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Division I
State of Washington

NO. 74727-4-I

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

MARK C. IDEN & VICKI WINSTON,

Appellants,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

**DEPARTMENT OF LABOR & INDUSTRIES
BRIEF OF RESPONDENT**

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dated March 10, 2015

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I. INTRODUCTION

Mark Iden and Vicki Winston own a tram that possesses an emergency stopping device that may cause a free fall before its stopping device engages, which could result in serious injury or death. The Department of Labor & Industries ordered them to cease operating the unsafe tram because its emergency stopping mechanism—the Rehmke device—does not comply with Department regulations. Under the plain language of RCW 70.87.145, the Department appropriately ordered Iden and Winston to discontinue the operation of their unsafe tram. The Office of Administrative Hearings and the superior court affirmed the Department's action.

Substantial evidence supports the determination that the tram did not comply with the required residential incline elevator (tram) regulation and the finding that the Rehmke device is unsafe. Equitable principles of laches and equitable estoppel do not apply because the Department notified Iden and Winston that their tram did not comply with safety regulations as early as 1993 and they have taken no steps to fix the tram since then. This Court should affirm.

II. ISSUES

1. Did the Department appropriately order the tram's discontinued use under RCW 70.87.145 when it does not comply with the applicable safety regulation and is unsafe?

2. Does substantial evidence support the finding that Iden and Winston's tram is unsafe when the Rehmke emergency stopping device used by the tram may result in a free fall before the safety hook engages that could cause serious injury or death?
3. Does substantial evidence support the finding that the Department did not grant a variance for the tram when the Department told Iden and Winston several times over the years that the tram did not comply with the regulation?
4. Does substantial evidence support the determination that Iden and Winston failed to prove the requisite elements of laches when Iden and Winston knew the tram violated the safety regulation and when the Department provided the tram owners a substantial grace period to fix the tram?
5. Does substantial evidence support the determination that Iden and Winston failed to prove the requisite elements of equitable estoppel when the Department never said their tram was safe and never acted inconsistently with any statement, and when it would impair important governmental functions to not allow the Department to stop a tram's use that could result in injury or death?

III. STATEMENT OF THE CASE

A. The Tram Did Not Comply With the Safety Requirements at the Time of Installation

Iden and Winston operate a tram to help them access their property in Burien, Washington. AR Iden 247¹; Finding of Fact (FF) 4.1. The property lies at the bottom of a steep slope, which is otherwise only accessible by a trail with approximately one-hundred-and-fifty steps. AR Winston 192; FF 4.1. The tram uses a cable to carry it up and down a

¹ The administrative agency record will be cited as "AR" followed by the page number or the witness name and page number.

track. AR 341. The tram runs on two parallel rails connected by rungs four feet apart. AR 340-47; AR Iden 266; FF 4.12. In the event of a catastrophic failure, the tram has a hook—the Rehmke device—that deploys and engages a cross bar running between the two pieces of track as a means of stopping the tram. AR Ernestes I 136,² 440; FF 4.12. When the hook engages, there is a shock absorber that absorbs some of the impact. AR Iden 269; FF 4.12.

The regulation in effect at the time of installation of the tram provided that “the car safety shall be of the Type A or B and operated by a speed governor.” WAC 296-94-170 (1986);³ Conclusion of Law (CL) 5.6. A “safety” is an emergency stopping device that comes into play when the tram’s cable system catastrophically fails. AR Ernestes I 98; AR Iden 277-78. The Rehmke hook, used by this tram, is not a Type A or Type B emergency stopping device. AR Ernestes I 104, 116, 170-72; FF 4.12; CL 5.7. Type A and B stopping devices engage the rails of the track, as opposed to engaging one of the cross bars. AR Ernestes I 115, 133. A Type A stopping device smoothly stops the tram in a very short distance. AR Ernestes II 438-39, AR 359. Trams operating at a higher rate of speed use a Type B stopping device. AR Ernestes I 170, AR Ernestes II 454. The Type

² Becky Ernestes testified on both hearing dates. Her testimony on the first date of hearing will be cited as “Ernestes I” and her testimony on the second date of hearing will be cited as “Ernestes II.”

³ This regulation is attached as Appendix A.

A stopping device applies here based on the speed of the tram. AR Ernestes I 170-71; AR Ernestes II 440, 454.

In some tests, the Rehmke hook has skipped the first rung between the tracks during a failure, instead engaging the second downslope rung. AR 243. Missing the first rung could result in serious injury or death because it could throw passengers against the tram wall or eject them entirely. AR Day 74-75; AR 322, 358. Even when it deploys as designed, the Rehmke hook damages the rung it engages because that rung absorbs some of the impact. *See* AR 358. Such an abrupt stop damages the first rung and results in a jarring impact to the passengers. AR 358;- FF 4.12.

The tram was installed in October 1989. AR Ernestes I 105-16. In October 1989, the Department completed its original inspection of this tram after the installation. AR 25. Following this inspection, the Department issued a temporary operating permit subject to the owner obtaining a variance for the emergency stopping device. AR 339. The Department raised other concerns with the tram related to the car enclosures, doors, and gates. *See* AR 339 (indicating regulations regarding car enclosures, doors, and gates). In October 1989, the tram's designer, William Rehmke, sent a letter to the Department seeking variances for the Mark 12 Hillside Tram for all his customers. AR 348.

Under certain circumstances, the Department may grant an

exception or variance to the requirements set forth in RCW 70.87. RCW 70.87.110; AR Ernestes I 178-79; CL 5.8. The Department may only grant a variance if the alternative design provides equal safety as the required design. RCW 70.87.110; CL 5.8. The Department determined that the Rehmke device did not meet this requirement because it engages the cross bar instead of the rails, and the stopping speed exceeds the speed recommended by the American Society of Mechanical Engineers and the American National Standards Institute (ANSI). AR Ernestes I 102, 116-17; CL 5.8. This society and institute developed the standards that the Legislature directed the Department to adopt as its standards for elevators. AR Ernestes I 99-100. The Department did not issue a variance for the Rehmke device on Iden's and Winston's tram or any other tram with regard to the requirement of a Type A stopping device. AR Day 79; AR Ernestes I 111, 147, 152; FF 4.4. Additionally, the Department does not grant blanket variances—meaning that the Department would not consider Rehmke's request that all of his customers should get a variance to constitute a variance request. AR Ernestes I 179; RCW 70.87.110.

Although a variance was never obtained, the inspector later issued a permanent operating permit. AR 259. The permit lists no variances. AR 259. At the time, the Department issued operating permits even if the elevator was not in compliance with the code. AR Ernestes I 107. Obtaining

an operating permit has nothing to do with whether the elevator is in compliance with the law. AR Ernestes I 107, 155-56.

The Department conducted a follow-up inspection of the tram in October 1990 and the Department reiterated that the tram did not comply with the requirements related to the enclosures and car gates. AR 332.

B. The Department Notified Iden and Winston That the Rehmke Hook Did Not Comply With the Regulations on Multiple Occasions Between 1993 and 2008

In 1992, Iden and Winston purchased the home serviced by the tram. AR 336. There is no evidence that they contacted the Department before they purchased the home. They reviewed the temporary operating permit, which directed obtaining a variance. AR Iden 311. They also reviewed the permanent operating permit, which did not include a variance. AR Iden 253; *see* AR 259. In June 1993, the Department conducted a regular inspection and notified Iden and Winston that the emergency stopping device did not comply with WAC 296-94-170 (1986). AR 328. After the inspection, the Department told Iden and Winston that the “car safety and governor” did not comply with WAC 296-94-170 (1986). AR 327-28. The Department told them to correct the discrepancies within 90 days. AR 327. They were to notify the Department when they fixed the tram. AR 327.

In August 1994, Iden requested a follow-up inspection. AR 330.

However, shortly thereafter, Iden cancelled the inspection “pending upgrades to my tram to meet code.” AR 330.

In November 1997, the Department sent a letter to Iden and Winston indicating that it had never received notice that they performed the required repairs noted on the 1993 inspection report. AR 324. This letter further informed Iden and Winston that if they were still using the tram, state law required the tram to meet state safety standards. AR 324. As of that time, Iden and Winston had not repaired the tram. AR Iden 358-59.

C. After a Safety Review, the Department Determined the Rehmke Device Is Particularly Unsafe

In 2005, Jack Day, chief elevator inspector for the Department, learned that the residential incline tram industry believed that the Rehmke hook posed a significant safety risk. AR 273. He learned that the Rehmke’s hook deployment could be too harsh, inconsistent, and that it could miss the first bar. AR Day 39-40. Such a failure could cause serious injury, including the potential for riders to be thrown from the tram car. AR 273-74, 358. The Department continuously assesses the safety of the elevators, escalators, and trams it regulates and takes enforcement action consistent with what it learns. AR Day 40-41; AR Ernstes I 100-02, 135-36. If the Department determines that equipment is unsafe, the Department

requires the owner to upgrade or replace the equipment to make it safe.

AR Day 40; AR Ernestes I 101-02, 135-36.

Leery that the incline elevator industry's concerns might be a sales ploy to require the unnecessary replacement of Rehmke trams, the Department undertook efforts to verify the device's safety. AR Day 42, 54-55, 82.

Becky Ernestes is the elevator technical specialist for the Department. AR Ernestes I 94. She is an experienced elevator inspector trained as an elevator mechanic. AR Ernestes I 94-95; FF 4.10. In her investigation into the potential damage of the Rehmke device, she took several steps to investigate by:

- Contacting a number of stakeholders in the residential incline elevator installation and maintenance community;
- Asking that an engineer study the device and issue a report with his findings; and
- Referring to the regulations and the American Society of Mechanical Engineers A.17 Code, which is developed by elevator company engineers.

AR Day 78, 82-83; AR Ernestes I 99-104.⁴

⁴ RCW 70.87.030 requires that the Department consider the American Society of Mechanical Engineer codes when making rules regarding elevators operating in the state

After her review of the Rehmke device, the Department concluded that the Rehmke hook posed a serious safety risk for tram passengers. *See* AR Ernestes I 104. The Department determined that the Rehmke device has fundamental design flaws—flaws that could result in injury even if the device deployed as designed—and that it did not meet the code as a Type A or B emergency stopping device. AR Day 42; AR Ernestes I 170-71. In addition, Ernestes considered the age of the tram, and thus the Rehmke device, as well as environmental conditions and information from industry personnel as to how the trams were or were not being maintained. AR Ernestes I 136.

The Rehmke hook was never safe because the definition for the emergency stopping device comes from the American Society of Mechanical Engineers and it does not comply with this code. *See* AR Ernestes I 102, 104.

D. The Department Ordered Iden and Winston to Stop Using Their Tram After the Department Determined That the Rehmke Hook Presented a Current Safety Risk

Based on the substantiation of industry concerns, in June 2008, the Department informed all owners of trams with a Rehmke hook that the trams were not safe. AR Day 45; AR 322-23. It informed the owners that there was a known safety problem regarding the emergency stopping

of Washington. The Department adopted these codes for residential elevators. WAC 296-96-00650.

device that the owners needed to address. AR Day 46; AR 322-23.

Realizing the expense and impact of such a change, Day stated that the letter was meant to get owners to start working toward a fix. AR Day 46. The letter also warned that the Department would take further steps to bring the trams into compliance with the law. AR 323. Iden and Winston did not respond to the letter. AR Iden 359-60.

Recognizing the expense and inconvenience related to fixing the trams, the Department did not act immediately to stop use of them. AR Day 46. Instead, it provided the homeowners the opportunity to work with the tram companies and make the alterations at their own pace. The Department took action to stop the use of the trams, including that of Winston and Iden, only after it provided a significant grace period. *See* AR Day 47-48. The Department also did not take action immediately because it lacked the resources to address the issue immediately. AR Day 48, 57-58, 60-62, 84.

Because the Department considered the Rehmke device unsafe, and knew Iden and Winston had a Rehmke Mark 12 tram using the Rehmke hook, on January 8, 2013, the Department posted a notice on Winston and Iden's tram notifying them that they must discontinue use (a "red-tag"). AR 24, 314-16. Iden and Winston appealed the Department's order.

E. The Administrative Law Judge Concluded That the Department Appropriately Ordered the Discontinued Use of the Iden and Winston Tram

The administrative law judge affirmed the Department's order.⁵

The judge found that the device is unsafe. CL 5.4.⁶ The judge also found that the Department did not grant a variance for the Rehmke device. CL 5.6.⁷

The administrative law judge determined that without a variance the tram "violates the rules in effect at the time of installation." CL 5.7. Finding that the Department granted no variance, the judge concluded that since "the [tram] does not meet the safety requirements of the code that applied at the time of original installation, the Department should have and did red tag the [tram] under RCW 70.87.120(3) and RCW 70.87.145." CL 5.7. Iden and Winston appealed to superior court. CP 1-25.

F. The Superior Court Concluded That Substantial Evidence Supported the Order to Discontinue Operating the Tram

The superior court affirmed the Department's actions. CP 131. The court determined that "[b]ecause the elevator was not a Type A or B safety system, and because no credible evidence exists that the Department

⁵ The Office of Administrative Hearings Order and the superior court order are attached as Appendix B and Appendix C.

