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No. 91357-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR & INDUSTRIES,

Petitioner,

vs.

BART A. ROWLEY, SR.

Claimant/Respondent.

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Filed
Washington State Supreme Court
SEP 28 2015
by h
Ronald R. Carpenter
Clerk

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Bryan P. Harnetiaux
WSBA No. 5169
517 E. 17th Ave.
Spokane, WA 99203
(509) 624-3890

George M. Ahrend
WSBA No. 25160
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000

Michael J. Pontarolo
WSBA No. 5319
601 W. Main Ave., Ste. 1212
Spokane, WA 99201
(509) 455-9500

On Behalf of
Washington State Association
for Justice Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the rights of claimants under the Industrial Insurance Act, Title 51 RCW (IIA or act).

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal provides the Court with an opportunity to clarify the meaning of two IIA statutes, RCW 51.52.050 and RCW 51.32.020, in the course of addressing the argument of Petitioner Department of Labor & Industries (Department) that Claimant-Respondent Bart A. Rowley, Sr. (Rowley) is not entitled to coverage under the act.

The underlying facts are drawn from the published Court of Appeals opinion, the briefing of the parties, the Decision and Order of the Board of Industrial Insurance Appeals (Board), and the Department order at issue and Rowley's appeal therefrom. See Department of Labor & Indus. v. Rowley, 185 Wn. App. 154, 340 P.3d 929 (2014), *review granted*, 183 Wn.2d 1007 (2015); Department Br. at 1-2, 5-14; Rowley Br. at 1-13; Department Pet. for Rev. at 1-2, 3-8; Rowley Ans. to Pet. for Rev.

at 1-14; Department Supp. Br. at 2-6; Department 1/13/09 Order (CP 72), affirming its 10/27/08 Order (CP 73-75); Rowley Notice of Appeal to the Board (CP 76-78); and the Decision and Order (D&O) of the Board (CP 11-19).¹

For purposes of this brief, the following facts are relevant: While working as a truck driver, Rowley drove his tractor-trailer truck off an overpass and sustained severe injuries, including a severed spinal cord. He was in an induced coma days after the accident, and has no memory of events, beginning several days before the accident.

Rowley filed an industrial injury claim, and the Department initially awarded him time-loss benefits. However, the Department subsequently *rejected* Rowley's claim and sought to recover time-loss benefits paid based upon RCW 51.32.020. The statute provides that, if a claimant is engaged in the commission of a felony at the time of injury, he or she cannot obtain any payment under the IIA. See CP 72 (1/13/09 Order on reconsideration); CP 73-75 (10/27/08 Order rejecting claim). Rowley sought review of the Department's rejection, contending it "is unjust and unlawful in that Claimant is entitled to allowance of the claim[.]" CP 77.

¹ The Board's D&O is published as In re Bart Rowley, Sr., BIIA Dec., 09 12323 (2012), 2012 WL 1374566 (2012), and a copy is reproduced in the Appendix to this brief.

On review before an industrial appeals judge (IAJ) and the Board, the principal issue was whether Rowley was engaged in commission of a felony—possession of methamphetamine—at the time of injury. Following a contested hearing, the IAJ and the Board concluded that there was insufficient evidence that Rowley committed a felony. The Board ultimately decided that “the Department order must be reversed and the claim must be remanded with direction to allow the claim and pay benefits in accordance with the Industrial Insurance Act.” Board D&O at 6 (CP 16). In reaching this result, the Board stated:

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

Id. at 3 (CP 13, ellipses & brackets added).

[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 then shifts to the Department to prove by at least clear, cogent, and convincing evidence that the worker was

injured while engaged in the attempt to commit or the commission of a felony as defined under state or federal criminal law. If the Department meets that burden, the worker and his beneficiaries shall not receive payments for time-loss compensation, loss-of-earning power, permanent partial disability, permanent total disability, or similar payments.

Id. at 5 (CP 15).

We decline to find that the Department proved by at least clear, cogent, and convincing evidence that the white substance was methamphetamine based merely on a field test and conjecture without laboratory confirmation. At a minimum, alleged narcotics must be tested in a laboratory before we will uphold a denial of payment of industrial insurance benefits under RCW 51 32 020 [*sic*] in an alleged narcotics possession case. The evidence fails to show Mr. Rowley committed or attempted to commit a felony while he was injured on August 14, 2008.

Id. at 6 (CP 16).²

The Department appealed to superior court, which affirmed and adopted the Board's legal conclusion that, under RCW 51.32.020, the Department bore the burden of proving Rowley engaged in the commission of a felony by clear, cogent, and convincing evidence. See Rowley, 185 Wn.App. at 159 (describing superior court disposition).

² This D&O has been designated by the Board as a significant decision. See RCW 51.52.160; Department of Labor & Indus. v. Shirley, 171 Wn. App. 870, 887-88, 288 P.3d 390 (2012) (recognizing Board significant decisions nonbinding but entitled to deference), *review denied*, 177 Wn. 2d 1006 (2013). A list of Board significant decisions is maintained by the Board at www.bia.wa.gov. The Board decisions cited in this brief are significant decisions.

The Department then appealed to the Court of Appeals, which affirmed in part, reversed in part, and remanded for further proceedings.

See id. at 157. Specifically, the Court of Appeals held:

- The superior court (and Board) correctly concluded that the Department, not Rowley, has the burden on appeal to prove Rowley is ineligible for payment of benefits under RCW 51.32.020 because of commission of a felony. See Rowley at 162-63. Under this statute, the commission of a felony would not negate any element of the industrial insurance claim, the existence of which is otherwise undisputed. See id. at 161-62, 166-67.
- The superior court (and Board) was likewise correct that the Department's proof of commission of a felony must be by clear, cogent and convincing evidence. See id. at 163-65.
- The superior court (and Board) erred in concluding that proof of commission of a felony under RCW 51.32.020 requires a "confirming laboratory test." See id. at 168. As a consequence, the case is remanded for further proceedings consistent with the opinion. See id. at 170.
- The Department has the implied power to reject a claim based upon commission of a felony under RCW 51.32.020, and the superior court (and Board) erred in holding otherwise. See id. at 169-70.

This Court granted the Department's petition for review.

III. ISSUE PRESENTED

Under RCW 51.52.050(2)(a), governing appeals of Department administrative determinations to the Board, is Rowley's "burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal" satisfied by proof that he was an employee acting in the course of employment at the time of injury, or must he also establish that the injury did not occur while in the commission of a felony, when the Department "rejected" his claim based upon RCW 51.32.020?

