

Givich, Laura

TREATMENT

Proper and necessary medical and surgical services (RCW 51.36.010)

The rule for respiratory impairment, WAC 296-20-370, accepts that workers at maximum medical improvement can still be taking maintenance medication. Where the severity and treatment of the condition has changed little over several years, and the medical testimony establishes that the occupational condition is medically fixed and stable, the claim may not remain open solely to provide maintenance medication so long as cessation would not result in dire and certain consequences like a swift and life-threatening exacerbation or job-threatening disability.*In re Laura Givich, BIIA Dec., 17 21454 (2019)* [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under WhatcomCounty Cause No. 19-2-00979-5.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: LAURA E. GIVICH**)
2)
3 **CLAIM NO. SE-29236**)
4)
 DOCKET NO. 17 21454
 DECISION AND ORDER

5 The claimant, Laura Givich, suffers from occupational asthma caused by exposure during the
6 course of her employment with the self-insured employer, Intalco Aluminum Corp. (Alcoa). The
7 Department issued an order denying the self-insured employer's request to close this claim. Alcoa
8 argues that Ms. Givich's occupational asthma has reached maximum medical improvement, which
9 requires the Department to close her claim. Finding that Ms. Givich's occupational asthma had not
10 reached maximum medical improvement, our industrial appeals judge affirmed the Department's
11 order. We determine Ms. Givich's occupational asthma had reached maximum medical improvement
12 and the Department should close her claim. The Department's order is incorrect and is **REVERSED**.
13 This matter is **REMANDED** to the Department to enter an order closing Ms. Givich's claim.
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DISCUSSION

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20 The claimant, Laura E. Givich, was a 49 year old woman on the day of hearing. She had some
21 college education. At the time of hearing, she had been working for Regence Blue Shield as a claims
22 analyst for six years. Previously, she worked as a pot line operator for Alcoa from January 19, 2011,
23 through February 8, 2012, at its Ferndale smelter. Otherwise, Ms. Givich has experience working as
24 a temporary office worker, doing unspecified work at a life insurance business and, as a teen, working
25 on her family's ranch.
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29 "Pot" is the name of the large 6' x 20' crucibles used to smelt aluminum ore. Pot line operators
30 feed ore into pots from a crane. They also use a powered poker to tamp the ore under the high-
31 voltage anodes. Moving between work stations, they climb up and down the ladder into their cranes
32 many times a day. Because of the "gassy" environment on the pot line, pot line operators must wear
33 respirators to breathe. Alcoa monitored its pot line operators for occupational "pot line" asthma.
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37 Over time working on the pot line, Ms. Givich experienced breathing problems at work. Getting
38 a good breath became hard, and she tired easily climbing the ladder into her crane. She eventually
39 visited allergy and asthma physician William Anderson, M.D. He diagnosed her with occupational
40 asthma caused by her pot line operator work for Alcoa. "Asthma" is a pathological constriction of the
41 bronchial tubes that feed air into the lungs in response to environmental irritants.¹ It restricts airflow
42 and makes breathing more difficult. On May 27, 2016, pulmonologist Lawrence Klock, M.D.,
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47 ¹ Klock Dep. at 17.

