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SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner,

v.

BART A. ROWLEY,

Respondent.

**DEPARTMENT OF LABOR & INDUSTRIES
ANSWER TO WSAJ'S AMICUS CURIAE BRIEF**

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I. INTRODUCTION

Consistent with 80 years of precedence by this Court, the Legislature places the burden to “establish a prima facie case for the relief sought in such appeal” on the appealing party in a workers’ compensation appeal. RCW 51.52.050(2)(a). The Legislature has provided only two narrow exceptions when the Department has the burden of proof in a Board appeal. In all other cases, the appealing party has the burden, which the Legislature’s specific provision of the exceptions found in RCW 51.52.050(2)(c) and RCW 51.32.185 confirms. A prima facie showing in an appeal of a Department order denying benefits because of RCW 51.32.020’s felony bar includes a showing that the Department’s order was incorrect. Holding claimants to this standard promotes worker safety and the judicious use of public resources.

Here, the Washington State Association for Justice Foundation (WSAJ) argues that RCW 51.52.050 only requires a prima facie showing that Rowley was injured in the course of employment. This fails in two fundamental ways. First, RCW 51.52.050(2)(a) does not authorize such an interpretation as it does not define “prima facie case” to mean an injury acting in the course of employment only, instead a “prima facie case” requires proof of the “relief sought in the appeal.” Second, the course of employment statute, RCW 51.32.010, refutes WSJA’s interpretation. It

provides that “[e]ach worker injured in the course of his or her employment . . . shall receive compensation *in accordance with this chapter*.” (emphasis added). Under RCW 51.32.010, the worker is only entitled to benefits if he or she meets all the requirements of chapter RCW 51.32, one of them is showing that the injury is not self-inflicted and another is showing that the injury did not occur in the course of a felony.

WSAJ also introduces the novel concept that “prima facie” does not require the worker to show that the Department’s order rejecting a claim is incorrect. This reading is refuted by the plain language of RCW 51.52.050, chapter RCW 51.32, and *Mercer v. Department of Labor & Industries*, 74 Wn.2d 96, 101, 442 P.2d 1000 (1968), which held a claimant to the burden of proof under the self-inflicted injury bar in RCW 51.32.020.

II. STATEMENT OF THE ISSUES

1. RCW 51.52.050 provides that a party appealing a Department order bears “the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such an appeal.” Is Rowley’s burden to establish a prima facie case limited to a showing that he was “an employee who sustained an injury while acting in the course of employment” or does it also include a showing that the Department’s order under RCW 51.32.020 was incorrect when (1) RCW 51.52.050 requires him to

present a prima facie case for the “relief sought in such appeal,” (2) the relief sought is reversal of an order denying benefits under RCW 51.32.020, and (3) RCW 51.32.010 conditions receipt of “compensation *in accordance with this chapter*,” which includes RCW 51.32.020?

WSAJ raises a second issue not raised by the parties in their issue statements, nor raised by Rowley in his supplemental brief.¹ This Court should not consider it, but if it does, the second issue is:

2. RCW 51.32.020 bars payments under the Industrial Insurance Act to any claimant subject to this statute. Does the Department have the authority to reject Rowley’s claim under RCW 51.32.020 when the statute precludes payment of any benefits to a claimant subject to the statute and when such payment is necessary to maintain a claim?

III. ARGUMENT

A. RCW 51.52.050’s Prima Facie Standard Requires the Appealing Party To Prove That the Department’s Order Was Incorrect

As the appealing party, Rowley had the burden of proving that the Department’s action—denying his claim based on RCW 51.32.020—was wrong:

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 ag-

¹ WSAJ does not list it as an issue, but instead argues it throughout its brief.

grieved 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.*

RCW 51.52.050(2)(a) (emphasis added). Only in cases where the Department alleges that an appellant received benefits through willful misrepresentation does the statutory scheme place the burden of proof on the Department. RCW 51.52.050(2)(a), (c).²

WSAJ agrees with the Department that “[a] prima facie case consists of evidence supporting the minimum facts necessary for an employee to prevail on appeal.” Amicus Br. 6. WSAJ also agrees that “[t]he proof required in a given case may vary depending upon the relief sought as a result of the Department action under review.” Amicus Br. 6. Where WSAJ falters is that it claims that the only necessary facts for the appellant to prove are those facts that show whether the worker was injured in the course of employment. Amicus Br. 7. As discussed further below, this is not what RCW 51.52.050(2)(a) provides.