See Department Pet. for Rev. at 2; Rowley Ans. to Pet. for Rev. at 1.³

IV. SUMMARY OF ARGUMENT

RCW 51.52.050(2)(a) provides that a person appealing a Department decision to the Board “shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.” A prima facie case consists of evidence supporting the minimum facts necessary for an employee to prevail on appeal. The proof required in a given case may vary depending upon the relief sought as a result of the Department action under review.

Here, the Department order appealed by Rowley purports to “reject” his claim under RCW 51.32.020 because his injury—otherwise within the course of employment—allegedly occurred while he was engaged in the commission of a felony. The Department contends Rowley’s prima facie evidence must include evidence he was *not* engaged in the commission of a felony at the time of his injury.

The Department misinterprets RCW 51.52.050(2)(a) because disproving commission of a felony is not part of the prima facie case for allowance of a claim, the relief sought on appeal. The Department also

³ In addition to placement of the burden of proof, the Department also challenges the Court of Appeals determination regarding the quantum of proof necessary to satisfy the burden, i.e., clear, cogent and convincing evidence. See Department Pet. for Rev. at 2 (issue 2); Rowley, 185 Wn. App. at 163-67. This quantum of proof issue is not addressed in this amicus curiae brief.

misinterprets RCW 51.32.020, because this statute does not authorize it to *reject* a claim based on commission of a felony. Properly interpreted, the statute presupposes an otherwise cognizable industrial claim, and commission of a felony only results in a loss of payment to the claimant and specified beneficiaries.

In his appeal, Rowley established a prima facie case for allowance of his claim because it was undisputed that he was an employee under the IIA who was injured in the course of his employment. The burden was on the Department to prove that Rowley is not entitled to payment of benefits because his injury occurred in the commission of a felony.

V. ARGUMENT

A. **Brief Overview Of The IIA And Its System Of Adjudication From The Department Level Through The Appellate Courts, And The Nature Of The “Prima Facie Case” Required Of A Claimant Appealing A Department Order To The Board.**

Background

The IIA is a no-fault compensation system providing “sure and certain relief” for workers injured on the job. RCW 51.04.010. While claimants are held to strict proof of facts establishing coverage, the provisions of the act itself are to be liberally construed in favor of claimants. See RCW 51.12.010; Dennis v. Department of Labor & Indus., 109 Wn. 2d 467, 470, 745 P.2d 1295 (1987); Olympia Brewing Co. v.

Department of Labor & Indus., 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled in part on other grounds*, Windust v. Department of Labor & Indus., 52 Wn. 2d 33, 39-40, 323 P.2d 241 (1958).

When a claimant files a claim, the Department conducts an investigation and passes upon the claim in a non-adversarial setting. See generally Ch. 51.04 RCW; Ch. 296-14 WAC.⁴ A claimant may challenge the Department determination by appeal to the Board, and an adversarial hearing on the merits follows. See RCW 51.52.102-.104 (regarding Board hearings). A claimant's appeal from a Department order is heard de novo by the Board, and the order is not evidence and carries no presumption of correctness. See Olympia Brewing Co., 34 Wn. 2d at 506 (explaining under former statutory scheme that "[t]he ruling of the [Department] supervisor is before the joint board, but it is not evidence and there is no presumption that it is correct"); In re David Gerlach, BIAA Dec., 85 2156 at 2 (1986), 1986 WL 31885, at *1 (1986) (stating same rule under RCW 51.52.104 & .106, quoting Olympia Brewing Co.).

A Board decision and order may be appealed to the superior court and is reviewed de novo on the record. See RCW 51.52.115. Board fact determinations are subject to a rebuttable presumption of correctness. See id.; WPI 155.03. Legal determinations involving substantive provisions of

⁴ A similar procedure applies if the employer is self-insured. See Ch. 51.14 RCW.

the act are reviewed de novo. See Shafer v. Department of Labor & Indus., 166 Wn. 2d 710, 715, 213 P.3d 591 (2009).

Superior court determinations are subject to further appeal, with fact determinations reviewed by the appellate court for substantial evidence, and substantive legal issues reviewed de novo. See RCW 51.52.140; Robinson v. Department of Labor & Indus., 181 Wn. App. 415, 425, 326 P.3d 744, *review denied*, 337 P.3d 325 (2014).

Appeals to Board Under RCW 51.52.050.

This brief focuses upon the nature of the proof required when a claimant appeals an adverse Department order to the Board. RCW 51.52.050(2)(a) provides in relevant part that “[i]n an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for relief sought in such appeal.”⁵ The phrase “prima facie case” is undefined and must be given its ordinary meaning. See Harris v. Department of Labor & Indus., 120 Wn. 2d 461, 472, 843 P.2d 1056 (1993) (applying plain meaning rule to interpret IIA). Any doubt as to the meaning must be resolved in favor of the claimant under the mandated liberal construction of the act. See RCW 51.12.010; McIndoe v. Department of Labor & Indus., 144 Wn. 2d 252, 256-57, 26 P.3d 903 (2001).

⁵ The full text of the current version of RCW 51.52.050 is reproduced in the Appendix.

A “prima facie case” involves “[t]he establishment of a legally required rebuttable presumption,” or “[a] party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.” Black’s Law Dictionary s.v. “prima facie case” (10th ed. 2014). Customary practice in civil cases applies to proceedings before the Board. See RCW 51.52.140. In civil cases, “[a] ‘prima facie case’ is one where the evidence is sufficient to justify, but not to compel, an inference of liability[.]” McCoy v. Courtney, 25 Wn. 2d 956, 962, 172 P.2d 596 (1946) (brackets added). In determining whether a plaintiff has presented a prima facie case, a plaintiff is entitled to all fact inferences interpreted in a manner most favorable to his or her case. See Robertson v. Club Ephrata, 48 Wn. 2d 285, 290, 293 P.2d 752 (1956). Under this rule:

Defendants have the burden of proving their affirmative defenses. Plaintiff may establish a *prima facie* case under the complaint and the denials thereto without disproving the affirmative defenses which defendants have pleaded.

Id.

The question before the Court is the nature of the prima facie case required of Rowley before the Board under RCW 51.52.050(2)(a). The answer to this question depends in part upon “the relief sought in such appeal,” which is discussed in §B, below.

