testing kit. Moreover, the trial court apparently incorrectly refused to consider Rowley's proven methamphetamine intoxication as circumstantial evidence of possession. Circumstantial evidence can prove a proposition in either the civil or criminal context.

The trial court committed reversible error when it applied the wrong burden of proof, put the initial burden on the Department to show that felony bar applied to Rowley, and failed to consider the relevant evidence. If the correct standard of proof was applied to the Department's evidence, a fact finder could conclude that Rowley was in possession of methamphetamine at the time of his injury. Likewise, the trial court

applied an evidentiary bar to the evidence of methamphetamine possession because there was no confirming laboratory test that confirmed the Department's compelling evidence that Rowley possessed methamphetamine at the time of the accident. This error was not harmless, particularly given Rowley's failure to present any evidence that showed that the felony bar did not apply.

Finally, the Department had the authority under RCW 51.32.020 to reject Rowley's claim when it applied the felony bar to his claim. The plain language of the statute bars all payments to Rowley. It is illogical to conclude that the legislature intended to require the Department to allow claims when it may make no payments to benefit the worker. Claim rejection is likewise supported by both past Board case law and the recognition by the courts that RCW 51.32.020 is a statutory bar to proximate cause.

VI. STANDARD OF REVIEW

The first step in seeking review of the Department's decision to deny a workers' compensation claim is an appeal to the Board. RCW 51.52.060. As the appealing party, Rowley bore the burden of proof to prove by a preponderance of the evidence that the Department's order was incorrect. *See* RCW 51.52.050; *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942). One seeking benefits under the

Industrial Insurance Act "must prove his claim by competent evidence." *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966).

Decisions of the Board may be appealed to superior court. RCW 51.52.110. The findings and decisions of the Board are considered prima facie correct until the superior court, by a preponderance of the evidence, finds them incorrect. *Dep't of Labor & Indus. v. Moser*, 35 Wn. App. 204, 208, 665 P.2d 926 (1983). The superior court reviews the Board's decisions de novo, but without any evidence or testimony other than that included in the Board's record. RCW 51.52.110; *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560-61, 897 P.2d 431 (1995).

The ordinary standard of civil review applies to this Court's review of the trial court's decision in a workers' compensation appeal. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *see Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The Court of Appeals reviews the findings of the superior court, not the Board. *See Rogers*, 151 Wn. App. at 179-81.

This appeal presents issues of what standard of proof applies, who has the initial burden of proof, issues of statutory interpretation (regarding whether the Department can deny a claim under RCW 51.32.020),

whether there is an new evidentiary bar in industrial insurance cases with no parallel in other proceedings (the requirement that a laboratory drug test confirm field drug tests as a matter of law), and whether reversible error was committed by the trial court. These are all legal questions reviewed de novo. *See generally Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997) (superior court legal conclusions reviewed de novo).

Although the court may substitute its own judgment for that of the agency regarding issues of law, it gives great weight to the agency's interpretation of the law it administers. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

VII. ARGUMENT

A. The Initial Burden Of Proof To Show Entitlement to Benefits Lies With Rowley Because Claimants Have The Initial Burden In Workers' Compensation Appeals

The Department rejected Rowley's claim. The October 27, 2008 order rejecting Rowley's claim for benefits specifically stated the basis for the rejection was RCW 51.32.020.[6] CP 242.

RCW 51.32.020 precludes a claimant who is injured while committing a felony from receiving benefits:

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[6] That order was subsequently affirmed by an order dated January 13, 2009. CP 69.

> 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.) Under this statute, Rowley must show that he did not commit a felony in order to have benefits.

1. Rowley has the burden to show entitlement to benefits, including showing that the statutory felony bar does not apply, because claimants are held to strict proof of their right to receive compensation

Claimants appealing any order of the Department in an industrial insurance case bear the burden of proving entitlement to benefits. RCW 51.52.050(2) ("In any 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."); *see also* WAC 263-12-115(2). It was Rowley's burden to prove his right to receive benefits under the Industrial Insurance Act. *See Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955) ("[P]ersons who claim rights [under the Industrial Insurance Act] should be held to strict proof of their right to *receive benefits* provided by the act."). Multiple cases over the years support the longstanding proposition that the burden rests with the claimant to prove each element of his or her claim. *See Lightle*, 68 Wn.2d at 510; *Cyr*, 47 Wn.2d at 97; *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); *Hastings v. Dep't of Labor & Indus.*, 24 Wn. 2d 1, 5, 163 P.2d 142 (1945); *Guiles*, 13 Wn.2d at 610.

