

Tyson Fresh Meats

SAFETY AND HEALTH

Knowledge requirement

"Employee misconduct" defense

Although a supervisor's knowledge may be imputed to the employer for purposes of establishing a violation of a safety standard, an employer may nevertheless be able to establish the affirmative defense of employee misconduct when the supervisor's misconduct was the basis of the violation.*In re Tyson Fresh Meats, BIIA Dec., 17 W1079 (2018)*

[*Editor's note:* The Board's decision was appealed to superior court under Walla Walla County Cause No. 19-2-00050-4.]

Scroll down for order.

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

N RE: TYSON FRESH MEATS) DOCKET NO. 17 W1079
)
CITATION & NOTICE NO. 317942647) DECISION AND ORDER

The Department cited Tyson Fresh Meats with a serious violation of safety standards for failing to ensure coordination of lockout/tagout procedures with an outside cleaning company; and a serious violation for failing to ensure that an authorized employee verified the lockout/tagout procedure and that a machine had been deenergized prior to starting work. We agree with our industrial appeals judge that Tyson violated the standard for ensuring coordination of lockout/tagout procedures, but did not violate the standard for verifying lockout/tagout procedure and deenergization before commencing work due to unpreventable employee misconduct. We grant review to: clarify that the application of the latter standard is not limited to machinery that actually caused an injury or was the subject of a citation; discuss imputed knowledge of a supervisor; and analyze the unpreventable employee misconduct defense when a supervisor commits the violation. The corrective notice of redetermination is **AFFIRMED AS MODIFIED**.

DISCUSSION

Tyson Fresh Meats (Tyson) operates a meat processing plant near Pasco, Washington. The Pasco plant has approximately 3,000 pieces of machinery and equipment; a piece of equipment must be locked out before service or maintenance can be performed on it. Tyson's lockout/tagout rules include locking out a machine before performing maintenance, before removing or bypassing a guard, and before placing any body part inside a machine. Each work group has its own colored tags to identify which department or contractor locked out a machine. Violation of lockout/tagout procedures results in discipline. An employee who intends to place a hand inside a machine is responsible for placing his or her own lockout tag on the machine rather than assuming that someone else has locked it.

PSSI is an outside company that Tyson contracts with to clean and sanitize the machinery during the night shift. PSSI and Tyson shared their respective lockout/tagout procedures with each other. Before cleaning, PSSI deenergizes the machinery by turning off the main circuit breaker, which is located in a separate room. One area in which PSSI cleans and sanitizes machinery is in the bone grinding room. PSSI had no policy in place to let Tyson employees in the bone grinding room know that they were about to reenergize the circuit. After PSSI cleans the machinery, Tyson employees reassemble the machinery. Jim Mohamed supervises Tyson employees who reassemble meat

1 grinding machinery in the bone grinding room after they are cleaned by PSSI. Mr. Mohamed
2 confirmed the absence of any procedures for exchanging information with PSSI staff regarding
3 lockout/tagout and did not recall ever discussing lockout/tagout procedures with them in the many
4 years he has been working for Tyson.
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7 For the past six to seven years, Jesus Marquez has been a night shift production supervisor
8 in Tyson's rendering plant. On October 15, 2016, after PSSI had finished cleaning, Mr. Marquez was
9 reassembling meat grinders in the bone grinding room, a task that he does not typically perform. The
10 machinery in this room could be locked out by engaging the local disconnect switch inside the room
11 or in a panel room upstairs. Mr. Marquez did not normally work in the bone grinding room and was
12 unfamiliar with the location of the local disconnect switches. When he began working in the bone
13 grinding room that day, there were no PSSI locks on any of the machinery.
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18 Mr. Marquez was using a small key to reassemble the meat grinder. He inadvertently dropped
19 the key into another piece of equipment, the incline auger, which was located directly below the meat
20 grinder. Through the mesh guard covering the incline auger, he could see that the key was about to
21 fall through the drain hole at the bottom of the auger. Mr. Marquez knew that if he removed the mesh
22 guard to reach the key, he would have to lock the incline auger out. Instead of removing the mesh
23 guard, he unscrewed the drain cap on the bottom of the auger and reached inside, believing that the
24 key would simply fall through. The moment he reached his fingers inside, the auger turned on and
25 amputated two of his fingers.
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30 Although Mr. Marquez locked out the meat grinder before he began reassembling it, he did
31 not verify that the incline auger was locked out or deenergized before placing his fingers through the
32 hole. He testified that he did not know if the incline auger had a separate lockout mechanism and
33 that he was never specifically trained on the lockout/tagout procedures for the incline auger in the
34 bone grinding room. The local disconnect switch for the incline auger was located about 15 feet away
35 and was clearly labeled, though Mr. Marquez was not aware of that fact at the time.
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39 Annual Lockout/Tagout Periodic Inspection Certification forms from 2008 to 2017 confirm that
40 Mr. Marquez was observed successfully conducting a 10-step lockout/tagout procedure on a variety
41 of machinery, the purpose of which was to "ensure this team member understands the procedures
42 used at this facility for the control of energy associated with the equipment."¹ Mr. Marquez also
43 regularly trained the employees he supervised on lockout/tagout procedures for the past 10 years.
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47 ¹ Ex. 17.

