

NO. 48842-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent,

v.

DOUG AND ALICE KRISTENSEN,

Appellants.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

In the over 20 years since the Department of Labor and Industries last inspected the residential tram that Doug and Alice Kristensen use to access their house, the Department learned that the tram's emergency brake can fail. The safety hook designed to latch onto a cross bar to stop the tram in an emergency can malfunction and injure the tram's occupants. Dozens of similar trams across the state have the same unsafe hook. Due to this significant safety concern, in 2013 the Department ordered the Kristensens to stop using the tram ("red-tagged") and fix the problem.

An administrative law judge incorrectly concluded, on the Kristensens' motion for summary judgment, that equitable estoppel prevented the Department's action as a matter of law because the Department approved the installation of the tram in 1989 and allowed it to operate in the early 1990s after it had inspected the tram.

The courts disfavor applying estoppel against the government, and the superior court correctly reversed and remanded for a hearing on the merits. The Department was acting on new safety information when it red-tagged the tram, not acting inconsistently. The Kristensens' purchase of the tram was not detrimental reliance because it is not reasonable to believe that a tram approved for installation in 1989 will always remain safe once the Department has allowed its installation. It is not manifestly

unjust to the Kristensens to ensure their tram is safe and does not injure its current and future occupants. Finally, application of estoppel here would impair the Department's ability to enforce its statutory directive to ensure safe operation of the multitude of elevators, escalators, and trams that the Department regulates in cases where the Department discovers a latent and serious safety defect sometime after the machine passed an inspection.

This Court should affirm.

II. ASSIGNMENT OF ERROR

1. The administrative law judge erred in concluding that the Department was equitably estopped as a matter of law from ordering the Kristensens to discontinue the operation of their tram and in granting summary judgment to them.¹

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. The Department acted on new safety information that it discovered after it issued permits to the Kristensens. The Department acted because it has an important interest in ensuring safe elevator operations in the state. Does estoppel apply against the Department as a matter of law when this would freeze the Department's safety enforcement powers in time, thereby frustrating important governmental interests in preventing serious injury to users of unsafe elevators?

¹ The administrative law judge improperly entered 28 findings of fact (identified as "facts as a matter of law") in the corrected final order granting summary judgment. AR 2-5. Because findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court, it is unnecessary to assign error to such findings. *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991); *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 117, 362 P.3d 974 (2015). In any case, the Department challenges findings 4.14, 4.19, 4.22, 4.23, and 4.24 in whole or in part.

IV. STATEMENT OF THE CASE

A. The Department Enforces Safety Regulations for Elevators, Escalators, and Trams

The Department enforces safety regulations for “conveyances” in the state, a broad category of machinery that includes elevators, escalators, moving walks, casket lifts, dumbwaiters, and other elevating devices, including residential inclined elevators (or “trams”). RCW 70.87.010(6), (11), .020, .034(1); *see also* WAC 296-96-00910. The Department regulates a vast and varied range of conveyances, encompassing elevators in Seattle skyscrapers, moving walkways at SeaTac airport, and private residence elevators that are not accessible to the general public. *See* RCW 70.87.010(6), (11), (26), (33); WAC 296-96-00700.

The Department’s core purpose is to ensure the safe operation of conveyances and to protect the life and limb of the conveyances’ users. *See* RCW 70.87.020(1). The Department has adopted rules to ensure the safe design, installation, and mechanical and electrical operation of conveyances. WAC 296-96-00500(1); *see also* RCW 70.87.030, .034(1).² To this end, the Department inspects conveyances, issues operating

² The Legislature has directed the Department to consider certain national safety standards before adopting rules, including the American National Standards Institute Safety Code for Personnel and Material Hoists and the American Society of Mechanical Engineers Safety Code for Elevators, Dumbwaiters, and Escalators. RCW 70.87.030. A list of the national elevator codes and supplements that the Department has adopted appears at WAC 296-96-00650.

permits, licenses elevator contractors and mechanics, and undertakes other safety measures in order to protect the users of these conveyances. *See, e.g.*, RCW 70.87.090, .120, .240; WAC 296-96-00900, -01000, -01006.

All conveyances, including private residential inclined elevators, must comply with the Department's rules in effect at the time the Department issued a permit for the elevator, regardless of whether the rules have been repealed, unless any new rule specifically states that it applies to all conveyances. WAC 296-96-00600, -07021.

B. The Mark 12 Hillside Tram, Which Employs a Hook as an Emergency Brake, Can Be Dangerous

Between 1970 and 1995, at least 39 residential inclined elevators (or "trams") manufactured by Rehmke Products Corporation were installed in the state. AR 154, 171, 178. These include several Mark 12 hillside tram models, the model involved in this case. *See* AR 218, 222, 237, 240, 255.

The emergency braking system, or "car safety," of the Mark 12 hillside tram is a hook that catches on a cross bar (or "track lattice brace"). AR 154, 169, 171, 176, 178, 195, 199, 222. The hook is designed to catch on the cross bar if a suspension cable breaks, if excessive speed occurs, or if the hoisting mechanical system fails. AR 169, 176, 178, 199.