⁶ Although denominated a conclusion, this is really a finding. The court reviews a finding of fact erroneously described as a conclusion of law as a finding of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

⁷ Again, although denominated a conclusion, this is really as a finding. *See Willener*, 107 Wn.2d at 394.

granted a variance for [Iden and Winston's] Rehmke Hook, the Department's finding that the system was unsafe is reasonable" and that "[t]he decision to red tag was reasonable." CP 129. Iden and Winston appeal.

IV. STANDARD OF REVIEW

The Administrative Procedure Act, RCW 34.05 (APA), governs this appeal. RCW 70.87.170(4); RCW 34.05.526. Under the APA, as the appellants, Iden and Winston have the burden to prove the invalidity of the agency order. RCW 34.05.570(1)(a). At the appellate level, the court reviews the decision of the agency—here 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); RCW 34.05.570.

The court reviews factual findings for substantial evidence. RCW 34.05.570(3)(e); *Premera v. Kreidler*, 133 Wn. App. 23, 31, 131 P.3d 930 (2006). A party's failure to assign error to the findings of fact renders them verities on appeal. *Nelson v. Dep't of Labor & Indus.*, 175 Wn. App. 718, 723, 308 P.3d 686 (2013). Where substantial evidence exists, the court does not substitute its judgment for that of the fact-finder even though the court might have resolved a factual dispute differently. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded

person of the truth of the declared premises. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995).

The court accords deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues; however, the court is not bound by an agency's interpretation of a statute. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). The court defers to agency views "when an agency determination is based heavily on factual matters, especially factual matters that are complex, technical, and close to the heart of the agency's expertise." *Premera*, 133 Wn. App. at 31-32.

V. ARGUMENT

Iden's and Winston's arguments boil down to a contest about whether the administrative law judge appropriately found that the Rehmke device is unsafe and appropriately found that the Department did not grant a variance. But these arguments ask the Court to reweigh the facts, which the court does not do on substantial evidence review. Winston and Iden do not contest the Department's ability to stop the use of an unsafe tram. *See* Iden Br. 1-50.⁸ Rather, they argue that the operating permit allows them to operate the tram, that the Department granted a variance, and that the tram is safe. Iden Br. 6-7, 14-15. None of these arguments have merit.

⁸ They may not raise any such argument in their reply. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

The Court should also reject Iden's and Winston's equitable theories. The Court should reject the laches theory in the absence of unreasonable delay by the Department. It was not until 2005 that the Department learned of new concerns regarding the emergency stopping device. The Department carefully reviewed the new information and allowed homeowners an extended period of time to repair the trams before ordering the tram's nonuse. When Iden and Winston failed to take action after repeated requests, the Department stopped the use of their tram.

Likewise, they failed to prove any of the elements of equitable estoppel by clear, cogent, and convincing evidence. The Department made no statement inconsistent with its current actions. Even if it had, as the administrative law judge properly concluded, any reliance would have been dispelled in 1993 when the Department directed Iden and Winston to correct the emergency stopping device.

A. The Department Appropriately Ordered the Discontinued Use of an Unsafe Tram

The Department appropriately ordered Iden and Winston to discontinue the operation of their tram because the Rehmke device violates RCW 70.87; it does not comply with the regulations and it is unsafe.

RCW 70.87 seeks “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).⁹ To further this purpose, the Legislature required the Department to adopt regulations to govern the mechanical and electrical operation of conveyances, including privately owned residential incline elevators (trams). RCW 70.87.030, .040. The trams must conform to RCW 70.87 and all Department rules and orders. RCW 70.87.020(1).

At the time of the 1989 installation of the Iden/Winston tram, the regulation required a Type A or Type B emergency stopping device. WAC 296-94-170 (1986).¹⁰ Trams such as the one here “must comply with the rules adopted by the department that were in effect at the time the elevator was permitted, regardless of whether the rule(s) has been repealed” WAC 296-96-07021.¹¹

Under RCW 70.87, the Department must ensure the safe operation of conveyances, including trams. RCW 70.87.030. The Department may investigate violations of RCW 70.87. RCW 70.87.120(4). In 1997, the

⁹ A conveyance is an elevator, including inclined elevators (trams); escalator; moving sidewalk, and similar transportation machines. RCW 70.87.010(6).

¹⁰ A copy of the regulation is attached as Appendix A.

¹¹ In response to Executive Order 97-02, in 1998 the Department began re-writing the elevator and conveyance related rules so that they could all be in one location under WAC 296-96. Wash. St. Reg. 98-13-124 (proposed June 17, 1998); Wash. St. Reg. 00-14-041 (proposed June 30, 2000); Wash. St. Reg. 01-02-026 (proposed December 22, 2000). As a result, the Department repealed WAC 296-94 in 2000 but this repeal did not change the requirements that apply to the Iden/Winston tram. WAC 296-96-07021.

Legislature exempted private residence conveyances from annual inspections. *See* Laws of 1997, ch. 216, § 2. In 1998, the Legislature exempted private residence conveyances operated exclusively for single-family use from the requirements in RCW 70.87.090. *See* Laws of 1998, ch. 137, § 4. Single-family use trams no longer require a permit or annual inspections. *See* RCW 70.87.090, .120. But the Legislature did not exempt privately-owned trams from the other requirements of RCW 70.87, including the requirements of the safety requirements of RCW 70.87.145. The Department may still investigate alleged violations of RCW 70.87 and order discontinued operation for unsafe trams. RCW 70.87.120(4), .145(1)(b).

Contrary to Iden's and Winston's arguments, the presence of an operating permit does not mean that the Department cannot order discontinued use of an unsafe tram. *Iden Br.* 45, 47. The Department's issuance of a permit does not foreclose the Department from subsequently inspecting for safety problems. RCW 70.87.120(2)(b)(i), .145. The Legislature requires the Department to "provide for safety to life and limb . . . and to ensure the safe design, mechanical and electrical *operation* . . . of conveyances." RCW 70.87.020 (emphasis added). The focus is on the "operation" of the tram even if there is an operating permit. As Ernstes testified, obtaining an operating permit does not indicate that the elevator

is in compliance with the law. AR Ernstes I 107. When an elevator is in active status with the Department, the owner is assessed an operating fee that is not related to a finding of compliance because the Legislature provides that “the law for an operating permit is not tied in with corrections or compliance.” AR Ernstes I 155-56; *see* RCW 70.87.020, .145.

Moreover, the issuance of a permit does not stop the Department’s review of new information showing a conveyance is unsafe, particularly when the Department did not know that information at the time of issuance. RCW 70.87.145(1)(b) authorizes the Department to order an owner to discontinue operating a conveyance if the Department learns that the conveyance is unsafe. AR Day 49-50; RCW 70.87.145(1)(b) (authorizing order to discontinue operation if conveyance “has otherwise become unsafe.”)

Consistent with RCW 70.87’s mandate to ensure safety to life and limb and prevent injuries, the Department collects information about the safety of products on an on-going basis. AR Day 40-41; AR Ernstes I 100-102, 135-136. If this information shows a particular component does not comply with the code requirements, even though the Department previously approved it for use, the Department requires the owner to replace the component or fix the elevator or tram. RCW 70.87.120(3),

.145(3); AR Day 40; AR Ernstes I 100-01, 135. In the event an inspection shows the elevator to be unsafe, the Department issues a written report indicating the repairs or alterations necessary to make the elevator safe. RCW 70.87.120(3). If the owner does not repair the dangerous elevator or tram, the Department orders the owner to discontinue operation of an elevator or tram until the owner fixes the conveyance. RCW 70.87.145(1), (3).

Absent a variance, which the Department did not grant here, the Legislature does not make following the Department's safety regulations contingent on the potential cost to the tram's owner. Iden and Winston argue that the Department did not follow the APA to order the discontinued use of their tram, claiming it requires that the Department must not impose "excessive, unreasonable, or unnecessary obligations," citing RCW 34.05.328. Iden Br. 15, 29. They point out that it will cost a great deal of money to make the tram safe. Iden Br. 15. But RCW 34.05.328 governs the process to adopt rules. The Department has already engaged in rulemaking, consistent with the legislative direction to have trams that are safe for "life and limb." RCW 70.87.020.

Agency rules have the force and effect of law. *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 910, 246 P.3d 1254 (2011). The Department appropriately enforced the rule requiring a Type A or B emergency

stopping device. *See* AR Ernestes I 184; WAC 296-94-170 (1986). RCW 34.05.328 does not apply to the enforcement of an existing rule. *Contra* Iden Br. 15, 29.¹²

Iden and Winston admit they do not have a Type A or B stopping device, which violates WAC 296-94-170 (1986). *See* Iden Br. 14. Iden and Winston have not been “in conformity with the provisions of this chapter and the applicable statutes of the state of Washington, and all orders, and rules of the department.” *See* RCW 70.87.020(1). The Rehmke device is unsafe and they never obtained a variance. AR Day 79; AR Ernestes I 111, 147, 152. So the Department appropriately ordered the tram’s discontinued use until Iden and Winston fixes it and makes it safe. *See* RCW 70.87.145.

B. Substantial Evidence Supports the Finding That the Tram Is Unsafe Due to the Rehmke Device

The administrative law judge found that the Rehmke stopping device is unsafe. AR 30-31.¹³ He found that “in some tests, the Rehmke hook has skipped the first downhill rung and caught the second downhill rung allowing the runaway car to gain speed and momentum.” AR 27. He

¹² Iden and Winston rely on RCW 34.05.328 to argue that requiring replacement of the tram for \$125,000 places an undue burden on them. Iden Br. 15-16. The Department has not required Iden and Winston to replace the entire tram—but instead to fix the emergency stopping device. AR Ernestes I 172; AR Ernestes II 456-57.

¹³ Iden and Winston argue that the evidence does not support the trial court’s observation that the trams posed a “very real and very immediate danger.” Iden Br. 14. But they provide no authority that this is the legal standard required here. RCW 70.87.145 does not require such a standard.

further found that even if it worked as designed, the hook “would stop the car within 4 track feet at the cost of metal fatigue and deformation damage to a rung and a jarring impact to the passengers.” AR 27. In addition, the administrative law judge found that the Rehmke device is not as safe as a Type A or B emergency stopping device. AR 31. Substantial evidence supports the administrative law judge’s findings.

1. The Rehmke device can result in a catastrophic failure to stop the tram, resulting in serious injury or death

Iden’s and Winston’s lengthy discussion about their stopping mechanism does not remedy the fundamental flaw identified by the Department: their tram relies on a hook that engages the cross bar of the track, which could result in a catastrophic failure. *See* Iden Br. 16-17. The tram can free fall as much as four feet, or eight feet if it bounces and misses the first cross bar, before the hook engages. AR 243. “[T]he car speeds can change from a travel speed of 75 feet/minute to as much as 850 feet/minute in 4 feet of free fall along the track.” AR 243. The force could cause the cross bar to break sending the tram in an uncontrolled descent to the bottom of the track. AR 243. This could result in serious injury or death. AR 243; AR Day 39-40, 51, 74-75.

Iden and Winston suggest that no accidents have been associated with these trams and therefore the Department cannot conclude their tram

is unsafe. Iden Br. 13-14. Rather, none have been reported. Further, Day testified the Department does not wait for an accident before taking action. *See* AR Day 87. Anecdotal evidence does not refute the objective evidence presented by the Department to the administrative tribunal showing that the tram is unsafe. And the Legislature has plainly stated that the prevention of injuries, which are substantially likely to result from the use of an unsafe conveyance, is in the best interest of the people of Washington. RCW 70.87.020. The Department's order to cease operation furthers these important goals.

2. The appellate court does not reweigh the ample evidence that the fact-finder accepted as showing the Rehmke hook is unsafe

Iden and Winston engage in a series of arguments that re-argue the facts here. The Court should reject their attempt to circumvent the standard of review. The administrative law judge's findings that the Rehmke device is unsafe are supported by substantial evidence.

First, substantial evidence supports that the tram is unsafe because industry representatives lodged concerns regarding the safety of the Rehmke device with the Department. AR Day 39-40. They told the Department that the hook deployed too harshly and inconsistently, and that the hook could potentially miss the first cross bar. AR Day 39-40. These flaws created a serious risk of injury or death that could result from

a passenger being ejected from the car or pushed against other objects inside the car. AR Day 51.

The Department substantiated these concerns. AR Ernestes I 101-04. The Department's technical specialist communicated with the representatives from the residential incline elevator industry to gather input and viewed a video demonstration of the deployment of the Rehmke hook and its problems. AR Ernestes I 103-04. Iden and Winston assert that the industry manipulated the marketing video. Iden Br. 10. However, the administrative law judge properly rejected this speculation.

The administrative law judge considered Iden's and Winston's argument that the video was not legitimate because it was prepared by industry representatives who may be financially motivated to exaggerate safety risks. This certainly could have formed a basis to reject the Department's evidence that the Rehmke device is unsafe. But the administrative law judge rejected their arguments, and on appellate review the court does not reweigh the evidence and accepts that the video's information is true. *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 103, 187 P.3d 243 (2008).

Iden and Winston also question whether the video relied on by the Department in this matter is "legitimate evidence that Rehmke Mark 12 trams are unsafe." Iden Br. 10. At the Office of Administrative Hearings

they did not object to the admission of the video into evidence. *See* AR Hearing 5, 21. Further, they did not object to testimony regarding the video. *See* AR Day 55-56; AR Ernestes I 102. A party cannot raise an objection to evidence for the first time on appeal. *See Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969); RCW 34.05.554(1) (party cannot raise new issues not raised at agency level); RAP 2.5.