1 Tyson suspended Mr. Marquez for three days as a result of his violation of its lockout/tagout
2 procedures.
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4 Laurie Garcia was the safety manager at Tyson's Pasco plant at the time of the accident. She
5 conducted an internal investigation following Mr. Marquez's accident and learned that the incline
6 auger had been energized because a PSSI employee had just removed his lock on it and had
7 engaged the energy source from a panel room about 100 feet away from the bone grinding room
8 moments before Mr. Marquez placed his fingers inside the incline auger. Ms. Garcia confirmed that
9 there was no policy or procedure in place governing how a PSSI employee in the panel room would
10 communicate with Tyson employees in the bone grinding room.
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14 ANALYSIS

15 1. Application of WAC 296-803-50060

16 WAC 296-803-50060 provides:
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18 **Coordinate with outside employers servicing or maintaining your machines or 19 equipment.**

20 You must do the following before allowing another employer's personnel to service or
21 maintain machines or equipment if your energy control procedures require they be
22 locked or tagged out:
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- 24 (1) Inform the outside employer of your lockout or tagout procedures.
- 25 (2) Make sure the outside employer informs you of their lockout or tagout procedures.
- 26 (3) Make sure you and the outside employer confirm that all employees understand and
27 will follow the restrictions of the other employer's energy control program.
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29 We agree with our industrial appeals judge that Tyson failed subsection (3). Tyson did not make sure
30 that all of its employees understood PSSI's lockout/tagout procedures. Jim Mohamed, Tyson's bone
31 grinding room supervisor, testified that there was no procedure in place regarding communication
32 between Tyson and PSSI before PSSI reenergized the machinery after it had finished cleaning.
33 Mr. Mohamed also testified that he has never discussed PSSI's lockout/tagout procedures with PSSI
34 personnel. Tyson's safety manager, Laurie Garcia, also confirmed the absence of any procedure
35 regarding how PSSI employees would let Tyson employees know that they were removing locks or
36 reenergizing the machinery in the bone grinding room.
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38 In its Petition for Review, Tyson argues that WAC 296-803-50060 does not apply because
39 WAC 296-803-100 states that the chapter only applies to the service and maintenance of machines,
40 and Mr. Marquez was not servicing or maintaining the incline auger that caused the amputation.
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1 WAC 296-803-100 provides:

2 This chapter applies to the service and maintenance of machines and equipment . . . if
3 employees could be injured by the:

- 4 (1) Unexpected energization or start up of the machine or equipment; or
5 (2) Release of stored energy.
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7 The plain language of the regulation specifies only "the service and maintenance of machines and
8 equipment" and the "unexpected energization or start up of the machine or equipment." There is no
9 language in WAC 296-803-100 to suggest that WAC chapter 296-803 only applies to the service and
10 maintenance of machines or equipment **that caused the actual injury** or was the subject of a
11 violation. To reach such a conclusion would require us to read words into the regulation, contrary to
12 the well-established law of statutory interpretation.² And although Mr. Marquez was not servicing or
13 maintaining the incline auger, he **was** servicing and/or maintaining the meat grinding machinery. That
14 is sufficient to trigger the application of WAC 296-803-50060 under the plain language of WAC 296-
15 803-100.
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21 2. Imputed Knowledge/Unpreventable Employee Misconduct

22 The Department cited Tyson with a serious violation of WAC 296-803-50030 because
23 Mr. Marquez did not verify that the incline auger was isolated from all energy sources prior to starting
24 work. A serious violation is defined by RCW 49.17.180(6) as follows:

25 [A] serious violation shall be deemed to exist in a workplace if there is a substantial
26 probability that death or serious physical harm could result from a condition which exists,
27 or from one or more practices, means, methods, operations, or processes which have
28 been adopted or are in use in such workplace, **unless the employer did not, and**
29 **could not with the exercise of reasonable diligence, know of the presence of the**
30 **violation.**
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32 (Emphasis added.)

