

## Romo, Estela

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### SUSPENSION OF BENEFITS (RCW 51.32.110)

#### Good cause

When an injured worker asserts that the Department's lack of authority to schedule a needless or unnecessary examination is the basis for good cause not to attend, the worker must establish a prima facie case that the examination was unnecessary before the Board will conduct a balancing of the factors set forth in *In Re Bob Edwards*, BIIA Dec., 90 6072 (1992). ...***In re Estela Romo*, BIIA Dec., 94 3874 (1996)** [Editor's Note: *Affirmed, Romo v. Department of Labor & Indus.*, 92 Wn. App. 348 (2004).]

Scroll down for order.

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

1 **IN RE: ESTELA ROMO** ) **DOCKET NO. 94 3874**  
2 )  
3 **CLAIM NO. K-900116** ) **DECISION AND ORDER**  
4 \_\_\_\_\_)

5 **APPEARANCES:**

6  
7 Claimant, Estela Romo, by  
8 Calbom & Schwab, P.S.C., per  
9 G. Joe Schwab

10  
11 Employer, Sun Russet Potatoes, Inc.,  
12 None

13  
14 Department of Labor and Industries, by  
15 The Office of the Attorney General, per  
16 Stephen K. Meyer, Assistant  
17

18 The claimant, Estela Romo, filed an appeal with the Board of Industrial Insurance Appeals  
19  
20 on November 18, 1994, from an order of the Department of Labor and Industries dated November  
21  
22 4, 1994. The order suspended the claimant's right to further compensation effective November 4,  
23  
24 1994, for failure to submit to a medical examination. **AFFIRMED.**

25  
26 **PROCEDURAL AND EVIDENTIARY MATTERS**  
27

28 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
29  
30 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and  
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32 Order issued on September 18, 1995, in which the order of the Department dated November 4,  
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34 1994, was reversed and remanded to the Department with directions to consider factors such as:  
35  
36 the claimant's physical and psychiatric condition; medical treatment; expectation of a fair,  
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38 independent, and effective medical examination; the need for further medical information; the  
39  
40 Department's statutory duty to act in an attempt to resolve disputes at the first-step administrative  
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42 level; comparative expense; and, other relevant factors. Proposed Decision and Order, at 15.

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44 As a preliminary matter, we overrule the claimant's objections to certain evidence offered by  
45  
46 the Department. The Department offered evidence of a June 15, 1994 letter wherein the claimant  
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1 proposed that she attend another medical examination with Dr. Silvas. The claimant objected to  
2  
3 this evidence on grounds that the proposal was part of settlement negotiations and, therefore, not  
4  
5 admissible. The Department also offered evidence of a July 11, 1994 letter wherein the claimant  
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7 indicated she did not oppose a further medical examination solely to obtain current medical  
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9 information so long as the Department made assurances that a prior examining physician would  
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11 not be called to testify at hearing if the claim proceeded to litigation. The claimant objected to this  
12  
13 evidence on the same grounds as before. We overrule the claimant's objections.

14  
15 Evidence Rule (ER) 408 states in part: "Evidence of conduct or statements made in  
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17 compromise negotiations is likewise not admissible." The word "likewise" refers to a portion of the  
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19 preceding sentence of the rule, "is not admissible to prove liability for or invalidity of the claim or its  
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21 amount."

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23 The evidence in question here is not offered to "prove liability for or invalidity of the claim or  
24  
25 its amount." Rather, this appeal concerns whether the Department acted within its statutory  
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27 authority to schedule a further medical examination, and whether the claimant had "good cause,"  
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29 within the meaning of RCW 51.32.110, for refusing to attend the scheduled medical examination.  
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31 Moreover, the Department did not issue an order suspending benefits until November 4, 1994,  
32  
33 after the claimant refused to attend examinations scheduled in July of 1994 and in September of  
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35 1994, and well after the letters in question. We do not believe the letters in question are properly  
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37 excluded as part of settlement negotiations over the present controversy within the meaning of ER  
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39 408. We ~~note~~hasten to add, however, that we do not need to rely on the testimony concerning  
40  
41 these letters in reaching our decision in this appeal.

