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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
SUPPLEMENTAL BRIEF**

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I. INTRODUCTION

To promote worker safety and the judicious use of public resources, the Legislature ensured that workers may not profit if they are injured while committing a felony. RCW 51.32.020. The Legislature showed no intent in the Industrial Insurance Act that the Department of Labor & Industries (Department) has a special burden of proof when the Department denies a claim based on RCW 51.32.020. Instead, like other workers' compensation cases, the Legislature intended the worker to have the burden to establish a prima facie case for the relief sought. RCW 51.52.050(2)(a).

Here, Bart Rowley seeks to reverse the Department's order rejecting his claim under RCW 51.32.020 because he possessed methamphetamine when he wrecked a truck-trailer while driving on a public highway. The Court of Appeals erred by placing the burden of proof on the Department to prove by clear, cogent, and convincing evidence that the Department order was correct under a mistaken theory of affirmative defense. The creation of such an affirmative defense has no parallel in workers' compensation law and directly contradicts RCW 51.52.050. The Department asks this Court to reverse and confirm that the worker has the burden of proof when the Department denies a claim because the worker was in the course of committing a felony at the time of injury.

II. ISSUES PRESENTED FOR REVIEW

1. RCW 51.52.050 provides that a party appealing a Department order bears “the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such an appeal.” Does Rowley bear the burden of proof to show that the Department’s order denying his claim was incorrect when RCW 51.52.050 requires him to present a prima facie case for the relief sought?

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

III. STATEMENT OF THE CASE

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

While driving with methamphetamine in his system, Rowley was seriously injured when he drove his truck-trailer off an overpass on north-bound 599. CP 641-42, 791-818, 987-88. Rowley was taken to Harborview Medical Center for treatment. CP 737-38.

Officer Donevan Dexheimer, a trained drug recognition officer, was sent to the hospital because Rowley was suspected of being under the influence of an illicit substance. CP 718-33. The State Patrol also dispatched Trooper Nicholas King to investigate. CP 499-501, 984-85.

When Officer Dexheimer arrived Nurse Jennifer Compton told him

that Rowley had a “surprise” in his pocket when Rowley had arrived in the emergency room—a baggie with a smiley face containing off-white granules. CP 737, 744-47. Rowley’s clothes had been removed and most of the contents found in the baggie had been dumped into the sink, CP 906, 923. Rowley’s clothes and the baggie had been placed in a trash bag in the hallway. CP 744. Nurse Mary Comstock took Officer Dexheimer to the trash where Rowley’s clothes had been taken. CP 760-61. Nurse Comstock retrieved the baggie with the smiley face. CP 761. Officer Dexheimer examined the substance in the baggie and determined that the substance appeared to be methamphetamine: it was packed in a one-inch square baggie—the most common way to package illicit drugs; the residual in the bag were granules—the type of crystals typical of methamphetamine; and, the coloration was off-white—typical of methamphetamine. CP 745.

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

As part of the investigation, Officer Dexheimer also had Rowley’s

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

Because the industrial injury occurred while Rowley committed the felony of possession of methamphetamine, a controlled substance in violation of RCW 69.50.4013, the Department rejected Rowley's claim by an October 27, 2008 order. The order specifically referenced RCW 51.32.020, providing:

[The] claim is rejected based [on] RCW 51.32.020 which states if an injury or death results to a worker . . . while the worker is engaged in the attempt to commit, or the commission of, a felony . . . shall not receive any payment under this Title.

CP 275. After the Department's order was affirmed, Rowley appealed to the Board of Industrial Insurance Appeals. CP 69, 76-77.

B. The Board Placed the Burden of Proof on the Department

At the Board, the industrial appeals judge reversed the Department order and the Department petitioned the Board for review.

The Board issued a decision and order with three opinions, each applying different standards of proof, but in all decisions the Board placed the burden of proof on the Department. CP 11-19. Ultimately, the Board reversed the Department order based on a plurality—two of the three

agreed to apply at least a clear, cogent, and convincing evidence standard. CP 14. The Board further decided that RCW 51.32.020 did not give the Department the authority to reject Rowley's claim. CP 13. Lastly, the Board created a bar to presenting evidence of possession without a confirming laboratory test. CP 16.