The manufacturer explained to the Department in a 1993 letter that the Mark 12 tram “is complex and can be dangerous if all of the safety features designed into the machine are not periodically checked for satisfactory operation.” AR 255. The company’s letter asserted that “the Mark 12 tram, *properly maintained and inspected over [its] life*, is by far the safest machine available to private owners.” AR 256 (emphasis added).

C. The Kristensens’ Tram Has Not Been Inspected in Over 20 Years

In 1989, Doug and Alice Kristensen purchased a house in Kent that could not be accessed by motor vehicle. AR 217. The Department approved their application to install the Mark 12 hillside tram, which they installed in 1990. AR 218.

The regulation in effect when the Kristensens installed the tram provided that “[t]he car safety shall be of the Type A or B and operated by a speed governor.”³ Former WAC 296-94-170(2) (1986), *repealed by* Wash St. Reg. 01-02-026; AR 152, 163. Type A and B safeties apply pressure to the guide rails to stop the car. *See* AR 183. A speed governor is a device that continuously monitors speed and that imparts a retarding

³ Although the Department has repealed former WAC 296-94-170, that regulation still applies to the Kristensens’ tram because conveyances must comply with the rules in effect at the time the Department issued a permit for operation of the conveyance. WAC 296-96-00600.

force to activate the car safety if the tram reaches a predetermined speed.

AR 182.

The safety hook on the Kristensens' tram, which works by latching onto a cross bar rather than applying pressure to the guide rails, did not comply with this regulation. AR 155, 196. According to Jack Day, the Department's chief elevator inspector, it is regrettable that the Department approved the Kristensens' installation application in 1989 when the car safety was not a type A safety. AR 195.

Over the next four years, the Department periodically inspected the Kristensens' tram and required corrections to tram components that did not involve the safety hook. AR 153, 218-20, 223-25, 228-29. In June 1990, the Department inspected the tram and required corrections to the landing gates and handrails, the hoist, and the push button station. AR 223. In October 1990, the Department inspected the tram and required corrections to the landing gates and handrails, the sides of the car enclosure, the electrical contact for the car door or gate, and the push button station. AR 224-25. The Department declined to issue an operating permit until these corrections had been made. AR 153, 219, 224-25.

In March 1991, the Department issued a final inspection report stating that the tram "has been inspected and all acceptance tests performed" and that "[n]o apparent deficiencies were found." AR 153,

228. The inspection report did not state what tests had been performed. AR 153, 228. In July 1992, the Department inspected the tram and required corrections to the landing gates and the electrical contact. AR 153, 219, 229, 231. The Kristensens corrected these problems, and the Department issued an operating permit. AR 153, 219, 229, 231-32.

In 1994, the Department granted a variance for an on-off key switch. AR 153, 219, 233. The Department has never issued a variance related to the car safety. CP 153.

Also in 1994, the Kristensens applied to install a “car mounted overspeed unit.” AR 153. After the installation, the Department issued an inspection finding in October 1994 that “the modernization/alteration work on this conveyance has been inspected and no apparent deficiencies were noted.” AR 234; *see also* AR 153.⁴

The Department has not inspected the tram since 1994. AR 219-20. Generally, the Department must inspect and test conveyances, such as residential trams, annually. RCW 70.87.120(2)(a). But in 1997, the Legislature limited the Department’s authority to inspect private residence conveyances operated exclusively for single-family use. Laws of 1997, ch. 216, § 2. Under the 1997 amendment, the Department could inspect these

⁴ The ALJ and the Kristensens appear to rely on this finding to conclude that the Department “inspected the tram” in 1994. AR 4; App. Br. 6. But the finding states only that the Department inspected the “modernization/alteration work.” AR 234.

conveyances when they were new, altered, or relocated and an operating permit had been issued, or “to investigate accidents and alleged or apparent violations of this chapter.” Laws of 1997, ch. 216, § 2; *see also* former RCW 70.87.100(2) (1983). The following year, the Legislature amended the statute to allow the owner to request an annual inspection. Laws of 1998, ch. 137, § 4.⁵

Since 1990, the Kristensens have used their tram as the primary means of ingress and egress. AR 218, 220. Other than routine maintenance, the tram has not been relocated or altered. AR 220. They have not had the tram inspected since the 1997 amendment. AR 220.

