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No. 91357-9

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner,

v.

BART A. ROWLEY, SR.,

Respondent.

SUPPLEMENTAL BRIEF

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 ORIGINAL

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INTRODUCTION

The Department raises two issues in its Petition: (1) who bears the burden of proving whether Rowley was committing or attempting to commit a felony when he was injured in the course of his employment?; and (2) did the Board and trial court err in ruling that the Department must provide clear, cogent, and convincing evidence? The Court of Appeals correctly determined that the felony payment bar, RCW 51.32.050, creates an affirmative defense that does not negate any element of the claimant's *prima facie* case (*i.e.*, that the claimant was injured in the course of his employment with an employer), so the Department bears the burden of proof. That court also correctly determined that the clear, cogent, and convincing standard applies due to the stigma, prejudice, and possible exposure to criminal charges that may follow from the Department's application of the felony payment bar.

On the first issue, the Department's proposal that negating the felony payment bar is an element of a claim would create an odd result: *all* claimants would have to plead and prove that they were not committing or attempting to commit a felony. The Court should reject that absurd result. And requiring clear, cogent, and convincing evidence is simply fair. The Court should affirm.

RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. RCW 51.52.050(2)(a) states the aggrieved appellant's burden to establish "a prima facie case for the relief sought" in an appeal to the Board. In this case, the relief sought was IIA benefits. Rowley presented a prima facie case that he was injured in the course of his employment, which the Department did not dispute. Rowley thus established his entitlement to benefits. Should workers also face an additional burden to prove that they were not committing or attempting to commit a felony when injured, where neither this statute nor anything else in the IIA makes such proof an element of a *prima facie* case for benefits?

2. Where, as here, the Hearing Officer, the Board, and the trial court determined that the Department has the burden to prove that a worker was committing or attempting to commit a felony in order to deny workers compensation benefits, should this Court affirm their additional determinations that such harsh consequences require a higher standard of proof (clear, cogent, and convincing) under the dictates of due process?

STATEMENT OF THE CASE

The facts are fully stated and cited in Rowley's Brief of Appellant and in his Answer to the Petition for Review.

ARGUMENT

- A. **The Hearing Officer, Board, and trial court, each correctly placed a burden of proof on the Department to establish its affirmative defense.**

The Court of Appeals held that “[p]roof that an industrial injury occurred during the commission of a felony does not negate any element of an industrial insurance claim,” so “the trial court properly treated the felony payment bar as an affirmative defense to be proved by the Department.” *Dep’t of Labor & Indus. v. Rowley*, 185 Wn. App. 154, 162-63, 340 P.3d 929 (2014) *rev. granted*, 183 Wn.2d 1007 (2015). This holding is correct because courts generally

treat a statutory exception as an affirmative defense to be proved by the party asserting it “unless the statute reflects legislative intent to treat proof of the absence of the exception as one of the elements of a cause of action, or the exception operates to negate an element of the action.”

Rowley, 185 Wn. App. at 162 & n.14 (quoting *Asplundh Tree Expert Co. v. Dep’t of Labor & Indus.*, 145 Wn. App. 52, 61, 185 P.3d 646 (2008)). Our courts liberally construe the IIA so as to ensure worker benefits, “with doubts resolved in favor of the worker.” *Id.* at 161 & n.9 (citing *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)). This Court should affirm.

Accepting the Department’s argument would mean that all claimants would have to plead and prove that they were not

attempting to commit or committing a felony when they were injured – that is, this would be (or would negative) an *element* of the claim. Such a rule has no legal support.

The Department nonetheless cites eight decisions from this Court that it claims conflict with the Court of Appeals' holding. Petition at 9.¹ None of these cases even touches upon – much less conflicts with – *Rowley's* holding that RCW 51.32.020, the felony payment bar, is an affirmative defense on which the Department bears the burden of proof. 185 Wn. App. at 162-63. Rather, each of these cases examines the claimant's *prima facie* case (*i.e.*, whether the claimant was a worker injured in the course of employment).

In *Zoff*, the claimant injured his foot and received a permanent partial disability, and his case was closed. 174 Wn.2d at 586. After surgery to remove a decayed bone fragment in his foot, he sought to reopen his claim; but his doctor could not say what caused the bone

¹ *Zoff v. Dep't of Labor & Indus.*, 174 Wash. 585, 586, 25 P.2d 972 (1933); *Kirk v. Dep't of Labor & Indus.*, 192 Wash. 671, 674, 74 P.2d 227 (1937); *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942); *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 5, 163 P.2d 142 (1945); *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grnds*, *Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958); *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955); *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966); *Mercer v. Dep't of Labor & Indus.*, 74 Wn.2d 96, 101, 422 P.2d 1000 (1986)).

fragment, so the Department closed the claim again. *Id.* at 587. This Court held that the Department was presumptively correct and that Zoff did not meet his burden to show otherwise. *Id.* at 586. **Zoff** thus stands for the unremarkable proposition that a claimant who fails to show a *prima facie* case of entitlement to reopen his claim should lose. **Zoff** has no application here.²

In **Kirk**, the question was whether the claimant, who died from injuries suffered while felling a tree, was injured in the course of employment. 192 Wash. at 671, 674. This Court held that the “necessary elements of certainty required to establish the relation of employer and employee are lacking here. There was no agreement to labor for an agreed wage or compensation, an essential element, since the tax upon an industry is based upon the payroll of the employer.” *Id.* at 675. The claimant thus failed to establish an element of his *prima facie* case (that he was injured in the course of employment) so the claim was properly denied. **Kirk** is inapposite.