Second, substantial evidence supports that the tram is unsafe because the tram expert the Department asked to review the Rehmke tram concluded that “[t]rams with the Rehmke Products Inc. safety hook emergency brake are unsafe.” AR 243. In this report, Williams provided calculations regarding the speed a tram can attain during a four foot free fall, which the Rehmke tram, by design, can experience before the hook engages a cross bar on the track. AR 243. In addition, he noted that in testing the hook can bounce and miss the first cross bar and that can allow up to an eight foot free fall before the hook engages a cross bar. AR 243. He further explained that when the hook catches the cross bar, it absorbs energy instantaneously. AR 243. Williams concluded that this could cause the cross bar to break and lead to an uncontrolled descent to the bottom of the track. AR 243.

While Iden and Winston argue that Williams bases his data on the Hillside video (Iden Br. 11), nothing in his report suggests that is the sole basis for his opinion. The report contains Williams' calculations and reasons he feels the trams with the Rehmke hook are unsafe. AR 243. To the extent they dispute this report's admission into evidence it was Iden and Winston who introduced it as an exhibit. AR 191, 243. At hearing they raised no objection to testimony about the document. AR 26, 191, 243; AR Ernestes I 103-04. A party cannot raise an objection for the first time on appeal. *Sepich*, 75 Wn.2d at 316; RCW 34.05.554; RAP 2.5. Further, Williams' information echoes other information the Department used. *See* AR Ernestes I 103-04. In applying this analysis to the Iden/Winston tram, the Department also considered the age of the tram, the fact it is exposed to the elements, and maintenance requirements. AR Ernestes I 136-38. The fact-finder could properly rely on this evidence.

Again raising an argument that re-argues the facts, Iden and Winston argue that the Department personnel are not credible in their review of the facts about the tram. Iden Br. 18. Day and Ernestes readily admit they are not engineers. AR Day 56; AR Ernestes I 101. Instead, they rely on national codes developed by elevator engineers and information provided by manufacturers, installers, and engineers. AR Day 40-43, 83;

AR Ernestes I 101, 104.¹⁴ Iden and Winston want this Court to second guess the Department's methodology—but the administrative law judge found it reasonable and the inquiry ends. *See Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 103 (appellate court may not reweigh evidence).¹⁵

When viewing the evidence in the light most favorable to the Department, including the information from the industry, the video, the documentation from the tram expert, and the experience of the Department's elevator specialists, the Court should affirm the administrative law judge's determination.

C. Substantial Evidence Supports That the Department Did Not Grant a Variance for the Rehmke Device on Iden's and Winston's Tram

The administrative law judge correctly found that the Department did not grant a variance for the Rehmke device on the Iden and Winston tram. AR 25. The judge found that Iden and Winston had not requested a

¹⁴ Current Department personnel did not inspect the Iden and Winston tram because when they tried, they were denied access. AR Day 82. Iden never provided documentation showing his maintenance of the tram until the appeal of the Department order. AR Iden 360-61.

¹⁵ Iden and Winston also question any reliance on an out-of-state accident involving a tram as a basis for assessing the efficacy of the Rehmke device. Iden Br. 7. For this, they rely on Day's testimony that he learned of a tram experiencing an uncontrolled descent where the emergency stopping devices did not engage. AR Day 52. When asked on direct examination the basis for his determination that the Rehmke hook is unsafe, he made no mention of this incident as a basis for his decision. *See* AR Day 39-40. For the first time on appeal, Iden and Winston also appear to seek exclusion of hearsay about the out-of-state incident. Iden Br. 7. But a party cannot raise objections to evidence for the first time on appeal. *Sepich*, 75 Wn.2d at 316; RCW 34.05.554; RAP 2.5. Iden and Winston further question Ernestes' reliance on an incident she witnessed in 1999 or 2000. Iden Br. 8. However, in response to an objection from Iden and Winston the administrative law judge excluded the evidence. AR Ernestes II 472.

variance, that the Department had not granted one, and that, based on the statute and regulations, the Department could not have granted a variance for the Rehmke device in any case. AR 31.

The Department may grant a variance that modifies or waives the requirements of RCW 70.87 if it is impracticable for an owner to comply with a regulation. RCW 70.87.110. The Department may only grant a variance for a specific installation and may grant it only if the owner uses an equally safe option:

The requirements of this chapter are intended to apply to all conveyances except as modified or waived by the department. They 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. However, the department shall not allow the modification or waiver unless equivalent or safer construction is secured in other ways. An exception applies only to the installation covered by the application for waiver.

RCW 70.87.110; AR Ernestes I 178-80.

- 1. The Department properly did not grant a variance and the Court should reject Iden's and Winston's backdoor request to receive one now**

Iden and Winston have not asked the Department for a variance, nor have they appealed from the denial of a variance—either now or in the past. AR 28; FF 4.14. But they make a backdoor argument that the Department should have granted one and that they should essentially have

one now. *See* Iden Br. 30; AR Iden 305-06, 314-15. The court should not consider such arguments.

But in any event, to argue that the Department should have granted a variance, Iden and Winston contend that a Type A emergency stopping device was not available for the Rehmke trams in 1989. Iden Br. 6, 31. They provide no evidence other than their statements and a letter from another homeowner in this regard. AR Winston 408. A fact-finder may choose to disbelieve self-serving statements about a fact. *See Ramos v. Dep't of Labor & Indus.*, 191 Wn. App. 36, 40, 361 P.3d 165 (2015). Additionally, the homeowner's letter requests the Type A or B requirement be suspended "until such time as the device is *readily* available," supporting that they were available. AR Winston 409. In addition, Day confirmed that Type A stopping devices have been in existence since 1921. AR Day 88-89. Ernstes pointed out that a homeowner could use a manufacturer from out of state. AR Ernstes I 141-42.

Iden and Winston argue that the Rehmke device is safe enough to justify a variance, but as shown above, substantial evidence supports the device is not as safe as a Type A or B stopping device. *See supra* Part B. They argue they have proposed economically feasible alternatives to a safe stopping device that should "ease the minds" of the Department and

reduce the financial burden on homeowners. Iden Br. 30. These ideas include seat belts and/or adding cross bars to reduce the distance between such by half. *Id.* A seat belt is not a safe alternative to the emergency stopping device. A seat belt does not stop the tram and would not comply with the code. *See* AR Ernstes II 456; AR Iden 368-69, 371. An additional cross bar is similarly not acceptable because there is still the issue of free fall and cross bars do not provide the same smooth stop as a Type A or B stopping device, and the variance statute requires equivalent or safer construction. AR Iden 379; AR Day 39-40; WAC 296-94-170 (1986); RCW 70.87.110.

If the Court wanted to revisit the question of whether the Department should have granted a variance in the past or now, the fact-finder could determine that the record supports the stopping device was available for use in Washington and that the proposed alternatives are not as safe as a Type A or B emergency stopping device.

2. The fact-finder could rely on years of documentation to find that the Department granted no variance

Substantial evidence supports the administrative law judge's finding that the Department did not grant a variance. AR 25. Iden and Winston rely on the fact that an operating permit approved the tram installation as evidence that the Department must have granted a variance.

Iden Br. 6-7. In support of this position, they posit that in 1989 Department employees reviewed the data provided by Rehmke. Iden Br. 17. However, all that is known is that Rehmke provided the Department with information. Both Day and Ernstes testified that they do not know what the Department reviewed at the time this tram was installed. AR Day 85; AR Ernstes I 99, 152-53. Additionally, Iden and Winston acknowledge that the operating permit does not list a variance. Iden Br. 27. The Department never issued an operating permit that listed a variance. AR 259.

Iden and Winston further rely on an October 1989 letter from Rehmke to the Department to support their variance claim. Iden Br. 33. In his letter, Rehmke requests general variances for several aspects of his device for all his customers, including a waiver of the requirements of WAC 296-94-170 (1986)—the regulation that addresses tram emergency stopping devices. AR 348-50. While Rehmke sent this letter close in time to the October 1989 inspection, it does not aid Iden and Winston because this letter does not reference the conveyance at issue here nor does it reference a specific conveyance at all. The letter was an impermissible request for a blanket variance. *See* RCW 70.87.110; AR Ernstes I 179.

When the Department grants a variance, “an exception applies only to the installation covered by the application for waiver.” RCW 70.87.110.

So the Department only grants variances that apply to the single conveyance for which the requester sought a variance and it does not grant blanket variances that apply to one design for multiple users. *See* AR Ernestes I 179. And nothing suggests that the Department departed from the statutory limitation and granted a variance for the Rehmke hook on the Iden/Winston tram. Indeed, substantial evidence supports that it did not.

The Department's 1993 inspection report told Iden and Winston that their tram did not comply with WAC 296-94-170 (1986). AR 328. Iden scheduled and then cancelled his 1994 inspection request to allow him time to comply with the code, including WAC 296-94-170 (1986), noted in the 1993 inspection report. AR 330. As shown by the 1997 letter, in between 1993 and 1997, Iden and Winston took no steps to inform the Department that they fixed the tram. AR 324. Iden conceded in his testimony that at the time of the 1997 letter he had not made the requested alterations. AR Iden 358-59. Had the Department granted a variance, no reason would exist for the Department in 1993 and 1997 to tell Iden and Winston that the tram did not comply with the regulations or for Iden to cancel the inspection to allow more time for repairs. After the 1997 letter, Iden claims he contacted the Department and relied on the Department to get back to him to let him know whether it found a variance that applied to his tram. AR Iden 276-77. Iden and Winston cite no authority that the law

obligated the Department to respond to his contact (if it indeed happened) beyond good customer service. It was his responsibility to follow up to fix the tram or file a variance request, which he did not do. *See* AR Iden 277.

3. Iden and Winston did not raise a spoliation theory before the fact-finder, but in any event it has no merit

Iden and Winston now raise a theory that the Department issued a variance, but that the Department improperly destroyed evidence about it. Iden Br. 42. Their claim of evidence spoliation lacks merit. Iden and Winston did not raise this issue before the administrative law judge, and they may not raise it for the first time on appeal. RCW 34.05.554(1); *Fort v. Dep't of Ecology*, 133 Wn. App. 90, 99, 135 P.3d 515 (2006).

If this Court considers this issue, Iden and Winston fail to prove that spoliation occurred. The courts define spoliation as the intentional destruction of evidence. *Henderson v. Tyrrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996) (citing Spoliation, Black's Law Dictionary (6th ed. 1990)). While it might be that the Department would be expected to possess pertinent documents related to trams, no evidence exists that the Department intentionally destroyed the "acceptance letter" referred to by Iden and Winston, and they must show this to establish spoliation. *Contra* Iden Br. 42; *see Henderson*, 80 Wn. App. at 605; *see also Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 134, 307 P.3d 811 (2013).

Iden and Winston have not proven the elements necessary to show spoliation. In *Tavai*, the court held that “[i]n deciding whether to apply a spoliation inference, this court has used two general factors: (1) the potential importance or relevance of the missing evidence and (2) the culpability or fault of the adverse party.” *Tavai*, 176 Wn. App. at 135; *see also Henderson*, 80 Wn. App. at 607. With regard to the culpability element, the court stated “we examine whether the party acted in bad faith or conscious disregard of the importance of the evidence or whether there was some innocent explanation for the destruction.” *Tavai*, 176 Wn. App. at 135.

The record lacks evidence to support that the Department intentionally destroyed the referred to acceptance letter. Rather, the evidence at best suggests that the Department files were disorganized when Day took over as chief elevator inspector. *See Iden Br. 18-19*. But evidence suggesting that the Department may not engage in the best record management is not the “bad faith or conscious disregard of the importance of the evidence” that the doctrine of spoliation requires. *Tavai*, 176 Wn. App. at 135.

Iden’s and Winston’s actions confirm the lack of spoliation as neither provided anything over the years to show that the Department granted a variance, even though on multiple occasions it would have been

in their interest to do so. *See* AR Iden 361. Viewing the evidence in the light most favorable to Department, the Department granted no variance.

D. Iden and Winston Failed to Prove the Elements of Laches

The administrative law judge determined that he could not address the equitable defense of laches. AR 33-34. As a result, this was first addressed in the superior court. The superior court properly determined that Iden and Winston were not entitled to relief on a laches theory because Iden and Winston failed to establish any of the elements of laches and because the courts do not apply laches to impair the proper exercise of government functions. CP 122-23.

To prevail on laches, Iden and Winston must prove the following three elements:

- (1) Knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant,
- (2) An unreasonable delay by the plaintiff in commencing that cause of action, and
- (3) Damage to defendant resulting from the unreasonable delay.

Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 635, 733 P.2d 182 (1987).

The courts disfavor applying laches against the government because it interferes with the government's exercise of its duties. *See Housing Auth. v. Ne. Lake Wash. Sewer & Water Dist.*, 56 Wn. App. 589, 591-93, 784 P.2d 1284 (1990) ("Generally, equitable defenses may not be asserted against

governmental entities if their application would interfere with the proper exercise of governmental duties ”); *Federal Way Disposal Co. v. Tacoma*, 11 Wn. App. 894, 896-97 n.2, 527 P.2d 1387 (1974). Such is the case here because taking action under RCW 70.87.020 and .145 constitutes a proper exercise of the Department’s duty to ensure that elevators, escalators, and trams are safe.