D. In 1998, Four Years After the Department Last Inspected the Kristensens’ Tram, the Department Became Aware of the Hook’s Safety Problem and Conducted a Safety Review

In 1998, Becky Ernstes, an elevator technical specialist with the Department, first became aware of a safety problem with the Rehmke safety hook. AR 151, 155. She observed and helped perform a full-load safety test on a Rehmke tram that year. AR 155. During that test, she observed that “[t]he device did not work at all.” AR 169. When the safety

⁵ The Legislature also exempted private residence conveyances operated exclusively for single-family use from the operating permit requirements in RCW 70.87.090. *See* Laws of 1998, ch. 137, § 4. Such single-family use trams no longer require an operating permit or annual inspections unless the owner requests these. *See* RCW 70.87.090, .120(2)(b)(i), WAC 296-96-01000(3), -01045(3). In 2004, the Legislature also exempted owners performing maintenance work on private residence conveyances (and contractors performing such work at the owners’ direction) from the Department’s licensing requirements. Laws of 2004, ch. 66, § 3; RCW 70.87.305.

hook did engage the cross bar, the speed exceeded safe operating parameters. AR 155, 169. The safety hook would sometimes fail to set on the first cross bar, causing “hard sets.” AR 155, 169. She observed that when the hook engaged the cross bars, the cross bars bent. AR 155, 169.

The Department received additional input about safety concerns from other individuals and entities in the elevator industry, including from Ron Williams, a registered professional engineer who has installed trams and who is familiar with the Mark 12 hillside tram design. AR 155, 178, 195, 198-99. Williams believes that trams with the Rehmke safety hook are unsafe. AR 176, 199. He knew about a Rehmke car safety failure event in California that caused personal injury. AR 198.

According to Williams, the Mark 12 hillside tram may achieve too much speed before the safety hook engages to stop the car. *See* AR 176. The tram can free fall as much as four feet before the safety hook catches the cross bar. AR 176. A four-foot free fall can cause the car’s speed to increase from 75 feet per minute to 850 feet per minute. AR 176. In testing, the safety hook can bounce and miss the first cross bar and catch the second cross bar, allowing up to an 8 foot free fall before the hook engages. AR 176. When the safety hook catches the cross bar, the energy is instantaneously absorbed. AR 176. The hook and cross bar could yield to the point of breaking, which would allow the car to fall in an

uncontrolled descent to the bottom of the track. AR 176.

Ernstes also reviewed a video from Hillside Elevator, Inc. about “what happens during an actual hook safety set.” AR 155, 169. The video showed damage to the car and cross bars when the safety hook engaged, and it also showed “that a person would be thrown from the elevator, or thrown against the car enclosure” when the safety hook engaged. AR 169.

E. After the Department Determined in 2008 That the Hook Was Unsafe, It Asked Homeowners to Address the Safety Issue, But When This Was Not Done, the Department Red-Tagged Several Rehmke Trams, Including the Kristensens’

In 2008, the chief elevator inspector sent a letter to the owners of Rehmke trams, notifying them about the safety problem. AR 155, 178.

Day informed the homeowners that after he heard about the hook’s safety concerns, discussions were held between industry representatives and the Department. AR 178. He wanted to ensure “this wasn’t a ploy to gain business.” AR 178.

After the Department’s review, Day concluded in the letter that “there is a known safety problem that needs to be addressed.” AR 178. He explained that the primary function of an emergency stopping device, like the Rehmke hook, is to stop and hold a lift quickly, and that today’s design standards for such devices provide for an almost instantaneous stop to “help ensure that the inertia of a rider does not increase to the point that

the subsequent stop could cause serious injury or, in extreme cases, throw a passenger from a car.” AR 178. But in the Department’s view “[t]he problem with the Rehmke device is that the car may achieve too much speed prior to the application of the safety hook.” AR 178. The letter stated that the Department would take further steps to bring the lifts into compliance but requested homeowners to “first work with licensed companies to mitigate these issues.” AR 178-79. This letter was sent to the Kristensens at their address of record but was returned “unable to forward.” AR 155.

According to Day, no one at the Department was aware of the safety hazards posed by the Rehmke safety hook until after the Department stopped performing regular inspections of residential inclined elevators at private residences. AR 195. The Department believes that the Rehmke trams “can and will injure someone if the safeties are needed in a system failure.” AR 171.

According to Ernstes, the safety hook must be replaced with a code compliant and safe device. AR 157. This may be accomplished at vastly less cost than replacing the tram itself. AR 157. According to Williams, a conveyance mechanic can alter the hook to ensure code compliance and safety. AR 199. As of 2013, seven Rehmke trams in the state had code compliant upgrades. AR 171.

In December 2012, an elevator inspector visually confirmed that the Kristensens' tram did not have a type A safety. AR 156. Day authorized the red-tagging of the Kristensens' tram because the hook did not comply with the code and because of his informed belief "that the safety hook poses a risk of injury to people who ride the affected conveyances." AR 154, 156, 195-96.

One year later, in December 2013, the elevator inspector met Mr. Kristensen to inspect the tram. AR 156. The inspection report stated that the lift was red tagged because the owner "did not meet the 30-day agreement to get a licensed elevator company to pull a permit regarding the alteration to the inclined elevator." AR 193. In January 2014, the inspector removed the red tag when the Kristensens agreed to have a 60-day plan and contract in place for remedy/alteration of the safety hook. AR 156.

