Rowley, Bart, Sr.

BOARD

Authority to determine felony (RCW 51.32.020)

RCW 51.32.020 does not require that the worker be convicted of a felony. The Board has the authority to determine if the worker was engaged in a felony at the time of the injury. ***….In re Bart Rowley, Sr.*, BIIA Dec., 09 12323 (2012)** [*Editor's Note: Affirmed, Department of Labor & Indus. v. Rowley*, 185 Wn. App. 154 (2014). *See also Department of Labor & Indus. v. Rowley,* Supreme Court No. 91357-9 (March 17, 2016).]

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

Commission of felony (RCW 51.32.020)

Coverage and exclusions

The Department cannot reject the claim based on the provisions of RCW 51.32.020. Instead, the proper inquiry is whether the worker committed a felony so as to bar receipt of payments under the Industrial Insurance Act. ***….In re Bart Rowley, Sr.*, BIIA Dec., 09 12323 (2012)** [*Editor's Note: Overuled in part, Department of Labor & Indus. v. Rowley,* 185 Wn. App. 154 (2014). The court held that the unambiguous language of the statue that empowers the Department to deny all payments under Title 51 RCW implies the Department's power to deny the underlying claim should a statutory bar to payment apply. *See also Department of Labor & Indus. v. Rowley,* Supreme Court No. 91357-9 (March 17, 2016).]

DEPARTMENT

Authority to reject claim for commission of felony (RCW 51.32.20)

The Department cannot reject the claim based on the provisions of RCW 51.32.020. Instead, the proper inquiry is whether the worker committed a felony so as to bar receipt of payments under the Industrial Insurance Act. ***….In re Bart Rowley, Sr.*, BIIA Dec., 09 12323 (2012)** [*Editor's Note: Overuled in part, Department of Labor & Indus. v. Rowley,* 185 Wn. App. 154 (2014). The court held that the unambiguous language of the statue that empowers the Department to deny all payments under Title 51 RCW implies the Department's power to deny the underlying claim should a statutory bar to payment apply. *See also Department of Labor & Indus. v. Rowley,* Supreme Court No. 91357-9 (March 17, 2016).]

STANDARD OF PROOF

Commission of felony (RCW 51.32.020)

The standard of proof to establish the commission of a felony under the provisions of RCW 51.32.020 is by clear, cogent, and convincing evidence. ***….In re Bart Rowley, Sr.*, BIIA Dec., 09 12323 (2012)** [*Editor's Note: Reversed, Department of Labor & Indus. v. Rowley,* Supreme Court No. 91357-9 (March 17, 2016). The Court held the standard of proof is by a preponderance of the evidence.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

IN RE: BART A. ROWLEY, SR.	)	**DOCKET NO. 09 12323**
	)	
CLAIM NO. AH-12490	)	**DECISION AND ORDER**

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

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.

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 "ecstacy, 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].

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).

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 at 10. [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?

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 "ecstacy, 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 ecstacy 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.

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.

Dated: January 30, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
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.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
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.

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.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
JACK S. ENG Member