1. A Worker May Appeal “Any Action” of the Department and Must Establish a Prima Facie Case for the “Relief Sought” in Overturning That Action

The Industrial Insurance Act withdrew litigation about workplace

² Likewise, the Legislature has also created prima facie evidentiary presumption the Department must rebut for certain occupational diseases for firefighters. *See* RCW 51.32.185; *see also Gorre v. City of Tacoma*, __ Wn.2d __, __ P.3d __ (2015).

injuries from the common law system. RCW 51.04.010. The Act represents a compromise between business and labor, each forfeiting certain rights in exchange for the "sure and certain relief" provided by the Act. *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002); RCW 51.04.010. Consistent with this scheme, the Department has original jurisdiction to consider claims for workers' compensation benefits. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539-40, 886 P.2d 189 (1994). When the Department adjudicates a claim it considers a number of interwoven requirements and limitations on entitlement to benefits. This breaks down to six categories:

1. Is the claim timely filed as an injury or occupational disease under RCW 51.28.050 or .055?
2. Did the claimant sustain an "injury" or "occupational disease" under RCW 51.08.100, .140? And, did it proximately cause the condition and need for treatment under RCW 51.36.010?
3. Is the claimant a "worker" under RCW 51.08.180?
4. Do the exclusions in RCW 51.12 exclude the claimant?
5. Is the claimant "acting in the course of employment" under RCW 51.32.010, as defined by RCW 51.08.013?
6. Is the claimant barred because of a self-inflicted injury or felony-involved injury under RCW 51.32.020?

After considering these requirements for eligibility, the Department issues an order allowing or rejecting the claim. A worker may appeal such an order to the Board. RCW 51.52.050, .060. The appellant will have to establish "a prima facie case for relief in such an appeal."

RCW 51.52.050. The Department may appear and is entitled to present evidence. RCW 51.52.100.³ At the Board, the issues on appeal are fixed by the Department order. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 986-87, 478 P.2d 761 (1970); *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 662, 879 P.2d 326 (1994); *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (plurality) (The Board hears appeals de novo, “reviewing the specific Department action” from which the party appealed.); see *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491-92, 288 P.3d 630 (2012). That the issues being litigated are those set forth by the Department order is consistent with this Court’s acknowledgment that the Industrial Insurance Act confers purely an “appellate function” on the Board and the courts in workers’ compensation appeals under RCW Title 51. *Kingery* 132 Wn.2d at 171. The Board only obtains appellate jurisdiction when a Department decision is appealed—it is the order that is the central inquiry of a Board appeal and as such it is the worker’s burden to disprove it under RCW 51.52.050. See *Hanquet*, 75 Wn. App. at 662. But the only burden that worker has is to disprove the order, it need not disprove other possible bases for denial of

³ This statute recognizes that the Department may appear, but does not place the burden of proof on the Department. RCW 51.52.100.

the claim. *Hanquet*, 75 Wn. App. at 662.⁴ In other words, all workers do not need to prove they were not committing a felony when they were injured, this issue only arises when it is the basis for the Department's denial of a claim.

Here, the Department issued an order that rejected Rowley's claim based on RCW 51.32.020. This order was the basis of Rowley's appeal and, as such, Rowley bore the burden to disprove this order because that was the "relief sought" in his appeal. RCW 51.52.050(2)(a) (appealing party shall "have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal."). WSAJ attempts to discount the multitude of cases cited in the Department's briefs that apply this burden of proof on the worker, claiming that none involve "the interpretation of the phrase 'prima facie case' in RCW 51.52.050(2)(a)." Amicus Br. 14-15. While none of the cases specifically engage in the interpretation of RCW 51.52.050, they all apply the well-established principle that underpins RCW 51.52.050(2)(a)—that the worker has the burden to show

⁴ In *Hanquet*, the Department's order rejected the claim because Hanquet was a sole proprietor or partner, and because of this the Department could not argue at the Board that the claim should be rejected on another basis, namely whether the worker was excluded by the "private home" exclusion of RCW 51.12.020(3). 75 Wn. App. at 662-63.

entitlement to benefits.⁵

2. Affirmative Defenses Do Not Exist in the Industrial Insurance Act Because the Appealing Party Must Show that the Department Order Is Incorrect

Consistent with the withdrawal of workplace injuries from the common law system, the Industrial Insurance Act does not have causes of action or affirmative defenses to causes of action. RCW 51.04.010. Rather, the Act contains certain conditions of eligibility for benefits as provided by the multiple and interwoven statutes within the Act. *See* Part III.A.1. When the Department issued its order in this claim, it was not asserting an affirmative defense itself, it was determining that Rowley's claim could not be allowed under RCW 51.32.020.