33 WAC 296-803-50030 provides:

34 **Verify that the machine or equipment is safe before starting work.**

35 You must make sure the authorized employee verifies that the machine or equipment
36 that has been locked out or tagged out has been isolated from all energy sources and
37 deenergized before starting work.
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39 To prove that a violation is serious, the Department must make a prima facie case showing that:
40 (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were
41 exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise
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47 ² *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422 (1984).

1 of reasonable diligence, could have known of the violative condition, and (5) “there is a substantial
2 probability that death or serious physical harm could result” from the violative condition.³
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4 Mr. Marquez, by his own admission, failed to verify that the incline auger was locked out and
5 deenergized before he placed his fingers inside the machinery. Thus, Tyson failed to meet the
6 standard set forth in WAC 296-803-50030. When a supervisor commits a violation, the supervisor's
7 knowledge may be imputed to the employer.⁴ Here, there is no dispute that Mr. Marquez was a
8 supervisor. Therefore, his knowledge that he was in violation of WAC 296-803-50030 is imputed to
9 Tyson.
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11 Because the Department has established a prima facie case, the burden now shifts to Tyson
12 to prove the affirmative defense of unpreventable employee misconduct.⁵ RCW 49.17.120(5)(a)
13 provides that an employer asserting unpreventable employee misconduct must show the existence
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18 (i) A thorough safety program, including work rules, training, and equipment designed
19 to prevent the violation;
20 (ii) Adequate communication of these rules to employees;
21 (iii) Steps to discover and correct violations of its safety rules; and
22 (iv) Effective enforcement of its safety program as written in practice and not just in
23 theory.
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25 The evidence must show that the employee's conduct was an isolated occurrence and not
26 foreseeable.⁶
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28 Tyson had very robust and thorough lockout/tagout policies designed to prevent employees
29 from working on machinery without verifying that it had been locked out and deenergized, which its
30 employees were well aware of. Mr. Marquez was required to demonstrate his understanding and
31 knowledge of these procedures to his supervisor on an annual basis. He was aware of Tyson's rule
32 to always lock out a machine before reaching inside it and to never assume that someone else had
33 locked out a machine. To everyone's surprise, however, he disregarded his training and knowledge
34 (which was unforeseeable) by reaching his fingers inside the auger without locking it out first, which
35 resulted in the amputation of his fingers.
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44 ³ *Washington Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914 (2004).

45 ⁴ *In re Max J. Kuney Co.*, Dckt. No. 12 W0264 (April 28, 2014); *In re Pro-Active Home Builders, Inc.*, Dckt. No. 13 W1251
46 (January 5, 2016); *In re Pease Piping, Inc.*, Dckt. No. 11 W1176 (December 18, 2012).

47 ⁵ *In re Max J. Kuney Co.*, Dckt. No. 12 W0264 (April 28, 2014).

⁶ *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 111 (2007).

1 In the past, we have held that the unpreventable employee misconduct defense is not available
2 to an employer if the violation was committed by a supervisor.⁷ However, we have since departed
3 from this per se rule. In *In re Jornada Roofing 1, Inc.*, we held "the fact that a supervisor engaged in
4 a violation of the regulation is extremely important evidence in assessing whether unpreventable
5 employee misconduct has occurred."⁸ In *In re Greater American Construction*, we explained that a
6 supervisor's participation in a safety violation "weighs heavily in favor of assessing that unpreventable
7 employee misconduct has not occurred."⁹ In *Potelco, Inc. v. Department of Labor and Indus.*, the
8 court of appeals held that when a supervisor commits a violation, "the proof of unpreventable
9 employee misconduct is more rigorous and the defense is more difficult to establish since it is the
10 supervisor's duty to protect the safety of employees under his supervision."¹⁰ The court further stated
11 that a supervisor's negligent behavior that puts employees under his or her supervision at dangerous
12 risk "raises an inference of lax enforcement and/or communication of the employer's safety policy."¹¹

