

# American Neon Signs

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## DEPARTMENT

Authority to issue nunc pro tunc order

## SAFETY AND HEALTH

Authority to issue nunc pro tunc order

The Department cited an employer for four safety violations and issued a Corrective Notice of Redetermination assessing a \$6,000 penalty arising out of an incident where a worker was electrocuted. In a separate investigation, the Department apparently determined it had been too lenient on the employer and, more than 60 days after issuance of the unappealed Corrective Notice of Redetermination, issued a *nunc pro tunc* order vacating the Corrective Notice of Redetermination. The Board concluded there was no statutory authority to issue a *nunc pro tunc* order. ...***In re American Neon Signs, BIA Dec., 94 W346 (1995)*** [*Editor's Note: The Board's decision was appealed to superior court under Pierce County Cause No. 9202094624-5.*]

Scroll down for order.



1 On June 18, 1993, Donovan Fait, an employee of American Neon Signs, was electrocuted  
2 while in the course of his employment. After investigating the incident, the Department issued Citation  
3 and Notice 115516593, alleging that American Neon Signs had violated four safety standards relating  
4 to worker safety. The citation and notice assessed penalties totaling \$7,800.00. Following an appeal  
5 by the employer and reassumption by the Department, the Department ultimately issued amended  
6 Corrective Notice of Redetermination 115516593, on October 1, 1993, wherein it alleged three safety  
7 standard violations and assessed total penalties of \$6,000.00. Significantly, there was no timely  
8 appeal taken to Corrective Notice of Redetermination 115516593. Equally important, on October 28,  
9 1993, American Neon Signs paid the \$6000.00 penalty.

10 Thereafter, the Department of Labor and Industries reopened its investigation of the matter  
11 under Safety Report 111318747. Based on its further investigation, the Department appears to have  
12 been persuaded that it was unduly lenient with American Neon Signs. Thus, on December 10, 1993, it  
13 issued the nunc pro tunc order under consideration here in an effort to set aside Amended Corrective  
14 Notice of Redetermination 115516593. Believing that the corrective notice was effectively set aside,  
15 the Department then issued Citation and Notice 111318747, on December 15, 1993, wherein it  
16 alleged that the employer had committed various safety violations bearing penalties of \$67,500.00.

17 In the present matter, the Board does not reach the question of whether the Department had  
18 authority to issue the Citation and Notice dated December 15, 1993, that matter being considered  
19 under a companion appeal, Docket 94 W135. Here, we limit our consideration to the Department's  
20 nunc pro tunc order of December 10, 1993, and conclude, as did our industrial appeals judge, that the  
21 Department was without authority to set aside the Amended Corrective Notice of Redetermination  
22 dated October 1, 1993, inasmuch as that order had become final and binding.