With regard to other Rehmke trams, as of February 2013, three Rehmke trams had been removed from service. AR 154. Seven Rehmke trams had been altered, and one had an outstanding alteration permit. AR 154. Nine Rehmke trams had been red-tagged, and the Department had left requests on the doors of other tram owners to call the Department. AR 154. Day authorized the red-tagging of these trams only after numerous and varied attempts to obtain voluntary compliance and voluntary owner-

alteration of the safety. AR 196. The likelihood of an accident involving the safety hook increases with the passage of time as the Rehmke conveyances age. AR 196.

F. The Administrative Law Judge Concluded, on Summary Judgment, That Estoppel Precluded the Department from Red-Tagging the Kristensens' Tram, but the Superior Court Correctly Reversed

The Kristensens appealed the Department's decision to red-tag their tram to the Office of Administrative Hearings. They moved for summary judgment, arguing in relevant part that equitable estoppel barred the Department's red-tagging action. AR 207-11. The administrative law judge granted summary judgment, concluding that the Department was equitably estopped from red-tagging the Kristensens' tram. AR 8-12.

On judicial review, the superior court reversed, concluding that the administrative law judge erroneously interpreted or applied the law. CP 70-71. The superior court remanded for an administrative hearing on the merits. CP 70. The Kristensens now appeal. CP 73-78.

V. STANDARD OF REVIEW

The Administrative Procedure Act (APA) governs appeals of a Department order to discontinue the operation of a conveyance. RCW 34.05.526; RCW 70.87.145, .170(4); WAC 296-96-00805(1). At the appellate level, the court reviews the final order issued by the Office of

Administrative Hearings. *See Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 404, 858 P.2d 494 (1993).

The Department has the burden to show that the final order was incorrect. *See* RCW 34.05.570(1)(a). Because this case was decided on summary judgment, this Court overlays the APA standard of review with the summary judgment standard. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). This Court views the facts in the light most favorable to Department as the nonmoving party. *Id.* The court grants summary judgment only if the undisputed facts entitle the moving party to judgment as a matter of law. *Id.*

This Court should reverse the judge's order if it determines that the judge erroneously applied or interpreted the law. *See* RCW 34.05.570(3)(d). Equitable estoppel presents a mixed question of law and fact. *Coble v. Hollister*, 57 Wn. App. 304, 309, 788 P.2d 3 (1990).

VI. ARGUMENT

A. **The Department Has Authority to Investigate Alleged or Apparent Violations of RCW 70.87 for Private Residences and to Order Owners to Discontinue Operation of Unsafe Trams**

The Department's paramount duty under RCW 70.87, which governs elevators, lifting devices, and moving walks, is "to provide for safety of life and limb . . . and to ensure the safe design, mechanical and electrical operation . . . of conveyances" RCW 70.87.020(1). The

operation of conveyances must “be reasonably safe to persons and property” and must comply with RCW 70.87 and Department orders and rules. *Id.*

All privately owned conveyances are subject to the provisions of RCW 70.87 “except as specifically excluded by this chapter.” RCW 70.87.040. The Kristensens’ tram is a “private residence conveyance” under this chapter. *See* RCW 70.87.010(33).

Consistent with this rule, the Legislature granted the Department the authority to discontinue the operation of a conveyance (known as “red-tagging”) if the conveyance has become unsafe. RCW 70.87.145(1)(b); *see also* WAC 296-96-00700 (defining “red tag status”). The order to discontinue operation is effective immediately, must specify why the conveyance violates RCW 70.87 or is otherwise unsafe, and must be rescinded if the conveyance is fixed or modified to bring it into compliance with RCW 70.87. RCW 70.87.145(1)–(3).

The Department has broad authority to investigate “accidents and alleged or apparent violations” of RCW 70.87 for all conveyances, including private-residence trams operated exclusively for single-family use. *See* RCW 70.87.120(4); WAC 296-96-01045(2). Because the dangerous safety hook on the Mark 12 hillside tram is an apparent violation of RCW 70.87.020(1)’s requirement that trams operate safely,

the Department had authority to investigate this safety issue. And, more to the point here, it had authority to order discontinued operation of the Kristensens' tram for safety reasons. RCW 70.87.145(1)(b).

The Kristensens are simply wrong to rely on the Legislature's 1997 amendment to assert that "the Department had no authority to inspect the Kristensens' tram after 1997." App. Br. 17 (citing Laws of 1997, ch. 216, § 2); *see also* RCW 70.87.120(2)(b)(i). In their brief, whenever they address or summarize the Department's authority to inspect under RCW 70.87.120(4), they read "alleged or apparent violations" out of the statute, instead focusing on the Department's authority to inspect in cases of accidents. App. Br. 6, 7, 17.

But the Legislature's 1997 amendment clearly left undisturbed the Department's authority to inspect private residence conveyances in order to investigate "alleged or apparent violations" of RCW 70.87:

Private residence conveyances operated exclusively for single-family use shall be inspected and tested only when required under RCW 70.87.100 *or as necessary for the purposes of subsection (4) of this section.*

Laws of 1997, ch. 216, § 2; *see also* RCW 70.87.120(2)(b)(i). In a block quote of this amendment, the Kristensens characterize subsection (4) as limited to an "accident investigation." App. Br. 17. This disregards the plain language of that subsection, which states that "[t]he department may

investigate accidents and *alleged or apparent violations* of this chapter.”