13 Here, however, we believe that the inference of lax enforcement is rebutted by abundant
14 evidence of Tyson disciplining its employees for lockout/tagout violations. Exhibit 45 shows that
15 Tyson verbally warned, suspended, or discharged employees for violating core safety mandates on
16 34 different occasions from 2012 to 2016. Moreover, Tyson disciplined Mr. Marquez for violating its
17 lockout/tagout rules by suspending him for three days. Thus, it is clear that Tyson was not lax in its
18 enforcement of its safety rules, and the defense of unpreventable employee misconduct applies.

29 DECISION

30 The employer, Tyson Fresh Meats, filed an appeal with the Board of Industrial Insurance
31 Appeals on April 10, 2017. The employer appeals Corrective Notice of Redetermination (CNR) No.
32 317942647 issued by the Department on March 22, 2017. In this notice, the Department alleged the
33 following: (1) Item 1-1, a serious violation of WAC 296-803-50060, for failing to ensure coordination
34 of lockout/tagout procedures with an outside cleaning company; and (2) Item 1-2, a serious violation
35 of WAC 296-803-50030, for failing to ensure than an authorized employee verified the lockout/tagout
36 procedure and that a machine had been deenergized prior to starting work. Item 1-1 is correct and
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42 ⁷ *In re John Lupo Construction, Inc.*, Dckt. No. 96 W075 (June 10, 1997); *In re C. Walter Smith Roofing Contractors, Inc.*,
43 Dckt. No. 96 W529 (July 31, 1998); *In re Shake Specialists, Inc.*, Dckt. No. 99 W0528 (January 22, 2001).

44 ⁸ Dckt. No. 08 W1050 (January 27, 2010) at 6.

45 ⁹ Dckt. No. 12 W1058 (August 16, 2013) at 3.

46 ¹⁰ 194 Wn. App. 428, 437 (2016) (citing *Secretary of Labor v. Archer W. Contractors Ltd.*, 15 BNA OSHC 101 (No. 87-
47 1067, 1991)).

¹¹ 194 Wn. App. 428, 437 (2016) (citing *Brock v. L.E. Myers Co.*, 818 F.2d 1270) (6th Cir. 1987).

1 is affirmed. Item 1-2 is vacated because the violation was the result of unpreventable employee
2 misconduct. CNR No. 317942647 is incorrect and is affirmed as modified.
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4 **FINDINGS OF FACT**

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6 1. On May 18, 2017, an industrial appeals judge certified that the parties
7 agreed to include the Jurisdictional History in the Board record solely for
8 jurisdictional purposes.
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- 10 2. Tyson Fresh Meats (Tyson) operates a meat processing plant near
11 Pasco, Washington. For the six to seven years before October 15, 2016,
12 Jesus Marquez worked as Tyson's night shift production supervisor and
13 was an "authorized employee" under WAC 296-803-50030. Mr. Marquez
14 was very familiar with Tyson's lockout/tagout procedures and regularly
15 trained his own employees on lockout/tagout procedures. He
16 demonstrated his understanding of Tyson's lockout/tagout procedures to
17 his supervisor on an annual basis.
- 18 3. PSSI is an outside company that cleans and sanitizes Tyson's machinery
19 during the night shift. Before cleaning, PSSI deenergizes the machinery
20 by turning off the main circuit breaker, which is in a different room than
21 the bone grinding room. On October 15, 2016, there were no procedures
22 that governed how PSSI employees would let Tyson employees in the
23 bone grinding room know that they were about to reenergize the circuit.
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- 25 4. On October 15, 2016, Mr. Marquez was reassembling machinery in the
26 bone grinding room. He placed his hand into an incline auger without
27 ensuring that it had been locked out or deenergized, in violation of Tyson's
28 lockout/tagout procedures. At the same moment, a PSSI employee had
29 reenergized the machinery, which resulted in the amputation of two of
30 Mr. Marquez's fingers.
- 31 5. The October 15, 2016 accident triggered an inspection of Tyson's plant
32 by a Department Safety and Health Officer. On March 22, 2017, the
33 Department issued Corrective Notice of Redetermination No. 317942647,
34 alleging: Item 1-1, a serious violation of WAC 296-803-50060, with an
35 assessed penalty of \$6,000; and Item 1-2, a serious violation of
36 WAC 296-803-50030, with an assessed penalty of \$4,800.
- 37 6. On October 15, 2016, Tyson did not ensure that Mr. Marquez verified that
38 the incline auger was deenergized before starting work, and it failed to
39 ensure that its employees understood PSSI's energy control program,
40 contrary to WAC 296-803-50060.
- 41 7. With respect to Item 1-1, the severity of the hazard was 3 on a scale of 1
42 to 3; the probability of injury, illness, or disease that will occur as a result
43 of the hazard was a 2 on a scale of 1 to 3; Tyson's good faith rating was
44 average, resulting in no adjustment to the penalty; and Tyson had 251 or
45 more employees on October 15, 2016, resulting in no adjustment to the
46 penalty.
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8. On October 15, 2016, Tyson had thorough lockout/tagout policies in place including work rules, training, and core mandates. Violation of these rules was adequately enforced and resulted in employee discipline.
 9. On October 15, 2016, Tyson had adequately communicated its lockout/tagout policies to all employees, including Mr. Marquez; took steps to discover and correct violations by conducting quarterly safety inspections and daily cleanliness inspections; and had an effective enforcement program for lockout/tagout violations, both in practice and in theory. Mr. Marquez's non-compliance with the lockout/tagout policies on October 15, 2016, was an isolated incident and was not foreseeable.

