

Air Quality Services

BOARD

Jurisdiction in WISHA appeal (RCW 49.17)

The Board is authorized to hear appeals from any action taken by the Department except where a specific provision deprives it of jurisdiction and RCW 49.17 does not deprive the Board of jurisdiction in appeals from an order of immediate restraint. ...*In re Air Quality Services*, BIIA Dec., 92 W370-C (1993) [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 93-2-00358-4.]

SAFETY AND HEALTH

Immediate restraint

An order and notice of immediate restraint is void when it is issued by Department at the same time as it declined to renew the contractor's asbestos removal certificate, proscribes prospective action rather than present action, is not the type of order provided for in RCW 49.17.130(1), and exceeds the Department's authority. In light of RCW 49.17.140, which results in an automatic stay upon an appeal to the Board, the Department lacks authority to take any action affecting the asbestos contractor's certificate pending the contractor's appeal of the failure to renew the certificate. The effect of the order of immediate restraint is circumvention of the employer's appeal from certificate nonrenewal; in order to restrain future activities, the Department must seek injunctive relief at the superior court. ...*In re Air Quality Services*, BIIA Dec., 92 W370-C (1993) [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 93-2-00358-3.]

Scroll down for order.

1 Department also issued the order and notice of immediate restraint. Air Quality Services, Inc. appeals
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3 from both Department actions pursuant to RCW 49.26.110, which provides that hearings should be
4 held in accordance with procedures set forth in RCW 49.17.140. This Decision and Order addresses
5 only the Department's order and notice of immediate restraint under our Docket No. 92 W370-C.
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7 Air Quality Services, Inc. contends that the Department is using the order of immediate restraint
8 to circumvent an automatic stay when a Department order is appealed. The Department asserts RCW
9 49.17.130(1) permits it to issue an order of immediate restraint and the Board does not have the
10 authority to review its order of immediate restraint.
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12 As background, we start with RCW 49.26.110 which states that:

13 (5) A denial [of a request to renew an asbestos contractor's certificate] . . .
14 may be appealed to the board of industrial insurance appeals within fifteen
15 working days after the denial. . . is entered. . . . The board of industrial
16 insurance appeals shall hold the hearings in accordance with procedures
17 established by RCW 49.17.140.¹
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20 As applied to appeals filed pertaining to RCW 49.26, RCW 49.17.140 provides in pertinent part:

21 A notice of appeal filed under this section shall stay the effectiveness of
22 [the Department's denial of a contractor's request to renew an asbestos
23 contractor's certificate] pending review by the board of industrial insurance
24 appeals.
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26 In other words, an appeal preserves the status quo. Air Quality Services, Inc. appeals from the
27 Department's denial of its request to **renew** its asbestos contractor's certificate. Air Quality Services,
28 Inc.'s appeal preserves the status quo inasmuch as its asbestos contractor's certificate remains valid
29 until resolution of that appeal.
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32 Once an appeal is before this Board and the Department has not exercised its rights to reassume
33 jurisdiction, the Board has exclusive jurisdiction over the subject matter of the appeal. RCW
34 49.26.110. RCW 49.17.140. This is the situation in Docket No. 92 W278C, which is Air Quality
35 Services, Inc.'s appeal requesting that the Department renew Asbestos Contractor Certificate No.
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41 ¹RCW 49.17.140(3) provides "If any employer notifies the director that he intends to appeal
42 **the citation** issued under either RCW 49.17.120 or 49.17.130 or **notification of the assessment**
43 **of a penalty** issued under subsections (1) or (2) of this section . . . he shall promptly notify the
44 state board of industrial insurance appeals The board shall thereafter make disposition of the
45 issues in accordance with procedures relative to contested cases appealed to the . . . board"
46 (Emphasis added).
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1 1063. The Department lacks authority to take any action which affects the validity of Air Quality
2 Services, Inc.'s asbestos contractor's certificate pending the outcome of Docket No. 92 W278C.