In **Guiles**, the question was whether the claimant was injured in the course of his employment (specifically, whether his exertion at work the day before he died caused his death). 13 Wn.2d at 611-12.

² **Hastings**, 24 Wn.2d 1, 4, also involved reopening a closed claim, due to aggravation of an injury. It is irrelevant here for the same reasons.

The trial court overruled the Department and found that he was so injured, and this Court affirmed. *Id.* at 606, 613. **Gulles** simply reiterates that the claimant has to establish a *prima facie* case by a preponderance of the evidence. *Id.* It has no application here.

In **Cyr**, the claimant reported for work, collapsed five minutes later, and died within the hour. 47 Wn.2d at 93-94. The medical testimony failed to establish that he died because of a workplace injury (the doctor merely speculated that he must have had a heart condition). *Id.* at 96. This Court affirmed the denial of a pension, noting that in appealing, the widow “assumed the burden of proof and of submitting sufficient substantial facts, as distinguished from a mere scintilla of evidence, to make a case for the jury.” *Id.* Again, the claimant failed to make out a *prima facie* claim. **Cyr** says nothing about the burden of proof for an affirmative defense.

Lightle is another “heart condition” case. 68 Wn.2d 507. “The appeal is limited to a single issue: Does the Industrial Insurance Act permit a widow to pursue her husband's unliquidated claim for time loss compensation?” *Id.* at 509. The answer is yes. *Id.* at 513. **Lightle** has no application here.

In **Mercer**, a widow claimed that her husband's suicide was caused by his industrial injury, trying thus to avoid the suicide

exclusion under RCW 51.32.020. **Mercer**, 74 Wn.2d at 92-98. Every tribunal agreed that the widow failed to establish a *prima facie* case, where the hypothetical medical testimony linking the suicide to the injury was properly excluded. *Id.* at 99. Again, **Mercer** does not support the proposition that the claimant must bear the burden to negative an affirmative defense. Rather, it merely recognizes the claimant's burden to establish an industrial injury.

That leaves **Olympia Brewing**, also a heart-condition case. There, the underlying question was whether a man found dead at his workplace (after doing difficult labor all morning) died as the result of an injury sustained at work, so his widow could claim a pension. 34 Wn.2d at 500-01. This Court faced a procedural question that is somewhat related to the issue in this case (*id.* at 505):

When a ruling of the supervisor as to the eligibility of a claimant for benefits under the workmen's compensation act is challenged by an employer and reviewed before the joint board, does the claimant or the department have to present a *prima facie* case showing that the claimant is entitled to the benefits of the act; or does the employer, despite the fact that there is no evidence showing that the claimant is entitled to such benefits, have to establish that the claimant is not entitled thereto?

Not precisely the question raised here, but related to it.

Remarkably, this Court did not answer the relevant question:

The answer is that, when the right of a claimant to the benefits claimed under the act is challenged at the joint board level, that right must be established. This has long been the rule when the supervisor has determined that a claimant is not entitled to relief and the claimant appeals to the joint board. The rule should be the same in any hearing before the joint board where the right to the relief claimed is challenged.

We do not say who must establish the claimant's right to the benefits of the act. The department may assume that burden, or, if the employer goes forward with his testimony, he may establish it inadvertently; but the risk of the failure of proof must rest with the claimant.

34 Wn.2d at 505-06 (emphases added).

In sum, the one case the Department cited that comes anywhere near to addressing the relevant issue does not give the answer for which the Department was hoping. There is no doubt that a claimant has the burden to establish *prima facie* that he was injured in the course of his employment. RCW 51.52.050(2)(a). But the Department must then prove its affirmative defense because not committing a felony is not an element of the claim.³

B. The standard of proof is clear, cogent, and convincing evidence.

The Court of Appeals properly deferred to the Board's policy determination that because the felony payment bar could result in significant reputation damage, a possible criminal prosecution, and

³ The Department's other arguments on this issue (Petition at 9-18) are fully addressed in Rowley's Answer at 15-19.

significant financial consequences to the claimant, the Department is required to produce clear, cogent, and convincing evidence that the bar applies. **Rowley**, 185 Wn. App. at 164-65. When the entity responsible for enforcing the statute interprets it to fill a gap, courts give it “great weight.” *Id.* at 165 & n.25 (citing **Hama Hama Co. v. Shorelines Hearings Bd.**, 85 Wn.2d 441, 448, 536 P.2d 157 (1975)). The Department cites nothing that precludes this policy decision. Petition at 18-20. The Court should affirm on this issue.

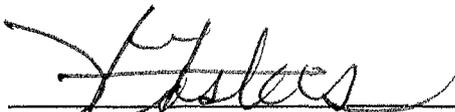
The Department does make its own policy argument, claiming that in setting this standard of proof, “the Court of Appeals decision rewards felonious conduct.” Petition at 19. That assertion is as unfounded as it is improper. If the Department fails to prove felonious conduct by clear, cogent, and convincing evidence – at least – then *there was no felonious conduct*. That will continue to be true, of course, only so long as our justice system refuses to abandon the presumption of innocence. Until then, it is illogical (at best) to suggest that requiring clear and convincing proof that something happened equates to encouraging it to happen. This Court should reject that fallacious reasoning.

CONCLUSION

For the reasons stated above and throughout Rowley's briefing, as well as in the well-reasoned decisions of the IAJ, the Board, the trial court, and the Court of Appeals, this Court should affirm.

RESPECTFULLY SUBMITTED this 8th day of September
2015.

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SUPPLEMENTAL BRIEF

Case: *Department of Labor & Industries v. Rowley*

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