1 conducted an Independent Medical Examination (IME) on Ms. Givich for Alcoa. Dr. Klock concurred
2 in Dr. Anderson's diagnosis and its cause. They are not contested.
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4 Ms. Givich has been treated continuously by Dr. Anderson for the six years from her initial
5 diagnosis. Since she left Alcoa, her condition has not worsened, nor has it improved. Using a battery
6 of respiratory medications that has shifted over time, she keeps her asthma under control. Around
7 2014, she attempted to stop using her medication for a month, but the trial ended after just two to
8 three days with an emergency nebulizer treatment. For now, she requires (1) a morning dose of
9 Advair 250 combined corticosteroid and bronchodilator, (2) an evening dose of Dulera, an unspecified
10 non-steroidal inhaled medicine, and (3) Ventolin, a rescue inhaler, as needed two to three times a
11 week. Dr. Anderson sees Ms. Givich about once a year to monitor and tweak her medications. Under
12 this medication regimen, Ms. Givich is living a normal life, including work and exercise. She must
13 avoid fumes that might trigger an asthma attack.
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19 Dr. Klock gave the sole medical testimony in this case. According to Dr. Klock, Ms. Givich's
20 occupational asthma is medically fixed and stable.² He believes the medicine she takes "keep[s] her
21 air passageways open on a long-term basis."³ "[T]he claimant should remain on her inhaled
22 corticosteroid and inhaled bronchodilator for optimal treatment of her asthma."⁴ Dr. Klock agreed
23 that asthma attacks can be "frightening" to the patient and "rarely" result in death.⁵ Ms. Givich's
24 asthma is fixed and stable so long as dependence on her asthma medication to avoid and mitigate
25 asthma attacks is consistent with "fixed and stable." We granted review to address this issue.
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30 Workers no longer qualify for treatment, and further treatment is no longer "proper and
31 necessary," when their accepted conditions reach maximum medical improvement.⁶ "Maximum
32 medical improvement" or "fixed and stable" means no further medical treatment will produce a
33 "fundamental or marked change in an accepted condition."⁷ When a worker's condition is
34 deteriorating, the condition has not yet become fixed, but it has become fixed when it is "stable,"
35 "lasting," and "unchangeable".⁸ Once all accepted conditions have reached maximum medical
36 improvement, any remaining disability is permanent and the Department should close the claim.⁹
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41 ² Klock Dep. at 20.

42 ³ Klock Dep. at 22.

43 ⁴ Klock Dep. at 32.

44 ⁵ Klock Dep. at 28.

45 ⁶ WAC 296-20-01002.

46 ⁷ WAC 296-20-01002.

47 ⁸ *In re Lyle Rilling*, BIIA Dec., 88 4865 (1990). See also *Du Pont v. Dep't of Labor & Indus.*, 46 Wn. App. 471, 477 (1986).

⁹ RCW 51.36.010(4); *Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 444-446 (2013).

1 Here, Ms. Givich's asthma stopped getting worse after she stopped working as a pot line
2 operator. Over six years, she settled on a medication regimen that controlled, but did not cure, her
3 asthma. That medicine allows her to work and live her life normally. Closing her claim will result in
4 losing industrial insurance coverage for her asthma medication. No evidence shows whether she
5 has alternative medical insurance, or, if she does, whether it would cover her asthma medication. If
6 a loss of industrial insurance resulted in her not taking her asthma medicine, Ms. Givich would fall off
7 the medication regimen that has kept her occupational asthma condition under control. And, stopping
8 the medication risks a significant deterioration of her condition.

9 In an employer appeal, the employer must first present a prima facie case.¹⁰ But, assuming it
10 does, the burden of proof shifts to the worker to establish qualification for benefits.¹¹ As the appealing
11 party, Alcoa had the burden of establishing a prima facie case of fixity. With Dr. Klock's testimony, it
12 met that burden, and the burden of proof shifted to Ms. Givich. She presented no medical witness of
13 her own, only admissions and cross-examination of Dr. Klock. While Dr. Klock conceded that
14 Ms. Givich still needed medicine to control her asthma, he identified no curative, rehabilitative, or
15 diagnostic treatment still necessary for her asthma, and he never conceded she had **not** reached
16 fixity. Because Ms. Givich's continuing qualification for benefits depends on her condition not
17 reaching fixity, she bears the burden of proof that her asthma was not fixed. While we analyze her
18 need for medicine below, Ms. Givich failed to meet her burden of proof to show her asthma was **not**
19 fixed.