B. Rowley Established A Prima Facie Case Before The Board Because It Was Undisputed He Was An Employee Under The Act And Sustained An Injury In The Course Of Employment, And He Had No Obligation To Present Evidence That He Was Not Engaging In Commission Of A Felony At The Time Of Injury.

Preliminarily, this case highlights the significance of identifying precisely the requisites for a prima facie case on an appeal to the Board under RCW 51.52.050(2)(a). The allocation of the initial burden of proof may well be outcome determinative when there are problems regarding the availability or reliability of relevant evidence.

The Department disallowed or “rejected” Rowley’s injury claim, CP 72-73, and Rowley appealed to the Board contending he is “entitled to allowance of the claim,” CP 77.⁶ The Department purported to reject the claim based upon RCW 51.32.020, which provides in relevant part:

If 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.)⁷ The Department continues to rely solely on this statute as the basis for rejecting Rowley’s claim. It further contends that because it is entitled to reject the claim on this basis Rowley’s prima facie case

⁶ As a consequence of the rejection, Rowley is obligated to repay certain time-loss benefits he had received. See CP 73-74; see also RCW 51.32.210, .230 & .240 (regarding payment of time-loss benefits and subsequent recoupment under certain circumstances).

⁷ The full text of the current version of RCW 51.32.020 is reproduced in the Appendix.

before the Board had to include evidence that he was not engaging in commission of a felony at the time of injury. See Department Pet. for Rev. at 9, 13-14. More particularly, the Department argues “someone who is committing a felony is *not* acting in [an] authorized manner at the time of injury, and thus was not acting in the course of employment at the time of injury.” See id. at 16 (emphasis in original; brackets added).⁸ In this way, the Department characterizes RCW 51.32.020 as a “specialized type of course of employment statute,” notwithstanding the specific definition of “acting in the course of employment” in RCW 51.08.013. Id.; see also Department Supp. Br. at 10 n.3.

The Board (and superior court) properly rejected this argument, because the Department misapprehends its authority under RCW 51.32.020:

The Department rejected Mr. Rowley’s industrial insurance claim solely on grounds that he allegedly committed a felony while he was injured. The plain language of the statute, however, shows claim allowance or rejection is not the appropriate determination under RCW 51.32.020. Rather, the statute only provides that where a worker commits a felony or attempts to commit a felony and is injured, only the worker, widow, widower, child, or dependent of the worker cannot receive payment under the Act. The statute does not indicate a claim will be disallowed. Claims fall within coverage of the Industrial Insurance Act when a worker is injured in the course of employment. It is undisputed that Mr. Rowley was driving

⁸ But see Department Br. at 38 (acknowledging Rowley’s evidence “was sufficient to present a prima facie showing that he was in the course of employment”).

his semi-trailer on a delivery for his employer in the course of his employment when he was injured. We hold that the Department cannot reject a claim under the felony provision of RCW 51.32.020. The Department should have allowed the claim. The proper inquiry is whether Mr. Rowley is barred from receiving industrial insurance payments under RCW 51.32.020.

Rowley Board D&O at 3 (CP 13).

The Board's textual analysis should control here, without any need to rely on either the rule of liberal construction or rule according deference to the Board's interpretation of the act. See Cowlitz Stud Co. v. Clevenger, 157 Wn. 2d 569, 573, 141 P.3d 1 (2006) (acknowledging that "[t]he Board's interpretation of the IIA, while not binding, 'is entitled to great deference'"; citation omitted). RCW 51.32.020 contains no enabling language supporting *rejection* of a claim, only denial of payment of benefits. In fact, the language of the statute presupposes an otherwise valid claim. Nor is there any disqualifying language in RCW 51.08.013, which defines "[a]cting in the course of employment," that addresses the consequence of felonious conduct or suggests that it is relevant to meeting this threshold requirement for coverage under the act.⁹ Consequently, Rowley's prima facie case at the Board level was met by the undisputed facts that he was an employee who sustained an injury while acting in the course of employment.

⁹ RCW 51.08.013 otherwise contains exclusionary language; i.e., "except parking area." The full text of the current version of RCW 51.08.013 is reproduced in the Appendix.

While the Court of Appeals reached the same result as the Board (and superior court), it did not rely on a textual analysis of the statute, finding it necessary to cast the “statutory exception” of commission of a felony as an “affirmative defense” which must be proved by the Department. Rowley, 185 Wn. 2d at 162-63. Given the plain language of the statute, there is no need to resort to a civil law analogue to resolve the prima facie case issue, even though civil law seems consistent with and supportive of the Board’s decision.

More troubling, the Court of Appeals strays from the statutory language in concluding that, the Department has the “implied power” or “implied authority” to *reject* a claim based upon commission of a felony under RCW 51.32.020. See id. at 168-70. This analysis is flawed. It ignores plain text and interprets the provision to the disadvantage of claimants in disregard of a mandatory rule of liberal construction that must favor claimants. See §A.

The Department urges that the above analysis disregards 80 years of precedent, see Department Pet. for Rev. at 1, and that this precedent requires claimants “to prove entitlement to benefits based upon a claim that the Department order is incorrect,” id. at 9-16 (citing 8 Supreme Court decisions dating back to 1933, with discussion of some of them). None of these cases involve interpretation of the phrase “prima facie case” in RCW

51.52.050(2)(a) or predecessor statutes, or the meaning of commission of a felony under RCW 51.32.020.¹⁰

Lastly, the Department points to the language of RCW 51.52.050(2)(c), regarding “willful misrepresentation,” and argues that in the absence of similar language regarding commission of a felony, the Legislature must have intended to place the burden of disproving a felony on the claimant rather than placing the burden to prove a felony on the Department (or self-insured employer). See Department Pet. for Rev. at 9; Department Br. at 23-24; Department Reply Br. at 6. RCW 51.52.050(2)(c) provides:

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

See also RCW 51.32.240(5)(b), (c) (defining “willful misrepresentation” and applying it with respect to “obtaining, continuing or increasing benefits under this title”).¹¹

¹⁰ One cited case, Mercer v. Department of Labor & Indus., 74 Wn. 2d 96, 101, 442 P.2d 1000 (1968), deals with a separate aspect of RCW 51.32.020, related to the consequences of a claimant deliberately intending to take his or her own life. This Court held that where the suicide was undisputed, the claimant must meet a case law exception for uncontrollable impulse or delirium in order to recover benefits. See also Rowley, 185 Wn. App. at 166. Mercer is distinguishable on this basis.