The requirement to establish the right to receive benefits is not diminished by the rule that the Industrial Insurance Act is liberally construed to affect its remedial purpose. *See Lightle*, 68 Wn.2d at 510. Regardless of liberal construction, one seeking benefits under the Act "must prove his claim by competent evidence." *Id.; see also Berry v. Dep't of Labor & Indus.*, 45 Wn. App. 883, 884, 729 P.2d 63 (1986).

Because claimants must prove the right to receive benefits, in order to recover, Rowley must show that he was entitled to benefits, including a prima facie showing that he was not in the commission of a felony at the time of his alleged industrial injury as the Department alleged. Holding claimants to strict proof for their requested relief has been applied to other statutory bars contained in RCW 51.32.020. *See Mercer v. Dep't of Labor & Indus.*, 74 Wn.2d 96, 101, 442 P.2d 1000 (1968).

For example, RCW 51.32.020 also contains a bar for workers, who deliberately intend to injure themselves or commit suicide. The *Mercer* 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 or while in a delirium when he committed suicide. *Mercer*, 74 Wn.2d at 10. The claimant presented a medical witness to offer such an opinion, but the court struck the witness's testimony because it lacked foundation based on the facts in the record. *Mercer*, 74 Wn.2d at 10. Thus, under *Mercer*, a claimant must prove that a bar in RCW 51.32.020 does not apply.

Claimants have the burden to establish that statutory exclusions do not apply in other contexts under the Industrial Insurance Act, including exclusions for domestic servants, partners or sole proprietors, and employees of common carriers involved in interstate commerce. *See Bennerstrom v. Dep't of Labor & Indus.,* 120 Wn. App. 853, 867-68, 86 P.3d 826 (2004) (claimant appealed Department order excluding him from coverage as a domestic servant and the court affirmed Department's summary judgment at the trial court); *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 879 P.2d 326 (1994) (claimant met his burden of showing that he was not excluded as a sole proprietor); *see Berry*, 45 Wn. App. at 884 (claimant was a partner not entitled to coverage and therefore the court upheld the Department order excluding him from coverage); *see Stetler v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 710-11, 57 P.3d 248 (2002) (court reinstated trial court's summary judgment affirming the Department order

excluding claimant from coverage because the employer was an exempted common carrier). It is the claimant's burden to show that an exclusion or bar to coverage does not apply.

2. The Industrial Insurance Act states unequivocally that the appealing party must establish prima facie case for the relief sought in such an appeal

Rowley must establish a prima facie case as to all the elements of his requested relief under the Industrial Insurance Act. "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). The trial court side-steps the plain language of the statute by creating the equivalent of an affirmative defense that the Department must raise whenever it asserts that worker is not entitled to benefits because he or she was injured during the commission of a felony. CP 1199 (CL 2 (CL 2.3(b)). The Board also adopted this rule. CP 5 ("[W]here the Department invokes the felony payment bar, the claimant must present evidence first. Once the claimant meets his or her burden to make a prima facie case for allowance of his or her claim, the burden shifts to the Department" to show that the felony bar applies.). There is no authority in the Industrial Insurance Act that allows the initial prima facie showing to be shifted to the Department in direct contradiction to the express language of RCW 51.52.050.

The Board suggests the divergence from requiring the appealing party to establish a prima facie case as to all elements is appropriate because of the similarities between willful misrepresentation and the felony bar. CP 14-15.[7] However, unlike RCW 51.32.020, where the default rule from RCW 51.52.050(2)(a) applies, RCW 51.52.050(c) specifically sets forth an exception for who should proceed first in willful misrepresentation cases. RCW 51.52.050(c) unequivocally states in relevant part: "In an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief." *See also* WAC 263-12-115(2)(a).

To express one thing in a law implies the exclusion of the other. *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002); *State v. Sommerville*, 111 Wn.2d 524, 535, 760 P.2d 932 (1988) (under principle of *expressio unius est exclusio alterius*, the express inclusion of certain conditions excludes the implication of others). By expressing that willful misrepresentation is the exception to the rule that an appealing party carries the burden of proof, the legislature meant to exclude the

[7] The Board asserts "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 received payments for time-loss compensation, permanent partial disability, and permanent total disability, under an otherwise allowed claim." CP 14.

application of the burden of proof to the Department in any other workers' compensation appeal at the Board.