20 When workers with occupational asthma reach maximum medical improvement, WAC 296-
21 20-370(1)(b)(x) and (xi) provide a method for rating their permanent partial disability. Under
22 WAC 296-20-370(1)(b)(xii), the respiratory function tests to determine the degree of disability should
23 be conducted after clearing medications like theophylline, beta agonists, oral steroids, inhaled
24 steroids, and cromolyn, unless medicine withdrawal would be hazardous or life threatening. By
25 anticipating a need to clear asthma medications, the rule accepts that workers at maximum medical
26 improvement will still be taking maintenance medication. So under the disability rating rules, a worker
27 can be at maximum medical improvement while still dependent on asthma medicine.

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44 ¹⁰ RCW 51.52.050(2)(a). "In an appeal before the board, the appellant shall have the burden of proceeding with the
45 evidence to establish a prima facie case for the relief sought in such appeal." See also *In re Kathleen Stevenson*, BIIA
46 Dec., 11 13592 (2012).

47 ¹¹ *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498 (1949), overruled on other grounds, *Windust v. Dep't
of Labor & Indus.*, 52 Wn.2d 33 (1958).

1 We decided a similar case in *In re Arthur M. Jenkins*.¹² In *Jenkins*, the worker suffered
2 occupational asthma described as "reactive airways disease." Like Ms. Givich, he needed ongoing
3 medical supervision of his prescription medicine to control it. Despite that need, we held, "The fact
4 that Mr. Jenkins will need ongoing medical supervision of his prescriptive medication is insufficient to
5 allow the claim to remain open for additional treatment."¹³ Referring to periodic asthma attacks, we
6 explained, "the variations in his symptoms are taken into consideration in the determination of
7 permanent partial disability."¹⁴ So, under *Jenkins*, a worker's occupational asthma can be considered
8 stable and at maximum medical improvement even though the worker still takes maintenance
9 medication, has annual checkups to supervise that medication, and suffers periodic asthma attacks,
10 just like Ms. Givich.

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16 Twelve years later in *In re Diane A. Stevens Hebert*, we decided that a similar worker had
17 reached maximum medical improvement.¹⁵ In *Stevens Hebert*, the worker had more severe asthma
18 than the worker in *Jenkins* or Ms. Givich. It required hospitalization twice a year, and discontinuing
19 her maintenance medicine "could be life threatening."¹⁶ Nonetheless, we held, "Ms. Hebert's asthma
20 condition must be considered fixed and stable. Her industrially related asthma has stabilized."¹⁷
21 Relying on a more expansive interpretation of RCW 51.36.010, later rejected in *Department of Labor*
22 *& Industries v. Slaugh*,¹⁸ we remanded the case in part for the Director to consider covering the
23 worker's asthma medication after closure with only partial disability. Because we acknowledged that
24 coverage lay within the Director's discretion to deny, our decision could not have turned on whether
25 the Department actually did cover her asthma medicine after claim closure. Therefore, *Slaugh's* later
26 elimination of that discretion does not undermine *Stevens Hebert's* fixity analysis.

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32 Like chronic asthma medication under WAC 296-20-370, the rule for determining permanent
33 partial disability for workers with industrially related epilepsy, WAC 296-20-320, anticipates they will
34 have a chronic dependence on anti-convulsant medication. In reaching our conclusion in *Stevens*
35 *Hebert*, we relied in part on our decision in *In re Deanne C. Clark*.¹⁹ In *Clark*, we held that a worker
36 with industrially related epilepsy had reached maximum medical improvement despite her

41 ¹² Dckt. No. 91 2457 (November 25, 1992).

42 ¹³ *In re Arthur M. Jenkins*, Dckt. No. 91 2457 (November 25, 1992).

43 ¹⁴ *Jenkins*, at 3.

44 ¹⁵ Dckt. No. 04 11121 (April 19, 2005).

45 ¹⁶ *Stevens Hebert*, at 2.

46 ¹⁷ *Stevens Hebert*, at 5.

47 ¹⁸ 177 Wn. App. 439, 444-446 (2013).