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

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**DECISION**

1 The issue in this appeal is whether the Department was correct in suspending claimant  
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3 Estela Romo's benefits effective November 4, 1994, under RCW 51.32.110, for her refusal to  
4  
5 submit to a scheduled medical examination.  
6

7 An injured worker claiming benefits is required to submit to medical examinations with  
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9 physicians selected by the Department from time to time at reasonably convenient locations. RCW  
10  
11 51.32.055(4) and RCW 51.32.110. The Department may suspend benefits under a claim if the  
12  
13 worker fails to submit to an examination. However, the Department may not suspend benefits if the  
14  
15 claimant has "good cause" for refusing to submit to the examination. RCW 51.32.110 and WAC  
16  
17 296-14-410.  
18

19 When a worker appeals a suspension of benefits for failure to attend a scheduled medical  
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21 examination, our inquiry concerns whether the claimant had good cause for refusing to attend the  
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23 examination. As a part of the inquiry, we must examine the relevant factors that the claimant  
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25 believes justified not attending the examination. If we determine that there are factors that would  
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27 support the worker's decision not to attend, then we must balance these against the Department's  
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29 interests in the examination and its statutory responsibility to attempt to resolve disputes at its  
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31 administrative level. *In re Bob Edwards*, BIIA Dec., 90 6072 (1992). If the factors for not attending  
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33 the examination still outweigh any justification for ordering the examination the worker has shown  
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35 good cause and the Department may not suspend benefits.  
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37 The appealing worker bears the burden of showing to show by a preponderance of the  
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39 evidence that the Department was incorrect, in other words, to show that she had good cause for  
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41 not submitting to the medical examination. See also, *Olympia Brewing Company v. Department of*  
42  
43 *Labor & Indus.*, 34 Wn.2d 498 (1949).  
44

45 We stated in *Edwards*:  
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47

1 The issue thus becomes whether Mr. Edwards has proven by a  
2 preponderance of the evidence that he had good cause for failing to  
3 submit to the medical examination.  
4

5 Whether good cause exists in a given case will depend on a variety  
6 of factors that require balancing from one instance to the next. Among  
7 those factors that may be considered are the claimant's physical  
8 capacities, sophistication, circumstances of employment, family  
9 responsibilities, proven ability or inability to travel, medical treatment  
10 and other relevant concerns, not the least of which is the expectation of  
11 a fair and independent medical evaluation.  
12

13 Balanced against this are the interests of the Department and its  
14 statutory responsibility to act in attempting to resolve disputes at the  
15 first-step administrative level. This may include the need to resolve  
16 conflicting medical documentation, the location of willing and qualified  
17 physicians, the length of time before a physician is available to perform  
18 an examination, and the comparative expense of such. Neither of the  
19 above lists of factors are exhaustive.  
20

21 *Edwards*, at 3-4. (Emphasis in the original.)  
22

23 We cite the relevant language from *Edwards* because we are concerned in the present  
24 appeal that our industrial appeals judge misunderstood *Edwards* and placed an unwarranted  
25 burden upon the Department to show "good cause" for scheduling the examinations that the  
26 claimant, Ms. Romo, refused to attend. The balancing referred to in *Edwards*, cited above, refers  
27 to the Department's need for an examination in the face of or in consideration of the worker's  
28 factors not to attend. The authority of the Department to schedule medical examinations does not  
29 initially depend on a showing of good cause by the Department. Presumptively, a worker should  
30 attend a properly scheduled medical examination unless "good cause" exists to support not  
31 attending.  
32

33 In this appeal, Ms. Romo asserts only that the examinations scheduled by the Department  
34 were not necessary, not that she had good cause not to attend. Ms. Romo did not testify or  
35 otherwise present affirmative evidence of any personal impediment to her attendance at the  
36 examinations. Neither did Ms. Romo present any evidence that the examiners who were to  
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1 conduct the examinations were incapable of conducting a fair and independent medical  
2 examination or that they were motivated to be other than fair. - In short, Ms. Romo did not present  
3 a prima facie case that she had any cause not to attend the examination, much less a showing of  
4 good cause for failure to do so.  
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9 Ms. Romo merely challenges the Department's authority to schedule what she alleges is  
10 a needless examination. It would be consistent with our holding in *Edwards* that a truly  
11 unwarranted examination would constitute good cause not to attend. Further, applying *Edwards*,  
12 that if Ms. Romo could establish a prima facie case that the examination was unwarranted, we  
13 would need to weigh the interests of the Department in ordering the examination.<sup>1</sup> However, Ms.  
14 Romo failed to establish that the Department's scheduling of a further examination in her case was  
15 unwarranted.  
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23 Turning now to the facts of this appeal, Ms. Romo was injured in November of 1988. The  
24 Department allowed her claim and she received various authorized benefits. Over the course of  
25 the administration of the claim, the Department sponsored several medical panel examinations. As  
26 a result of a November 20, 1992 examination, Dr. Jose R. Silvas, a psychiatrist, diagnosed Ms.  
27 Romo as having a somatization disorder and dysthymia (depression), ~~which he~~ causally related to  
28 the industrial injury. Dr. Silvas recommended that Ms. Romo undergo psychotherapy and that she  
29 be provided vocational assistance. In the event Ms. Romo was considered not in need of  
30 treatment, Dr. Silvas rated her condition within Category 3 of WAC 296-20-340, the categories of  
31 permanent mental health impairments.  
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44 <sup>1</sup> We would observe that if a worker were successful in meeting his or her initial burden in showing that an examination  
45 was unnecessary or unwarranted, that the subsequent balancing set forth in *Edwards* would likely be a very abbreviated  
46 inquiry. In order to establish that the examination was unnecessary, the worker would have to present evidence on the  
47 administration of the claim much as Ms. Romo did in this appeal. Such evidence will either establish the worker's case  
or show that the examination was necessary. If the worker is successful in presenting a prima facie case that the  
examination was unnecessary, it would be difficult to imagine what evidence the Department could present at that time  
to "balance" against such a finding.