This makes sense because willful misrepresentation is markedly different than the felony bar. When the Department is using its recoupment powers, it disgorges benefits that have already been paid to a worker months or even years earlier, often displacing final and binding orders. The Department also has the ability to levy a 50 percent penalty on the overpayment if the benefits were received as the result of willful misrepresentation. RCW 51.32.240(5).

Putting the burden on the Department also violates the Board's regulation directing its proceedings. *See* WAC 263-12-115(2)(a).

WAC 263-12-115(2)(a) provides:

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

(Emphasis added.) WAC 263-12-115(2)(a) is consistent with RCW 51.52.050. However, requiring the Department to introduce evidence that addresses the basis of a rejection order as an affirmative defense is

completely at odds with the requirement that the claimant introduce all evidence to show the claim denial is incorrect in his or her case-in-chief.

3. The directly analogous crime victims' case law also supports Rowley's burden because claimants must rule out exclusions from coverage

The case law addressing who has the initial burden in crime victim's cases is directly analogous to the case here. *Stafford v. Dep't of Labor & Indus.*, 33 Wn. App. 231, 653 P.2d 1350 (1982).[8] The *Stafford* Court required the claimant widow to prove that the victim of the criminal act was also *innocent*. *Id.* at 233. The court based its analysis, in large part, on the Industrial Insurance Act's requirement that claimants provide "strict proof" of their entitlement to benefits. *See id.* at 235. Noting the absence of express statutory direction as to whether the Department must prove limitations on coverage or whether the claimant must prove their absence, the *Stafford* Court held: "Strict 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." *Id.* at 236.

Indeed, the *Stafford* Court analogized to industrial insurance cases addressing the other exclusions under RCW 51.32.020 where survivors of workers who commit suicide must show the death was such that the

[8] At the time of the case, the statute adopted RCW 51.32.020 by cross-reference in RCW 7.68.070(3). Laws of 1973, 1st Ex. Sess., ch. 122, § 7 *amended by* Laws of 2011, ch. 346, § 401. However, RCW 7.68.061 now contains the language of RCW 51.32.020 verbatim.

"decedent acted under an uncontrollable impulse or while in a delirium," in support of holding the crime victim to the burden of proving innocence at time of the act. *Stafford*, 33 Wn. App. at 236-37 (citations omitted). Like the *Stafford* claimant, Rowley must prove that his injury is not excluded from coverage because he was committing a felony at the time of his injury. Otherwise he has not proven a right to receive benefits.

B. The Standard Of Proof In Workers' Compensation Appeals Is Preponderance Of The Evidence Rather Than Clear, Cogent, and Convincing Evidence

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*, 13 Wn.2d at 610 (emphasis added).

The Board's own decisions also demonstrate that the civil, preponderance of the evidence standard applies, unless a provision of the Industrial Insurance Act dictates otherwise. *See In re: Barbara Binion*, Dckt. No. 01 14940, 2003 WL 21129939, *3 (2003) ("Persons claiming benefits under the Industrial Insurance Act are held to strict proof, by a preponderance of the evidence, of their right to receive benefits."); *see also In re Christine Guttromson*, BIIA Dec. 55 804, 1981 WL 375941, *2 (1981).

Here, the Board decided that "where the Department invokes the felony payment bar, the claimant must present evidence first. Once the claimant meets his or her burden to make a prima facie case for allowance of his or her claim, the burden then shifts to the Department to prove *by at least clear, cogent, and convincing evidence* that the worker was injured while engaged in the attempt to commit or the commission of a felony as defined under state or federal criminal law." CP 15 (emphasis added). The trial court decided that the Board did not err in this decision. CP 1184; CL 2.3(b). This directly contradicts the case law.

The Board has applied the clear, cogent, and convincing standard to one exception—recoupment cases both under the workers' compensation fraud statute before 2004 and under the willful misrepresentation recoupment statute after the statute was amended. *See In re Del Sorenson*, BIIA Dec. 89 2697, 1991 WL 87430, *5 (1991); *see also In re Frank Hejna*, BIIA Dec. 04 24184, 2006 WL 3520132, *8-9 (2006); RCW 51.32.240(5).

The Board has said that the Department has the burden of proceeding with the evidence to establish a claimant engaged in willful misrepresentation resulting in overpayment by clear, convincing, and cogent evidence. *Hejna*, 2006 WL 3520132 at *8-9. No appellate court has addressed the issue of whether the clear, convincing, and cogent

evidence standard applies to willful misrepresentation after the 2004 revisions to RCW 51.32.240(5).[9]

The revisions to RCW 51.32.240(5) established a three-part test for willful misrepresentation, thus departing from the nine-element civil fraud test, which has a long history in Washington State. *See Howell v. Kraft*, 10 Wn. App. 266, 271, 517 P.2d 203(1973). Under the previous version of RCW 51.32.240(4), the appellate courts applied the clear, cogent, and convincing standard to repayment of benefits based on fraud. *See Layrite Products Co. v. Degenstein*, 74 Wn. App. 881, 887, 880 P.2d 535 (1994).