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

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

The Department appealed to the Court of Appeals. The Department argued again that RCW 51.52.050 and this Court's case law place the burden of proof on a party appealing a Department order. App. Br. 19-24. The Department also argued that the normal civil standard of proof applied, not clear, cogent, and convincing evidence. App. Br. 26-30. Division One rejected these arguments and affirmed the superior court in part and reversed in part. *Rowley v. Dep't of Labor & Indus.*, 185 Wn. App. 154, 157, 340 P.3d 929, *review granted*, 183 Wn.2d 1007, 352 P.3d

187 (2015). The Court of Appeals believed that the Department had the burden to show by clear, cogent, and convincing evidence that Rowley committed a felony. *Id.* at 157. It likened RCW 51.32.020 to an affirmative defense. *Id.* at 162-63. It disagreed with the superior court that the Department had to provide a confirming laboratory test to show possession of a controlled substance and remanded to determine whether the Department had proven that Rowley committed a felony. *Id.* at 168. It also held that the Department may reject the claim under RCW 51.32.020. *Id.* at 168-69.

IV. ARGUMENT

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

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

(emphasis added.) The Department rejected Rowley's claim for benefits because he had been injured during the commission of a felony—the felony of possession of methamphetamine. CP 275. Both RCW 51.52.050(2)(a) and case law requiring a claimant to prove entitlement to benefits mandate that it is Rowley's burden to make a prima facie

case that the Department's order is incorrect. Moreover, placing the burden on the Department by the heightened standard of proof of clear, cogent, and convincing evidence makes it more difficult for the Department to implement the Legislature's objectives in RCW 51.32.020 to prevent those who have committed felonies from profiting from their misdeeds. Society does not benefit if an individual who has acted to hurt society obtains workers' compensation benefits for such behavior. The Legislature evinced no intent that a special burden of proof applies in this circumstance and this Court should not graft such a requirement onto RCW Title 51.

A. The Burden of Proof Lies With Rowley Because the Legislature Placed the Burden on Workers to Show They Are Entitled to Benefits

1. RCW 51.52.050 Requires the Appealing Party to Prove that the Department's Order Was Incorrect

It is a fundamental rule of workers' compensation law that the burden is on the party appealing a Department order to prove it is incorrect. RCW 51.52.050(2)(a) provides:

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.

RCW 51.52.050(2)(a) (emphasis added). Here the “relief sought” is reversal of the Department order that expressly rejected the claim under RCW 51.32.020.

The Legislature adopted this longstanding requirement from case law in 1975. Laws of 1975, 1st Ex. Sess., ch. 58, §1. In 1987, the Legislature added a provision that requires the Department to “initially introduce all evidence in its case in chief” in willful misrepresentation cases, but did not change the burden on appealing parties for all other cases. Laws of 1987, ch. 151 §1; RCW 51.52.050(2)(a), (c). This statutory scheme demonstrates that the Legislature intended to hold an appealing worker to the burden of proof in all cases *except* when the Department alleges benefits were received through willful misrepresentation.¹ The Legislature did not provide for such burden shifting provisions with respect to RCW 51.32.020 and the absence of any provision requiring the departure from RCW 51.52.050(2)(a) shows the Legislature did not intend such a result. *See In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (to express one thing in a law implies the exclusion of the other).

¹ Likewise, the Legislature has also created prima facie evidentiary presumption for certain occupational diseases for firefighters. *See* RCW 51.32.185; *see also Gorre v. City of Tacoma*, ___ Wn.2d ___, ___ P.3d ___, No. 90620-3, at 2 (August 27, 2015).