¹⁹ Dckt. No. 97 3934 (July 7, 1999).

1 dependence on anti-convulsant medicine because "no medical treatment exists that can cure the
2 convulsant disorder or result in a more complete recovery."²⁰ *Clark, Jenkins, and Stevens Hebert*
3 stand for the principle that a worker's condition can achieve fixity despite dependence on long-term
4 medication because the medicine dependence is the measure of disability.
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7 Considering a different type of maintenance treatment, we also approved claim closure in
8 *In re Lyle Rilling*.²¹ Physical therapy provided the worker in *Rilling* temporary relief from the pain of
9 his industrially related cervical radiculopathy. Still, we considered his radiculopathy fixed and stable
10 because no treatment, including physical therapy, would have a lasting effect.
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13 On the other hand, in *In re Freda Hicks*²² and a dependent case *In re Robert G. Thorsen*,²³ we
14 held open claims in which workers were receiving maintenance treatment without expectation of
15 improvement. In *Hicks*, we relied on medical testimony that Ms. Hicks needed her opiate pain
16 medication "to maintain even her very limited functional capacity [without which she] would be unable
17 to carry on normal, life-sustaining, functions."²⁴ And, we relied on psychiatric testimony that Ms. Hicks
18 needed continued, regular psychotherapy or her "depression would deepen to the point that she
19 would not be able to care for herself. Her risk of suicide would increase."²⁵ In *Thorsen*, we relied on
20 medical testimony that pain medication and muscle relaxers facilitated Mr. Thorsen's return to work
21 at a new job. In *Thorsen*, we specifically rejected a Department argument that holding the case open
22 to cover maintenance medication threatened to create a perpetual claim. Now, more than 10 years
23 later in a time more skeptical of long term opiate use, we might decide these cases differently.
24 Furthermore, the decisions rest significantly on the dire and certain consequences of stopping
25 treatment. In *Hicks*, "[w]ithout treatment, her deterioration will be swift and life threatening."²⁶ And,
26 in *Thorsen*, his medication "enable[s] him to be fully employed."²⁷
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34 Here, the uncontroverted medical testimony establishes that Ms. Givich's occupational asthma
35 is medically fixed and stable. The severity, treatment, and lived experience of her condition has
36 changed little in six years. While Dr. Anderson has slightly adjusted her medication over that time,
37 the changes were conservative and did not affect her dependence on her medication or the frequency
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41 ²⁰ *Clark*, at 2.

42 ²¹ BIIA Dec., 88 4865 (1990).

43 ²² BIIA Dec., 01 14838 (2004).

44 ²³ Dckt. No. 05 23423 (January 24, 2007).

45 ²⁴ *Hicks*, at 3.

46 ²⁵ *Hicks*, at 3.

47 ²⁶ *Hicks*, at 4.

²⁷ *Thorsen*, at 12.

1 or severity of her asthma attacks. Past changes were too minor and more radical future changes are
2 both too unexpected and too speculative for those changes to make her condition unstable. Her
3 condition meets the *Rilling* factors for fixity. It is "stable," "lasting," and "unchangeable." Stopping
4 coverage for Ms. Givich's medication would not result in dire and certain consequences like a "swift
5 and life-threatening" exacerbation or job-threatening disability. So, the severity of those
6 consequences is distinguishably and significantly less than the consequences for the workers in
7 *Hicks* and *Thorsen*. And, like the workers in *Jenkins*, *Stevens Hebert*, and *Clark*, Ms. Givich's
8 industrially related condition is fixed and stable under maintenance medication. Thus, like the
9 workers in *Jenkins*, *Stevens Hebert*, and *Clark*, her case should be closed. Ms. Givich's occupational
10 asthma is "fixed and stable" under WAC 296-20-01002 and her claim is ripe for closure under *Rilling*,
11 *Du Pont v. Department of Labor & Industries*,²⁸ and RCW 51.36.010(4).
12