1 By a letter to the Department dated May 1, 1993, Dr. Andrew Whitmont, the psychologist  
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3 who provided Ms. Romo psychotherapy upon referral, reported that Ms. Romo had attended three  
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5 sessions, after which he closed her case. Dr. Whitmont thought Ms. Romo was not amenable to  
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7 treatment and was not motivated.

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9 The Department adjudicator decided another psychiatric opinion would be in order, based  
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11 on Dr. Whitmont's letter. Dr. Oscar Romero, a psychiatrist, conducted another examination as part  
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13 of a medical panel on January 13, 1994. The panel examiners, including Dr. Romero, indicated  
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15 Ms. Romo's conditions were fixed and stable and that she was capable of work. Specifically, Dr.  
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17 Romero thought Ms. Romo was unlikely to benefit from treatment because she had poor insight  
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19 and was not psychologically minded. Ms. Romo's attending family physician, Dr. Conrado DeLeon,  
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21 agreed with some of the panel findings. However, he believed that Ms. Romo's pain was real, that  
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23 she had some decreased range of motion, and that she was not malingering. Dr. DeLeon thought  
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25 Ms. Romo had some type of somatization disorder. He recommended Ms. Romo receive a  
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27 psychiatric evaluation in Seattle and attend a pain clinic.

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29 The Department adjudicator assigned greater weight to the opinions of the panel examiners  
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31 because of their specialization and because Dr. DeLeon had only recently become Ms. Romo's  
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33 attending physician. The adjudicator issued an order finding Ms. Romo capable of work and  
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35 terminating time loss compensation. Ms. Romo protested this order, but the Director of the  
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37 Department affirmed it. The adjudicator then issued an order on May 2, 1994, which closed the  
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39 claim. On May 9, 1994, Ms. Romo's attorney appealed the closing order. In this appeal, Ms. Romo  
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41 requested further treatment, further time loss compensation, an award for permanent partial  
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43 disability, and a finding of permanent total disability.

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45 On May 31, 1994, the Department's claims consultant, Dawn Glazebrook, issued notice that  
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47 the Department was reassuming jurisdiction as allowed by RCW 51.52.060. Ms. Glazebrook

1 believed there was a need to resolve the controversy resulting from attending physician Dr.  
2  
3 DeLeon's disagreement with the panel examination report and his recommendation for further  
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5 psychiatric evaluation and a pain clinic. Ms. Glazebrook did not otherwise view the examinations  
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7 as deficient and did not inquire anything further of Dr. Whitmont, Dr. Romero, or Dr. DeLeon.  
8

9 Ms. Glazebrook planned an examination to be conducted by an orthopedist, neurologist,  
10  
11 and psychiatrist in the Tri-Cities area on June 28, 1994. Before the examination was held, Ms.  
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13 Romo's attorney wrote to Ms. Glazebrook. The attorney informed Ms. Glazebrook that Ms. Romo  
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15 would not attend the examination because of the belief there had been no change in her condition  
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17 and the examinations would be redundant (and, therefore, unnecessary). This has been Ms.  
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19 Romo's position regarding subsequent attempts to be examined and in this appeal contesting the  
20  
21 Department's order suspending benefits.  
22

23 The attempt to resolve the conflict in opinions of Dr. DeLeon and the panel examination  
24  
25 was within the authority of the Department as provided in RCW 51.32.110 and RCW 51.32.055(4).  
26  
27 Moreover, we note that Ms. Romo's appeal of the May 2, 1994 closing order alternatively identified  
28  
29 virtually every conceivable form of relief. The Department had the right to reassume jurisdiction  
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31 and further investigate the facts relating to the claim as further raised by this appeal. This right is  
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33 limited only by the requirement that the Department issue its further order within 90 days, which  
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35 period may be extended an additional 90 days for good cause, stated in writing. RCW 51.52.060;  
36  
37 *Tollycraft Yachts v. McCoy*, 122 Wn.2d 426 (1993).  
38