The Board's assertion that the felony bar in RCW 51.32.020 punishes the worker "inasmuch as it denies the worker and his or her beneficiaries the right to receive payments" and therefore is more akin to willful misrepresentation is also not accord with civil practice. CP 14. RCW 51.52.140 requires that practice in civil proceedings apply to Board and trial court proceedings in workers' compensation cases. 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

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[9] Whether the Board is correct regarding the standard in willful misrepresentation cases is not before this Court. Although the Department agrees that prior to the 2004 amendments the standard of proof for common law fraud applied, the Department does not concede the Board is correct to apply the clear, cogent, and convincing standard of proof after the legislature abandoned the nine-element civil fraud test.

of the evidence is sufficient." *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 591, 187 P.3d 291 (2008); *Carlton v. Vancouver Care LLC*, 155 Wn. App. 151, 169, 231 P.3d 1241, 1250 (2010) (civil claim involving rape only requires proof by a preponderance of the evidence); *State v. Von Thiele*, 47 Wn. App. 558, 564, 736 P.2d 297 (1987) (civil standard appropriate for restitution-type statute even though legislature also had criminal punishment).

Finally, that the preponderance of the evidence standard is the proper standard of proof in cases of this kind is further supported by the well settled rule that, on an appeal to superior court, a party challenging the Board's findings bears the burden of proving, by "'a fair preponderance of credible evidence,'" that the decision of the Board was incorrect. *See Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992) (internal quotation omitted)); *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 253 P.3d 430 (2011); *see* 6A *Washington Practice: Washington Pattern Jury Instructions: Civil,* 155.03 at 136 (6th ed. 2012) (WPI); *see also* RCW 51.52.115.

Whether the matter is tried to the Board or to superior court, the standard of proof is the civil, preponderance of the evidence standard. There is no basis for the trial court's conclusion that the Board did not err by

adopting the clear, cogent, and convincing standard of proof at the Board and the trial court erred as a matter of law when it applied de novo the clear, cogent, and convincing standard of proof without any authority to do so. *See* CP 1199 (CL 2.3(b)).

C. The Lack of A Confirming Laboratory Test Does Not Act As An Evidentiary Bar In Felony Rejection Cases

The trial court adopted the Board's holding that it would not weigh the evidence without a laboratory test confirming the identity of the substance. CL 2.3(d); FF 1.5; CP 1199. Accordingly, the trial court imposed an evidentiary requirement that has no support in the law. As noted, RCW 51.52.140 provides that the civil practice should apply to proceedings at the Board, unless another provision of the Industrial Insurance Act dictates otherwise. Here, there is no language in any portion of the Industrial Insurance Act that suggests that a special evidentiary standard or rule excludes relevant testimony about the identity of an illicit substance. Thus, the rules of evidence, and the ordinary civil rules, apply. Accordingly, there is no basis for ruling, as the Board and trial court apparently did, that the Departments' witnesses' testimony was irrelevant or inherently defective simply because a laboratory result was not obtained for the substance itself.

1. The trial court held the Department to a higher evidentiary standard than is required for a criminal conviction for possession

In both civil and criminal cases, a party may use circumstantial evidence to prove an assertion. *See State v. Andrews*, 172 Wn. App. 703, 707, 293 P.3d 1203 (2013); *see also Boguch* v. *Landover Corp.*, 153 Wn. App. 595, 613, 224 P.3d 795 (2009). Circumstantial evidence is no less reliable than direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766, 539 P.2d 680 (1975).

Although the civil standards apply here, criminal cases are useful in showing the type of testimony and evidence the trier of fact may use. A witness who demonstrates an expertise "acquired either by education or experience" may give an opinion as to the identity of an illicit substance. *State v. Hutton*, 7 Wn. App. 726, 731, 502 P.2d 1037 (1997); *see also United States v. Dominguez*, 992 F.2d 678, 681 (7th Cir. 1993) (circumstantial evidence establishing the identity of an illegal drug may include "lay-experience based on familiarity through prior use, trading, or law enforcement"). The opinion need not be based upon expert chemical analysis. *See United States v. Schrock*, 855 F.2d 327, 334 (6th Cir. 1988) (chemical analysis identification evidence is not always practical given that "[i]llegal drugs will often be unavailable for scientific analysis because their nature is to be consumed."). Even when there may be

insufficient direct evidence to establish possession of a controlled substance, possession can still be proven by substantial circumstantial evidence. *State v. Talley,* 14 Wn. App. 484, 487, 543 P.2d 348 (1975).