13 A basic policy of the Industrial Insurance Act seeks to restore injured and disabled workers to
14 health and productivity.²⁹ That policy is embodied in the principle of maximum medical improvement.
15 So long as injured workers' conditions can still improve, their claims should remain open for coverage
16 of all proper and necessary treatment.³⁰ Once their conditions are stable and no longer improving,
17 the Industrial Insurance Act provides permanent disability benefits as restitution for their lost health
18 and productivity. Doing so gives the worker, the employer, and the Department finality, financial
19 certainty, and psychological closure. Perpetual claims defy this policy and forgo these benefits. In
20 the right case, compelling circumstances appealing strongly to competing policies may justify
21 perpetual claims. This is not that case.
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23 DECISION

24 In Docket No. 17 21454, the employer, Intalco Aluminum Corp., filed an appeal with the Board
25 of Industrial Insurance Appeals on August 30, 2017, from an order of the Department of Labor and
26 Industries dated July 31, 2017. In this order, the Department declined to close Ms. Givich's claim.
27 This order is incorrect and is reversed and remanded.
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45 ²⁸ 46 Wn. App. 471 (1986).

46 ²⁹ RCW 51.32.055(1).

47 ³⁰ RCW 51.32.055(1). "Benefits for permanent disability shall be determineonly after the injured worker's condition becomes fixed." See also 6 Lex K. Larson, *Larson's Workers' Compensation* § 80.03[3] (Matthew Bender, Rev. Ed.).

1 **FINDINGS OF FACT**

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- 3 1. On October 31, 2017, an industrial appeals judge certified that the parties
- 4 agreed to include the Jurisdictional History in the Board record solely for
- 5 jurisdictional purposes.
- 6 2. Laura Givich developed an occupational disease diagnosed as
- 7 occupational asthma that first required medical treatment on July 9, 2011.
- 8 The asthma arose naturally and proximately from the distinctive
- 9 conditions of her employment as a pot line operator for Alcoa.
- 10 3. Ms. Givich's occupational asthma became medically fixed and stable by
- 11 July 31, 2017.

12 **CONCLUSIONS OF LAW**

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- 14 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
- 15 and subject matter in this appeal.
- 16 2. Ms. Givich's conditions proximately caused by her occupational disease
- 17 were fixed and stable as of July 31, 2017. She is not entitled to further
- 18 treatment under RCW 51.36.010.
- 19 3. This matter is remanded to the Department to issue an order denying
- 20 further treatment and closing the claim.

21 Dated: May 2, 2019.

22 BOARD OF INDUSTRIAL INSURANCE APPEALS

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24 LINDA L. WILLIAMS, Chairperson

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26 JACK S. ENG, Member

27 **DISSENT**

28 While I concur with the majority that Ms. Givich suffers from occupational asthma, I disagree

29 that Ms. Givich's condition is fixed and stable. "Where a claimant's condition is deteriorating or further

30 medical treatment is contemplated, the condition is not 'fixed.'"³¹ Likewise, under the definition of

31 "proper and necessary" in WAC 296-20-01002, a condition is not fixed and stable so long as a marked

32 change can be expected "without treatment." Here, the medical testimony shows that without

33 ongoing medical supervision and prescription medicine, Ms. Givich would suffer regular and serious

34 asthma attacks, a marked change for the worse.³² And, her medicines contain cortisone, which has

35 ³¹ *Pybus Steel Co. v. Dep't of Labor & Indus.*, 12 Wn. App. 436, 439 (1975).

36 ³² Klock Dep. at 32.