¹¹ The full text of the current version of RCW 51.32.240 is reproduced in the Appendix.

The problem with the Department's argument is that RCW 51.52.050(2)(c) does not mention the burden of proof. The statute simply alters the *order* of proof, as confirmed by the relevant section of the Department's implementing regulation. See WAC 263-12-115(2) (entitled "Order of presentation of evidence").¹² The Department (or self-insured employer) is required to initially introduce all evidence regarding willful misrepresentation in its case in chief. This reordering of the customary sequence of evidence is understandable given the potentially significant penalties that may be imposed for willful misrepresentation. See RCW 51.32.240(5)(a) (requiring repayment plus "a penalty of fifty percent of the total"). This unique aspect of cases involving willful misrepresentation justifies variance in the order of proof to give the claimant a fair opportunity to respond to the Department's evidence. Where necessary, the claimant will still have to present a prima facie case under subsection (2)(a) in the course of responding to the Department (or self-insured employer). Under the foregoing analysis, subsection (2)(c) simply does not alter the applicable burden of proof.

The superior court correctly adhered to the Board determination that under RCW 51.32.020 the Department had the burden of proving commission of a felony before the Board.

¹² The full text of the current version of WAC 263-12-115 is reproduced in the Appendix.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in resolving the issues on review.

DATED this 11th day of September, 2015.

George M. Ahrend
FOR BRYAN P. HARNETIAUX

George M. Ahrend
GEORGE M. AHREND

AND
FOR *George M. Ahrend*
MICHAEL J. PONTAROLO

On behalf of
WSAJ Foundation

WITH AUTHORITY

Appendix

2012 WL 1374566 (Wash.Bd.Ind.Ins.App.)

Board of Industrial Insurance Appeals

State of Washington

IN RE: BART A. ROWLEY, SR.

Docket No. 09 12323

Claim No. AH-12490

January 30, 2012

***1 Appearances:**

Claimant, Bart A. Rowley, Sr.,

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

Employer, Craig Mungas Receiver for Jos,

None

Department of Labor and Industries,

by The Office of the Attorney General, per Lynette Weatherby-Teague, Assistant

DECISION AND ORDER

The claimant, Bart A. Rowley, Sr., filed an appeal with the Board of Industrial Insurance Appeals on March 9, 2009, from an order of the Department of Labor and Industries dated January 13, 2009. In this order, the Department affirmed its order dated October 27, 2008, in which it demanded that the claimant pay the Department \$3,542.88. The Department determined that Mr. Rowley was entitled to time-loss compensation benefits totaling \$765, but the Department paid \$2,777. In its order the Department stated that the overpayment resulted because the claim was rejected for some reason other than those listed for automated rejection orders; that is that the claim was rejected based on RCW 51.32.020 that states "if injury or death results to a worker from the deliberate intention of the worker himself ... while the worker is engaged in the attempt to commit, or the commission of, a felony ... shall not receive any payment under this title." The Department order is **REVERSED AND REMANDED**.

DECISION

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

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. The industrial appeals judge reached the correct result. Mr. Rowley's injury is covered by the Industrial Insurance Act and payments are not barred under RCW 51.32.020, the felony payment bar. We have granted review, however, to accomplish the following: First, we clarify that the legal issue in this case is not whether Mr. Rowley's industrial insurance claim should be allowed. It should. The issue is, whether Mr. Rowley should be barred from receiving payments under this claim. Second, we clarify that there is no requirement that a worker must be convicted of a felony in superior court for the RCW 51.32.020 felony payment bar to apply. The Board is empowered to make this determination for industrial insurance purposes. Third, we clarify that when determining whether the felony provision of RCW 51.32.020 applies, the standard of proof as to whether a felony occurred is at least clear, cogent, and convincing evidence. Fourth, we also clarify that the legal standard to

be used in felony benefit exclusion cases is the precise language of the felony provision found in RCW 51.32.020, and we have accordingly amended the Findings of Fact and Conclusions of Law.

*2 Bart A. Rowley, Sr., the claimant, drove his tractor-trailer semi truck, off an overpass onto the road below on August 14, 2008, at about 11:30 a.m. The accident occurred on a clear, dry day, and there were no skid marks observed on the road. In the accident, Mr. Rowley's spinal cord was severed, and he was in a coma for 40 days after the accident. He is now a quadriplegic.

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

A police officer arrived at the ER to investigate. A nurse informed the officer Mr. Rowley had a "surprise" in his pocket when he arrived, a small plastic baggie. At the officer's urging, the nurse dug the baggie out of the trash down the hall. The officer thought the substance in the bag looked like methamphetamine. Another nurse drew the claimant's blood and placed it in vials supplied by the police officer. The officer next gave the baggie and the two vials to a state trooper. The trooper placed the unconscious claimant "under arrest" in the ER. The trooper performed a field test and determined it was likely "ecstasy, methamphetamine." The trooper then placed the blood vials and the baggie in an evidence locker. The State Toxicology Lab received the vials of blood, but never received the baggie. A blood test showed Mr. Rowley's blood held 0.88 milligrams of methamphetamine per liter, a level described as likely impairing by a testifying toxicologist. The baggie disappeared, and was never tested by a laboratory to identify its contents. Mr. Rowley recalls nothing for four days before the accident through 40 days after the accident when he emerged from the coma. Mr. Rowley was never charged with a crime. He filed an industrial injury claim. Citing RCW 51.32.020, the Department rejected the claim on grounds that Mr. Rowley was engaged in the attempt to commit, or the commission of, a felony when he was injured.

Can a claim be rejected under RCW 51.32.020?

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

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

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

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

Mr. Rowley maintains that a worker must be convicted of a felony before the Department may deny payments to him under RCW 51.32.020. He also argues that the Board lacks authority to determine whether a worker committed a felony under RCW 51.32.020. We disagree. The language of the statute is plain and unambiguous. Had the Legislature intended to require a felony conviction in superior court, the Legislature would have required a felony conviction. We decline to read this additional language into the Act. We hold the felony provision of RCW 51.32.020 does not require that the worker be convicted of a felony in superior court to bar a worker from receiving payment. It requires only a finding that the worker was engaged in conduct, or attempting to engage in conduct, that would meet the statutory elements of a felony under federal or state criminal law at the time of the injury. When the Legislature passed RCW 51.32.020, it empowered the Board to decide whether a worker was engaged in a felony act when the industrial injury occurred.