RCW 70.87.120(4) (emphasis added).

The Kristensens thus cannot insulate themselves from the Legislature’s mandate that conveyances operate safely in the state. *See* RCW 70.87.020(1). Unsafe trams, no matter their location, can injure people. Though the Legislature has relaxed certain requirements under RCW 70.87 related to annual inspections and licensing requirements for work performed on private residence conveyances, the core purpose of RCW 70.87 remains the same for all trams. *See* Laws of 2004, ch. 66, § 3; Laws of 1997, ch. 216, § 2; RCW 70.87.020(1); RCW 70.87.120(2)(b)(i); RCW 70.87.305(1). The Department must ensure the safe operation of trams to protect life and limb. RCW 70.87.020(1).

B. The Kristensens Do Not Prove Estoppel by Clear, Cogent, and Convincing Evidence—Quite Simply the Department May Act on New Safety Information to Protect Washington Citizens

Equitable estoppel against the government is disfavored. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 20, 43 P.3d 4 (2002). A party asserting estoppel against the government must prove each of five elements by clear, cogent, and convincing evidence. *Campbell v. Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 902, 83 P.3d 999 (2004). The five necessary elements are:

- (1) An admission, act, or statement by the government that is inconsistent with a later claim;
- (2) the asserting party acted in reasonable reliance on the admission, act, or statement;
- (3) injury would result to the asserting party if the government was permitted to repudiate or contradict the earlier admission, act, or statement;
- (4) estoppel is necessary to prevent a manifest injustice; *and*
- (5) granting of estoppel must not impair the exercise of government functions.

Id.

The Kristensens cannot establish any of these elements by clear, cogent, and convincing evidence. Because the Department red-tagged the tram in 2013 based on new safety information that it did not have when it approved the tram's operation in the early 1990s, the Department has not acted inconsistently. Safety issues arise over time, and the Kristensens cannot reasonably rely on the Department's approval of their tram's operation over 20 years ago for the proposition that their tram remained safe in 2013 and that the Department could not require them to fix the unsafe emergency brake. Because the Legislature requires the Department to ensure the safe operation of trams, it not manifestly unjust to allow the Department to act on new safety information to prevent injuries from unsafe trams. Finally, application of estoppel here would impair the exercise of governmental functions because it would render the Department powerless to order the discontinued operation of trams it

knows to be unsafe, in clear contravention of the Department's authority in RCW 70.87.145. As the superior court correctly concluded, this case should be remanded for a hearing on the merits to address the correctness of the Department's action of red-tagging the tram.

1. The Department never represented that the braking hook was safe and now it has learned that the hook is not safe

The Department never represented to the Kristensens that the emergency stopping device, the braking hook, was safe. Now the Department believes the hook on their tram (and other Rehmke trams) is unsafe and "poses a risk of injury to people who ride the affected conveyances." AR 196. There are numerous safety problems with the hook: the device may not work at all (AR 169); the hook may not catch the first cross bar, causing the tram to acquire excessive speed before the hook catches, leading to "hard sets" that can injure passengers (AR 169, 176, 178, 198-99); and the hook can yield to the point of breaking, leading to an uncontrolled descent to the bottom of the track (AR 176).

Thus, viewed in the light most favorable to the Department, the emergency braking hook is unsafe. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party). Although the Department need not

wait until a Rehmke tram’s safety defect injures someone before it orders the discontinued operation of an unsafe tram under RCW 70.87.145, the Kristensens are wrong that “the Department submitted no evidence that any Rehmke tram had ever failed or caused personal injury to anyone.” App. Br. 7 n.2. Williams stated that he was “aware of a Rehmke [residential inclined elevator] car safety failure event that happened in California and caused personal injury.” AR 198. The Department seeks to prevent a similar event in Washington by seeking voluntary compliance from owners to fix the safety problem and then by red-tagging dangerous trams when necessary.

2. The Department’s red-tagging of the Kristensens’ tram in 2013 is not inconsistent with allowing that tram to operate in the early 1990s because the Department did not know the emergency braking system was dangerous in the early 1990s

Disregarding the critical safety problem, the Kristensens assert that the Department’s actions in the early 1990s allowing their tram to operate—when the Department was not aware of the specific hazards of the unsafe hook—are inconsistent with its order in 2013 to order to discontinue operation of the tram.⁶ App. Br. 12-13. But because the

⁶ The basis for the Kristensens’ arguments on the first estoppel element appears to be actions, and not statements, by Department employees. *See* App. Br. 12-13. The Kristensens cite no past affirmative statement by the Department that the safety hook is safe, and none exists. And it is undisputed that the Department never granted a safety variance to the Kristensens for the car safety or speed governor. AR 153.