Consistent with the Legislature's intent in RCW 51.52.050, this Court has long held that appealing claimants must prove the Department order incorrect and it has held them to the strict proof of their right to receive benefits in a multitude of cases, including when an order's stated basis for rejection is the very statute at issue here. *Mercer v. Dep't of Labor & Indus.*, 74 Wn.2d 96, 101, 442 P.2d 1000 (1968) (claimant must make a "prima facie case").²

As evidenced by the statutory scheme and this Court's decisions, the issue before the Board below should have been whether Rowley met his burden of establishing prima facie evidence of his relief sought. See RCW 51.52.050; *Woodard v. Dep't of Labor & Indus.*, 188 Wash. 93, 95, 61 P.2d 1003 (1936); *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977,

² See also *Zoff v. Dep't of Labor & Indus.*, 174 Wash. 585, 586, 25 P.2d 972 (1933) ("The decision of the department was prima facie correct, and the burden was upon the one attacking that decision to overcome the same by evidence."); *Kirk v. Dep't of Labor & Indus.*, 192 Wash. 671, 674, 74 P.2d 227 (1937) ("Persons entitled to the benefits of the act should be favored by a liberal interpretation of its provisions, but for this very reason they should be held to strict proof of their title as beneficiaries." (citation omitted)); *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942) ("We are mindful of the rule that the burden rests on claimant to prove every element of his claim by a preponderance of the evidence."); *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 5, 163 P.2d 142 (1945) ("The first rule is that the decision of the department is prima facie correct and the burden of proof is upon the party attacking the decision."); *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds by Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958) ("We have again and again declared that, while the act should be liberally construed in favor of those who come within its terms, persons who claim rights thereunder should be held to strict proof of their right to receive the benefits provided by the act."); *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955) ("persons who claim rights thereunder should be held to strict proof of their right to receive the benefits provided by the act." (citation omitted)); *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966) ("We have held that a liberal construction of the act does not dispose of the requirement that a claimant must prove his claim by competent evidence.").

982, 478 P.2d 761 (1970). Ignoring the specific context of his appeal to the Board, Rowley posits that the “‘relief sought’ is [Industrial Insurance Act] benefits, and ‘the prima facie case’ for that relief is proving injury in the course of employment.” Answer 16 (citing *Knight v. Dep’t of Labor & Indus.*, 181 Wn. App. 788, 795-96, 321 P.3d 1275, *review denied*, 181 Wn.2d 1023 (2014)). But *Knight* proves the opposite proposition when it states that “[i]n a claim for workers’ compensation benefits, the injured worker bears the burden of proving that he is entitled to benefits.” *Knight*, 181 Wn. App. at 795-96. A prima facie case for benefits is not limited to showing an injury in the “course of employment” in *Knight* or any other RCW Title 51 case.³

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. RCW 51.52.050(2)(a). Notwithstanding this statutory requirement, the Court of Appeals placed the burden on the Department of proving that its order was correct. This is contrary to the plain language of the Industrial Insurance Act and relevant cases, which hold appellants responsible for making the prima facie case that they are entitled to relief. The decision below

³ Note that the felony bar statute is a specialized type of course of employment statute. Under RCW 51.32.020, 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 the injury. RCW 51.32.010; RCW 51.08.013. Rowley first raised the course of employment issue in his sur-reply brief in the Court of Appeals. Resp’t’s Reply 9.

must be reversed and the matter remanded so that the Board can apply the proper burden.⁴

2. RCW 51.32.020 Does Not Create a Statutory Exception to an Appellant's Burden of Proof Before the Board

The Court of Appeals agreed with the Board that the felony payment bar found in RCW 51.32.020 creates a statutory exception to the burden of proof found in RCW 51.52.050(2)(a). In doing so the Court of Appeals' erroneously concluded that if a statute precludes a worker from receiving benefits, then it must be treated as an affirmative defense to be proven by the Department on appeal. *Rowley*, 185 Wn. App. at 162-63. This is incorrect. When the Department issues an order that finds a worker ineligible for benefits based on a statutory bar in the Industrial Insurance Act, the Department is not asserting an affirmative defense; it is adjudicating whether the worker is entitled to benefits under the Act. *See Mercer*, 74 Wn.2d at 101.