Adopting the Board's flawed reasoning, the Court of Appeals found that RCW 51.32.020 creates an exception to the burden of proof found in RCW 51.52.050(2)(a). *Rowley v. Dep't of Labor & Indus.*, 185 Wn. App. 154, 164-65, 340 P.3d 929, *review granted*, 183 Wn.2d 1007

⁵ There are many cases that stand for this proposition including *Olympia Brewing Co. v. Department of Labor & Industries*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds*, *Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958). It should be noted, however, that this case has been partially abrogated by statute. In *Olympia Brewing*, the court held that claimants had the burden to show "strict proof of their right to receive benefits" even if it was an employer appeal. *Id.* RCW 51.52.050 makes it clear that the "appellant," which could include an employer, now has the burden to establish a prima facie case. *See In re Kathleen Stevenson*, No. 11 13592, 2012 WL 5838717, *2 (Wash. Bd. Indus. Ins. Appeals Aug. 3, 2012). Under Board practice once the employer makes a prima facie case, the claimant must prove his or her case by the preponderance of the evidence based on *Olympia Brewing. Id.*

(2015).⁶ In doing so the Court of Appeals has erroneously concluded that if a statute excepts a worker from receiving benefits, then it may need to be treated as an affirmative defense to be proven by the Department. *Id.*

WSAJ gives a nod to the Court of Appeals' affirmative defense theory, but does not believe it necessary to engage in such an analysis. Amicus Br. 14. Significantly, WSAJ recognizes that the affirmative defense theory is a "civil law analogue." Amicus Br. 14. But this "civil law analogue" has no place in the statutory scheme of RCW Title 51. RCW 51.04.010. WSAJ's apparent discomfort with the Court of Appeals' approach illustrates the fact that there is no authority for the Court of Appeals' departure from the Industrial Insurance Act's statutory system.

As WSAJ may recognize, the affirmative defense theory has no place in a textual analysis of the Act. Amicus Br. 14. Fundamentally, it is inconsistent with the statutory scheme of RCW Title 51. As described above, original jurisdiction is granted to the Department to adjudicate

⁶ WSAJ suggests that this Court should defer to the Board. *See* Amicus Br. 13. But the courts defer to the Department when there is a conflict in interpretation between the Department and the Board because the Department is the executive agency charged by the Legislature to administer RCW Title 51. *Dep't of Labor & Indus. v. Slauch*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013), *review denied*, 180 Wn.2d 1007 (2014). Because the question of an affirmative defense profoundly implicates the scope of the Department's original jurisdiction under the Industrial Insurance Act, this Court should defer to the Department. Although there may be superficial appeal in deferring to the Board as this case implicates Board procedure, no deference is warranted when the Board has fundamentally misapprehended the entire statutory scheme. *Nelson v. Appleway*, 160 Wn.2d 173, 184, 157 P.3d 847 (2007) ("[A]n agency interpretation that conflicts with a statute is given no deference").

workplace injuries; the Department considers statutory requirements and limitations in the six categories of statutes described above and then issues an order; a worker may appeal such an order under RCW 51.52.050, which requires the worker to make “a prima facie case for the relief sought in such appeal;” and in such an appeal, the worker contests the correctness of the order and is held to “strict proof” of his or her entitlement to benefits. It is fundamentally flawed to say that when the Department appears—as it may under RCW 51.52.100—and confirms its position at the Board about the order, it is somehow raising an affirmative defense.

The Court of Appeals justified its affirmative defense theory on its supposition that there were certain “necessary elements” of a prima facie claim that did not include consideration of the felony bar. *Rowley*, 185 Wn. App. at 166. When the Department pointed out that there were other statutory exclusions that could be part of the prima facie case if named in the Department’s order, the Court of Appeals distinguished them on the ground that they “negate employment status or deal with an employer’s exempted status under the Industrial Insurance Act, thus undermining a necessary element of a prima facie case, covered employment status. In contrast, the felony payment bar does not negate proof of a worker’s covered employment status.” *Id.* The Court of Appeal and WSAJ, with its course of employment argument (more fully addressed below), falsely as-

sumes that there only some “necessary” elements to allowance of an industrial insurance claim. Such an argument is inconsistent with the industrial insurance system, and neither WSAJ nor the Court of Appeals cite any authority to support such a view of the Act. Likely this is because 80 years of case law requires a claimant to provide “strict proof of their entitlement as beneficiaries” of the Act. *Kirk v. Dep’t of Labor & Indus.*, 192 Wash. 671, 674, 74 P.2d 227 (1937); *Robinson v. Dep’t of Labor & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744 (2014).