In *State v. Colquitt*, the court noted that a chemical analysis is not vital to uphold a conviction for possession of a controlled substance; circumstantial evidence may be sufficient to establish the identity of a controlled substance. *State v. Colquitt*, 133 Wn. App. 789, 801, 137 P.3d 892 (2006);[10] *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997) (circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case); *U.S. v. Dominguez*, 992 F.2d 678, 681 (7th Cir.1993) (circumstantial evidence establishing a controlled substance beyond a reasonable doubt may include lay experience based on familiarity through prior use, trading *or law enforcement.*)

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts. ER 702; WPI 6th 2.10. To determine the credibility of the witness and the weight to be given the evidence, the trier of fact should consider

[10] Although the *Colquitt* Court ultimately reversed the defendant's conviction, the Court noted that the only evidence to establish the identity of the substance was a police report, which was devoid of the officer's experience and training that would allow him to properly identify the item as a controlled substance. *Colquitt,* 133 Wn. App. at 801.

the officer's education, training, experience, and knowledge. WPI 6th 2.10. However, to assert that the drug recognition expert's testimony could not be given *any* weight absent a laboratory test confirming that the substance was methamphetamine is baseless and legally unsupportable. Neither the trial court nor the Board made a determination that Officer Dexheimer lacked the experience, knowledge, or training to render an opinion on the substance in the baggie before it dismissed his opinion outright. CP 11-19, 1183-84. Nor was the evidence excluded during the hearing.

The weight of authority shows that the trial court erred in requiring a laboratory test.

2. The police officers' testimony shows Rowley possessed methamphetamine

Officer Dexheimer's opinion that the white substance in the baggie was methamphetamine could not be rejected simply because there was no confirming laboratory test. Circumstantial evidence of the identity of an illicit substance can include testimony by witnesses who have a significant amount of experience with the drug in question. *See Colquitt*, 133 Wn. App. at 801 (citing *State v. Watson,* 231 Neb. 507, 514-17, 437 N.W.2d 142 (1989)). Officer Dexheimer's experience and expertise also met the threshold for providing an expert opinion. *State v. Baity*, 140 Wn.2d 1,

18, 991 P.2d 1151(2000) (holding drug recognition expert evidence is admissible in criminal trials under *Frye* because it is generally accepted in the relevant scientific communities).

Officer Dexheimer was familiar with what methamphetamine looked like and had arrested individuals for possession of methamphetamine before. CP 719-34. Officer Dexheimer examined the substance in the bag, and based on his considerable experience and drug recognition expert training, he determined that the substance in the baggie was likely methamphetamine. CP 745. He believed that it was methamphetamine because: 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. Rowley's physiological signs were also consistent with someone coming down from methamphetamine. CP 751-52.

Additionally, Trooper Nicholas King field tested the substance in the baggie using a commercial NIK® testing kit and he followed the proper procedure and protocols for testing kit. CP 524-27. The substance from the baggie tested positive for methamphetamine. CP 527. Both Officer Dexheimer's and Trooper King's testimony should not be disregarded because there was no laboratory test.

3. Evidence of assimilation is circumstantial evidence supporting Rowley's possession of methamphetamine

Evidence of assimilation is circumstantial evidence of prior possession, which when combined with other evidence may be sufficient to prove possession. *See State v. Dalton*, 72 Wn. App. 674, 677, 865 P.2d 575 (1994). To prove constructive possession *based on consumption*, in a criminal proceeding, there must be a sufficient nexus between circumstantial evidence of having consumed alcohol, for example, and possession. *State v. Roth*, 131 Wn. App. 556, 564, 128 P.3d 114 (2006). Courts have found a sufficient nexus where the defendant was observed in close proximity to a beer keg and cups of beer, with an unsteady walk, slurred speech, bloodshot eyes, and a strong odor of an alcoholic beverage about him. *State v. Hornaday*, 105 Wn.2d 120, 126, 128-29, 713 P.2d 71 (1986); *Dalton*, 72 Wn. App. at 677.

