

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: Overruled in part, *Department of Labor & Indus. v. Rowley*, 185 Wn.2d 186 (2016). (Affirming the Board's authority to determine if the worker was engaged in a felony but reversing on the appropriate standard of review.)]

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: Overruled in part, *Department of Labor & Indus. v. Rowley*, 185 Wn.2d 186 (2016). The court held that the unambiguous language of the statute 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.]

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: Overruled in part, *Department of Labor & Indus. v. Rowley*, 185 Wn.2d 186 (2016). The court held that the unambiguous language of the statute 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.]

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: Overruled in part, *Department of Labor & Indus. v. Rowley*, 185 Wn.2d 186 (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

1 IN RE: BART A. ROWLEY, SR.) DOCKET NO. 09 12323

2 CLAIM NO. AH-12490) DECISION AND ORDER

3 APPEARANCES:

4
5 Claimant, Bart A. Rowley, Sr., by
6 Palace Law Offices, per
7 Thaddeus D. Sikes, Matt Midles, Roosevelt Currie, Jr., Blake I. Kremer,
8 Scott R. Grigsby, and Christopher S. Cicierski

9 Employer, Craig Mungas Receiver for JOS,
None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 Lynette Weatherby-Teague, Assistant

13 The claimant, Bart A. Rowley, Sr., filed an appeal with the Board of Industrial Insurance
14 Appeals on March 9, 2009, from an order of the Department of Labor and Industries dated
15 January 13, 2009. In this order, the Department affirmed its order dated October 27, 2008, in which
16 it demanded that the claimant pay the Department \$3,542.88. The Department determined that
17 Mr. Rowley was entitled to time-loss compensation benefits totaling \$765, but the Department paid
18 \$2,777. In its order the Department stated that the overpayment resulted because the claim was
19 rejected for some reason other than those listed for automated rejection orders; that is that the
20 claim was rejected based on RCW 51.32.020 that states "if injury or death results to a worker from
21 the deliberate intention of the worker himself . . . while the worker is engaged in the attempt to
22 commit, or the commission of, a felony . . . shall not receive any payment under this title." The
23 Department order is **REVERSED AND REMANDED**.

24 **DECISION**

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

29 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
30 no prejudicial error was committed. The rulings are affirmed. The industrial appeals judge reached
31 the correct result. Mr. Rowley's injury is covered by the Industrial Insurance Act and payments are
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1 not barred under RCW 51.32.020, the felony payment bar. We have granted review, however, to
2 accomplish the following: First, we clarify that the legal issue in this case is not whether
3 Mr. Rowley's industrial insurance claim should be allowed. It should. The issue is whether
4 Mr. Rowley should be barred from receiving payments under this claim. Second, we clarify that
5 there is no requirement that a worker must be convicted of a felony in superior court for the
6 RCW 51.32.020 felony payment bar to apply. The Board is empowered to make this determination
7 for industrial insurance purposes. Third, we clarify that when determining whether the felony
8 provision of RCW 51.32.020 applies, the standard of proof as to whether a felony occurred is at
9 least clear, cogent, and convincing evidence. Fourth, we also clarify that the legal standard to be
10 used in felony benefit exclusion cases is the precise language of the felony provision found in
11 RCW 51.32.020, and we have accordingly amended the Findings of Fact and Conclusions of Law.

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

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

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

5 **Can a claim be rejected under RCW 51.32.020?**

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

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

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

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

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

10 **Standard of proof and procedure**

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

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

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

13 **Legal standard under the felony provision of RCW 51.32.020**

14 In the Findings of Fact and Conclusions of Law of the Proposed Decision and Order, our
15 industrial appeals judge wrote that Mr. Rowley's injury "**did not result from the deliberate**
16 **intention of Mr. Rowley himself while he was engaged in the attempt to commit, or in the**
17 **commission of, a felony.**" PD&O at 10. [Emphasis added.] This same language appeared in the
18 Department order under appeal. The statute provides, "If injury or death results to a worker from
19 the deliberate intention of the worker himself or herself to produce such injury or death, or while the
20 worker is engaged in the attempt to commit, or the commission of, a felony, neither the worker nor
21 the widow, widower, child, or dependent of the worker shall receive any payment under this title."
22 RCW 51.32.020. We believe that in writing the legal standard this way, the industrial appeals judge
23 and the Department inadvertently mingled phrases from two different exclusions found in the same
24 sentence of the statute. The first provision, the suicide or self-injury provision, bars payments to
25 workers where the worker deliberately intends to produce an injury or death in the course of
26 employment. The second provision, the felony payment bar, begins with the word **or**, as in "**or**
27 while the worker is engaged in the attempt to commit, or the commission of, a felony. . ."
28 [Emphasis added.] Accordingly, we modify the Findings of Fact and Conclusions of Law to comport
29 with the legal standard as stated in RCW 51.32.020. Stated correctly, the legal standard in felony
30 payment bar cases is whether the worker suffered an injury while he or she was engaged in the
31 attempt to commit, or the commission of, a felony.