The First Element: Knowledge. As to the knowledge element, the Department did not confirm the Rehmke device’ inefficacy until 2008 after it investigated the residential incline elevator industry’s safety concerns. AR 322; AR Day 39. Due to fears that reported safety concerns might be a sales ploy by the residential incline elevator companies to require consumers to purchase new trams, and considering the cost and inconvenience to the homeowners, the Department sought to confirm these safety concerns before ordering homeowners to seek expensive fixes or replacements. AR Day 42, 46.

The Second Element: Unreasonable Delay. Iden and Winston do not prove the second element because the delay was reasonable. Based on the initial suspicion that the concerns raised by the industry might be an effort to generate business, the Department sought to review the alleged problems rather than order homeowners to immediately cease operation of their trams. *See* AR Day 42. The Department engaged in a lengthy review to

address these concerns. *See* AR Day 44-45; AR Ernstes I 104. Meanwhile, the homeowners continued to enjoy the use of their trams. After the Department substantiated the concerns with the Rehmke device, it sent the June 2008 letter to owners, including Iden and Winston, informing them of the Department's concerns. AR 322.

The Department acted reasonably by taking action in 2013 after sending the notice in 2008. First, the Department provided an extended period for the homeowners to take further steps to fix the trams because of the cost and impact of the upgrades. AR Day 46. This benefitted the homeowners. Second, the Department had significant resource issues during the Great Recession, and although safety initiatives are important, the Department lacked the resources to compel the homeowners to fix their trams. AR Day 84. Finally, the problem with the trams did not cure itself during the intervening years, and in fact, one of the factors for the Department was the age of the trams. AR Ernstes I 136.

The Third Element: Damage. Iden and Winston assert that laches requires that the unreasonable delay must prejudice them. Iden Br. 43. But prejudice is not the standard—damage is. *Valley View Indus. Park*, 107 Wn.2d at 635. Here, Iden and Winston received no damage even if the Court were to find that the delay was unreasonable. When a party asserts laches, that party “cannot prove damage simply by showing [they are] having to do

now what [they have] been legally obligated to do for years.” *In re Marriage of Capetillo*, 85 Wn. App. 311, 318, 932 P.2d 691 (1997). At least as of 1993, Iden and Winston were aware that they needed to comply with the regulations about their tram. *See* RCW 70.87.020 (operation of conveyances must conform to RCW 70.87 and applicable Department rules and orders.).

In addition, no matter when the Department ordered the discontinued use of Iden and Winston’s tram, WAC 296-94-170 (1986) would require the same actions. Iden and Winston must either equip the tram with a Type A or B emergency stopping device or obtain a variance by showing that the alternative design is at least as safe as the required design. WAC 296-94-170 (1986); RCW 70.87.145(3); RCW 70.87.110.

If Iden and Winston incurred any damage, their own inaction caused it, not any Department delay. The Department’s reasonable delay did not harm homeowners; it inured to their benefit because homeowners with Rehmke trams had additional time to use their trams and to fix them before the Department ordered them to cease operation. Iden and Winston claim that Winston would not have retired if she knew that she would have to pay for corrections to the tram. Iden Br. 45. They further claim that evidence they need to defend against the necessity of the corrections was lost in the intervening years. Iden Br. 43. But the 1993 inspection results report

indicates the tram did not comply with the regulation. AR 327-28. And the November 1997 letter indicated that Iden and Winston did not address the discrepancies. AR 324. They knew of the problem in 1993 and 1997 and their failing to fix it or obtain a variance is the cause of any economic loss or loss of evidence. After receiving the 1993 report and the 1997 letter, Iden and Winston should not have slept on their rights to seek a variance. The court does not extend equity to those that are not vigilant in protecting their rights. *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947).

As the superior court correctly noted, Iden and Winston do not come to this action with clean hands because they were on notice for years that their tram did not comply with WAC 296-94-170 (1986), but took no action. CP 131. The court does not grant equitable relief when a party who seeks it does not have clean hands. *Miller v. Paul M. Wolfe Co.*, 178 Wn. App. 957, 965, 316 P.3d 1113 (2014).

E. Iden and Winston Failed to Prove the Elements of Equitable Estoppel by Clear, Cogent and Convincing Evidence

The administrative law judge correctly concluded that Iden and Winston failed to prove the requisite elements of equitable estoppel. Substantial evidence supports this conclusion because Iden and Winston failed to prove the elements by clear, cogent, and convincing evidence.

To assert equitable estoppel against a government agency, the party asserting estoppel has to prove five elements:

- (1) A party makes a later claim that conflicts with a prior statement,
- (2) The asserting party reasonably relied upon the prior statement,
- (3) A party would receive injury if the other party could repudiate its prior statement,
- (4) Estoppel will prevent a manifest injustice, and
- (5) Granting of estoppel would not impair government functions.

Kramarevsky v. Dep't of Soc. & Health Servs., 122 Wn. 2d 738, 743-44, 863 P.2d 535 (1993).

The party asserting equitable estoppel must prove it by clear, cogent, and convincing evidence. *Newport Yacht Basin Ass'n of Condo Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 79, 277 P.2d 18 (2012). As with laches, the courts do not favor equitable estoppel and they strongly disfavor it when applied against the government. *State ex. rel Munroe v. City of Poulsbo*, 109 Wn. App. 672, 680, 37 P.3d 319 (2002).

Element One: Prior Inconsistent Statement. Substantial evidence supports the determination that Iden and Winston fail to prove an inconsistent statement. The Department did not make a prior statement or action that conflicts with the Department's finding that the Rehmke hook is unsafe. First, the Department issued a temporary operating permit that specifically ordered the securing of a variance. AR 339. The

Department never made a subsequent statement to Iden and Winston—or to anyone—that conflicts with this statement.

Second, the Legislature requires the Department to “provide for safety to life and limb . . . and to ensure the safe design, mechanical and electrical *operation* . . . of conveyances.” RCW 70.87.020 (emphasis added). The focus is on the “operation” of the tram—regardless of an operating permit. The statutory scheme allows for ongoing regulation for safety of the trams. RCW 70.87.020, .145.

Third, Iden’s and Winston’s argument of an inconsistent statement relies on their faulty premise that the Department granted a variance. As discussed above, substantial evidence supports the administrative law judge’s finding that the Department had not, in fact, granted a variance. In any event, issuance of the operating permit does not show an inconsistent statement because the Department issued operating permits independent of inspection results. AR Ernestes I 106-07, 155-56. According to Ernestes, obtaining an operating permit has nothing to do with whether the elevator is in compliance with the law. AR Ernestes I 107; *see* Part A *supra*. Substantial evidence shows that the issuance of the operating permit does not equate to a statement or act inconsistent with the Department’s subsequent determination that the Rehmke hook is unsafe. Substantial evidence supports that the Department did not grant a variance regarding

the tram. *See* Part C *supra*.

Finally, Iden and Winston were aware that their tram did not comply with WAC 296-94-170 (1986) as early as 1993. Iden Br. 27. The Department then confirmed that Iden and Winston needed to fix the tram in 1997. AR 324. It then notified the tram owners that the trams were unsafe in 2008. AR 322-23. These were the last statements of the Department, and it took no action inconsistent with these statements. Iden and Winston argue that the evidence does not support the trial court's observation that the trams posed a "very real and very immediate danger." Iden Br. 14. But they provide no authority that this is the legal standard required here. RCW 70.87.145 does not require such a standard.

Element Two and Three: Reliance and Injury. The second element—that the party acted in reliance upon the statement—and the third element—that injury would result if the Department was allowed to repudiate its prior statement are not met here because the Department never made a statement upon which Iden and Winston could rely, and as such, there was no reliance or injury. While the Department issued an operating permit, the testimony established that having an operating permit has nothing to do with being in compliance. AR Ernestes I 106-107, 155-56. Further, the operating permit did not indicate that the Department had granted a variance. AR 259.

Iden and Winston also state they reviewed a 1990 inspection report that did not identify the Rehmke device as an issue. Iden Br. 26. However, earlier documentation had notified the homeowner at the time about the problem. AR 339. Iden and Winston may have a complaint with the previous owner, but the Department bears no responsibility for their lack of due diligence. The evidence lacks any indication that they contacted the Department before purchasing the home.

Moreover, as early as 1993 Iden and Winston were on notice that their conveyance did not comply with WAC 296-94-170 (1986). The fact that the 1993 inspection results report indicates the tram did not comply with the regulation shows that there was no inconsistent statement upon which Iden and Winston could rely. AR 327-28. The November 1997 letter indicating that Iden and Winston had not addressed the emergency stopping device shows that the Department informed them that the tram did not comply with the regulation. AR 324. Given the 1993 report and the 1997 letter, Iden and Winston have no basis to argue that they relied on an inconsistent statement of the Department.

Element Four: Manifest Injustice. The administrative law judge also properly determined that Iden and Winston failed to show that estoppel is required to prevent a manifest injustice, the fourth element, because Iden and Winston have known their tram did not comply with

WAC 296-94-170 (1986) since at least 1993. CL 5.14. In 1994 Iden stated he wanted to cancel the inspection to bring his tram in compliance with the code. AR 330. Based on the 1993 inspection, he knew that the tram did not comply with WAC 296-94-170 (1986). AR 327-30.

Because Iden and Winston knew they were required to bring their tram into compliance, their failure to correct the deficiencies outlined in the 1997 letter cannot support a finding of manifest injustice. They had more than twenty years to address this compliance issue and did not do so. Aware of the cost and impact the fix would have on homeowners, after the 2008 letter the Department waited to stop use of the trams to allow owners, including Iden and Winston, to fix the trams on their own schedule. Iden and Winston chose not to do so.

Further, the Department ordered the discontinued use based on evidence that the Rehmke hook is unsafe. The Department stopped use of the tram based on information brought to it from those in the incline elevator industry that it did not possess when it issued the operating permit twenty-five years ago. The Department could not make its current safety determination until after it learned of the Rehmke hook's defect from industry representatives, and could confirm it through its safety review. In light of the legislative direction to "provide for safety to life and limb . . . and to ensure the safe design, mechanical and electrical *operation* . . . of

conveyances,” the Department had to take action to prevent a manifest injustice. RCW 70.87.020.

Element Five: Impairment of Governmental Function.

Granting of estoppel in this instance would impair government function such that Iden and Winston fail to prove element five. Applying equitable estoppel against the Department would undermine the legislative policy to protect Washington citizens by ensuring safe elevators and trams, and courts are reluctant to apply it to circumstances that implicate such important governmental functions. *See* RCW 70.87.020(1); *see, e.g., In re Peterson*, 99 Wn. App. 673, 681, 995 P.2d 83 (2000) (court found applying equitable estoppel would impair the exercise of an important government function directly related to community safety).

The Legislature tasked the Department with ensuring the safe operation of elevators, including residential incline elevators. Finding estoppel applies in this situation would prevent the Department from performing a legislatively mandated function and remove one of its powers to perform that function, namely taking out of operation elevators and trams that the Department finds unsafe. *See* RCW 70.87.145. To apply estoppel here would interfere with the Department’s proper discharge of a governmental duty.

With a private residential tram, the potential for injury stretches beyond just the potential injury to Iden and Winston. The tram poses a risk to anyone who rides this tram when a catastrophic failure occurs and the Rehmke hook fails to safely stop the tram. The Legislature determined that using an unsafe tram “imposes a substantial probability of serious and preventable injury to the public exposed to unsafe conditions.” RCW 70.87.020(1). Iden and Winston, along with their family and friends, are amongst those people the Legislature seeks to protect.

VI. CONCLUSION

The Department correctly ordered Iden and Winston to discontinue the operation of their tram because it found the Rehmke hook to be unsafe. Substantial evidence supports the determination that the Department properly stopped use of this unsafe tram. This Court should affirm.

RESPECTFULLY SUBMITTED this 26th day of August, 2016.

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Appendix A:

Regulation WAC 296-94-170 (1986)



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

Chapter 296-94 WAC
SAFETY RULES GOVERNING THE
CONSTRUCTION, OPERATION, MAINTENANCE
AND INSPECTION OF INCLINED PASSENGER
LIFTS FOR PRIVATE USE

WAC

296-94-010	Scope.
296-94-020	Definitions.
296-94-030	Approval of plans and specifications.
296-94-040	Protection required.
296-94-050	Landing enclosures and gates—Where required.
296-94-060	Bumpers and buffers.
296-94-070	Machinery beams and supports.
296-94-080	Platform area and rated load.
296-94-090	Rated speed.
296-94-100	Car and chassis construction.
296-94-110	Car enclosures.
296-94-120	Car doors or gates.
296-94-130	Use of glass and plastics.
296-94-140	Data plates.
296-94-150	Guide and track supports and fastenings.
296-94-160	Counterweight guiding and construction.
296-94-170	Car safeties and governors.
296-94-180	Driving machines and sheaves.
296-94-190	Terminal stopping switches.
296-94-200	Operation.
296-94-210	Suspension means.
296-94-220	Traveling cable(s).
296-94-230	Electric wiring.
296-94-240	Track(s)/guide(s) supporting structure.

(1986 Ed.)

296-94-250 Means of egress.