1 side effects so severe that a treating provider would keep trying to wean her off of them, just like
2 Dr. Anderson has tried once before.³³ Until her treating physician successfully weans her, her
3 condition can still improve.
4

5 Like the workers in *In re Freda Hicks*³⁴ and *In re Robert G. Thorsen*,³⁵ Ms. Givich needs
6 continuing medical treatment to maintain her health and avoid serious exacerbations. Because she
7 still needs medical supervision, prescription medicine is a kind of further medical treatment, and her
8 treating physician has not yet successfully tapered her cortisone dose, her occupational asthma is
9 **not** fixed and stable under *Pybus* and the definition of "proper and necessary" in WAC 296-20-01002.
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11 The majority relies on our decisions in *In re Arthur M. Jenkins*³⁶ and *In re Diane A. Stevens*
12 *Hebert*.³⁷ Those decisions held that workers with occupational asthma could be fixed and stable
13 despite dependence on medicine. But, we made those decisions before *Department of Labor &*
14 *Industries v. Slauch*³⁸ overruled *In re Debra Reichlin*.³⁹ Under *Reichlin*, RCW 51.36.010 gave the
15 Department discretion to cover ongoing medication for a worker permanently partially disabled by
16 occupational asthma. We recognized that "given the nature of certain illnesses like asthma, that can
17 be life threatening or with acute temporary flare ups" the reopening process would offer relief too
18 little, too late.⁴⁰ But, *Slauch* specifically overruled *Reichlin* and established that the Department
19 cannot cover chronic asthma medicine for workers with permanent partial disabilities.⁴¹ Now,
20 *Stevens Hebert* relied on *Reichlin* for the proposition that the Department could cover her asthma
21 medicine after case closure with permanent partial disability.⁴² The *Slauch* change in the law
22 removes that backstop. That distinction makes a difference, and we should overrule *Jenkins* and
23 *Stevens Hebert*. Otherwise, the application of these decisions shifts to the worker, or other insurer,
24 the ongoing medical cost for a condition caused by an occupational exposure. Such application is
25 antithetical to providing sure and certain relief to workers and their families.
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37 ³³ Klock Dep. at 32-33.

38 ³⁴ BIIA Dec., 01 14838 (2004).

39 ³⁵ Dckt. No. 05 23423 (January 24, 2007).

40 ³⁶ Dckt. No. 91 2457 (November 25, 1992).

41 ³⁷ Dckt. No. 04 11121 (April 19, 2005).

42 ³⁸ 177 Wn. App. 439, 452-53 (2013).

43 ³⁹ BIIA Dec., 00 15943 (2003).

44 ⁴⁰ *In re Debra Reichlin*, BIIA Dec., 00 15943 (2003).

45 ⁴¹ *Slauch*, at 452-53. "The final proviso [of RCW 51.36.010] granting discretion to the supervisor to authorize continued
46 life-sustaining treatment plainly applies only in case of a permanent total disability."

47 ⁴² *In re Diane A. Stevens Hebert*, Dckt. No. 04 11121 (April 19, 2005). "We hope her medication can be continued after
her claim is closed since her asthma symptoms are severe and medical witnesses agreed curtailing her steroid medication
would have dire consequences."

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The majority opinion uses the term Independent Medical Exam (IME) in the decision. I have always been bothered by this term. These exams are not truly Independent; they are paid for by the employer in this case to bolster their position.

I agree with the industrial appeals judge that this claim should remain open so Ms. Givich can receive ongoing medical supervision and prescription medicine. I would adopt the logic and reasoning of the well-drafted Proposed Decision and Order as my own.

Dated: May 2, 2019.

BOARD OF INDUSTRIAL INSURANCE APPEALS


FRANK E. FENNERTY, JR., Member

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Addendum to Decision and Order
In re Laura E. Givich
Docket No. 17 21454
Claim No. SE-29236

Appearances

Claimant, Laura E. Givich, by Wayerski Zmolek Injury Law Firm, per Mitchell Wayerski

Self-Insured Employer, Intalco Aluminum Corp., by Gress Clark Young & Schoepper, per James L. Gress

Department of Labor and Industries, by Office of the Attorney General, per Richard Becker

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on October 18, 2018, in which the industrial appeals judge affirmed the Department order dated July 31, 2017.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.