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4 **I. Subject Matter Jurisdiction - Order of Immediate Restraint.**

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6 The Department contends that RCW 49.17.130(1) permits it to issue orders of immediate
7 restraint, and such orders are not stayed by an appeal. RCW 49.17.140(3) does state that "A notice of
8 appeal [to this Board] . . . **shall not stay** the effectiveness of any **order of immediate restraint**
9 **issued by the director under the authority of RCW 49.17.130**. (Emphasis added). The Department
10 further contends that the Board lacks jurisdiction to hear any appeal from an order of immediate
11 restraint or to take any action which affects the order of immediate restraint.

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13 Such a position **seems** contrary to the implicit assumption of RCW 49.17.140, which provides
14 that in the event of an appeal to this Board that the order of immediate restraint is not stayed. Clearly
15 an appeal to the Board is contemplated although not explicitly provided for; otherwise, the language
16 concerning lack of a stay for an order of immediate restraint would be superfluous, contrary to settled
17 rules of statutory construction.

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19 Tribunals with dispute resolution functions have the authority to determine whether they have
20 jurisdiction over a particular dispute. For example, a court reviewing a dispute has the authority or
21 power to determine if it has jurisdiction to resolve the substantive issues giving rise to the dispute.
22 State ex rel. Hood v. Washington State Personnel Board, 82 Wn.2d 396, 402, 511 P.2d 52 (1973);
23 DeWeese v. City of Port Townsend, 39 Wn. App. 369, 372, 693 P.2d 726 (1984). Similarly, when the
24 Board's jurisdiction is challenged, we do have authority to determine the issues we are empowered to
25 review.

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27 RCW 49.17.130(3) permits the Department, through the attorney general, to request a temporary
28 restraining order from the superior court. Furthermore, after issuance of the order of immediate
29 restraint and upon petition of the Department, the superior court also has jurisdiction

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31 [t]o enjoin any condition or practice in any work place from which there is
32 substantial probability that death or serious physical harm could result to
33 any employee immediately or before the imminence of such danger can
34 be eliminated through the enforcement procedures otherwise provided by
35 this chapter

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37 RCW 49.17.170(1). No similar provision explicitly exists for the employer to obtain a hearing on the
38 necessity for an order of immediate restraint, either in superior court or before this Board. RCW
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1 49.17.140 is explicitly silent on the employer's right to appeal to the Board of Industrial Insurance
2 Appeals from an order of immediate restraint.
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4 The order of immediate restraint in this case was not issued as part of an inspection or
5 investigation, but was issued after the Department determined that it would not renew Air Quality
6 Services, Inc.'s asbestos contractor's certificate. Air Quality Services, Inc. is faced with two separate
7 actions of the Department, and both of them purport to prevent the company's further involvement in
8 any asbestos removal activities. The order denying a renewal of the asbestos contractor's certificate
9 is clearly appealable and the appeal stays the effect of the order, thus allowing Air Quality Services to
10 continue to perform asbestos removal activities during the pendency of that appeal. The second
11 action is an order of immediate restraint which the Department argues that the Board does not have
12 jurisdiction to deal with, and even if such jurisdiction exists the order of immediate restraint is not
13 stayed during an appeal, thus preventing Air Quality Services from performing any further asbestos
14 removal activities. It does appear that RCW 49.17 neither expressly permits nor expressly prohibits an
15 appeal from an order of immediate restraint to the Board.² The only specific method of review
16 provided for is within the discretion of the Department and not the employer. A hearing in superior
17 court is precipitated by the Department seeking further relief by means of an injunction against the
18 employer in addition to the order of immediate restraint. RCW 49.17.170(1) & (2). As there is no
19 explicit provision for an appeal of the order of immediate restraint, there is no apparent mechanism for
20 an employer to challenge the Department's actions ordering an employer to simply stop performing
21 any asbestos removal activities. The employer under such circumstances must stop removing
22 asbestos, or by continuing to do so run the risk of criminal sanctions under RCW 49.17.190(4).
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33 Clearly, the Legislature did not intend to require the employer to subject itself to criminal
34 sanctions before it could even obtain a hearing. Nor did the Legislature intend to deprive employers
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37 ²Although, as we have already noted, the language in RCW 49.17.140(3) seems to envision
38 such an appeal to the Board, as follows:

39 A notice of appeal filed under this section shall stay the effectiveness of
40 any citation or notice of the assessment of a penalty pending review by the
41 board of industrial insurance appeals, **but such appeal shall not stay the**
42 **effectiveness of any order of immediate restraint issued by the**
43 **director under the authority of RCW 49.17.130.** (emphasis added)

44 This section does not specify or authorize an appeal of an order of immediate restraint to the
45 Board, but provides by inference that in the event of such an appeal the order shall not be
46 stayed.
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1 procedural due process. The essential elements of procedural due process are notice and the
2 opportunity to be heard or to defend before a competent tribunal in an orderly proceeding adapted to
3 the nature of the case. Senior Citizens' League, Inc. v. Dep't of Social Security of Washington, 38
4 Wn.2d 142, 168, 228 P.2d 478 (1951); In re Hendrickson, 12 Wn.2d 600, 606, 123 P.2d 322 (1942).

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7 The Legislature imposed on the Board the responsibility to resolve disputes arising under Chapter
8 49.17 and Chapter 49.26. RCW 49.17.140; RCW 49.26.110(5); RCW 49.26.140. The Board is a
9 creature of the Legislature without inherent or common law powers and may exercise only powers
10 expressly conferred or implied by necessity. Jaramillo v. Morris, 50 Wn. App. 822, 829, 750 P.2d 1301
11 (1988). With respect to matters arising under Chapter 49.17, the Board is authorized to hear any
12 appeal from any action taken by the Department. Only when a specific provision deprives the Board
13 of jurisdiction, does the Board lack jurisdiction. There is no provision in Chapter 49.26 depriving the
14 Board of jurisdiction when an order of immediate restraint is issued under Chapter 49.17. Nor does
15 Chapter 49.17 deprive the Board of jurisdiction. We must conclude that the absence of a statutorily
16 designated forum does not deprive this Board of exercising jurisdiction in the event of an appeal by an
17 employer from an order of immediate restraint purportedly entered pursuant to Chapter 49.17. Such
18 an appeal does provide sufficient basis for the Board to exercise jurisdiction and to resolve the
19 substantive issues raised.

20 **II. Validity of Order of Immediate Restraint.**

21 Chapter 49.26 was enacted by the Washington Legislature to regulate the asbestos industries
22 under the police powers of the state. RCW 49.26.140(1) provides:

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Unless specifically provided otherwise by statute, this chapter shall be implemented and enforced, including penalties, violations, citations, and other administrative procedures, pursuant to the Washington industrial safety and health act, chapter 49.17 RCW.

The implication is that the enforcement procedures for Chapter 49.26 are the same as the enforcement procedures for Chapter 49.17. Notwithstanding, Air Quality Services, Inc. challenges the Department's legal authority to issue an order of immediate restraint as part of the asbestos contractor's certificate renewal process. We now examine this contention.

RCW 49.17.130(1) states in pertinent part:

If upon inspection or investigation, the director, or his authorized representative, believes that an employer has violated . . . any safety or health standard promulgated by the rules of the department . . . which