WAC 296-94-010 Scope. These regulations apply to the construction, operation, maintenance, and inspection of all inclined passenger lifts for private use installed in the state of Washington.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-010, filed 1/10/86.]

WAC 296-94-020 Definitions. (1) "Inclined passenger lift" means a device constructed and operated for transporting persons from one elevation to another and consisting essentially of a car or platform traveling on guide rails in an inclined plane. For the purpose of these rules, the terms "inclined passenger lifts" shall have the same meaning as the terms "passenger elevator" as defined by RCW 70.87.010 (4)(a).

(2) Devices installed indoors on stairways and utilizing chairs for carrying passengers are not considered as being inclined passenger lifts insofar as these regulations are concerned.

(3) "Enforcing authority" means the division of building and construction safety inspection services of the department of labor and industries.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-020, filed 1/10/86.]

WAC 296-94-030 Approval of plans and specifications. (1) Before commencing construction of any inclined passenger lift the owner shall submit complete plans and specifications to the enforcing authority for approval.

(2) Plans and specifications covering the installation of an inclined passenger lift shall be endorsed by a professional engineer before approval by the enforcing authority will be considered.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-030, filed 1/10/86.]

WAC 296-94-040 Protection required. If the car sides extend less than six feet above the floor of the car, there shall be no obstruction along the runway with the arc with a twenty-four inch radius whose center is the outer corner of the top rail of the car enclosure.

EXCEPTION: When solid guards are installed on the obstruction in both directions of travel which project at least fourteen inches in line with the direction of travel, the running clearance may be reduced to seven inches. The exposed edge of the guard shall be rounded to eliminate shear hazards.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-040, filed 1/10/86.]

WAC 296-94-050 Landing enclosures and gates—Where required. (1) Landing enclosures. Where a landing platform is provided or if a portion of an existing structure is used as a landing platform, it shall be protected by a railing no less than forty-two inches high.

(2) Landing gates. The opening in the railing shall be guarded by a gate to a height equal to that of the railing. The gates may be of the horizontally sliding or

swing type and shall be equipped with a lock and an electrical contact to prevent movement of the car with a gate open.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-050, filed 1/10/86.]

WAC 296-94-060 Bumpers and buffers. (1) Solid bumpers. For rated speeds not exceeding fifty feet per minute, if spring or equivalent type buffers are not used, solid bumpers shall be installed.

(2) Construction and requirements for solid bumpers. Solid bumpers shall be made of wood or other suitable resilient material of sufficient strength to withstand without failure the impact of the car with rated load or the counterweight, descending at one hundred fifteen percent of the rated speed. The material used shall be of a type which will resist deterioration or be so treated as to resist deterioration.

(3) Spring buffers. For speeds exceeding fifty feet per minute buffers of the spring type shall be installed.

(4) Construction and requirements for spring buffers. Spring buffers shall be constructed so as to have a minimum stroke of three-quarters of an inch and a maximum stroke of one and one-half inches and shall not be fully compressed when struck by the car with its rated load or counterweight traveling at one hundred fifteen percent of the rated speed.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-060, filed 1/10/86.]

WAC 296-94-070 Machinery beams and supports.

(1) Securing of machinery beams and type of supports. All machinery and sheaves shall be so supported and secured as to effectually prevent any part becoming loose or displaced. Beams directly supporting machinery shall be of steel or sound timber or reinforced concrete.

(2) Loads on beams and supports. Loads on beams and their supports shall be computed as follows:

(a) The total load on the beams shall be equal to the weight of all apparatus resting on the beams plus twice the maximum load suspended from the beams.

(b) The load resting on the beams shall include the complete weights of the driving machine, sheaves, controller, etc.

(c) The load suspended from the beams shall include the sum of the tensions in all ropes suspended from the beams.

(3) Fastening of driving machines and sheaves to underside of beams. The elevator driving machine or sheaves shall not be fastened to the underside of the supporting beams at the top of the hoistway.

EXCEPTION: Idlers or deflecting sheaves with their guards and frames. Cast iron in tension shall not be used for supporting members for sheaves where they are hung beneath beams.

(4) Factor of safety of beams and supports. The factor of safety for beams and their supports shall be not less than:

For steel	5
For timber and reinforced concrete	6

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-070, filed 1/10/86.]

WAC 296-94-080 Platform area and rated load. (1) Rated load. The rated load shall not exceed seven hundred pounds.

(2) Platform area. The inside net platform area shall not exceed twelve square feet.

EXCEPTION: The net platform area may be increased by not more than three square feet provided that shelves or benches permanently affixed to the car structure reduce the standing area to twelve square feet.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-080, filed 1/10/86.]

WAC 296-94-090 Rated speed. The rated speed measured along the incline shall not exceed seventy-five feet per minute.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-090, filed 1/10/86.]

WAC 296-94-100 Car and chassis construction. (1) Car and platform. Inclined lift cars shall have metal or combination metal and wood, or other materials of equal strength, frames and platforms. Car frames and platforms shall have a factor of safety of not less than five based on the rated load, all suitably prepared and/or protected for exposure to the weather.

(2) Chassis construction. Inclined lift chassis shall be constructed of metal, except for guiding members. Chassis shall have a factor of safety of not less than five, based on the rated load. The chassis guiding members shall be retained and/or enclosed in guide(s)/track(s) in such a manner that the chassis cannot be derailed.

(3) Use of cast iron. Cast iron shall not be used in the construction of any member of the car frame or chassis.

(4) Number of compartments. The car shall not have more than one compartment.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-100, filed 1/10/86.]

WAC 296-94-110 Car enclosures. (1) Enclosures required. Except at the entrance, cars shall be enclosed on all sides to a height of not less than forty-two inches. The enclosure material will be of a design that will reject a ball one and one-half inches in diameter.

(2) Securing of enclosures. The enclosure shall be securely fastened to the car platform and so supported that it cannot loosen or become displaced in ordinary service or on the application of the car safety or on buffer engagement.

(3) Deflection of enclosure walls. The enclosure walls shall be of such strength and so designed and supported that when subjected to a pressure of seventy-five pounds applied horizontally at any point on the walls of the enclosure, the deflection will not reduce the running clearance below three-quarter inch, nor to exceed one inch.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-110, filed 1/10/86.]

WAC 296-94-120 Car doors or gates. (1) Doors or gates required. A car door or gate which, when closed,

will guard the opening to a height of at least forty-two inches, shall be provided at each entrance to the car. Car doors may be of solid or openwork construction which will reject a ball three inches in diameter.

(2) Door or gate electric contacts. Car doors or gates shall be provided with an electric contact which will prevent operation of the elevator by the operating device unless the car door or gate is within two inches of full closure.

(3) Manual operation. Car doors or gates shall be manually operated.

(4) Latching of swing gate. If the car gate is of the swing type opening outward from the car, the contact in WAC 296-94-140 shall not make until the gate is securely latched.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-120, filed 1/10/86.]

WAC 296-94-130 Use of glass and plastics. (1) Tempered safety glass and plastics. Tempered safety glass and plastics conforming to the requirements of subsection (2) of this section may be used.

(2) Weather resistant plastics. Plastics shall be of a weather resistant type.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-130, filed 1/10/86.]

WAC 296-94-140 Data plates. (1) Capacity plates. A weather resistant capacity plate shall be provided by the manufacturer and fastened in a conspicuous place in the car stating the rated load in pounds, letters, and figures not less than one-fourth inch.

(2) Data plates. A metal data plate shall be provided by the manufacturer stating the weight of the car, speed, suspension means data, manufacturer's name, and the date of installation. It shall be fastened in a conspicuous place in the machine area.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-140, filed 1/10/86.]

WAC 296-94-150 Guide and track supports and fastenings. (1) Material. Guide rails, guide rail brackets, splice plates, and their fastenings shall be of steel or other metals conforming to the requirements of this section.

(2) Stresses and deflections. The guide rail brackets, their fastenings and supports, shall be capable of resisting the horizontal forces imposed by loading with a total deflection at the point of support not in excess of one-eighth inch. The guide rails shall not deflect in any direction more than one-fourth inch measured at the midpoint between brackets.

(3) Overall length of guide rails or tracks. The top and bottom ends of each run of guide rail shall be so located in relation to the extreme positions of travel of the car and counterweight that the car and counterweight guiding members cannot travel beyond the ends of the guide rails.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-150, filed 1/10/86.]

WAC 296-94-160 Counterweight guiding and construction. (1) Guiding. Counterweights, where used, shall be in a guide or track.

(2) Construction. Counterweights shall not be of sufficient weight to cause undue slackening of any car hoisting rope or chain during acceleration or retardation of the car. Counterweight weight section shall be mounted in structural or formed metal frames so designed as to retain weights securely in place.

EXCEPTION: Counterweights may be constructed of a single metal plate.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-160, filed 1/10/86.]

WAC 296-94-170 Car safeties and governors. (1) Where required. All inclined lifts shall be provided with a safety capable of stopping and sustaining the car with rated load.

(2) Operation of car safeties. The car safety shall be of the Type A or B and operated by a speed governor. The governor shall operate to set the safety at a maximum speed of one hundred forty percent of rated speed and on breakage of the hoisting ropes, the safety shall operate without appreciable delay and independently of the governor speed action.

(3) Location of speed governor. Where a speed governor is used, it shall be located where it cannot be struck by the car or counterweight in case of overtravel and where there is sufficient space for full movement of the governor parts and where it is accessible for examination.

(4) Opening of brake and motor control circuits on safety application. The motor-control circuit and the brake-control circuit shall be opened before or at the time the safety applies.

(5) Governor ropes. The governor ropes, where used, shall be of iron, steel, monel metal, or phosphor bronze not less than one-quarter inch in diameter. Tiller-rope construction shall not be used.

(6) Slack-rope and slack-chain devices for winding-drum and roller-chain type driving machines. Inclined lifts of the winding-drum type with rope suspension shall be provided with a slack-rope device of the manually reset type which will remove the power from the motor and brake if the car is obstructed in its descent and the hoisting ropes slacken.

Inclined lifts with roller-chain suspension shall be provided with a slack-chain device which will remove the power from the motor and brake if the car is obstructed in its descent and the hoisting chains slacken. This device need not be of the manually reset type if the chain sprockets are guarded to prevent the chain from jumping off the sprockets.

(7) Application of car safety. A car safety device which depends upon the completion or maintenance of an electric circuit for the application of the safety shall not be used. Car safeties shall be applied mechanically.

(8) Use of cast iron in car safeties. Cast iron shall not be used in the construction of any part of a car safety the breakage of which would result in failure of the safety to function to stop and sustain the car.

(9) Car safety tests. A test of the car safety, made with rated load in the car before the inclined lift is put into service. Governor operation of instantaneous-type safeties shall be tested at rated speed by tripping the governor by hand. Where speed governors are located on the car or chassis, testing shall be performed by obtaining sufficient slack rope and dropping the car.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-170, filed 1/10/86.]

WAC 296-94-180 Driving machines and sheaves.

(1) Materials for drums and sheaves and minimum diameter. Winding drums, traction sheaves, and overhead and deflecting sheaves shall be of cast iron or steel, of a diameter of not less than thirty times the diameter of the wire hoisting ropes. The rope grooves shall be machined.

EXCEPTION: Where 8 x 19 steel ropes are used, the diameter of drums and sheaves may be reduced to twenty-one times the diameter of the rope.

(2) Factor of safety. The factor of safety, based on the static load (the rated load plus the weight of the car, ropes, counterweights, etc.) to be used in the design of driving machines and sheaves shall be not less than:

(a) Eight for wrought iron and steel;

(b) Ten for cast iron, cast steel, and other material.

(3) Set-screw fastenings. Set-screw fastenings shall not be used in lieu of keys or pins if the connection is subject to torque or tension.

(4) Friction gear, clutch mechanism, or coupling. Friction gear, clutch mechanism, or coupling shall not be used for connecting the drum or sheaves to the main driving gear.

(5) Use of cast iron in gears. Worm gearing having cast iron teeth shall not be used.

(6) Driving machine brakes. Driving machines shall be equipped with electrically released spring-applied brakes.

(7) Operation of brake. A single ground or short circuit, a counter-voltage, or a motor field discharge shall not prevent the brake magnet from allowing the brake to set when the operating device is placed in the stop position.

(8) Location of driving machine, alignment, and guarding of sheaves. The driving machine may be mounted on the car chassis or placed at a remote location. If remotely located, all intervening sheaves or sprockets shall be placed to ensure rope or chain travels in proper alignment. All sheaves or sprockets shall be guarded.

(9) Driving-machine roller-chain sprockets. Driving-machine roller-chain sprockets shall be steel and shall conform in all particulars of design and dimensions to ANSI B29.1-1963, Transmission Roller Chains and Sprocket Teeth.

(10) Screw machines. Screw machines shall not be used.

(11) Hydraulic driving machines. Hydraulic driving machines, where used, shall conform to ANSI A17.1. Roped hydraulic machines may be used.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-180, filed 1/10/86.]

WAC 296-94-190 Terminal stopping switches. (1) Terminal stopping switches. Upper and lower normal terminal stopping switches, operated by the chassis, shall be provided and set to stop the chassis at normal top and bottom terminals of travel.

(2) Final stopping switches. Final terminal stopping switches, operated by the chassis, shall be provided and set to stop the chassis should it overtravel the normal terminals.