When claimants appeal a Department order denying a claim based on a statutory exclusion, they bear the burden of showing that the statutory exclusion does not apply. RCW 51.52.050(2)(a). Consistent with this principle, this Court has already recognized under RCW 51.52.050(2)(a)'s other bar—the bar for deliberate injuries—that the claimant must show that the

⁴ This Court has remanded to the Board when the Board placed the prima facie burden on the wrong party. *See Olympia Brewing*, 34 Wn.2d at 508 (remanding to place the prima facie burden on the worker).

exclusion does not apply. *Mercer*, 74 Wn.2d at 101; *see also Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733, n.5, 57 P.3d 611 (2002) (“A finding of a compensable injury includes a determination that the injury was not self-inflicted. *See* RCW 51.32.020.”).

In *Mercer*, this Court affirmed the trial court’s dismissal for failing to show that RCW 51.32.020 did not apply. *Mercer*, 74 Wn.2d at 101. The trial court had concluded that a widow failed to establish a prima facie showing that RCW 51.32.020 did not bar relief because competent medical evidence did not show that the decedent acted under an uncontrollable impulse or while in a delirium when he committed suicide. *Mercer*, 74 Wn.2d at 10.⁵ The *Mercer* Court did not “allocate[] the burden of proof to the party claiming an exception,” as the Court of Appeals would have, but rather specifically upheld the trial court’s dismissal on the basis that she “failed to establish a prima facie case.” *Id.* at 98; *contra Rowley*, 185 Wn. App. at 166-67.

⁵ Similarly, in *Stafford*, a case about crime victims compensation, an act administered under workers’ compensation appeal standards, the Court of Appeals held that “[s]trict proof of one’s right to CVC benefits demands a showing that the victim of a criminal act comes within the statute’s terms and is not excluded by its limitations.” *Stafford v. Dep’t of Labor & Indus.*, 33 Wn. App. 231, 236-37, 653 P.2d 1350 (1982). Accordingly, the *Stafford* Court considered the question of whether the claimant’s deceased husband was an innocent victim an “essential element incident to [the] right to receive benefits” rather than viewing it as a departure from some general rule that the one asserting a statutory limitation bears the burden of proof as *Rowley* suggests. *Id.* at 234-35; *contra* Answer 18.

The Court of Appeals' artificial affirmative defense construct endorsed by Rowley has no place under RCW 51.52.050(2)(a).⁶ When this Court must determine whether a statutory exception is an affirmative defense, to which the defendant has the burden of proof, it 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. *Kastanis v. Educ. Emp. Credit Union*, 122 Wn.2d 483, 493, 859 P.2d 26 (1994). Here, the statutory scheme shows that the Legislature intended to hold the worker to the burden of proof in all appeals *except* when the Department has alleged benefits were received through willful misrepresentation.

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

⁶ Because there is no legislative history from this statute first enacted at the dawn of the Industrial Insurance Act, the Court of Appeals leapt to the conclusion that there is no legislative intent to hold Rowley to his strict burden. *Rowley*, 185 Wn. App. at 163. However, the first step to determining legislative intent is to examine whether the plain meaning of the statute can illuminate the Legislature's intent. *See Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). Because both RCW 51.32.020 and RCW 51.52.050 are unambiguous, their intent may be discerned from the plain language.

that it is black letter law that a party asserting a general statutory limitation bears the burden of proof when the legislative scheme provides for the appealing party to prove its case.

The Court of Appeals' decision also introduces the idea that there are "necessary" elements to an industrial insurance claim, creating an artificial distinction between those that are necessary to be proved and those that are not. *See Rowley*, Wn. App. at 166-67. But neither the Industrial Insurance Act, nor the case law that has grown up around the proper interpretation of it, provides any foundation for the idea that some statutory bar to receiving benefits relates to a "necessary" element while others do not. In fact, this Court has already held that the deliberate injury bar negates an element of the cause of action: the element of causation. *See Schwab v. Dep't of Labor & Indus.*, 76 Wn.2d 784, 791-92, 653 P.2d 1350 (1969) ("Rather it appears that we have inclined more toward looking upon RCW 51.32.020 as erecting a statutory bar between cause and a proximately related result.").