1 violation is such that a danger exists from which there is a substantial
2 probability that death or serious physical harm could result to any
3 employee, the director or his authorized representative . . . may issue an
4 order immediately restraining **any such condition, practice, method,**
5 **process or means in the workplace.**(emphasis added)³
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7 The Department can issue an order of immediate restraint addressing any "condition, practice,
8 method, process, or means in the work place". The order of immediate restraint issued on October
9 19, 1992 was clearly broader than that. It was a sweeping order which prohibited Air Quality Services,
10 Inc. from performing into the indefinite future any work at any location which required an asbestos
11 contractor's certificate.
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14 When RCW 49.17.130 and RCW 49.17.140 are read together, it is not logical that the Legislature
15 would require the preservation of the status quo when an appeal was filed, yet at the same time permit
16 the Department to alter the status quo by issuing an order of immediate restraint on a prospective
17 basis. RCW 49.17.130 does not grant the Department power to issue orders which circumvent RCW
18 49.17.140 by altering the status quo. The order of immediate restraint issued by the Department on
19 October 19, 1992 is void since the Department lacks power under RCW 49.17.130, to issue an order
20 of immediate restraint prohibiting Air Quality Services, Inc., from performing any future work requiring
21 an asbestos contractor's certificate. The Department order did not identify any "condition, practice,
22 method, process or means in the workplace", nor was it issued in connection with an inspection or
23 investigation of a workplace. It was issued to attempt to prevent the employer from operating at all
24 thereafter under its still-valid certificate.
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27 However, the order of immediate restraint has been modified. The parties have stipulated that for
28 purposes of this appeal, Exhibit No. 1, the Amended Order of Immediate Restraint, is the subject of
29 the employer's appeal seeking a stay and/or vacation of said order. The amended order does not
30 prohibit Air Quality Services, Inc. from performing any work requiring an asbestos contractor's
31 certificate. Instead, the order prohibits Air Quality Services, Inc. from performing certain types of
32 activities, namely:
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- 34 1. The use of glove bags.
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43 ³ The Occupational Safety and Health Act of 1979 (Public Law 91-596; 84 Stat. 1590) does
44 not have a similar provision. Instead, 29 U.S.C. Section 662 requires the Secretary of Labor to go
45 to U.S. District Court for an order enjoining the employer. RCW 49.17.170, with minor modification,
46 parallels Section 662.
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- 1 2. The use of negative pressure or pressure differential enclosures.
- 2 3. The use of mini-enclosures.
- 3 4. Any asbestos removal or encapsulation which requires the use of respiratory protective
- 4 equipment.
- 5 5. Wrap and cut techniques used for the removal of asbestos pipe insulation.
- 6 6. Any work which requires the collection, analysis or reliance upon asbestos air monitoring
- 7 samples.
- 8 7. Application of asbestos encapsulating agents.

9 This prohibition applies to "any asbestos removal or encapsulation project."

10 RCW 49.17.130 is part of the Washington Industrial Safety and Health Act (WISHA) and
11 contemplates that an order of immediate restraint will be issued during an inspection or an
12 investigation, of presumably, a specific worksite. This grant of power comes from the police power of
13 the state to protect its citizens. RCW 49.17.130(1) further provides:

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15 Any order issued under this section may require such steps to be taken as
16 may be necessary to avoid, correct, or remove such danger and prohibit
17 the employment or presence of any individual in locations or under
18 conditions where such danger exists, except individuals whose presence
19 is necessary to avoid, correct or remove such danger or to maintain the
20 capacity of a continuous process operation in order that the resumption of
21 normal operations may be had without a complete cessation of operations,
22 or where a cessation of operations is necessary, to permit such to be
23 accomplished in a safe and orderly manner. (Emphasis added)

24 Generally, an order is issued when the inspector, based on his worksite inspection, believes that an
25 employee has a substantial probability of being seriously injured unless the condition or activity giving
26 rise to the threat is stopped by the issuance of an order of immediate restraint. But the employer is
27 usually given the opportunity to take action to eliminate the danger prior to an order being issued,
28 thereby avoiding a complete shutdown of his operations. This is the obvious intent of the above
29 emphasized statutory language.