(3) Slack cable switches. On winding drum machines, a slack cable switch may be used in lieu of a bottom final terminal switch.

(4) Operation of stopping devices. The final terminal stopping device shall act to prevent the movement of the chassis in both directions of travel. The normal and final terminal stopping devices shall not control the same switches on the controller unless two or more separate and independent switches are provided, two of which shall be closed to complete the motor and brake circuits in each direction of travel.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-190, filed 1/10/86.]

WAC 296-94-200 Operation. (1) Type of operation. The incline lift shall be operated by constant pressure or momentary pressure key switches at each landing and on the car. Key-operated switches shall be of the spring return type and shall be operated by a cylinder type lock having not less than five pin or five disc combination with the key removable only when the switch is in the off position and shall be weatherproof.

(2) Emergency stop switches in cars. An emergency stop switch shall be provided on or adjacent to the car operating panel. Stop switches shall be of the manually opened and manually closed type with red handles or buttons and conspicuously marked "STOP." Where springs are used, their failure shall not prevent opening of the switch.

(3) Control and operating circuit requirements. The design and installation of the control and operating circuits shall conform to the following:

(a) Control systems which depend on the completion or maintenance of an electric circuit shall not be used for:

(i) Interruption of the power and application of the machine brake at the terminals;

(ii) Stopping of the car when the emergency stop switch in the car is opened or any of the electrical protective devices operate;

(iii) Stopping the machine when the safety applies.

(b) If springs are used to actuate switches, contactors, or relays to break the circuit to stop an elevator at the terminal, they shall be of the restrained compression type.

(4) Hand rope operation. Hand rope operation shall not be used.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-200, filed 1/10/86.]

WAC 296-94-210 Suspension means. (1) Types permitted. Where the chassis is suspended from the

driving machine by a wire rope or roller chain, a single suspension means may be used. The suspension means shall be any one of the following:

(a) Steel elevator wire rope;

(b) Steel aircraft cable;

(c) Roller chain conforming to ANSI transmission roller chains and sprocket teeth.

(2) Types prohibited. Steel tapes shall not be used as suspension means.

(3) Minimum diameter of suspension means. The diameter of hoist rope(s) or cable(s) shall not be less than the following:

(a) One-quarter inch for elevator wire rope;

(b) Three-sixteenth inch for galvanized aircraft cable.

(4) Factor of safety of suspension means. The suspension means shall have a factor of safety of not less than eight based on the tension on the rope(s) or chain(s) when raising the carriage and its rated load. In no case shall the rated breaking strength of the rope(s) or chain(s) be less than four thousand pounds.

(5) Arc of contact of suspension means on sheaves and sprockets. The arc of contact of a wire rope on a traction sheave shall be sufficient to produce adequate traction under all load conditions. The arc of contact of a chain with a driving sprocket shall be not less than one hundred forty degrees.

(6) Idle turns of ropes on winding drums. All wire ropes anchored to a winding drum shall have not less than one full turn of rope on the drum when the car or counterweight has reached its limit of possible overtravel.

(7) Lengthening, splicing, repairing, or replacing suspension means. No car or counterweight wire rope shall be lengthened or repaired by splicing broken or worn suspension chains shall not be repaired. If one wire rope or a chain of a set is worn or damaged and requires replacement, the entire set of ropes or chains shall be replaced. In the event that a worn chain is replaced, the drive sprocket shall also be replaced.

(8) Securing ends of suspension ropes in winding drums. The winding-drum ends of car and counterweight wire ropes shall be secured by clamps on the inside of the drum or by one of the methods specified in subsection (9) of this section for fastening wire ropes to car or counterweight.

(9) Fastening of rope suspension means to cars and counterweights. The car or counterweight ends of wire ropes shall be fastened by return loop, by properly made individual tapered babbitted sockets or by properly attached fittings as recommended, by wire rope manufacturers. Clamps of the U-bolt type shall not be used.

Tapered babbitted rope sockets and the method of babbitting shall conform to the requirements of ANSI A17.1. The diameter of the hole in the small end of the socket shall not exceed the nominal diameter of the rope by more than three thirty-seconds of an inch.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100, 86-03-032 (Order 86-11), § 296-94-210, filed 1/10/86.]

WAC 296-94-220 Traveling cable(s). All traveling cable(s) shall be Type SO or ETT and shall conform to

Safety Requirement

the requirements of the National Electrical Code ANSI C1-1975. Where circuits through the traveling cable(s) exceed thirty volts, a means will be provided to remove the power automatically upon parting of the traveling cable.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-230, filed 1/10/86.]

WAC 296-94-230 Electric wiring. (1) Wiring requirements. All wiring shall conform to the requirements of the National Electrical Code.

(2) Electrical connections. If the driving machine is mounted on the car chassis, electrical connections between the car and power source is to be provided with a means to remove power should connecting traveling cable part. All electrical connections to the moving chassis and the stationary connections shall be insulated flexible conductors, in accordance with the National Electrical Code article six hundred and twenty on elevators.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-230, filed 1/10/86.]

WAC 296-94-240 Track(s)/guide(s) supporting structure. All supporting structures shall meet the local building codes.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-240, filed 1/10/86.]

WAC 296-94-250 Means of egress. (1) Hand crank. A hand crank capable of moving the car in accordance with ANSI A17.1 shall be provided.

(2) Brake release. The machine brake shall be provided with a lever to release the brake allowing use of the hand crank.

[Statutory Authority: RCW 70.87.080, 70.87.090 and 70.87.100. 86-03-032 (Order 86-11), § 296-94-250, filed 1/10/86.]

Appendix B:

**Office of Administrative Hearings Order,
dated March 10, 2015**

RECEIVED

MAR 13 2015

AGO L&I DIVISION
SEATTLE

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR & INDUSTRIES

In the Matter of:

Winston-Iden Residence Conveyance
#8510,

Appellant.

OAH Docket No. 2013-LI-0093

Agency Nos. 671605 & 672238

FINAL ORDER

1. ISSUES

1.1. Whether the Winston-Iden incline elevator may continue operating in present condition.

2. ORDER SUMMARY

2.1. The Winston-Iden incline elevator may not continue operating in present condition.

3. HEARING

3.1. Hearing Dates: January 6 & January 27, 2015

3.2. Administrative Law Judge: Robert Krabill

3.2.1. OAH Observer: Administrative Law Judge Jeff Friedman observed the hearing in the morning of January 6, 2015 only.

3.3. Appellant: Winston-Iden Residence Conveyance #8510

3.3.1. Owner Representatives: Vicky Winston and Mark Iden

3.4. Agency: Department of Labor & Industries, Elevator Section

3.4.1. Representative: Eric Leonard, AAG

3.4.2. Witnesses:

3.4.2.1. Jack Day

3.4.2.2. Becky Ernstes

3.4.3. Observer: James Hawk, AAG observed in the morning on January 27, 2015.

3.5. Exhibits:

~~3.5.1. Agency Exhibits 1 through 20 were admitted.~~

3.5.2. Appellant Exhibits 1 through 27 were admitted.

3.6. Observers:

3.6.1. Ingrid Hansen and Dennis Hansen observed the hearing on January 6, 2015 only.

3.6.2. Alice Kristensen and Doug Kristensen observed the hearing on January 6 & 27, 2015.

4. FINDINGS OF FACT

I find the following facts by clear, cogent, and convincing evidence:

Jurisdiction

4.1. Vicki Winston and Mark Iden own a home at 14901 28th Avenue SW, Burien, WA 98166. It lies near the water at the bottom of a steep slope. Access to the home requires navigating a steep trail with several switchbacks or using the Rehmke tram incline elevator #8510 that connects the upslope parking area to the downslope home.

4.2. The Department considered the Rehmke Mark 12 tram unsafe.¹ It knew the Winston-Iden incline elevator was a Rehmke Mark 12 tram. On January 8, 2013, Department Elevator Inspector Michael Jones inspected the elevator because the Department considered it unsafe. He "red tagged" their incline elevator. The red tag made use of the elevator illegal and criminal under RCW 70.87.145(4). Mr. Jones memorialized the red tag with an Inspection Report dated January 25, 2013.² The Inspection Report explained, "Posted unsafe....This lift has been red tagged because of a recall for the Rehmke overspeed safety hook device. Replacements must include type A safeties."³

4.3. Ms. Winston and Mr. Iden had actual notice of the red tag. It immediately

¹ Jack Day Letter to Rehmke Residential Incline Elevator Owners, June 18, 2008, Department's Exhibit 5; Testimony of Jack Day; Testimony of Becky Ernstes.

² Inspection Report, Michael Jones, January 25, 2013, Department Exhibit 1.

³ Inspection Report, Department Exhibit 1, pp. 2 & 3.

inconvenienced them and their son when he was doing work on their home. On January 22, 2013, they filed a request for hearing under RCW 70.87.170.⁴

The Winston-Iden Incline Elevator

4.4. The Roblees owned the Winston-Iden residence before selling it to Ms. Winston and Mr. Iden. In 1989, the Roblees installed a Rehmke Mark 12 Tram incline elevator to improve access to the downslope home. Department inspector Robert Romero completed the original inspection on October 16, 1989.⁵ The inspector issued a "temporary 30-day permit expiring on N/A...subject to the owner or his representative obtaining a variance on the following (A) WAC: 296-94-110 #1 (B) WAC 296-94-120 #2, #3, #4 (C) WAC 296-94-170 #3".⁶ The Department never affirmatively granted variances for the elevator.⁷ Nonetheless, Mr. Romero issued a permanent operating permit to Robert Roblee.⁸ At the time, the Department issued operating permits even when an elevator failed inspection.⁹

4.5. Doug Kristensen has a Rehmke residential incline elevator to serve his home at 26251 Marine View Drive, Kent, Washington 98032.¹⁰ Different from this elevator, Mr. Romero did not condition the temporary permit on obtaining variances.¹¹ The record does not reflect what type of Rehmke residential incline elevator Mr. Kristensen owns, nor whether it shares the same safety device.

4.6. The Winston-Iden residence is practically inaccessible without the elevator.¹² A treacherous footpath with 150 steps and multiple switchbacks is the only alternative access.¹³ The elevator runs down a 35 degree incline that drops 60 vertical feet over a 117 foot run.¹⁴ Ms. Winston has a painful foot condition that makes the

⁴ Request for Hearing, January 22, 2013, Department Exhibit 3.

⁵ Temporary Permit, October 16, 1989, Department's Exhibit 14.

⁶ Temporary Permit, Department's Exhibit 14.

⁷ Testimony of Jack Day; Testimony of Becky Ernstes; Testimony of Mark Iden Hearing Record, January 29, 2015, at 2:57:40-57.

Eric Leonard: Did you ever provide the Department with any documentation supporting your belief that there was a variance granted?

Mark Iden: No.

⁸ Operating Permit, Appellant's Exhibit 1; Testimony of Jack Day; Testimony of Becky Ernstes.

⁹ Testimony of Becky Ernstes.

¹⁰ Operating Permit Cover Letter to Doug Kristensen, March 15, 1991, Appellant's Exhibit 26, p. 1.

¹¹ Compare Operating Permit Cover Letter to Doug Kristensen, Appellant's Exhibit 26, p. 1, to

¹² Testimony of Vicky Winston.

¹³ Testimony of Vicky Winston.

¹⁴ Testimony of Vicky Winston.

elevator even more essential for her access and enjoyment of the home.¹⁵

4.7. Ms. Winston and Mr. Iden are a married couple. They bought the Winston-Iden residence with the present elevator in October 1992.¹⁶ Ms. Winston and Mr. Iden relied on the Operating Permit as proof that the elevator was both safe and legally operable without upgrade or replacement. They would not have bought the Winston-Iden residence at the price they paid without that assurance.

4.8. Mr. Iden has performed almost all maintenance and testing on the elevator himself.¹⁷ He is not a licensed elevator mechanic. Except for one time around October 1992 when Mr. Iden hired someone to look at the brake line, Ms. Winston and Mr. Iden have not had a licensed elevator mechanic inspect or test the elevator.¹⁸

The Rehmke Hook

4.9. Ms. Winston and Mr. Iden are both professional engineers with entire careers of experience at Boeing Corporation working in various capacities of increasing responsibility. Mr. Iden still works as a professional engineer, but Ms. Winston has retired and is pursuing a degree in naturopathic medicine at Bastyr University. As professionally trained and experienced engineers, both Ms. Winston and Mr. Iden are experts in engineering qualified to give opinion testimony in the field of engineering. Their expertise is focused on aerospace engineering, not elevator mechanical engineering.

4.10. Becky Ernstes and Jack Day are experienced elevator inspectors. Ms. Ernstes has prior training and experience as an elevator mechanic. Mr. Day manages the Department's Elevator Inspection Program. Ms. Ernstes and Mr. Day are experts in elevator safety and maintenance qualified to give opinion testimony in those fields.

4.11. As of 1987, the ASME (American Society of Mechanical Engineers) code requires elevators to have Type A or Type B safeties for deployment when the lifting cable breaks.¹⁹ A Type A safety grabs the elevator rails when the elevator car exceeds a maximum speed and stops the car nearly instantaneously.²⁰ A Type B

¹⁵ Letter of Daniel A. Lowinger, DPM, May 20, 2013, Appellant's Exhibit 13; Testimony of Vicky Winston; Testimony Mark Iden.