This Court should reject the concept that there are some statutes that are necessary elements to an industrial insurance claim and some that are not. The structure of the Industrial Insurance Act does not provide for it and it will be nearly impossible for the Department, the Board, workers, and employers to make a reasoned decision between when a statutory ban

to benefits negates an element and when it does not. RCW 51.04.010 mandates “sure and certain relief” for workers except as otherwise provided in the Act. Such certainty is not promoted by requiring all parties to engage in a confusing and inapt analysis.

B. The Standard of Proof in Workers’ Compensation Appeals Is Preponderance of the Evidence Rather Than the Heightened Standard of Clear, Cogent, and Convincing Evidence

Imposing the heightened standard of proof of clear, cogent, and convincing evidence on the Department is also inconsistent with holding a claimant to his or her burden of proof. This Court has long held that the claimant must prove every element of his or her claim by a preponderance of the evidence. *Guiles*, 13 Wn.2d at 610. The Court of Appeals’ decision conflicts with this rule by applying the heightened standard of clear, cogent, and convincing evidence to the Department, relying on the Board’s “policy decision.” *Rowley*, 185 Wn. App. at 164.

RCW 51.52.140 applies the practice in civil proceedings to proceedings at the Board and trial court in workers’ compensation cases. In other words, the general rules of civil practice apply to Board proceedings. And the preponderance of evidence generally applies in civil cases. *E.g.*, 6A *Wash. Prac. Wash. Pattern Jury Instr.: Civil* 155.03, at 136 (6th ed. 2012). No authority exists to support such a departure from RCW 51.52.140 and case law. Moreover, because this is a type of course

of employment statute, the same standard and burden of proof should apply. *Cf. Knight*, 181 Wn. App. at 795-96; RCW 51.32.010; RCW 51.08.013.

That this case involves criminal conduct is not relevant to the standard of proof. Civil suits under the preponderance of the evidence standard frequently address the same conduct that can be criminally charged. “In a criminal case, proof must be beyond a reasonable doubt to satisfy due process; in a civil case, a preponderance of the evidence is sufficient.” *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 591, 187 P.3d 291 (2008); *In re Disciplinary Proceeding Against Peterson*, 180 Wn.2d 768, 787-88, 329 P.3d 853 (2014) (certified professional guardian board’s use of preponderance standard adequately protected guardian’s property interest in a disciplinary proceeding for misconduct);⁷ *Carlton v. Vancouver Care LLC*, 155 Wn. App. 151, 169, 231 P.3d 1241 (2010) (civil claim involving rape only needs proof by a preponderance).

But more fundamentally, the Court of Appeals’ decision rewards felonious conduct by imposing a heightened standard of proof and placing

⁷ Rowley no longer claims that a clear, cogent, and convincing burden of proof is constitutionally mandated. Answer 13, n.4. This is likely because this Court’s well-developed body of case law shows that for routine civil proceedings, the preponderance of the evidence standard applies. Compare *In re Disciplinary Proceedings Against Peterson*, 180 Wn.2d at 787-88 with *Nguyen v. Dep’t of Health, Med. Quality Assurance Comm’n*, 144 Wn.2d 516, 522, 29 P.3d 689 (2001).

the burden of proof on the Department. By making it more difficult for the Department to prove that RCW 51.32.020 applies, contrary to the intent and purpose of the statute, individuals who have committed felonies will gain benefits. RCW 51.32.020 discourages workers from committing felonies in the work place. This is in accord with the state's interest in creating a safe work place and a proper use of public resources. See Const. Art. II, § 35 (mandating that the Legislature shall pass laws for the protection of people working in dangerous employment).

C. Because the Trial Court Improperly Refused to Weigh the Evidence Without a Confirming Laboratory Test, the Substantial Evidence Standard of Review Cannot Be Applied

Rowley may attempt to raise issues with respect to the Court of Appeals' rulings in favor of the Department as he alluded to in footnotes in his answer. Answer 14, n.5-6. But he did not raise such claims in the issue statement as required by RAP 13.4(d). Accordingly, the Court should not accept his attempt to cryptically raise additional issues here.