Standard of proof and procedure

It appears from our review of the record that our industrial appeals judge used the preponderance of the evidence as the standard of proof. We hold in this case of first impression that the standard of proof to be used in felony payment bar appeals under RCW 51.32.020 is at least the same as the standard of proof in cases where the Department or self-insured employer seeks to prove intentional misrepresentation by a worker. The standard of proof is at least clear, cogent, and convincing evidence. *In re Del Sorenson*, BIIA Dec., 89 2697 (1991). (The Department of Labor and Industries bears the burden to prove willful misrepresentation by clear, cogent, and convincing evidence in appeals under RCW 51.32.240).

*4 As a general rule, the standard of proof in industrial insurance appeals is the preponderance of the evidence. *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498, 504 (1949). Felony payment bar appeals, however, are different from ordinary industrial insurance appeals. In felony payment bar appeals, the worker has suffered an industrial injury covered by the Industrial Insurance Act, and the Department seeks to deprive the worker of benefits to which he or she would otherwise be entitled but for the allegation of wicked conduct. Moreover, an injured worker subjected to the felony provision of RCW 51.32.020 could also be subject to significant reputation damage, a potential for later criminal prosecution, and (as is the case at bar) significant financial consequences, such as an overpayment of benefits received prior to a determination that the worker committed the felony. The felony payment bar in RCW 51.32.020 punishes the worker who committed or attempted to commit a felony when injured inasmuch as it denies the worker and his or her beneficiaries the right to receive payments for time-loss compensation, permanent partial disability, and permanent total disability, under an otherwise allowed claim. The consequences of a finding of felony commission are punitive and sufficiently analogous to cases of willful misrepresentation to require the heightened standard of proof we have long applied in cases where the Department or self-insured employer alleges a worker committed intentional misrepresentation under RCW 51.32.240.

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

Legal standard under the felony provision of RCW 51.32.020

In the Findings of Fact and Conclusions of Law of the Proposed Decision and Order, our industrial appeals judge wrote that Mr. Rowley's injury "**did not result from the deliberate intention of Mr. Rowley himself while he was engaged in the attempt to commit, or in the commission of, a felony.**" PD&O at10. [Emphasis added.] This same language appeared in the Department order under appeal. The statute provides, "If injury or death results to a worker from the deliberate intention of the worker himself or herself to produce such injury or death, or while the worker is engaged in the attempt to commit, or the commission of, a felony, neither the worker nor the widow, widower, child, or dependent of the worker shall receive any

payment under this title.” RCW 51.32.020. We believe that in writing the legal standard this way, the industrial appeals judge and the Department inadvertently mingled phrases from two different exclusions found in the same sentence of the statute. The first provision, the suicide or self-injury provision, bars payments to workers where the worker deliberately intends to produce an injury or death in the course of employment. The second provision, the felony payment bar, begins with the word or, as in “or while the worker is engaged in the attempt to commit, or the commission of, a felony...” [Emphasis added.] Accordingly, we modify the Findings of Fact and Conclusions of Law to comport with the legal standard as stated in RCW 51.32.020. Stated correctly, the legal standard in felony payment bar cases is whether the worker suffered an injury while he or she was engaged in the attempt to commit, or the commission of, a felony.

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

*5 Although the evidence shows Mr. Rowley may have been impaired by drugs on August 14, 2008, driving under the influence of a controlled substance is not a felony. It is a gross misdemeanor, RCW 46.61.502(5). Possession of methamphetamine on the other hand is a felony, RCW 69.50.4013. The remaining issue is whether Mr. Rowley committed the felony of possession of methamphetamine. The Controlled Substances Act provides, in relevant part, as follows:

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

Methamphetamine is a controlled substance. RCW 69.50.206.

Did Mr. Rowley possess a baggie containing methamphetamine on August 14, 2008, when he drove off the over pass? Here there is a significant problem of proof. We cannot determine what was in that baggie based on this hearing record. Although Mr. Rowley likely used methamphetamine, this Board cannot find that he actually possessed methamphetamine in his truck based on the scant evidence presented. One officer testified that he thought the remnant white substance looked like methamphetamine, but he did not explain why. There was a type of field test that showed it was likely “ecstasy, methamphetamine,” but the trooper who tested it did not elaborate on the reliability of the field test or why it is that it could be both ecstasy and methamphetamine. There are also problems with the chain of custody of the reported baggie. One nurse found it. Someone dumped the contents in the sink, and another nurse put it in the trash down the hall. Later, a nurse dug it out of the trash. We decline to find that the Department proved by at least clear, cogent, and convincing evidence that the white substance was methamphetamine based merely on a field test and conjecture without laboratory confirmation. At a minimum, alleged narcotics must be tested in a laboratory before we will uphold a denial of payment of industrial insurance benefits under RCW 51.32.020 in an alleged narcotics possession case. The evidence fails to show Mr. Rowley committed or attempted to commit a felony while he was injured on August 14, 2008. Consequently, the Department order must be reversed and the claim must be remanded with direction to allow the claim and pay benefits in accordance with the Industrial Insurance Act.

FINDINGS OF FACT

1. On April 30, 2009, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. On or about August 14, 2008, Bart A. Rowley, Sr., the claimant, sustained an industrial injury during the course of his employment with Craig Mungas Receiver for JOS, when the truck-trailer he was driving left the road and crashed. As a result of this accident, he sustained extensive injuries.
- *6 3. Mr. Rowley was not engaged in the attempt to commit or the commission of a felony when he was injured on August 14, 2008.

CONCLUSIONS OF LAW

1. Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. On or about August 14, 2008, Bart A. Rowley, Sr., the claimant, sustained an industrial injury during the course of his employment with Craig Mungas Receiver for JOS, within the meaning of RCW 51.08.100.
3. Mr. Rowley's industrial injury did not occur while he was engaged in the attempt to commit, or in the commission of, a felony, within the meaning of RCW 51.32.020.
4. The order of the Department of Labor and Industries, dated January 13, 2009, is incorrect and is reversed. This claim is remanded to the Department with instructions to issue an order that allows the claim, and to pay benefits in accordance with the law and the facts.