¹⁶ Timeline of Events, Appellant's Exhibit 16; Testimony of Becky Ernstes.

¹⁷ Testimony of Mark Iden, 2:49:20-2:50:10.

¹⁸ Testimony of Mark Iden.

¹⁹ Testimony of Jack Day.

²⁰ Testimony of Becky Ernstes.

safety grabs the elevator rails when the elevator exceeds a maximum speed and stops the car in less than 15 inches.²¹ Both bring the car to a stop quickly before it can build any momentum.

4.12. The elevator in this case does not have a Type A or Type B safety. It relies on the Rehmke hook.²² The Mark 12 runs on parallel rails connected by 30 rungs of 4 inch diameter metal pipe positioned every 4 feet.²³ The Rehmke hook is a metal hook that drops onto the nearest downslope rung when the elevator cable loses tension (breaks).²⁴ A plastic block at the axis connects the hook to the car body. It extends up to 10 inches when the hook engages.²⁵ The plastic block connects to the car chassis through a shock absorber that absorbs some of the impact when the hook engages.²⁶ In some tests, the Rehmke hook has skipped the first downhill rung and caught the second downhill rung allowing the runaway car to gain speed and momentum.²⁷ When the Rehmke hook deploys as designed, it impacts and damages at least one rung.²⁸ The crumpling rung absorbs some of the impact when the hook engages. If the Rehmke hook worked as designed, it would stop the car within 4 track feet at the cost of metal fatigue and deformation damage to a rung and a jarring impact to the passengers.

4.13. The Rehmke Mark 12 cannot be tested without requiring repair or replacement of the impacted rung. Mr. Iden performed his own static testing using ropes to avoid damage to a rung.²⁹ Because his static tests avoided the very momentum the safety is intended to halt, they did not simulate an actual loss of cable tension emergency. A dynamic test would necessarily damage a rung that

²¹ Testimony of Mark Iden; Testimony of Becky Ernstes.

²² Model of Rehmke Hook, Appellant's proposed Exhibit 26; Rehmke Mark 12 Operational Schematics, Mark Iden, Appellant's Exhibit 17.

²³ Rehmke Mark 12 Operational Schematics, Mark Iden, Appellant's Exhibit 17; Testimony of Mark Iden; Request for Variance, William Rehmke, October 19, 1989, Appellant's Exhibit 2, p. 3.

²⁴ Rehmke Mark 12 Operational Schematics, Mark Iden, Appellant's Exhibit 17; Exception Request, William Rehmke, Testimony of Mark Iden.

²⁵ Rehmke Mark 12 Operational Schematics, Mark Iden, Appellant's Exhibit 17; Testimony of Mark Iden.

²⁶ Rehmke Mark 12 Operational Schematics, Mark Iden, Appellant's Exhibit 17; Testimony of Mark Iden.

²⁷ Emergency Safety Demonstration Video, Hillside Elevator, Inc., Department's Exhibit 24 (Video watched during hearing.); Testimony of Becky Ernstes.

²⁸ Testimony of Mark Iden; Testimony of Beck Ernstes.

²⁹ Testimony of Mark Iden.

would require repair. Because dynamic testing consumes the system tested, the Rehmke hook brake cannot be fully tested.³⁰

- 4.14. Here, William Rehmke, principal for Rehmke Hillside Trams, made a formal written request for a variance covering the Rehmke Mark 12 tram and including the Rehmke hook safety.³¹ The Department did not grant his request. Under the record presented, neither Mr. Roblee, Ms. Winston, or Mr. Iden made any other request.

Enforcement

- 4.15. On October 2, 1990, Mr. Romero inspected the elevator again.³² This time Mr. Romero identified several deficiencies, but the safety was not one of them.³³
- 4.16. On June 24, 1993, Department inspector S.H. inspected the elevator again.³⁴ The new inspection demanded correction of several deficiencies including "6) CAR SAFETY & GOVERNOR WAC 296-94-170".³⁵ The Inspection Report gave 90 days to make correction.³⁶ Mr. Iden requested a re-inspection on August 3, 1994, and paid a fee for the inspection.³⁷ On October 17, 1994, before the re-inspection occurred, Mr. Iden cancelled his request.³⁸ Ms. Winston and Mr. Iden made no corrections.
- 4.17. On November 26, 1997, the Department sent Ms. Winston and Mr. Iden a certified letter following up on the 1993 inspection.³⁹ Ms. Gould said, "If this elevator is still in use, state law requires that it meet state safety standards....Please call the Department of Labor and Industries' elevator section within 30 days of receiving this notice to arrange for an inspection."⁴⁰ No inspection followed.
- 4.18. Almost eleven years later on June 18, 2008, the Department sent Rehmke tram owners, including Ms. Winston and Mr. Iden, a letter notifying them about the

³⁰ Testimony of Becky Ernstes.

³¹ Request for Variance, Appellant's Exhibit 17.

³² Elevator Inspection Results, October 2, 1990, Department's Exhibit 10.

³³ Elevator Inspection Results, Department's Exhibit 10.

³⁴ Inspection Report, June 24, 1993, Department's Exhibit 7, p. 3.

³⁵ Inspection Report, Departments Exhibit 7, pp. 2, 3.

³⁶ Inspection Report, Department's Exhibit 7, p. 1.

³⁷ Request for Re-inspection, Mark Iden, August 3, 1994, Department's Exhibit 8.

³⁸ Rescission of Request for Re-inspection, Mark Iden, October 17, 1994, Department's Exhibit 8.

³⁹ Letter from Jan Gould, Dep't of Labor & Industries, Elevator Section to Ms. Winston and Mr. Iden, November 26, 1997, Department's Exhibit 6.

⁴⁰ Letter from Jan Gould, Exhibit 6.

dangers of the Rehmke hook.⁴¹ In the letter, the Department admits that it previously approved safety variances for the Rehmke hook at least some times.⁴² It does not admit approving a Rehmke hook safety variance for particular owners; most especially, it does not admit approving a Rehmke hook safety variance for Ms. Winston and Mr. Iden. The letter suggests owners “upgrad[e] their trams to current standards” and anticipates “further steps to bring these lifts into compliance”.⁴³

- 4.19. The Department admits that it made little or no effort to enforce the Type A safety standard for residential incline elevators like the Rehmke Mark 12 under past administrations.⁴⁴

Repair

- 4.20. The Rehmke Mark 12 cannot be retrofitted with a Type A brake.⁴⁵ Repair and replacement are essentially the same.⁴⁶ The cost to replace the elevator is between \$80,000 and \$125,000.⁴⁷

5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

Jurisdiction

- 5.1. RCW 70.87.170 and Chapter 34.05 RCW govern jurisdiction in this matter.
- 5.2. An elevator owner may request a hearing within 15 days of the Department red tagging the elevator.⁴⁸ If the owner timely files a request for hearing, the

⁴¹ Rehmke Tram Owners Warning Letter, Jack Day, June 18, 2008, Exhibit 5.

⁴² Rehmke Tram Owners Warning Letter, Exhibit 5.

The problem with the Rehmke device is that the car may achieve too much speed prior to the application of the safety hook. For this reason it is *no longer* being approved by the Department for new installations or alterations.

You may be asking how something that was *approved* by the Elevator Department is now considered unsafe. [Emphasis added.]

⁴³ Rehmke Tram Owners Warning Letter, Exhibit 5, p. 2.

⁴⁴ Testimony of Becky Ernstes.

⁴⁵ Letter from William Bentley, American Elevator Corp., to Ms. Winston and Mr. Iden, November 26, 2013, Appellant’s Exhibit 12.

⁴⁶ Letter from William Bentley, Exhibit 12; Hillside Elevator, Inc. Estimate, February 7, 2013, Appellant’s Exhibit 11.

⁴⁷ Hillside Elevator, Inc. Estimate, Exhibit 11; Testimony of Ms. Winston.

Department must delegate the matter to an Administrative Law Judge for hearing.⁴⁹ Here, the Department red tagged the elevator, and the owners requested a hearing within 15 days, so I have jurisdiction to hear it under RCW 70.87.170.

Red Tagging

5.3. The Department may inspect private residence conveyances if it believes the elevator violates Chapter 70.87 RCW.⁵⁰ If the inspection reveals that the elevator is unsafe, the Department must issue an inspection report detailing the repairs required to make it safe.⁵¹ It may also red tag the elevator, that is, forbid further operation.⁵²

5.4. Here, the Department knew the elevator relied on a Rehmke hook safety. It considered the Rehmke hook safety unsafe, which made the elevator unsafe. Because the Department can inspect private residence conveyances it believes to be unsafe, it could inspect the elevator on January 8, 2013 under RCW 70.87.120(4). The inspection report properly identified the need to replace the Rehmke hook safety. Because the Department found a safety violation, it could red tag the elevator under RCW 70.87.120(3) and RCW 70.87.145.

The Rehmke Hook

5.5. Under current rules, elevator safeties must be Type A or Type B or other Department approved devices.⁵³ Safeties must be tested under full load.⁵⁴

5.6. Existing, unaltered residential incline elevators must comply with the rules in effect at the time of installation.⁵⁵ The Department has adopted ANSI A17.1, 1987 as the national elevator code for elevators installed from January 1, 1989 to December 31, 1992.⁵⁶ In October 1989, when the elevator was installed, the national code and the Department's rules required Type A or Type B safeties. The Department never granted the Winston-Iden family or its predecessors the Roblees a variance for the Rehmke hook safety.

⁴⁸ RCW 70.87.170.

⁴⁹ RCW 70.87.170(2).

⁵⁰ RCW 70.87.120.

⁵¹ RCW 70.87.120(3).

⁵² RCW 70.87.120(3); RCW 70.87.145.

⁵³ WAC 296-96-07170(1)(a).

⁵⁴ WAC 296-96-07171(1).

⁵⁵ WAC 296-96-07021.

⁵⁶ WAC 296-96-00650.

5.7. The elevator has a Rehmke hook safety, not a Type A or Type B safety, so without a variance, it violates the rules in effect at the time of installation. Because (a) the elevator lacks an approved safety and (b) the Department has not granted a variance for the Rehmke hook safety it does have, the elevator does not meet the safety requirements of the code that applied at the time of original installation or the current rule WAC 296-96-07170. Because the elevator does not meet the safety requirements of the code that applied at the time of original installation, the Department should have and did red tag the elevator under RCW 70.87.120(3) and RCW 70.87.145.

Exception

5.8. The Department can grant an exception or variance to any rule "whenever any requirements are shown to be impracticable, such as involving expense not justified by the protection secured."⁵⁷ The Department cannot grant a variance unless the alternative design is at least as safe as the required design.⁵⁸ The owner must make a formal written request for a variance.⁵⁹ Ms. Winston and Mr. Iden have not made a formal written request. Even if they had, the Department has not granted one. Regardless, the Rehmke hook is not as safe as a Type A safety that stops a runaway car instantaneously or a Type B safety that stops a runaway car a few inches farther down the track because it allows the car to gain momentum for up to 4 feet before stopping. Because the Rehmke hook is not as safe as the safeties required under former WAC 296-94-0170 and current WAC 296-96-07170, the Department cannot grant a variance for the Rehmke hook safety under RCW 70.87.110.

Equitable Estoppel

5.9. Equitable estoppel is an equitable defense. Under equitable estoppel, a plaintiff is estopped from - that is, prevented from repudiating - an earlier statement that the defendant reasonably relied on.⁶⁰ A State agency may not repudiate its interpretation of its own rules once a third party has relied on the original interpretation.⁶¹

⁵⁷ RCW 70.87.110.

⁵⁸ RCW 70.87.110.

⁵⁹ WAC 296-96-01075, as promulgated by WSR 04-12-047, effective June 30, 2004.

⁶⁰ *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 887 (2007), citing *Kramerevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743 (1993).

⁶¹ *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 324-325 (2008); citing *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 889 (2007); *Silverstreak*, 159 Wn.2d 887-891.

When equitable estoppel is asserted against the government, the party asserting estoppel must establish five elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims; (2) the asserting party acted in reliance upon the statement or action; (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action; (4) estoppel is "necessary to prevent a manifest injustice"; and (5) estoppel will not impair governmental functions.⁶²

- 5.10. An Administrative Law Judge does not normally have the equitable powers necessary to consider an equitable defense like equitable estoppel. However, the Administrative Law Judge in *Silverstreak* apparently did. *Silverstreak* involved the Department as a party, so, by accepting the premise that the Administrative Law Judge could as a predicate to the majority and concurring opinions, it affirms the power of Administrative Law Judges in Department hearings to grant equitable estoppel.
- 5.11. The first element of equitable estoppel against a State agency is an inconsistent prior statement. Unlike a case where the Department granted a variance in writing, the Department here made no affirmative statement to Mr. Roblee, Ms. Winston, or Mr. Iden authorizing a variance for their Rehmke hook safety. On the contrary, the Department regularly identified the Rehmke hook safety as a deficiency in its inspection reports and letters. What it did not do was aggressively follow up on the identified deficiencies. The lack of follow up does not contradict its affirmative statements, so Ms. Winston and Mr. Iden have failed to establish the first element of equitable estoppel – a statement, admission, or act inconsistent with present claims. Without the first element, equitable estoppel fails.
- 5.12. The second element of equitable estoppel against a State agency is reasonable reliance. Here, the Department made no statement upon which Ms. Winston and Mr. Iden could rely as concluded above. However, the Department did issue an operating permit, and Ms. Winston and Mr. Iden relied on the operating permit as an authorization to continue operating the elevator without modification when they purchased their home. At the time, the Department issued permits independent of inspection results, so Ms. Winston and Mr. Iden could not reasonably rely on the operating permit as a statement that the elevator had passed inspection or won a variance. Whatever reliance they may have had, the Department dispelled it when it identified the Rehmke hook as a deficiency in the June 24, 1993 inspection. Because Ms. Winston and Mr. Iden did not reasonably

⁶² *Silverstreak*, 159 Wn.2d at 888, citing *Kramarevcky*, 122 Wn.2d at 743.

rely on the operating permit or any other Department statement, they have failed to establish the second element of equitable estoppel. Independently of the other elements, failure of the second element precludes granting equitable estoppel.