30 In this instance, the Department attempts to use the order of immediate restraint to prevent the
31 employer from even beginning any further work activities. RCW 49.17.130 is being used to prohibit Air
32 Quality Services, Inc. from performing a substantial number of certain tasks that are necessary to
33 engage in the business as an asbestos removal contractor. In essence, the order of immediate
34 restraint acts as a restraining order pending the outcome of Air Quality Services, Inc.'s appeal from the
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1 Department's decision to deny its certificate renewal request. The actions the order prohibits could
2 occur only if Air Quality Services, Inc. attempts to use its asbestos contractor certificate after the order
3 of immediate restraint's issuance.
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5 The order of immediate restraint was not issued as part of an inspection or investigation, but was
6 issued after the Department determined that it would not renew Air Quality Services, Inc.'s asbestos
7 contractor's certificate. Air Quality Services, Inc. is faced with two separate actions of the Department
8 and, as previously pointed out, both of them purport to prevent the company's further involvement in
9 any asbestos removal activities. The order denying a renewal of the asbestos contractor's certificate
10 is appealable and the appeal stays the effect of the order, allowing Air Quality Services, Inc. to
11 continue to perform asbestos removal activities during the pendency of the appeal. The second action
12 is an order of immediate restraint which the Department argues that the Board does not have
13 jurisdiction to deal with, and even if such jurisdiction exists the order of immediate restraint is not
14 stayed during an appeal, thus preventing Air Quality Services, Inc. from performing any further
15 asbestos removal activities.
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22 The Department's action is inappropriate and inherently contradictory. What our right hand can't
23 do, maybe the left hand can, says the Department! If the Department wants injunctive relief, RCW
24 49.17.170(1) directs it to file a petition in superior court requesting that Air Quality Services, Inc. be
25 enjoined from performing specific activities. RCW 49.17.170(2) provides that:
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28 Upon the filing of any such petition the superior courts of the state of
29 Washington shall have jurisdiction to grant such injunctive relief or
30 temporary restraining order pending the outcome of enforcement
31 proceedings pursuant to this chapter
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33 RCW 49.17.130(1) in conjunction with RCW 49.17.170(1) & (2) provides the Department the judicial
34 means to attempt to prevent Air Quality Services from performing the activities set forth in the
35 amended order and notice of immediate restraint dated December 1, 1992. This would provide the
36 employer an opportunity to be heard prior to the issuance of an injunction.
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39 The Department believes that Air Quality Services, Inc. should not be permitted to disregard the
40 rules and regulations pertaining to asbestos removal or encapsulation. The Department believes that
41 Air Quality Services, Inc. will continue to expose its employees to asbestos, in violation of its rules.
42 For those reasons, it has issued the order of immediate restraint. The Department identifies certain
43 tasks that it believes would result in exposure of employees to asbestos fibers. The Department's
44 rationale is that Air Quality Services, Inc. will continue to violate WISHA regulations if it is not
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1 prohibited from performing certain activities. Based on such presumptions, the Department wants to
2 shut down such activities by the employer. Such prospective action into the indefinite future is not
3 what is contemplated for an order of immediate restraint, in light of the language in RCW 49.17.130(1).
4 Regardless of what the Department believes may happen, Air Quality Services, Inc. is still entitled to a
5 hearing prior to the issuance of an injunction.⁴
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9 The Department predicates its action on the belief that its denial of Air Quality Services, Inc.'s
10 request to renew its asbestos contractor's certificate will be affirmed. If the Department is wrong, there
11 is no basis for denying Air Quality Services, Inc. the right to take any action permitted by a valid
12 asbestos contractor's certificate. By not filing a petition in superior court, the Department denies Air
13 Quality Services, Inc. the opportunity to be heard. In effect, the Department is attempting both a
14 temporary restraining order and a temporary injunction without having to make any showing on the
15 likelihood of prevailing on the merits.
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19 Air Quality Services, Inc. requests that the Department's order of immediate restraint be stayed
20 pending the outcome of the proceedings before the Board. As we previously noted, RCW
21 49.17.140(3) provides that in the event of an appeal (by inference to this Board) an order of immediate
22 restraint shall not be stayed. Were we dealing with the kind of order of immediate restraint as provided
23 for in RCW 49.17.130(1), we could not grant a stay. However, the Department has attempted much
24 more and has restrained not present actions, but prospective actions. Such an order exceeds the
25 Department's authority and is not contemplated by the statute.
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28 29 **III. Summary.** 30 31 32 33

34 ⁴ To obtain an injunction, the Department must show:

- 35 (1) It has a clear legal or equitable right;
36 (2) It has well grounded fear of immediate invasion of that right; and
37 (3) The acts it seeks to prevent are resulting in or will result in actual and
38 substantive harm.