David E. Threedy
Chairperson
Frank E. Fennerty, Jr.
Member

SPECIAL CONCURRING OPINION

I agree that the Department must allow Mr. Rowley's industrial insurance claim. I also agree that RCW 51.32.020 does not bar his right to receive payments based on the evidence presented. I agree with my colleague that the Department failed to offer clear, cogent, and convincing evidence that Mr. Rowley committed a felony. I respectfully disagree with my colleague's interpretation of RCW 51.32.020 on the standard of proof, however. The Department's burden of proof, in felony payment bar appeals RCW 51.32.020 should be the higher standard of proof beyond a reasonable doubt. The felony bar provision bars the payment to workers who commit a felony at work. The standard of proof in felony cases is beyond a reasonable doubt. RCW 9A.04.100. The stigma of concluding that a worker committed a felony and the consequences of such a conclusion are severe. This higher burden must be used in the courts before concluding a person committed a felony, and there should be no difference at this tribunal. I also believe the reference to "attempt" in the statute is a reference to the crime of felony attempt, something that must also be adjudicated using the standard of beyond a reasonable doubt.

Dated: January 30, 2012.

Frank E. Fennerty, Jr.
Member

SPECIAL DISSENTING OPINION

I agree with the majority's analysis and conclusions regarding whether a claim can be rejected under RCW 51.32.020, whether a conviction is required before the Department or Board can deny benefits under RCW 51.32.020, and the procedure to be followed. However, I disagree regarding the standard of proof and whether Mr. Rowley is barred from receiving benefits. Accordingly, I respectfully dissent.

The Board should decide these appeals using the preponderance of the evidence as the standard of proof. In the passing RCW 51.32.020, the Legislature empowered the Board to decide by the preponderance of the evidence whether a worker was engaged in a felony act when the industrial injury occurred. Cases holding that the preponderance of the evidence standard is the standard

of proof in workers' compensation cases are legion. *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498, 504 (1949). There is no indication in the statute or elsewhere that the Legislature intended that the standard of proof be any different in this context.

*7 The present appeal turns on whether Mr. Rowley possessed methamphetamine during his accident. Possession of methamphetamine is a felony. RCW 69.50.4013 and RCW 69.50.206. Here, there is ample circumstantial evidence of methamphetamine possession in this case to conclude, by the preponderance of the evidence or by the even the higher standard of clear, cogent, and convincing evidence, that Mr. Rowley was in possession of methamphetamine when he was injured. The evidence shows that at the time of his injury, Mr. Rowley had an impairing level of methamphetamine in his blood. Evidence of assimilation of a substance in the blood is circumstantial evidence of prior possession of that substance. *State v. Dalton*, 72 Wn. App. 674, 676 (1994). Although insufficient by itself to support a criminal conviction, when combined with other corroborating evidence of sufficient probative value, evidence of assimilation into the blood can be sufficient to prove possession even under the beyond a reasonable doubt standard used in criminal cases. Here, the evidence shows Mr. Rowley had a suspicious, single vehicle accident on a clear, dry day, in daylight with no skid marks. He had intoxicating levels of methamphetamine in his blood at the time of the injury. He had a smiley-faced baggy containing a substance identified by a field test to be methamphetamine. The Kent police officer, a drug recognition expert, thought it looked like methamphetamine, and after the accident, placed an unconscious, hospitalized Mr. Rowley under arrest. I believe the laboratory evidence that Mr. Rowley had significant methamphetamine in his blood, coupled with the other corroborating evidence at least satisfies the preponderance of the evidence standard of proof that Mr. Rowley possessed methamphetamine when he drove his vehicle off the overpass-onto the road below.

Mr. Rowley should be barred from receiving industrial insurance benefits as provided by RCW 51.32.020, because he was engaged in the commission of a felony when injured.

Dated: January 30, 2012.

Jack S. Eng
Member

2012 WL 1374566 (Wash.Bd.Ind.Ins.App.)

West's Revised Code of Washington Annotated
Title 51. Industrial Insurance (Refs & Annos)
Chapter 51.08. Definitions

West's RCWA 51.08.013

51.08.013. "Acting in the course of employment"

Currentness

(1) "Acting in the course of employment" means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking area. It is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based or that the event is within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

(2) "Acting in the course of employment" does not include:

(a) Time spent going to or coming from the employer's place of business in an alternative commute mode, notwithstanding that the employer (i) paid directly or indirectly, in whole or in part, the cost of a fare, pass, or other expense associated with the alternative commute mode; (ii) promoted and encouraged employee use of one or more alternative commute modes; or (iii) otherwise participated in the provision of the alternative commute mode.

(b) An employee's participation in social activities, recreational or athletic activities, events, or competitions, and parties or picnics, whether or not the employer pays some or all of the costs thereof, unless: (i) The participation is during the employee's working hours, not including paid leave; (ii) the employee was paid monetary compensation by the employer to participate; or (iii) the employee was ordered or directed by the employer to participate or reasonably believed the employee was ordered or directed to participate.

(3) "Alternative commute mode" means (a) a carpool or vanpool arrangement whereby a group of at least two but not more than fifteen persons including passengers and driver, is transported between their places of abode or termini near those places, and their places of employment or educational or other institutions, where the driver is also on the way to or from his or her place of employment or educational or other institution; (b) a bus, ferry, or other public transportation service; or (c) a nonmotorized means of commuting such as bicycling or walking.

Credits

[1997 c 250 § 10; 1995 c 179 § 1; 1993 c 138 § 1; 1979 c 111 § 15; 1977 ex.s. c 350 § 8; 1961 c 107 § 3.]

Notes of Decisions (70)

West's RCWA 51.08.013, WA ST 51.08.013

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West's Revised Code of Washington Annotated
Title 51, Industrial Insurance (Refs & Annos)
Chapter 51.52, Appeals (Refs & Annos)

West's RCWA 51.52.050

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

Effective: July 22, 2011

Currentness

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

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

(b) An order by the department awarding benefits shall become effective and benefits due on the date issued. Subject to (b) (i) and (ii) of this subsection, if the department order is appealed the order shall not be stayed pending a final decision on the merits unless ordered by the board. Upon issuance of the order granting the appeal, the board will provide the worker with notice concerning the potential of an overpayment of benefits paid pending the outcome of the appeal and the requirements for interest on unpaid benefits pursuant to RCW 51.52.135. A worker may request that benefits cease pending appeal at any time following the employer's motion for stay or the board's order granting appeal. The request must be submitted in writing to the employer, the board, and the department. Any employer may move for a stay of the order on appeal, in whole or in part. The motion must be filed within fifteen days of the order granting appeal. The board shall conduct an expedited review of the claim file provided by the department as it existed on the date of the department order. The board shall issue a final decision within twenty-five days of the filing of the motion for stay or the order granting appeal, whichever is later. The board's final decision may be appealed to superior court in accordance with RCW 51.52.110. The board shall grant a motion to stay if the moving party demonstrates that it is more likely than not to prevail on the facts as they existed at the time of the order on appeal. The

board shall not consider the likelihood of recoupment of benefits as a basis to grant or deny a motion to stay. If a self-insured employer prevails on the merits, any benefits paid may be recouped pursuant to RCW 51.32.240.