39 In conclusion, a worker is not required to attend a scheduled medical examination when the  
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41 worker can establish "good cause" not to attend. When the worker asserts the Department's lack  
42  
43 of authority to schedule the examination or that the examination is needless or unnecessary as the  
44  
45 basis for good cause not to attend, the worker must establish a prima facie case that the  
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47 examination was unnecessary before we will conduct a balancing of factors as set forth in



1 *Edwards.* In Ms. Romo's appeal she did not establish a prima facie case that the Department's  
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3 scheduled examination was unnecessary or not within its statutory authority. It goes without saying  
4  
5 that she has also failed to establish good cause within the meaning of RCW 51.31.110. However,  
6  
7 even if we were to assume that Ms. Romo had set forth a prima facie case and that we would have  
8  
9 to weigh the various reasons that Ms. Romo had to not attend the examination, against the  
10  
11 Department's interests to schedule an examination, we still find that Ms. Romo did not have good  
12  
13 cause and that the Department's order suspending benefits was correct.

14  
15 After careful consideration of the entire record before us, we make the following Findings of  
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17 Fact and Conclusions of Law:

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19 **FINDINGS OF FACT**

- 20  
21 1. On December 9, 1988, Estela Romo filed an application for benefits with  
22 the Department of Labor and Industries, alleging an industrial injury in the  
23 course of employment with Sun Russet Potatoes, Inc. The Department  
24 subsequently allowed the claim and provided benefits. On November 4,  
25 1994, the Department issued an order suspending further compensation  
26 for failure to submit to a medical examination. On November 18, 1994,  
27 Ms. Romo filed her Notice of Appeal with the Board of Industrial  
28 Insurance Appeals from that order. On December 16, 1994, the Board  
29 issued an order granting the appeal, assigning it Docket No. 94 3874, and  
30 directing that further proceedings be held on the appeal.  
31
- 32 2. On May 9, 1994, the claimant filed an appeal of an order dated May 2,  
33 1994, which closed the claim. In the appeal, the claimant contended she  
34 was entitled to further time loss compensation, treatment, an award for  
35 permanent partial disability, and a finding of total permanent disability.  
36 On May 31, 1994, the Department reassumed jurisdiction over the claim.  
37
- 38 3. As of May 31, 1994, the Department had been informed of a controversy  
39 between various examining physicians, including the claimant's chosen  
40 attending physician, over matters such as, but not limited to, the extent of  
41 the claimant's disability; whether she was in need of further psychiatric  
42 treatment or a pain clinic or further evaluation; and whether she was  
43 amenable to further psychiatric treatment. The claimant's Notice of  
44 Appeal also put the Department on notice that the claimant herself  
45 disagreed with the terms of the May 2, 1994 closing order.  
46
- 47 4. The Department, through its claims consultant, Dawn Glazebrook,  
directed further investigation into the claimant's condition, and for that

1 purpose, provided the claimant notice of scheduled medical  
2 examinations. The first scheduled medical examination was for June 28,  
3 1994. The claimant, through her attorney, objected to the examination  
4 and declared her intention not to attend the examination.  
5

6 5. After some discussion and failed attempts with the claimant's attorney to  
7 resolve whether the claimant would attend an examination, and after  
8 rescheduling the examination, the Department eventually scheduled  
9 another examination, provided the claimant notice that she would be  
10 required to attend the examination, and warned the claimant that her  
11 benefits would be suspended if sufficient reason for not attending the  
12 examination was not provided within 30 days.  
13

14 6. The claimant refused to attend any of the examinations scheduled by the  
15 Department on June 28, 1994, and thereafter. The claimant's refusal to  
16 attend the examinations was not due to any inability or inconvenience.  
17 The claimant's asserted reason for not attending the examinations is only  
18 that she did not believe the examinations were necessary. The  
19 examinations were necessary to allow the Department to resolve conflicts  
20 in medical opinion and to investigate the issues raised by the appeal filed  
21 by Ms. Romo on May 9, 1994.  
22

### 23 CONCLUSIONS OF LAW

- 24
- 25 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
26 parties and the subject matter of this appeal.  
27
  - 28 2. The claimant did not have "good cause" for failing to attend the  
29 examinations within the meaning of RCW 51.32.110.  
30
  - 31 3. The order of the Department of Labor and Industries dated November 4,  
32 1994, which suspended the right of Estela Romo to further benefits  
33 effective November 4, 1994, for failure to submit to a medical  
34 examination, is correct, and is affirmed.  
35

36  
37 It is so ORDERED.

38  
39 Dated this 5th day of March, 1996.  
40

41 BOARD OF INDUSTRIAL INSURANCE APPEALS

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45 /s/ \_\_\_\_\_  
46 S. FREDERICK FELLER Chairperson  
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/s/ \_\_\_\_\_  
ROBERT L. McCALLISTER Member