23 In matters involving the Washington Industrial Safety and Health Act, our state's statutory  
24 scheme allows an employer to appeal within fifteen working days of receipt of a citation and notice.  
25 Absent an appeal, the citation becomes final. RCW 49.17.140(1). If the employer files a timely appeal  
26 and the Department chooses to reassume jurisdiction, the Department must issue a corrective notice  
27 of redetermination within 30 working days. Thereafter, once a corrective notice is issued by the  
28 Department and received by the employer, it too will become final subject to the employer filing a  
29 timely appeal with the Board of Industrial Insurance Appeals. RCW 49.17.140(3). Should the  
30 employer not appeal from the corrective notice of redetermination, there is no statutory provision for  
31 keeping the corrective notice from becoming final. The result is that the unappealed corrective notice  
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1 becomes a final disposition of the issues raised. Neither the employer nor the Department of Labor  
2 and Industries has the statutory authority to modify or set aside the corrective notice once it becomes  
3 final. In the case at hand, American Neon Signs did not appeal the Corrective Notice of  
4 Redetermination as finally amended on October 1, 1993. It became final. The penalty was paid.  
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7 We have granted review for the purpose of recognizing the issues raised by the employer in its  
8 Petition for Review. Although our industrial appeals judge ruled in the employer's favor with respect to  
9 the nunc pro tunc order, the employer has nonetheless filed a Petition for Review. It essentially raised  
10 two arguments. First, the employer argues that it did not bring a Motion for Summary Judgment under  
11 the present docket number, 94 W346. Thus, the matter is not properly before the Board. Second, the  
12 employer argues that the Motion for Summary Judgment, brought under Docket 94 W135, does not  
13 include a prayer for relief on summary judgment under Docket 94 W346.  
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18 The first of the employer's arguments is without merit. The fact that our industrial appeals judge  
19 elected to establish a second docket number does not detract from either the evidence stipulated to by  
20 the parties or the substance of the employer's motion for summary judgment. Establishing a second  
21 docket number is a purely administrative function undertaken at the discretion of the Board as the  
22 circumstances may require. Here, our industrial appeals judge correctly recognized, after the parties  
23 had completed oral argument on the employer's Motion for Summary Judgment, that two separate  
24 orders of the Department were at issue; the December 10, 1993 nunc pro tunc order and the  
25 December 15, 1993 citation and notice. Further, the employer's oral argument of October 14, 1994,  
26 and its appeal letter of December 22, 1993, reference two Department decisions. Thus, it was  
27 appropriate for our industrial appeals judge to establish a second docket number. From this we  
28 conclude that the failure of the employer's Summary Judgment Motion to reference both docket  
29 numbers does not deprive the Board of authority to decide an issue that is otherwise before the Board  
30 for adjudication given the substance of the underlying issue.  
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37 Similarly, we do not find persuasive the employer's argument that it has not made a prayer for  
38 relief under Docket 94 W346. In examining page two of the employer's Motion for Summary  
39 Judgment, we see that it raised the issue of whether an administrative agency can vacate a final order  
40 issued by that agency. We see that the employer argued, on page five of its Motion for Summary  
41 Judgment, that the nunc pro tunc order should be vacated. Finally, the employer clearly objected to  
42 the nunc pro tunc order during oral arguments heard October 14, 1994. On balance, we conclude that  
43 the employer's Motion for Summary Judgment reasonably contemplates that the Board render a  
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1 decision on whether the Department's nunc pro tunc order of December 10, 1993, was statutorily  
2 authorized. As noted above, we conclude that there was no statutory authorization for the December  
3 10, 1993 nunc pro tunc order.  
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5 The Corrective Notice of Redetermination, amended October 1, 1993, became final. Thus, the  
6 Department's nunc pro tunc order of December 10, 1993, is a nullity inasmuch as the Department was  
7 without statutory authority to issue such. Because the December 10, 1993 order is a nullity, no appeal  
8 can be taken from said order and the present appeal, identified as Docket 94 W346, must be  
9 dismissed. The Department is ordered to respect the finality of the corrective notice issued on  
10 September 29, 1993, and amended on October 1, 1993.  
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### 12 **FINDINGS OF FACT**

- 13 1. On July 29, 1993, the Department of Labor and Industries issued Citation  
14 and Notice 115516593, alleged four serious violations of safety standards  
15 and assessed a penalty in the amount of \$7,800.00. On August 18, 1993,  
16 the employer, American Neon Signs, filed a Notice of Appeal from the  
17 citation and notice with the Department of Labor and Industries Safety  
18 Division. On September 3, 1993, the Department issued a notice of its  
19 intent to reassume jurisdiction over the matter. On September 29, 1993,  
20 Corrective Notice of Redetermination 115516593 was issued, and on  
21 October 1, 1993, an Amended Corrective Notice of Redetermination was  
22 issued and the Department affirmed three items and vacated one item,  
23 reducing the total penalty to \$6,000.00.  
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- 25 2. On December 10, 1993, the Department issued an order which vacated  
26 Corrective Notice of Redetermination 115516593. On December 22,  
27 1993, the employer filed an appeal from Corrective Notice of  
28 Redetermination 115516593 with the Department of Labor and Industries  
29 Safety Division. On February 4, 1994, the Department transmitted the  
30 appeal to the Board of Industrial Insurance Appeals.  
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### 32 **CONCLUSIONS OF LAW**

- 33 1. The Board of Industrial Insurance Appeals does not have jurisdiction over  
34 the parties and the subject matter of this appeal.  
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- 36 2. The Department was without statutory authority to issue the December 10,  
37 1993 order which vacated Corrective Notice of Redetermination  
38 115516593 nunc pro tunc.  
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- 40 3. The employer's appeal raises no genuine issue of material fact.  
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1 4. The Department order entered on December 10, 1993, is a nullity and as  
2 such the Board does not have jurisdiction over this appeal. Corrective  
3 Notice of Redetermination 115516593 issued on September 29, 1993,  
4 and amended on October 1, 1993, is a final and binding order on the  
5 Department and American Neon Signs.  
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7 It is so ORDERED.  
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9 Dated this 28th day of March, 1995.  
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11 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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13 /s/  
14 S. FREDERICK FELLER Chairperson  
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16 /s/  
17 FRANK E. FENNERTY, JR. Member  
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19 /s/  
20 ROBERT L. McCALLISTER Member  
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