WSAJ’s partial abandonment of the affirmative defense theory in favor of a “textual analysis” of the Act is consistent with workers’ compensation jurisprudence. Amicus Br. 14. The courts have never construed any of the conditions or limitations on workers’ compensation eligibility to place the burden on the Department to establish an affirmative defense. *See, e.g., Wilbur v. Dep’t of Labor & Indus.*, 38 Wn. App. 553, 556, 686 P.2d 509 (1984) (worker must prove he or she satisfies statute of limitations to file claim for industrial injury);⁷ *Levang v. Dep’t of Labor & In-*

⁷ This points out the difference between cases under the Industrial Insurance Act and the common law system abandoned for workers’ compensation claims. Unlike under the Act, under the common law, a claim that an action is barred by the statute of limitations is an affirmative defense. *Compare Harmony at Madrona Park Owners Ass’n v. Madison Harmony Dev., Inc.*, 143 Wash. App. 345, 356-57, 177 P.3d 755 (2008) with *Wheaton v. Dep’t of Labor & Indus.*, 40 Wn.2d 56, 58, 240 P.2d 567 (1952). Similarly, the civil rules provide for a complaint by a plaintiff and an answer by a defendant, which includes affirmative defenses. CR 3, 8(c). This does not apply to workers’ compensation cases, as RCW 51.52.050, .060, .100 have no such requirements. *See* RCW 51.52.140 (civil practice does not apply when RCW Title 51 provides otherwise).

dus., 18 Wn. App. 13, 16, 566 P.2d 573 (widow claimant presented a prima facie case sufficient to defeat dismissal); *Weyerhaeuser v. Farr*, 70 Wn. App. 759, 765-66, 855 P.2d 711(1993) (summary judgment granted because worker failed to show that he had not voluntarily withdrawn from the work force).

Knight v. Department of Labor & Industries, 181 Wn. App. 788, 800, 321 P.3d 1275, *review denied*, 339 P.3d 635 (2014), is an especially telling illustration of the claimant's burden. In that case, the worker attempted to shift the burden of proof to prove an exception to acting in the course of employment upon the Department, which the court rejected. The court held that the worker, who had no memory of the injury, had the burden to prove he was not on distinctive departure from employment at the time of injury. *Knight*, 181 Wn. App. at 800; *see also Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 19 Wn. App. 800, 804, 578 P.2d 59 (1978) (burden on survivor to show decedent was not on frolic at time of death).

Consistent with the Act's statutory scheme and the Department's original jurisdiction to adjudicate the claim, when a Department issues an order, it informs the claimant why it is denying the claim based on the application of the six categories of statutes—described in Part A.1.—that

provide conditions and limitations governing eligibility for benefits.⁸

3. WSAJ Improperly Adds Terms to RCW 51.52.050 but Ignores the Course of Employment Statute's Requirement That Compensation Occur Only in Compliance With the Felony Statute

It is well established that courts do not add terms to a statute. *City of Seattle v. Fuller*, 177 Wn.2d 263, 269, 300 P.3d 340 (2013). Yet WSAJ essentially proposes that the phrase “injured in the course of employment” be added to the phrase “prima facie case” in RCW 51.52.050(2)(a). Amicus Br. 7, 13. No such phrase is in the statute, nor can it be implied or found in the ordinary dictionary meaning of “prima facie.” See *Black's Law Dictionary* 1382 (10th ed. 2014) (a prima facie case is “[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.”). In fact, the statute states what “prima facie case” requires: it is proof of the “relief sought in such appeal.”

The prima facie case for benefits is not limited to showing an inju-

⁸ This Court has not recognized a general presumption that a statutory exception is an affirmative defense. See *Kastanis v. Educ. Emp. Credit Union*, 122 Wn.2d 483, 493, 859 P.2d 26 (1994). Rather, this Court looks to whether the statute reflects legislative intent to treat the statutory exception as an affirmative defense or whether the statutory exception negates an element of the action which the plaintiff must prove. *Id.* at 493. As discussed in the Department’s supplemental brief, under this Court’s analysis in *Kastanis* the statutory scheme shows the Legislature did not intend to treat RCW 51.32.020 as an affirmative defense; and, RCW 51.32.020 acts as a rule that negates the element of causation—an element which the claimant must prove—rather than an affirmative defense. See App’s Suppl. Br. 12-13 (citing *Kastanis*, 122 Wn.2d at 493; *Schwab v. Dep’t of Labor & Indus.*, 76 Wn.2d 784, 791-92, 653 P.2d 1350 (1969) (“Rather it appears that we have inclined more toward looking upon RCW 51.32.020 as erecting a statutory bar between cause and a proximately related result.”)).