As part of the drug recognition investigation, Officer Dexheimer also had Rowley's blood drawn and taken to the state laboratory for testing. CP 749-50. Rowley's blood was drawn by Nurse Compton and given to Officer Dexheimer. CP 871-73. Officer Dexheimer gave the vials of blood to Trooper King who took them to the Washington State Patrol office to be forwarded to the Washington State Toxicology Laboratory. CP 508-11.

Brian Capron, a forensic specialist employed by the Washington State Toxicology Laboratory, testified that the blood test results demonstrated Rowley had a high amount of methamphetamine in his blood the day of his accident. CP 791-818. The amount that Rowley had in his system was consistent with his impairment and the accident on that day. CP 803-04.

The amount of circumstantial evidence here, is more than sufficient to prove by a preponderance of the evidence that Rowley was in the commission of a felony when he injured himself by driving his truck off an overpass even though it was Rowley's burden to rebut the order on appeal.

D. The Trial Court Committed Reversible Error By Applying The Wrong Burden Of Proof, Placing The Burden On The Wrong Party, And Not Considering Relevant Evidence

The Department has assigned error to findings 1.4 and 1.5. Because the trial court applied the wrong standards, as outlined above, the trial court erred as a matter of law in entering these findings. Likewise, the trial court erred as a matter of law entering its conclusions 2.3, 2.4, 2.5, 2.6, and judgment in favor of Rowley. The application of the incorrect standard of proof was not harmless error, it prejudiced the Department, and the trial court's decision must be reversed. *See Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 921, 640 P.2d 1 (1982). Applying the

correct standard of proof and burden of proof, a trier of fact could conclude that Rowley was in possession of methamphetamine at the time of his injury. Additionally applying an evidentiary bar to the evidence of methamphetamine was not harmless because it materially affected the outcome of the trial as it meant the trial court did not consider evidence of methamphetamine possession absent a laboratory test. *See Saldivar v. Momah*, 145 Wn. App. 365, 401, 186 P.3d 1117 (2008) (error prejudicial if within reasonable probabilities it materially affects outcome of trial).

Rowley presented no evidence about the events of the accident. CP 638-70. Rowley presented himself and the office manager. [11] Rowley testified that he could not remember anything up to four days before the accident or on the day of the accident. CP 647-48. Department's counsel asked him directly about whether he knew whether he had possession of methamphetamine at the time of the accident:

> Q. Mr. Rowley, you have no recollection of whether or not you may or may not have had meth in your possession the day of your accident, correct?
>
> A. I don't remember anything about the day of the accident.

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[11] The parties stipulated that there was accident that caused an injury, so Rowley did not need to call a doctor to support his appeal seeking allowance. In the absence of the stipulation, Rowley would have been required to put on medical evidence to support his claim. Medical testimony is required to establish a causal relationship between the industrial injury and the condition for which benefits are sought. *See Parr v. Dep't of Labor & Indus.*, 46 Wn.2d 144, 145, 278 P.2d 666 (1955); *see also Vaupell Indus. Plastics, Inc. v. Dep't of Labor & Indus.*, 4 Wn. App. 430, 435, 481 P.2d 577 (1971).

CP 648. Accordingly, he had no direct knowledge of the events.

Rowley testified that he also understood that he had had negative urine tests when tested by his employer before the accident. CP 649-50. Even taking this self-serving testimony as true, it provides no relevant information in support of Rowley's claim for benefits here. The gravamen of this case is that he made no attempt to show that he did not possess methamphetamine when he was injured, which was the basis of the Department's claim rejection.

The office manager testified that Rowley was working for the employer on the day of the injury, but she had no personal knowledge of accident itself. CP 708-13. This was sufficient to present a prima facie showing that he was in the course of employment, but it does not address that basis of the Department's rejection.

On the other hand, the Department presented compelling evidence that Rowley possessed methamphetamine at the time of the accident. Not only did he have a baggie of methamphetamine as identified by Officer Dexheimer and State Trooper King, but his physical presentation and the circumstances of the accident indicate that he was intoxicated at the time of the accident. CP 524-27, 742-54, 791-818. This was confirmed by a blood test showing Rowley had a high level of methamphetamine in his blood at the time of the accident. CP 803-18. The intoxication is not a

felony itself, but corroborates that the substance identified by Officer Dexheimer and Trooper King was methamphetamine and that he possessed it at the time of the industrial injury. If a trier of fact 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 RCW 69.50.4013. "The elements of unlawful possession of a controlled substance requires proof of two elements: (1) possession of (2) controlled substance." *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010). This record shows that Rowley has not proven by a preponderance of the evidence that a felony was not committed.