Department did not make its current safety determination until it learned about the safety defect from industry representatives, engineer Ron Williams, and others, its actions in the early 1990s and its safety determination in 2008 are not inconsistent. In light of the legislative direction to “provide for safety of life and limb . . . and to ensure the safe design, mechanical and electrical *operation* . . . of conveyances,” the Department has the authority to consider and to act on new safety information to ensure the safe operation of a conveyance even if it initially approves the installation. RCW 70.87.020(1) (emphasis added).

An unsafe component in a tram may be identified, as in this case, only with the passage of time. The Kristensens suggest, erroneously, that because the Department approved the installation, operation, and modification of Mark 12 trams, including their own, it would now be inconsistent to order the discontinued operation of these trams. App. Br. 12-13. This argument ignores the reality that serious safety problems are not always immediately apparent, whether in a tram, a medical device, or a prescription drug. Once apparent, they must be corrected. People should not be put in harm’s way just because a safety problem was not immediately apparent.

The Department’s previous approvals of other Mark 12 hillside trams are also not inconsistent with its order that the Kristensens

discontinue operation of the tram. The Kristensens try to bolster their argument by arguing that the Department “regularly approved and issued permits” for other Rehmke trams. App. Br. 12. But these arguments are unavailing for the same reason—the Department had not yet determined the hook was unsafe when it allowed the operation of those trams.

The Department’s enforcement powers to protect tram passengers are not frozen in time. It is not and cannot be the law that once the Department issues a permit for any of the conveyances that it regulates (elevators, escalators, and trams) to operate, it is forever bound to allow the conveyance to operate even when new engineering information establishes that passengers are in peril if they use the conveyance. This would render moot the power granted to the Department under RCW 70.87.145(1)(b) to order the discontinued operation of a conveyance if it becomes unsafe. Information that the Department did not know about can render a conveyance unsafe such that the Department can order the discontinued operation even though the Department may have allowed its operation years earlier.

The Department red-tagged the Kristensens’ tram out of its overriding safety concern that an accident will occur involving the Rehmke hook. *See* AR 154, 176, 196. In Day’s words, “the safety hook poses a risk of injury to people who ride the affected conveyances” and

the hazard increases with the passage of time. AR 196. Ernstes believes the Rehmke trams “can and will injure someone if the safeties are needed in a system failure.” AR 154. It is also true that hook did not comply with the applicable safety regulation at the time, former WAC 296-94-170(2), because it was not a type A or B safety that applied pressure to the guard rails to stop the tram, and that the Department cites this lack of compliance as an independent basis for red-tagging the Kristensens’ tram. *See* AR 196. The Department admits that the hook never complied with the regulation and that the inspector in 1989 should not have approved the non-code-compliant hook. AR 195. But contrary to the Kristensens’ arguments, that the Department did not discover the lack of code compliance in the early 1990s does not mean it cannot now red-tag the tram until the Kristensens fix the unsafe hook. App. Br. 12. The Department did not know in the early 1990s that the hook could fail, could bend the cross bar, could miss the first cross bar and cause inertia injuries, and could yield to the point of breaking and cause an uncontrolled descent. This is new safety information that informs the Department’s decision in this case and is not inconsistent with its previous actions.

Moreover, the Department never issued a “blanket waiver for the Mark 12 tram,” as the Kristensens suggest. App. Br. 13. Their sole authority for this assertion appears to be a statement in a 1993 letter from

the president of Rehmke Products Corporation to the Department, noting that the company had applied for “certain variances” that “were granted.” App. Br. 13 (citing AR 256). The letter does not identify the nature of the variances and does not refer anywhere to the emergency braking hook. AR 256. This is not clear, cogent, and convincing evidence of a blanket waiver. Further, because the Department has stated it never granted a variance to the Kristensens for the car safety, this is at most a disputed fact that must be viewed in the Department’s favor. *See* AR 153.⁷

The Department must ensure the safe operation of trams in the state. Contrary to the Kristensens’ assertions, it does not have “the ability to issue a blanket waiver for the Mark 12 tram.” *See* App. Br. 13 (citing RCW 70.87.110). The statute the Kristensens cite for this proposition states that the requirements of RCW 70.87 are “intended to be modified or waived whenever any requirements are shown to be impracticable, such as involving expense not justified by the protection secured.” RCW 70.87.110. But the Legislature specifically prevented the Department from “allow[ing] the modification or waiver unless equivalent or safer construction is secured in other ways.” RCW 70.87.110. For purposes of summary judgment, this Court must conclude that the Rehmke hook is

⁷ Because the Department was not aware of the safety hazards of the braking hook, the Kristensens are also incorrect to suggest that because the Department inspected and approved four other Rehmke trams with positive engagement hooks, it “had issued a blanket approval of Rehmke positive hook trams” *Contra* App. Br. 8 n.3.

unsafe, so this statute cannot apply because the Rehmke safety hook is not as safe as a type A safety device. *See* AR 169-170. Ernstes also stated that the Department only issues variances on a case-specific basis as confirmed by RCW 70.87.110, which allows variances for individual variance requests only. AR 157; *see also* WAC 296-96-01075.