ry in the course of employment, but rather it is for the “relief sought” by the appealing party. RCW 51.52.050(2)(a). The course of employment statute, RCW 51.32.010, does not provide that RCW 51.32.020 is an affirmative defense to it, nor does it provide that a prima facie case under RCW 51.52.050(2)(a) is limited to a determination that the worker was injured in the course of employment. Rather, RCW 51.32.010 explicitly demands that for “each worker injured in the course of his or her employment” that compensation may be received only “in accordance with this chapter”:

Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter

And, the phrase “in accordance with this chapter” necessarily includes RCW 51.32.020, which provides for no “payment under this title” for self-inflicted injuries or injuries in the commission of a felony.⁹

WSAJ ignores the language of RCW 51.32.010 and points to the definition of course of employment in RCW 51.08.013 and argues that because injuries that occur while a felony is committed are not “disqualified” from this definition, this means that a worker need only prove that he or she was in the course of employment. Amicus Br. 13. Given that

⁹ “Accordance” means “agreement, conformity <in *accordance* with a rule>.” <http://www.merriam-webster.com/dictionary/accordance>.

RCW 51.32.010 requires conformity with RCW 51.32.020, the fact that the definition of course of employment does not mention felonies (or for that matter self-inflicted injuries) is of no moment.

Moreover, WSAJ invites this Court to ignore the numerous statutory provisions in RCW Title 51 not referenced in RCW 51.08.013, but that the courts have concluded allow the Department to deny workers' compensation coverage. *Compare* Amicus Br. 13 with *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 867-68, 86 P.3d 826 (2004) (affirmed Department order excluding worker from coverage as a domestic servant under RCW 51.12.020(2)). RCW 51.08.013, for example, references none of the exclusions under RCW 51.12.020 from coverage, yet the courts recognize that the claimant has the burden of proof to show that the exclusions do not apply. *E.g.*, *Berry v. Dep't of Labor & Indus.*, 45 Wn. App. 883, 884, 729 P.2d 63 (1983) (claimant was a partner not entitled to coverage under RCW 51.12.020(5) and therefore the court upheld the Department order excluding him from coverage).

WSAJ's argument that the prima face case is limited to acting in the course of employment fails under the statutory scheme in RCW Title 51, which shows that the many exclusions to coverage are the claimant's burden to disprove. It also fails under RCW 51.32.010 and RCW 51.32.020, which together help determine who is entitled to com-

compensation and who is not entitled to compensation as shown by RCW 51.32.010's reference to "receiv[ing] compensation in accordance with this chapter."

4. WSAJ Ignores the Language in RCW 51.52.050(2)(c), Which Provides When the Department Bears the Burden

In an attempt to explain away the Legislature's adoption of the statutory scheme in RCW 51.52.050 that holds an appealing worker to the burden of proof in all cases *except* when the Department alleges benefits were received through willful misrepresentation, WSAJ introduces the novel concept that RCW 51.52.050(2)(c) merely "alters the *order* of proof." Amicus Br. 16 (emphasis in original). This is a fundamental misapprehension of Board procedure. As confirmed by the Board, the *order of proof* in RCW 51.52.050 is synonymous with the burden of proof. *See in re Gerald E. Hopkins*, No. 11 14921, 2012 WL 4343110, *3 (Wash. Bd. Indus. Ins. Appeals June 5, 2012).

The Department agrees with WSAJ that the "unique aspect of cases involving willful misrepresentation justifies variance in the order of proof." Amicus Br. 16. Willful misrepresentation cases are different because they may displace otherwise final and binding orders. *See, e.g., Layrite Products Co. v. Degenstein*, 74 Wn. App. 881, 883-84, 880 P.2d 535 (1994) (the Department ordered the repayment of time-loss benefits

previously paid plus a 50 percent penalty). Generally speaking, the Department is bound by a final order if there is no appeal within 60 days of the order. *Marley*, 125 Wn.2d at 537; RCW 51.52.050, .060. But RCW 51.32.240(5) allows the Department to recover money paid if the worker misrepresented facts to the Department to obtain those benefits. The Department may also impose a 50 percent penalty. RCW 51.32.240(5)(a). It makes sense that the Legislature would determine that when the Department goes back to disgorge benefits erroneously paid and to assess a penalty, it should have the burden of proof. But unlike willful misrepresentation appeals, the felony statute applies to the initial granting of benefits, therefore, it is necessary for the claimant to present a prima facie case under subsection (2)(a) that the Department's decision was incorrect. The fact that the Legislature chose to place the burden of proof explicitly on the Department in subsection (2)(c) shows it had no intent to do so in (2)(a). See *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (to express one thing in a law excludes the other).