In any event, the Court of Appeals correctly reversed the trial court's decision not to consider evidence of narcotics without a laboratory test confirming the identity of the substance. *Rowley*, 185 Wn. App. at 168. While Rowley claims that there should only be a substantial evidence review of this issue (Answer 13), in fact the trial court directly imposed in

its conclusions a requirement of a confirming laboratory test—this improper rule of law is reviewed de novo. CP 1184.

Criminal law and civil law *both* allow the consideration of circumstantial evidence. *State v. Gosby*, 85 Wn.2d 758, 766, 539 P.2d 680 (1975); 6A *Wash. Prac. Wash. Pattern Jury Instr.: Civil* 1.03, at 29 (6th ed. 2012). The consideration of circumstantial evidence is also consistent with the application of civil practice unless another provision of the Industrial Insurance Act dictates otherwise, which it does not. *See* RCW 51.52.140. No authority exists under the court rules or case law that requires a confirming laboratory test to prove possession of a controlled substance.

D. The Department May Reject a Claim Under RCW 51.32.020 Because It Permits No Payment for Benefits

The Court of Appeals also correctly ruled that the Department may reject a claim under RCW 51.32.020. The plain language of the statute allows the Department to deny claims. Indeed, the statute states unambiguously that if “an injury or death results to a worker . . . while the worker is engaged in the attempt to commit, or the commission, of a felony, neither the worker nor the widow, widower, child, or dependent of the worker shall receive *any payment under this title.*” RCW 51.32.020 (emphasis added). Rowley counsels this Court to read RCW 51.32.020 in isolation.

Answer 14 (“This plain language does not empower the Department to deny a claim, but only to withhold payments.”). While it is true that the statute does not explicitly direct the Department to reject Rowley’s claim, such a result is inherent in not making *any* payment under the Industrial Insurance Act. The Department has both the powers expressly granted to it by the Industrial Insurance Act and the powers that that Act necessarily implies that it has. *See Tuerk v. Dep’t of Licensing*, 123 Wn.2d 120, 864 P.2d 1382 (1994). Here, the Department must be able to reject a claim if no payments are payable under the claim.

The Board’s reading of the RCW 51.32.020—implicitly adopted by the trial court—suggests that a person injured in the course of a commission of a crime could still be eligible for medical benefits and vocational benefits since these are not denoted in the list of benefits it says are excluded as payments. CP 15, 1199. Rowley conceded below that this is not correct, stating that these statutes would “no longer apply.” Resp’t’s Br. 33.⁸ If these statutes no longer apply, then the Department should be able to reject the claim because no benefits are available. Rejection of the

⁸ Rowley also argued below that the courts should defer to the Board’s decision. *See* Resp’t’s Br. 33-34. The Court does not defer to the Board on an unambiguous statute. But even it were ambiguous on the question of whether the claim should be rejected, this Court should reject the Board’s interpretation and defer to the Department’s interpretation. When there is a conflict in interpretation between the Department and the Board, the Department is entitled to deference as the front-line agency charged by the Legislature to administer the statute. *See Dep’t of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 453, 312 P.3d 676, *review denied*, 180 Wn.2d (2014); *see also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004).

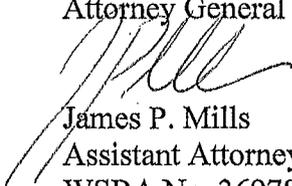
claim makes sense, after all the worker should not benefit from committing a felony.

V. 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. Placing the burden of proof on a claimant who has committed a felony while in the course of being injured, not only properly applies RCW 51.52.050, but it also serves to advance important public policy objectives in not rewarding those who would seek to injure others or society by their behavior. The Court should remand this case to the Board to apply the correct burden and standard of proof. If the Court reaches the issues, it should also hold that no confirming laboratory test is needed under RCW 51.32.020 and that the Department may reject a claim under this statute.

RESPECTFULLY SUBMITTED this 8th day of September, 2015.

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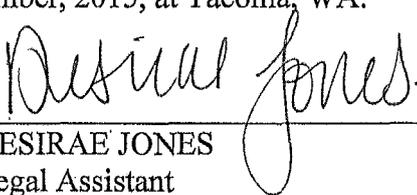
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Good Afternoon,

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

1. Department of Labor & Industries Supplemental Brief.

Thank you,

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