



Strong Evidence Required to Deny Washington Workers' Compensation Benefits based on Commission of a Felony

By Scott Kennedy • January 26, 2015

A case recently issued by the Washington State Court of Appeals, *Department of Labor and Industries v. Rowley*,¹ has now established the standard of evidence required to support a denial of benefits under the so-called "felony payment bar" statute,² clarifying specifically how that standard applies when the felony at issue is drug possession.

Mr. Rowley, a trucker driver of 33 years, was partially paralyzed after he inexplicably drove his truck off a highway overpass during a shift. While he was in the hospital after the incident, a certified drug expert saw residue of what appeared to be methamphetamine in a plastic bag from Mr. Rowley's pocket.

The expert completed a field test of the substance and determined that it was "likely" to be methamphetamine. He then sent samples of Mr. Rowley's blood to the state toxicology lab, which later confirmed the drug's presence in Mr. Rowley's blood. However, samples of the residue from the bag were not sent to the state lab for confirmation testing.

Because possession of methamphetamine is a felony in Washington State, the Department denied Mr. Rowley's claim for an industrial injury under the felony payment statute. However, the Board of Industrial Insurance Appeals reversed the Department's order. The Pierce County Superior Court then affirmed the Board's decision. The court reasoned that, because the residue found on Mr. Rowley's person had not been sent to the state lab for confirmation testing, the Department had failed to prove that Mr. Rowley had been in the possession of methamphetamine at the time of injury.

The court of appeals disagreed with the superior court's reasoning in part. It held that laboratory confirmation testing of the substance on Mr. Rowley's person was not required to prove that he had been in possession of methamphetamine. The court was also clear that proof of a felony conviction is not required to support a denial of benefits under the felony payment statute.

However, in reaching this conclusion, the court of appeals agreed with both the Board and the superior court on a significant point of law: it held that clear, cogent, and convincing evidence of a felony or attempted felony is required to support a denial of benefits. The court remanded Mr. Rowley's case for further proceedings consistent with these conclusions.

The clear, cogent and convincing standard of evidence lies between the

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The clear, cogent and convincing standard of evidence lies between the preponderance standard and the reasonable doubt standard



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Denial based on a felony conviction (continued)

preponderance standard (which requires a greater than 50% likelihood), and the reasonable doubt standard (which requires proof beyond a reasonable doubt).³ This elevated standard places a high burden on the Department or self-insured employer seeking to deny benefits on the basis of a suspected felony.

But at the same time, the Rowley decision leaves open the possibility that benefits may be denied under the felony payment statute even in the absence of the strongest possible evidence, such as proof of a criminal conviction or laboratory confirmation.

Under the Rowley decision, an employer who suspects the commission of a felony in conjunction with an industrial injury, including the possession of certain controlled substances, faces a difficult task when deciding whether and how to pursue a denial of benefits on that basis. Contact one of our Washington practice attorneys for more information. ■

¹ Dckt. No. 71737-5, Dec. 22, 2014 (reporter citation not yet available)

² See RCW 51.32.020 (“If 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.”)

³ The former standard is typically employed in civil cases, including the adjudication of workers’ compensation benefits. The latter standard is typically employed in criminal cases, where an especially high standard of proof is required to obtain a conviction.

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