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

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

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

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

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

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

Credits

[2011 c 290 § 9, eff. July 22, 2011; 2008 c 280 § 1, eff. June 12, 2008; 2004 c 243 § 8, eff. June 10, 2004; 1987 c 151 § 1; 1986 c 200 § 10; 1985 c 315 § 9; 1982 c 109 § 4; 1977 ex.s. c 350 § 75; 1975 1st ex.s. c 58 § 1; 1961 c 23 § 51.52.050. Prior: 1957 c 70 § 55; 1951 c 225 § 5; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1947 c 247 § 1, part; 1911 c 74 § 20, part; Rem. Supp. 1947 § 7676e, part. (iii) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (iv) 1923 c 136 § 7, part; 1921 c 182 § 10, part; 1917 c 29 § 3, part; RRS § 7712, part. (v) 1917 c 29 § 11; RRS § 7720. (vi) 1939 c 50 § 1, part; 1927 c 310 § 9, part; 1921 c 182 § 12, part; 1919 c 129 § 5, part; 1917 c 28 § 15, part; RRS § 7724, part.]

Notes of Decisions (47)

West's RCWA 51.52.050, WA ST 51.52.050

Current with all laws from the 2015 Regular and First Special Sessions that are effective on or before July 24, 2015, the general effective date for laws from the Regular Session, and available laws from the 2015 Second and Third Special Sessions

West's Revised Code of Washington Annotated
Title 51: Industrial Insurance (Refs & Annos)
Chapter 51.32: Compensation - Right to and Amount (Refs & Annos)

West's RCWA 51.32.020

51.32.020. Who not entitled to compensation

Currentness

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

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

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

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

Credits

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

Notes of Decisions (14)

West's RCWA 51.32.020, WA ST 51.32.020

Current with all laws from the 2015 Regular and First Special Sessions that are effective on or before July 24, 2015, the general effective date for laws from the Regular Session, and available laws from the 2015 Second and Third Special Sessions

West's Revised Code of Washington Annotated
Title 51: Industrial Insurance (Refs & Annos)
Chapter 51.32: Compensation--Right to and Amount (Refs & Annos)

West's RCWA 51.32.240

51.32.240. Erroneous payments--Payments induced by willful misrepresentation--Adjustment for self-insurer's failure to pay benefits--Recoupment of overpayments by self-insurer--Penalty--Appeal--Enforcement of orders

Effective: July 22, 2011

Currentness

(1)(a) Whenever any payment of benefits under this title is made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient thereof mistakenly acted upon, or any other circumstance of a similar nature, all not induced by willful misrepresentation, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The department or self-insurer, as the case may be, must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefor has been waived.

(b) Except as provided in subsections (3), (4), and (5) of this section, the department may only assess an overpayment of benefits because of adjudicator error when the order upon which the overpayment is based is not yet final as provided in RCW 51.52.050 and 51.52.060. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

(c) The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise his or her discretion to waive, in whole or in part, the amount of any such timely claim where the recovery would be against equity and good conscience.

(2) Whenever the department or self-insurer fails to pay benefits because of clerical error, mistake of identity, or innocent misrepresentation, all not induced by recipient willful misrepresentation, the recipient may request an adjustment of benefits to be paid from the state fund or by the self-insurer, as the case may be, subject to the following:

(a) The recipient must request an adjustment in benefits within one year from the date of the incorrect payment or it will be deemed any claim therefore has been waived.

(b) The recipient may not seek an adjustment of benefits because of adjudicator error. Adjustments due to adjudicator error are addressed by the filing of a written request for reconsideration with the department of labor and industries or an appeal with the board of industrial insurance appeals within sixty days from the date the order is communicated as provided in RCW 51.52.050. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

(3) Whenever the department issues an order rejecting a claim for benefits paid pursuant to RCW 51.32.190 or 51.32.210, after payment for temporary disability benefits has been paid by a self-insurer pursuant to RCW 51.32.190(3) or by the department pursuant to RCW 51.32.210, the recipient thereof shall repay such benefits and recoupment may be made from any future

payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The director, under rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise discretion to waive, in whole or in part, the amount of any such payments where the recovery would be against equity and good conscience.

(4) Whenever any payment of benefits under this title has been made pursuant to an adjudication by the department or by order of the board or any court and timely appeal therefrom has been made where the final decision is that any such payment was made pursuant to an erroneous adjudication, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim whether state fund or self-insured.

(a) The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise discretion to waive, in whole or in part, the amount of any such payments where the recovery would be against equity and good conscience. However, if the director waives in whole or in part any such payments due a self-insurer, the self-insurer shall be reimbursed the amount waived from the self-insured employer overpayment reimbursement fund.

(b) The department shall collect information regarding self-insured claim overpayments resulting from final decisions of the board and the courts, and recoup such overpayments on behalf of the self-insurer from any open, new, or reopened state fund or self-insured claims. The department shall forward the amounts collected to the self-insurer to whom the payment is owed. The department may provide information as needed to any self-insurers from whom payments may be collected on behalf of the department or another self-insurer. Notwithstanding RCW 51.32.040, any self-insurer requested by the department to forward payments to the department pursuant to this subsection shall pay the department directly. The department shall credit the amounts recovered to the appropriate fund, or forward amounts collected to the appropriate self-insurer, as the case may be.

(c) If a self-insurer is not fully reimbursed within twenty-four months of the first attempt at recovery through the collection process pursuant to this subsection and by means of processes pursuant to subsection (6) of this section, the self-insurer shall be reimbursed for the remainder of the amount due from the self-insured employer overpayment reimbursement fund.

(d) For purposes of this subsection, "recipient" does not include health service providers whose treatment or services were authorized by the department or self-insurer.

(e) The department or self-insurer shall first attempt recovery of overpayments for health services from any entity that provided health insurance to the worker to the extent that the health insurance entity would have provided health insurance benefits but for workers' compensation coverage.