Because the Kristensens failed to prove the first element of equitable estoppel by clear, cogent, and convincing evidence, the ALJ erred in granting summary judgment.

3. The Kristensens cannot prove detrimental reliance because the Department has not acted inconsistently and because a tram owner cannot reasonably rely on the approval of an installation application to ensure that the tram will always be safe

The Kristensens cannot establish detrimental reliance by clear, cogent and convincing evidence for two reasons. First, the Department's decision to red-tag their tram based on new safety information is not inconsistent with the Department's approval of the installation of their tram in 1989. Second, even assuming an inconsistency, it is not reasonable for the Kristensens to rely on the Department's approval of the installation application in 1989 to conclude that their tram is safe in 2013.

To establish reliance, the party asserting estoppel must establish that the reliance is justifiable. *Campbell*, 150 Wn.2d at 903. Here, in the Kristensens' opening brief, the only act they identify as having

detrimentally relied on is the Department's "approval of the Rehmke Mark 12 tram," which they relied on in order "to purchase and install it at their principal residence." App. Br. 13.

The Department does not dispute that the Kristensens would have "looked to some other manufacturer" if the Department had not approved the installation application in 1989. AR 218. But that establishes only that the Kristensens reasonably relied on the Department's approval to *purchase* the tram. It is not reasonable to believe that once a tram is purchased, no latent safety problem will ever be detected. The Legislature specifically contemplated that safety problems could arise after a tram had been purchased when it gave the Department explicit authority to order the discontinued operation of trams that become unsafe. RCW 70.87.145. That is also why the Legislature gave inspection powers to the Department. Additionally, the Legislature requires the Department to "provide for safety of life and limb . . . and to ensure the safe design, mechanical and electrical *operation* . . . of conveyances . . ." RCW 70.87.020(1) (emphasis added). The focus is on the safe "operation" of the tram even if there is a permit.

The Kristensens cannot reasonably rely on the 1989 approval of the tram installation to believe that the Department will never order their tram to discontinue operation due to a safety problem. All that the

Department represented to them in 1989 was that the tram could be installed; it made no future guarantees about safety.

The *Sponburgh* case that the Kristensens cite supports the Department's position, not theirs. App. Br. 13-14 (citing *State ex. rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 143-44, 401 P.2d 635 (1965)). There, the court acknowledged that detrimental reliance existed when a public official made a commitment with "knowledge of the pertinent facts" that the other party had relied on to its detriment. *Sponburgh*, 66 Wn.2d at 143-44. Here, in contrast, the Department did not know the specific dangers of the safety hook until industry representatives, Williams, and others alerted the Department about these dangers years after the Department last inspected the Kristensens' tram. Now that the Department has the pertinent facts that the hook may malfunction and injure passengers, the Department has acted to prevent possible injuries and ensure safe operation of the Kristensens' tram.

Because there is no reasonable reliance (second element), there is no injury (third element). Because the Kristensens cannot prove the second and third elements of equitable estoppel by clear, cogent, and convincing evidence, the ALJ erred in granting summary judgment.

4. Requiring the Kristensens to fix the unsafe hook is not manifestly unjust where the Legislature requires the Department to ensure safe operation of trams

The Department must ensure the safe operation of trams in the state. RCW 70.87.020(1). Given this duty, the Department must act on new safety information to prevent injuries from unsafe conveyances. Failing to act to protect tram passengers would be contrary to the Legislature's directive. Applying that principle here, it is not manifestly unjust for the Department to prevent the Kristensens' tram from operating until they ensure that the emergency braking system on their tram is safe.

By red-tagging the Kristensens' tram, the Department has fulfilled its statutory directive to ensure safe operation of all trams, a directive that applies to private residence conveyances. It is not a "flip-flop" to act on new safety information that a tram's emergency braking system can fail. *Contra* App. Br. 15. By the Kristensens' strained logic, each time the Department discovers a latent safety problem in any type of conveyance that was not identified in earlier inspections, the Department is powerless to act to protect the public against the now apparent safety problem. The Kristensens try to make this case about their single tram, but their logic would extend to elevators in the highest office buildings. Such reasoning conflicts with the legislative directive to "provide for safety of life and limb." RCW 70.87.020(1).

The Kristensens' argument not only does not make sense from a safety perspective, but it creates perverse incentives. An inspection could be used as a shield against taking necessary safety measures rather than for its actual purpose—to ensure that a conveyance is safe and operates correctly. Private homeowners can currently request inspections, and commercial owners are required to have annual inspections. RCW 70.87.120(2). But if the Department is unable to address latent safety problems it did not discover after a single inspection, owners can hide behind the single positive inspection report even if the Department later learns that the conveyance's operation endangers passengers.