Given that the trial applied the incorrect standard of proof and burden of proof, and such errors were not harmless, this case must be remanded to the trial court to apply the correct standard. *See Spring*, 96 Wn.2d at 921 (remanding because trial court misapplied Washington law regarding sufficiency of the evidence and burden of proof); *Nissen v. Obde*, 55 Wn.2d 527, 529-30, 348 P.2d 421 (1960) ("Since it is the function of the trial court and not of this court to consider the credibility of witnesses and to weigh the evidence in order to determine whether it preponderates in favor of the party having the burden of proof, we are convinced that the proper course for us to follow is to remand."). Remand

to the trial court is appropriate given the de novo standard of review at the trial court. RCW 51.52.115.[12]

E. The Department Has Authority Under RCW 51.32.020 To Reject Rowley's Claim Because It May Deny Coverage When An Injury Occurred During the Course of a Felony

This Court has recognized that 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) (holding that RCW 51.32.020 "bars survivor claims" but applying this only when an intentionally caused death is the singular event for which compensation is claimed). The Department has long construed the bar to all benefits to allow rejection of the claim, and, in at least one of its decisions, the Board agreed. *See e.g. In re Robert T. Mathieson, Dec'd.*, BIIA Dec. 7099, 1958 WL 56109, *1 (1958).[13]

Nevertheless, here, the Board and the trial court concluded that the Department could not reject a claim under the felony bar provision. CP 13, 1184. The Board opines that the plain language of the statute only

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[12] Although it should be noted that the courts have also remanded to the Board when the Board has proceeded on a "fundamentally wrong basis." *See Olympia Brewing*, 34 Wn.2d at 508. Nevertheless, here, no further evidentiary proceedings are necessary at the Board.

[13] The Department contended that Mr. Mathieson was both outside the course of employment and barred because he was in the commission of a felony. *Id.* at *1. Although the Board affirmed the decision based in part that Mr. Mathieson was outside the course of employment, the Board also considered the Department's contention that he was barred because he was in the commission of a crime and issued a conclusion of law to that effect. *Id.* at *8.

allows the denial of payments under RCW 51.32.020, not the rejection of a claim. CP 13. The Board's analysis is that even if the Department meets its burden, the worker and his beneficiaries will only be barred from "*payments* for time-loss compensation, loss-of-earning-power, permanent partial disability, permanent total disability, or similar payments." CP 15 (emphasis added)).[14] Accordingly, the Board's language also suggests that benefits not paid directly to the worker such as medical treatment and most vocational services may not be precluded by the statute.

In its relevant part, RCW 51.32.020 provides: "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.*" (Emphasis added.).

The primary purpose in interpreting a statute is to give effect to the legislature's intent. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007). Plain meaning is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.2d 1020 (2007);

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[14] The trial court concluded that "the Board did not err as a matter of law in holding that . . . the Department could not reject a claim under RCW 51.32.020." CL 2.3(d).

Dep't of Ecology v. Campbell & Gwinn, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of the legislature's intent. *Udall*, 159 Wn.2d at 909. An unambiguous statute is not subject to statutory construction. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). However, if the statutory language remains susceptible to more than one reasonable interpretation, the statute is considered ambiguous, and the court may then employ statutory construction tools, including legislative history, for assistance in discerning legislative intent. *Udall*, 159 Wn.2d at 909.

Here, 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*." (emphasis added). Under this plain language, Rowley is not eligible for any benefits, as the same title governs both disability payments and eligibility for medical treatment. It makes no sense to conclude that the Department must accept the claim even though it may not make any payments of any kind under that claim. In its current iteration, the legislature did not intend workers whose injuries occur while in the commission of a felony to receive benefits of any kind, including time loss, permanent partial disability, permanent total disability, treatment, or vocational services.

RCW 51.32.020 must be read with RCW 51.32.010(2)(a): "Upon an occurrence of any injury to a worker *entitled to compensation* under the provisions of this title, he or she shall receive proper and necessary medical and surgical services . . . ." (emphasis added). Thus, a worker who is barred from receiving compensation is also not entitled to medical aid.