(5)(a) Whenever any payment of benefits under this title has been induced by willful misrepresentation the recipient thereof shall repay any such payment together with a penalty of fifty percent of the total of any such payments and the amount of such total sum may be recouped from any future payments due to the recipient on any claim with the state fund or self-insurer against whom the willful misrepresentation was committed, as the case may be, and the amount of such penalty shall be placed in the supplemental pension fund. Such repayment or recoupment must be demanded or ordered within three years of the discovery of the willful misrepresentation.

(b) For purposes of this subsection (5), it is willful misrepresentation for a person to obtain payments or other benefits under this title in an amount greater than that to which the person otherwise would be entitled. Willful misrepresentation includes:

(i) Willful false statement; or

(ii) Willful misrepresentation, omission, or concealment of any material fact.

(c) For purposes of this subsection (5), "willful" means a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact with the specific intent of obtaining, continuing, or increasing benefits under this title.

(d) For purposes of this subsection (5), failure to disclose a work-type activity must be willful in order for a misrepresentation to have occurred.

(e) For purposes of this subsection (5), a material fact is one which would result in additional, increased, or continued benefits, including but not limited to facts about physical restrictions, or work-type activities which either result in wages or income or would be reasonably expected to do so. Wages or income include the receipt of any goods or services. For a work-type activity to be reasonably expected to result in wages or income, a pattern of repeated activity must exist. For those activities that would reasonably be expected to result in wages or produce income, but for which actual wage or income information cannot be reasonably determined, the department shall impute wages pursuant to RCW 51.08.178(4).

(6) The worker, beneficiary, or other person affected thereby shall have the right to contest an order assessing an overpayment pursuant to this section in the same manner and to the same extent as provided under RCW 51.52.050 and 51.52.060. In the event such an order becomes final under chapter 51.52 RCW and notwithstanding the provisions of subsections (1) through (5) of this section, the director, director's designee, or self-insurer may file with the clerk in any county within the state a warrant in the amount of the sum representing the unpaid overpayment and/or penalty plus interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of the worker, beneficiary, or other person mentioned in the warrant, the amount of the unpaid overpayment and/or penalty plus interest accrued, and the date the warrant was filed. The amount of the warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the worker, beneficiary, or other person against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department or self-insurer in the manner provided by law in the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee under RCW 36.18.012(10), which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the worker, beneficiary, or other person within three days of filing with the clerk.

The director, director's designee, or self-insurer may issue to any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, a notice to withhold and deliver property of any kind if there is reason to believe that there is in the possession of such person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property that is due, owing, or belonging to any worker, beneficiary, or other person upon whom a warrant has been served for payments due the department or self-insurer. The notice and order to withhold and deliver shall be served by a method for which receipt can be confirmed or tracked accompanied by an affidavit

of service by mailing or served by the sheriff of the county, or by the sheriff's deputy, or by any authorized representative of the director, director's designee, or self-insurer. Any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired or in the notice and order to withhold and deliver. In the event there is in the possession of the party named and served with such notice and order, any property that may be subject to the claim of the department or self-insurer, such property shall be delivered forthwith to the director, the director's authorized representative, or self-insurer upon demand. If the party served and named in the notice and order fails to answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full amount, plus costs, claimed by the director, director's designee, or self-insurer in the notice. In the event that a notice to withhold and deliver is served upon an employer and the property found to be subject thereto is wages, the employer may assert in the answer all exemptions provided for by chapter 6.27 RCW to which the wage earner may be entitled.

This subsection shall only apply to orders assessing an overpayment which are issued on or after July 28, 1991; PROVIDED, That this subsection shall apply retroactively to all orders assessing an overpayment resulting from fraud, civil or criminal.

(7) Orders assessing an overpayment which are issued on or after July 28, 1991, shall include a conspicuous notice of the collection methods available to the department or self-insurer.

Credits

[2011 c 290 § 6, eff. July 22, 2011; 2008 c 280 § 2, eff. Jan. 1, 2009; 2004 c 243 § 7, eff. June 10, 2004; 2001 c 146 § 10. Prior: 1999 c 396 § 1; 1999 c 119 § 1; 1991 c 88 § 1; 1986 c 54 § 1; 1975 1st ex.s. c 224 § 13.]

Notes of Decisions (10)

West's RCWA 51.32.240, WA ST 51.32.240

Current with all laws from the 2015 Regular and First Special Sessions that are effective on or before July 24, 2015, the general effective date for laws from the Regular Session, and available laws from the 2015 Second and Third Special Sessions

End of Document

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Washington Administrative Code
Title 263, Industrial Insurance Appeals Board of
Chapter 263-12, Practice and Procedure (Refs & Annos)

WAC 263-12-115

263-12-115. Procedures at hearings.

Currentness

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

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

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

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

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

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

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

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

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

(a) Except as provided in subsection (5) of this section interlocutory rulings of the industrial appeals judge are not subject to direct review by the board. A party to an appeal or a witness who has made a motion to quash a subpoena to appear at board related proceedings, may within five working days of receiving an adverse ruling from an industrial appeals judge request a review by a chief industrial appeals judge or his or her designee. Such request for review shall be in writing and shall be accompanied by an affidavit in support of the request and setting forth the grounds for the request, including the reasons for the necessity of an immediate review during the course of conference or hearing proceedings. Within ten working days of receipt of the written request, the chief industrial appeals judge, or designee, may decline to review the ruling based upon the written request and supporting affidavit; or, after such review as he or she deems appropriate, may either affirm or reverse the ruling, or refer the matter to the industrial appeals judge for further consideration.

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

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

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

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

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

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

- The need to weigh a witness's demeanor or credibility.
- Difficulty in handling documents and exhibits.
- The number of parties participating in the hearing.
- Whether any of the testimony will need to be translated.

- Ability of the witness to travel.
- Feasibility of taking a perpetuation deposition.
- Availability of quality telecommunications equipment and service.

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

Credits

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

Current with amendments adopted through the 15-16 Washington State Register dated, August 19, 2015.

WAC 263-12-115, WA ADC 263-12-115

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Subject: Case #91357-9 - Department of Labor & Indus. v. Rowley

Dear Mr. Carpenter:

On behalf of the WSAJ Foundation, a letter request to substitute correction pages for an Amicus Curiae Brief previously filed on Sept. 11, 2015, and the proposed correction pages of Amicus Curiae Brief are attached to this email for filing with the Court. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

--

Shari M. Canet, Paralegal
Ahrend Law Firm PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000 ext. 810
Fax (509) 464-6290

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