The manifest injustice analysis in *Silverstreak v. Department of Labor & Industries*, 159 Wn.2d 868, 154 P.3d 891 (2007), is inapplicable to the facts here. *Contra* App. Br. 14. In *Silverstreak*, the Department publicly distributed a policy memorandum that interpreted a prevailing wage regulation, which a contractor had relied on to bid on a public works project, only to later interpret the regulation in a way that was inconsistent with the policy memorandum. 159 Wn.2d at 876-77, 888-91. This case is not about the changing interpretation of a regulation. It is about safety enforcement based on new information about the dangers of the Rehmke safety hook.

Homeowners can and should rely on the Department's approval of their installation application to install their trams. But just because the Department approves a tram's installation does not mean that a safety problem will not be identified later. That a tram operates safely today does not mean it will operate safely tomorrow. All investments carry risks, and there is always the possibility that a latent safety problem will be identified at a later date. Such an approval cannot mean that the tram is safe forever, especially here where the manufacturer described the tram as "complex" and explained that the tram's safety features should be "periodically checked for satisfactory operation." AR 255.

5. Application of estoppel would severely impair the exercise of governmental functions

The application of equitable estoppel here would broadly undermine the Department's power to protect the public from unsafe conveyances. It would not, as the Kristensens assert, "be limited to a red-tag on a single tram that is privately owned and not available for public use." App. Br. 15. If the Department is powerless to act on new safety information to discontinue operation of the tram in this case because it has previously approved and inspected the tram, it follows that the Department is powerless to act in any case where new safety information reveals that a tram component is dangerous if there has been a previous inspection. That

is entirely inconsistent with the public policy to regulate “unsafe and defective conveyances” that impose “substantial probability of serious and preventable injury” to the public. RCW 70.87.020(1). Applying estoppel here would disregard this important public interest.

Approximately 30 other trams with the dangerous Rehmke safety hook are installed in this state. The Department has inspected many of these trams, and has approved their operation. Assuming these owners do not want to fix the safety hazard, the Department’s powers to protect members of the public who are passengers on these trams would disappear. The scope of the effect of the Kristensens’ arguments is even more expansive if the Court considers the multitude of elevators and escalators operating in Washington.

Applying equitable estoppel against the Department in this instance is wholly inconsistent with the directives and findings of the Legislature to protect the public from unsafe conveyances. Courts should not apply estoppel when the government’s ability to protect the public would be undermined. *See In re Peterson*, 99 Wn. App. 673, 681, 995 P.2d 83 (2000) (court found that applying equitable estoppel would impair the exercise of an important government function directly related to community safety).

C. This Court Need Not Address the Kristensens' Argument About Legislative Abrogation and RCW 70.87 Does Not Support Their Argument

Because the Kristensens cannot establish any element of equitable estoppel by clear, cogent, and convincing evidence, this Court need not address the Kristensens' arguments that the Legislature did not intend to abrogate equitable estoppel principles in this case. App. Br. 16-18. In any case, the Kristensens' abrogation argument turns entirely on their faulty interpretation that the Legislature's relaxation of inspection and permitting requirements means the Department has little to no authority over their tram. *See* App. Br. 16-18. But, as discussed in section VI.A above, they are wrong that "under current law, the Department may not inspect the Kristensens' tram." App. Br. 18.

D. This Court Should Not Award Attorney Fees to the Kristensens

This Court should decline to award attorney fees to the Kristensens because they should not prevail. *See* App. Br. 18-19. Under the Equal Access to Justice Act "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." *Silverstreak*, 159 Wn.2d at 891 (quoting RCW 4.84.350(1)). Because the

Kristensens cannot prove equitable estoppel by clear, cogent, and convincing evidence as a matter of law, they are not entitled to fees.

The Kristensens should not prevail, but if they do, the Department agrees that the case should be remanded to the trial court to determine whether the Department's action was substantially justified, whether the Kristensens are qualified parties, and whether circumstances make an award unjust. *See Brown v. Dep't of Soc. & Health Servs.*, 190 Wn. App. 572, 598, 360 P.3d 875 (2015).

The Kristensens have not requested attorney fees at the appellate court. *See App. Br. 18-19.* The court does not consider a fee request if it is not made in a separate section as required by RAP 18.1(b); *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 676-77, 303 P.3d 1065 (2013). Even if the trial court on remand awards fees, the Kristensens may not receive fees on appeal because they did not request them. RAP 18.1(b).

VII. CONCLUSION

The Department's order to the Kristensens to discontinue operation of their tram until they fix a serious safety problem with the emergency braking system complies with the Legislature's directives to protect life and limb and to ensure safe operation of conveyances in the state. None of the elements of equitable estoppel preclude the Department's reasoned safety decision here. This Court should affirm.

RESPECTFULLY SUBMITTED this 7th day of September,
2016.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Paul Weideman". The signature is written in a cursive, flowing style.

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NO. 48842-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent,

v.

DOUG AND ALICE KRISTENSEN,

Appellants.

DECLARATION OF
MAILING

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I filed and mailed the Brief of Respondent Department of Labor and Industries to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Via email to E-filing

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DATED this 7th day of September, 2016.


EILEEN WEST
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September 07, 2016 - 11:46 AM

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