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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 "ecstasy, methamphetamine," but the trooper who tested it did not elaborate on the reliability of the field test or why it is that it could be both ecstasy and methamphetamine. There are also problems with the chain of custody of the reported baggie. One nurse found it. Someone dumped the contents in the sink, and another nurse put it in the trash down the hall. Later, a nurse dug it out of the trash. We decline to find that the Department proved by at least clear, cogent, and convincing evidence that the white substance was methamphetamine based merely on a field test and conjecture without laboratory confirmation. At a minimum, alleged narcotics must be tested in a laboratory before we will uphold a denial of payment of industrial insurance benefits under RCW 51.32.020 in an alleged narcotics possession case. The evidence fails to show Mr. Rowley committed or attempted to commit a felony while he was injured on August 14, 2008. Consequently, the Department order must be reversed and the claim must be remanded with direction to allow the claim and pay benefits in accordance with the Industrial Insurance Act.

1 **FINDINGS OF FACT**

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

12 **CONCLUSIONS OF LAW**

- 13 1. Based on the record, the Board of Industrial Insurance Appeals has
14 jurisdiction over the parties to and the subject matter of this appeal.
- 15 2. On or about August 14, 2008, Bart A. Rowley, Sr., the claimant,
16 sustained an industrial injury during the course of his employment with
17 Craig Mungas Receiver for JOS, within the meaning of RCW 51.08.100.
- 18 3. Mr. Rowley's industrial injury did not occur while he was engaged in the
19 attempt to commit, or in the commission of, a felony, within the meaning
20 of RCW 51.32.020.
- 21 4. The order of the Department of Labor and Industries, dated January 13,
22 2009, is incorrect and is reversed. This claim is remanded to the
23 Department with instructions to issue an order that allows the claim, and
24 to pay benefits in accordance with the law and the facts.

25 Dated: January 30, 2012.

26 BOARD OF INDUSTRIAL INSURANCE APPEALS

27 /s/ _____
28 DAVID E. THREEDY Chairperson

29 /s/ _____
30 FRANK E. FENNERTY, JR. Member

31 **SPECIAL CONCURRING OPINION**

32 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

1 that Mr. Rowley committed a felony. I respectfully disagree with my colleague's interpretation of
2 RCW 51.32.020 on the standard of proof, however. The Department's burden of proof in felony
3 payment bar appeals RCW 51.32.020 should be the higher standard of proof beyond a reasonable
4 doubt. The felony bar provision bars the payment to workers who commit a felony at work. The
5 standard of proof in felony cases is beyond a reasonable doubt. RCW 9A.04.100. The stigma of
6 concluding that a worker committed a felony and the consequences of such a conclusion are
7 severe. This higher burden must be used in the courts before concluding a person committed a
8 felony, and there should be no difference at this tribunal. I also believe the reference to "attempt" in
9 the statute is a reference to the crime of felony attempt, something that must also be adjudicated
10 using the standard of beyond a reasonable doubt.

11 Dated: January 30, 2012.

12 BOARD OF INDUSTRIAL INSURANCE APPEALS

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15 /s/ _____
16 FRANK E. FENNERTY, JR. Member

17 **SPECIAL DISSENTING OPINION**

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

23 The Board should decide these appeals using the preponderance of the evidence as the
24 standard of proof. In the passing RCW 51.32.020, the Legislature empowered the Board to decide
25 by the preponderance of the evidence whether a worker was engaged in a felony act when the
26 industrial injury occurred. Cases holding that the preponderance of the evidence standard is the
27 standard of proof in workers' compensation cases are legion. *Olympia Brewing Co. v. Department*
28 *of Labor & Indus.*, 34 Wn.2d 498, 504 (1949). There is no indication in the statute or elsewhere that
29 the Legislature intended that the standard of proof be any different in this context.

30 The present appeal turns on whether Mr. Rowley possessed methamphetamine during his
31 accident. Possession of methamphetamine is a felony. RCW 69.50.4013 and RCW 69.50.206.

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

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

21 Dated: January 30, 2012.

22 BOARD OF INDUSTRIAL INSURANCE APPEALS

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25 /s/ _____
26 JACK S. ENG Member

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