39 Port of Seattle v. International Longshoremen's & Warehousemen's Union, 52 Wn.2d 317, 319, 324
40 P.2d 1099 (1958). To show a clear legal or equitable right, the Department must show a likelihood
41 that it will prevail on the merits. Tyler Pipe Industries, Inc. v. Dep't of Revenue, 96 W.2d 785, 793,
42 638 P.2d 1213 (1982). A violation of a statute does not necessarily inflict injury sufficient to warrant
43 an injunction. County of King ex rel. Sowers v. Chisman, 33 Wn.App. 809, 818, 658 P.2d 1256
44 (1983). To satisfy the last criteria, the Department must show either (1) a condition or practice in
45 any work place of Air Quality Services, Inc. exposes employees to a substantial probability of
46 immediate death or serious physical harm or (2) the imminence of death or serious physical harm
47 to employees cannot be eliminated by the enforcement proceedings. RCW 49.17.170(1).

1 We agree with Air Quality Services, Inc. that the issuance of the order of immediate restraint was
2 an attempt by the Department to circumvent the appeal process involving the renewal of the
3 contractor's certificate. In the event the Department wishes to restrain the future activities of Air
4 Quality Services, Inc., it must do so as provided by RCW 49.17.170. We note that the kind of
5 equitable relief attempted by the Department, unless authorized by statute, is also beyond the power
6 of this Board. Equitable relief in the form of an injunction or a temporary restraining order is beyond
7 the power of an administrative agency such as the Board. See e.g., Tacoma v. Civil Service
8 Commission Board of Tacoma, 6 Wn. App. 600, 696, 494 P.2d 1380 (1972).
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10 The Order and Notice of Immediate Restraint issued by the Department on October 19, 1992 and
11 amended by the Department on December 1, 1992 is void and of no effect, and therefore should be
12 vacated.
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14 **FINDINGS OF FACT**

- 15 1. On October 19, 1992, the Department of Labor and Industries issued an
16 order and notice of immediate restraint pursuant to the alleged authority of
17 RCW 49.17.130(1) against Air Quality Services, Inc. On October 19,
18 1992, Air Quality Services filed a notice of appeal from the Department's
19 order and notice of immediate restraint with the Board of Industrial
20 Insurance Appeals and with the Safety Division of the Department of
21 Labor and Industries.
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- 23 2. On December 1, 1992, the order and notice of immediate restraint issued
24 on October 19, 1992 was modified and amended by the Department.
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- 26 3. The Department has not filed a petition for injunctive relief with the
27 superior court for the state of Washington.
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- 29 4. The Department's failure to file a petition for injunctive relief denies Air
30 Quality Services, Inc. an opportunity for a hearing on the merits of whether
31 an injunction should be issued.
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- 33 5. The Department's October 19, 1992 order and notice of immediate
34 restraint, as amended on December 1, 1992, was not issued as a result of
35 an inspection or investigation regarding specific violations of RCW 49.17
36 or 49.26, but instead, ordered Air Quality Services, Inc. to refrain from
37 performing certain kinds of asbestos removal activities which effectively
38 precluded it from operating under its still-valid asbestos contractor's
39 certificate prospectively, on the belief that safety violations would occur in
40 the future.
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42 **CONCLUSIONS OF LAW**

- 43 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
44 and over the subject matter to this appeal.
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2. The Order and Notice of Immediate Restraint issued by the Department on October 19, 1992 and amended on December 1, 1992, is not a valid order of immediate restraint as provided for in RCW 49.17.130(1) and is instead an unauthorized attempt to exercise injunctive relief.
 3. The Order and Notice of Immediate Restraint issued by the Department of Labor and Industries on October 19, 1992 and amended by the Department on December 1, 1992, is void and of no effect, and is vacated.

9 It is so ORDERED.

10 Dated this 15th day of January, 1993.

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12 BOARD OF INDUSTRIAL INSURANCE APPEALS

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15 /s/
16 S. FREDERICK FELLER Chairperson

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19 /s/
20 FRANK E. FENNERTY, JR. Member

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23 /s/
24 PHILLIP T. BORK Member