Likewise, vocational services cannot properly be held to be available to workers who are barred from receiving time loss compensation payments, because such a holding would create an irreconcilable conflict between RCW 51.32.020, which prevents payments from being made to such workers, and RCW 51.32.099, which provides that workers who are found eligible for vocational services "shall" receive time loss compensation while they are actively participating in a vocational retraining plan. If the Department found that a worker who had committed a felony was nonetheless entitled to vocational services, it would be impossible for it to proceed without violating the plain language of either RCW 51.32.099, which plainly requires it to pay time loss to such workers, and RCW 51.32.020, which plainly forbids it from doing so. Since a statute should, whenever possible, be construed in a way that avoids making it conflict with the provisions of a related statute, RCW

51.32.020 cannot be properly interpreted as allowing workers who fall under its terms to nonetheless be eligible for vocational services.

Furthermore, the history of RCW 51.32.020 shows that the legislature intends the statute to bar *all* benefits. Since its inception, the Industrial Insurance Act has always contained a provision that a worker cannot benefit from injuries that have occurred during criminal acts.

RCW 51.32.020 was first enacted in 1911. The statute read as follows:

> If injury or death results to a workman from the deliberate intention of the workman to produce such injury or death, neither the workman nor the widow, widower, child or dependent of the workman shall receive any payment whatsoever out of the *accident fund* . . . .

Laws of 1911, ch.74, §§ 5, 6 (emphasis added).

In 1971, the legislature substituted the phrase "under this title" for the previous language "whatsoever out of the accident fund." Laws of 1971, Ex. Sess., ch. 289, §42. By substituting the language from "under this title" for "whatsoever out of the accident fund," the legislature evidenced its intent to make it clear that no benefits of any kind could be

provided to someone injured during the commission of a felony.[15] However, under the prior version of the statute, arguably, payment from the medical aid fund could be made since it was limited to referencing the accident fund. The legislature closed that loophole by amending RCW 51.32.020 and providing that, under that statute, no payments may be made "under this title."

It is illogical to assume that the legislature intended that the Rowley's claim be allowed, under RCW 51.32.020, but that all benefits would be denied. There is no rationale that would support accepting a claim but denying all benefits under that claim in the context in which the legislature amended this section.

Furthermore, 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 Ortblad v. State*, 85 Wn.2d 109, 117, 530 P.2d 635 (1975). Here, the Department must have the authority to reject a claim if it is unable to make any payments for that claim under the Industrial Insurance Act.

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[15] Benefits are paid out of several funds, including the accident fund, the medical aid fund, stay at work fund, and supplemental pension fund. *See generally* Title 51.44 RCW. The accident fund pays for benefits such as time-loss compensation benefits, permanent partial disability, and permanent total disability. The medical aid fund pays for treatment. *See WR Enters., Inc. v. Dep't of Labor & Indus.*, 147 Wn.2d 213, 216-17, 53 P.3d 504 (2002).

Contrary to the Board's assertion that this is a case of first impression, the Board has addressed RCW 51.32.020 and the worker's involvement in a crime as basis for claim rejection before in a significant decision. *See Mathieson*, 1958 WL 56109 at *4.[16] Mathieson was killed while driving under the influence of alcohol and his surviving wife sought benefits. *Mathieson*, 1958 WL 56109 at *2. Since Mathieson was driving under the influence when his fatal injury resulted, he was involved in a "crime" and therefore his widow was properly denied benefits on that basis, as well has being outside the course of employment. *Id.* at *4.[17] The Board concluded that the legislature must have intended to "exclude workmen who are injured while 'engaged in the attempt to commit, or the commission of a crime' from *coverage* under the workmen's compensation act . . . ." *Id.* at *5 (emphasis added).

The *Mathieson* decision is in accord with the Supreme Court's view that RCW 51.32.020 is a statutory bar to proximate cause. *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

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[16] Despite *Mathieson*'s designation as a significant decision, the Board did not address the case in its decision. CP 11-19.

[17] The legislature later amended the statute substituting "felony" for "crime." Laws of 1971, Ex. Sess., ch. 289 §42. By substituting "felony" for "crime," the Legislature presumably excluded lesser crimes from the felony bar provision.

proximately related result."). The Department properly rejects claims when the felony bar in RCW 51.32.020 applies.

F. Attorney Fees Are Not Appropriate Because Rowley Should Not Have Prevailed On The Merits

Because this Court should reverse the trial court, Rowley does not prevail and attorney fees are not payable. *See* RCW 51.52.130

VIII. CONCLUSION

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

RESPECTFULLY SUBMITTED this 13th day of June, 2013.

ROBERT W. FERGUSON
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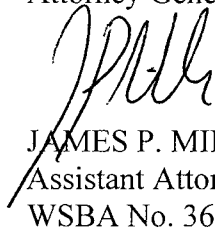

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Desirae Jones

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