B. The Department Has Authority Under RCW 51.32.020 To Reject Rowley's Claim Because It May Deny Coverage for Any Benefits to a Claimant Subject to RCW 51.32.020's Bars

The Court of Appeals correctly held that the Department may reject a claim under RCW 51.32.020. Rowley did not contest this holding in the issue statement in his answer as required by RAP 13.4(d). Although he

stated in a footnote in his answer that he may re-raise the issue, he did not address the issue in his supplemental brief. Answer 14, n.6.¹⁰ Accordingly, this Court need not consider this issue raised solely by amicus WSAJ. *See State v. Jordan*, 160 Wn.2d 121, 128 n.5, 156 P.3d 893 (2006). In any event, the Court of Appeals correctly ruled that the Department may reject a claim under RCW 51.32.020.

This Court has recognized that RCW 51.32.020 is a bar to *any* benefits under the Industrial Insurance Act. *See Mercer*, 74 Wn.2d at 101 (upholding the Department's dismissal of the widow's "claim"); *see also 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").

RCW 51.32.020 provides that "[i]f 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 (emphasis added). The Board's analysis, which apparently WSAJ endorses, was that even if the Department meets its purported burden, the worker and his beneficiaries will on-

¹⁰ The Court should disregard any attempt to raise it at oral argument as the Court does not consider arguments raised at oral argument only. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 893 n.3, 969 P.2d 64 (1998).

ly be barred from “payments for time-loss compensation, loss-of-earning-power, permanent partial disability, permanent total disability, or similar payments.” CP 15; Amicus Br. 14.¹¹ Accordingly, the Board’s language suggested that benefits not paid directly to the worker, such as medical treatment, may not be precluded by the statute.

But medical aid is not available to workers excluded by RCW 51.32.020 even though payments would not be made to them directly. RCW 51.36.010(2)(a) provides that “[u]pon 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.

Under RCW 51.32.020, Rowley is not eligible for any benefits, as “*this title*” governs both disability payments and eligibility for medical treatment. It makes no sense to require the Department to accept Rowley’s claim when it may not make payments of any kind under that claim.¹² While the Department is a creature of a statute, it has both the powers ex-

¹¹ 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).

¹² Liberal construction also does not apply here, as WSAJ suggests, because the statute is unambiguous that a worker may not “*receive any payment under this title*” when injured while committing a felony. *See Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993) (court does not liberally construe unambiguous terms of the Industrial Insurance Act); *see* RCW 51.032.020 (emphasis added).

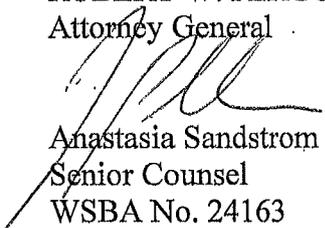
pressly granted to it by the Industrial Insurance Act and the powers that that Act necessarily implies that it has. *See Ortblad v. State*, 85 Wn.2d 109, 117, 530 P.2d 635 (1975). Allowing the Department to reject a claim under RCW 51.32.020 ensures the judicious use of public resources while assuring that workers injured during their misdeeds do not “receive any payment” under RCW Title 51 as the Legislature intended.

IV. CONCLUSION

The Legislature has mandated that a claimant such as Rowley carries the burden of proof to show the “relief sought,” namely reversal of the Department order. This serves to advance important public policy objectives in not rewarding individuals who would seek to injure others and society by their behavior.

RESPECTFULLY SUBMITTED this 14th day of October, 2015.

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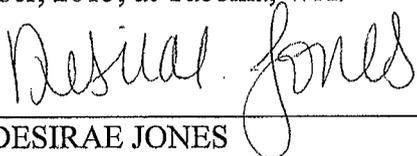
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Good Afternoon,

Attached for filing with the court please find the following document:

1. Department of Labor & Industries Answer to WSAJ's Amicus Curiae Brief:

Thank you,

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