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CONCLUSIONS OF LAW

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
 2. On October 15, 2016, Tyson committed a serious violation of WAC 296-803-50060, as alleged in Item 1-1, for failing to ensure coordination of lockout/tagout procedures with an outside cleaning company. The assessed penalty of \$6,000 was correctly calculated.
 3. The action of Mr. Marquez reaching his hand into the incline auger without following lockout/tagout procedure was the result of unpreventable employee misconduct.
 4. Tyson did not commit a serious violation of WAC 296-803-50060, as alleged in Item 1-2.
 5. Corrective Notice of Redetermination No. 317942647, dated March 22, 2017, is affirmed as modified. Item 1-1 is correct and is affirmed. Item 1-2 is vacated.

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Dated: December 17, 2018.

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BOARD OF INDUSTRIAL INSURANCE APPEALS


LINDA L. WILLIAMS, Chairperson


JACK S. ENG, Member

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DISSENT

I dissent. The unpreventable employee misconduct defense should not be available when a supervisor commits the violation, as the Board has previously held. Supervisors and managers are extensions of the employer. It is a supervisor's duty to protect the safety of the employees who work

1 under his or her supervision.¹² As we stated in *In re John Lupo*, "a safety program cannot be effective
2 in practice when the person who is given charge of its enforcement is the same person orchestrating
3 its violation."¹³ Mr. Marquez had been a supervisor for several years leading up to the accident. By
4 disregarding Tyson's lockout/tagout rules, Mr. Marquez compromised the safety of Tyson employees
5 under his supervision. Therefore, the unpreventable employee misconduct should not be available
6 to Tyson.
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10 Dated: December 17, 2018.

11 BOARD OF INDUSTRIAL INSURANCE APPEALS

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14 FRANK E. FENNERTY, JR., Member
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44 ¹² *Potelco, Inc. v. Dep't of Labor & Indus.*, 194 Wn. App. 428, 437 (2016) (citing *Secretary of Labor v. Archer W.*
45 *Contractors Ltd.*, 15 BNA OSHC 101 (No. 87-1067, 1991)).

46 ¹³ Dckt No. 96 W075 (June 10, 1997); see also *C. Walter Smith Roofing Contractors, Inc.*, Dckt. No. 96 W529 (July 31,
47 1998).

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**Addendum to Decision and Order
In re Tyson Fresh Meats
Docket No. 17 W1079
Citation & Notice No. 317942647**

Appearances

Employer, Tyson Fresh Meats, by Davis Wright Tremaine, LLP, per Jeffrey B. Youmans

Employees of Tyson Fresh Meats, None

Department of Labor and Industries, by Office of the Attorney General, per Pamela V. Thomure

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 Department and employer filed timely Petitions for Review of a Proposed Decision and Order issued on August 3, 2018, in which the industrial appeals judge modified the Department order dated March 22, 2017. The Department filed a response to the employer's Petition for Review.

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.