- 5.13. The third element of equitable estoppel is harm from the inconsistency. Here, Ms. Winston and Mr. Iden face a substantial expense in replacing the elevator. Assuming for the sake of argument that the Department has made an inconsistent statement, Ms. Winston and Mr. Iden will be harmed, if the Department persists in requiring replacement of the elevator's safety. So, they have established the third element of equitable estoppel.
- 5.14. The fourth element of equitable estoppel is prevention of manifest injustice. Here, the 1993 inspection report gave Ms. Winston and Mr. Iden a minimum of 21 years notice of the need to replace their Rehmke hook safety. Amortized over 21 years, the large present expense is relatively small. Had they acted upon notice, they could have financed the replacement at relatively low annual cost. The long delay has greatly reduced the shock of the present red tag and brought it below the threshold of manifest injustice. Without manifest injustice, Ms. Winston and Mr. Iden have failed to establish the fourth element of equitable estoppel. Independently of the other elements, failure of the fourth element precludes granting equitable estoppel.
- 5.15. The fifth element of equitable estoppel is non-interference with government function. Here, the Department has a duty to "provide for safety" and "ensure the safe design" of elevators.⁶³ Requiring the elevator to meet minimum safety standards fulfills that duty and tolerating violations shirks it. However, the Rehmke hook safety design works to avoid catastrophe and continuing to tolerate a single exception already tolerated for 26 years does not broadly interfere with the Department's fulfillment of its duties. So, Ms. Winston and Mr. Iden have established the fifth element of equitable estoppel.
- 5.16. Separately because Ms. Winston and Mr. Iden failed to establish the first, second, and fourth elements of equitable estoppel, I cannot grant them equitable estoppel under the *Silverstreak* rule.

Laches

- 5.17. Laches is an equitable defense. It applies when a plaintiff with a right fails to exercise the right for so long that the defendant reasonably relied on the plaintiff's abandonment of that right. No Washington law supports Administrative Law Judge authority to consider laches as a defense to an elevator red tag. With no authority

⁶³ RCW 70.87.020.

to consider laches, I decline to do so. Should this matter be appealed to Superior Court, a Superior Court Judge with clear equitable powers could consider it.

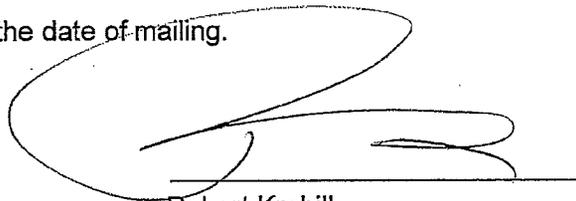
6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

6.1. The Department's action red tagging the Winston-Ilden residential elevator is AFFIRMED.

6.2. The Winston-Ilden incline elevator may not continue operating in present condition.

Issued from Tacoma, Washington, on the date of mailing.



Robert Krabill
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

Petition for Reconsideration:

Within 10 days of the service of this order, any party may file a petition for reconsideration with the Office of Administrative Hearings at the address noted below, stating the specific grounds upon which relief is requested. RCW 34.05.470(1). WAC 10-08-215.

The petition for reconsideration will not stay the effectiveness of this order. *Id.* at (2).

If the petition for reconsideration is timely and properly filed, the time for filing a petition for judicial review does not commence until after the Office of Administrative Hearings disposes of the petition for reconsideration. RCW 34.05.470(3). The Office of Administrative Hearings must dispose of the petition for reconsideration within twenty (20) days or issue a written notice specifying the date upon which it will act. *Id.* The petition for reconsideration is deemed denied of the Office of Administrative Hearings does not act with twenty (20) days. *Id.*

The disposition of the petition for reconsideration shall be by written order either denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further hearing. RCW 34.05.470(5).

An order is not required to file a petition for reconsideration before filing a petition for judicial review. RCW 34.05.470(5).

An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5).

Petition for Judicial Review

This order becomes final on the date of mailing unless within thirty (30) days of mailing, a party files a petition for judicial review with the Superior Court. RCW 34.05.532(2). The petition for judicial review may be filed in the Superior Court of Thurston County, of the county where petitioner resides, or of the county where the property owned by the petitioner and affected by the contested decision is located. RCW 34.05.514(1). The petition for judicial review must be served on all parties of record within thirty (30) days of mailing of the final order. Service of the petition for judicial review on opposing parties is completed when deposited in the U.S. Mail, as evidenced by the postmark. RCW 34.05.542(4).

The petition for judicial review must include the following: (1) the name and mailing address of the petitioner; (2) the name and mailing address of the petitioner's attorney, if any; (3) facts that demonstrate that the petitioner is entitled to obtain judicial review; (4) the petitioner's reasons for believing that relief should be granted; and (5) a request for relief, specifying the type and extent of relief requested. RCW 34.05.446.

CERTIFICATE OF MAILING IS ATTACHED

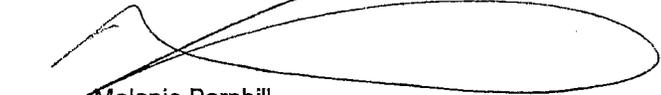
CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 2013-LI-0093

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

<p>Vicky Winston and Mark Iden 14901 28th Ave SW Burien, WA 98166</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Eric Leonard Assistant Attorney General Office of the Attorney General 800 5th Ave Ste 2000 Seattle WA 98104</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Michael L. Jones Compliance Inspector Department of Labor and Industries 12806 Gateway Dr Tukwila, WA 98168</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Jack Day Chief Elevator Inspector Department of Labor and Industries PO Box 44480 Olympia WA 98504</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>

Date: Tuesday, March 10, 2015

OFFICE OF ADMINISTRATIVE HEARINGS


 Melanie Barnhill
 Legal Secretary

Appendix C:

**Superior Court Order,
dated January 15, 2016**

1 As such, after conducting an independent review of the record, and having heard the
2 arguments of the parties, the Court adopts the factual findings of Judge Krabill in paragraphs
3 3.1 – 4.20 of his order, with the following additions, clarifications, and changes (See CR 23-
4 29¹).

5 Paragraph 4.2 – The Department determined that the Rehmke Mark 12 Tram was
6 unsafe as of 2005. The Department did not inform the Iden-Winston's of this fact until 2008.
7 Prior to 2005, the Department took the position that the tram's emergency braking system
8 was inconsistent with required regulations, but was content simply informing the Winston-
9 Idens of that fact rather than requiring a repair before allowing the tram to operate.
10

11 Paragraph 4.4 – Petitioners presented evidence that a letter was sent to the prior
12 owners of the property around the time the Department issued an operator's permit. They
13 argue that reference to the letter, which no person can now find, is evidence this court should
14 consider in determining that it was a letter granting a variance. Essentially, Petitioners argue
15 that the Department's failure to keep this letter constitutes spoliation of evidence, and that the
16 Court should thus infer that the letter is contrary to the Department's position, and was
17 actually a letter granting a variance for the braking system on the tram.
18

19 Paragraph 4.12 – Petitioners propose a modification to the current Rehmke Hook
20 braking system, which would make the system "equivalent" to a Type A or Type B safety
21 system, but would not cost as much as installing an actual Type A or Type B safety system.

22 Paragraph 4.16 – Petitioners dispute the efficacy of the 1993 inspection, insisting that
23 the inspector did a shoddy job, did not review past paperwork, and that this inspection should
24
25
26

¹ CR refers to "Court Record"
ORDER – Page 2

1 be discarded as evidence of whether they had knowledge that the Rehmke Hook required
2 replacement or modification.

3 Additional Paragraph 4.21 – The Department altered its position on the Rehmke Hook
4 in 2005, finding not only that the system was out of compliance with the WACs, but also that
5 it presented a very real and very immediate danger to those using it. The Department made
6 this decision based upon information from industry experts, a video, and other input. Neither
7 party presented any evidence from which this Court can find that the Department's decision-
8 making process was flawed, unfair, or unconstitutional. The Department handled the
9 communication of this finding to owners of Rehmke Trams poorly. Rather than immediately
10 informing them, in 2005, that their systems were dangerously flawed, they instead contacted
11 companies that conducted maintenance on these trams. Because Petitioners here did their
12 own maintenance of their tram, they did not learn about the Department's decision until 2008,
13 as described in Judge Krabill's findings.

14 ANALYSIS

15
16 The Department is authorized to inspect residential elevators or conveyances if it
17 believes they violate RCW 70.87. RCW 70.87.120. Here, given the inspection history of this
18 elevator, the Department was certainly authorized to do the inspection. If the Department
19 finds that the elevator is unsafe, it may "red tag" it, forbidding further use. RCW 70.87.120(3).
20

21 Because the elevator was not a Type A or B safety system, and because no credible
22 evidence exists that the Department granted a variance for Petitioner's Rehmke Hook, the
23 Department's finding that the system was unsafe is reasonable. The decision to red tag was
24 reasonable. Moreover, the system violated the rules in effect at the time of its installation.
25 WAC 296-96-07170.
26

1 Petitioners argue that the Department should be equitably estopped from arguing that
2 the braking system on their tram is unreasonable. Petitioners here, to assert equitable
3 estoppel, must show: (1) A statement by the Department which is inconsistent with its later
4 position; (2) Petitioner relied on the statement; (3) Injury would result to Petitioner by allowing
5 the Department to repudiate its prior statement or action; (4) Estoppel is necessary to prevent
6 a manifest injustice; and (5) Estoppel will not impair governmental functions.
7

8 Here, there is no statement by the Department. Petitioners could argue that the
9 Department's actions, by issuing an operating permit in 1989 and failing to red-tag the
10 conveyance before 2013, are sufficient in place of statements. However, the Department
11 consistently communicated to the Petitioners that the its tram was not in compliance with
12 state regulations and needed to be fixed. The 1993 inspection report, which Petitioners do
13 not agree with, could not be clearer as to the Department's position. They specifically asked
14 Petitioners to bring their elevator into State compliance. The Department's position in 2013 is
15 simply an extension of their position in 1993 and 1997.
16

17 Petitioner's failure to establish this first element defeats their equitable estoppel
18 argument.

19 Petitioners further argue that the doctrine of laches defeats the Department's red-tag
20 action in this case. Equitable defenses against governmental entitites are generally
21 disfavoered, particularly if they tend to interfere with the proper exercise of governmental
22 duties. *Housing Authority v. NE Lake Washington Sewer and Water District*, 56 Wn.App.
23 589, 591 (1990). It is unclear whether the doctrine of laches was intended to apply to a
24 situation such as this, where an administrative agency takes direct, non-judicial action, and
25 then the affronted party files an appeal of that decision.
26

1 There are three elements to laches: (1) Knowledge or reasonable opportunity to
2 discover on the part of the Department that they had a cause of action ("right to red-tag")
3 against Petitioner; (2) An unreasonable delay by the Department in commencing the cause of
4 action; and (3) Damages from the delay.

5 Here, the Court finds that the Department learned of the immediate danger inherent in
6 the Rehmke Hook in 2005. Upon initially learning of the danger, the Department undertook
7 an investigation to ensure that this was not simply a marketing ploy by industry salespersons.
8 The delay was not unreasonable. Moreover, given Petitioners' knowledge that problems
9 existed with their tram since at least 1993, and given that the Department repeatedly asked
10 them to bring their conveyance up to code, they do not come into this litigation with clean
11 hands. As such, laches does not apply.

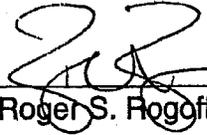
12 This Court incorporates all other findings and conclusions of Judge Krabill into this
13 order.
14

15 **ORDER**

16 **IT IS HEREBY ORDERED** that the Department's actions in red-tagging the conveyance
17 are affirmed. The Court finds for Respondent by clear, cogent and convincing evidence in this
18 trial de novo.
19

20 IT IS SO ORDERED.

21 DATED this 15th day of January, 2016.
22

23 
24 _____
25 Judge Roger S. Rogoff
26

Azzam, Amani (ATG)

From: Leonard, Eric (ATG)
Sent: Friday, January 15, 2016 4:17 PM
To: ATG MI LNI Sea Receptionist; Alexander, Lynn (ATG)
Subject: FW: Iden/Winston v Dept LNI, Court File No. 15-2-13278-4
Attachments: Scan 001.pdf

From: Court, Rogoff
Sent: Friday, January 15, 2016 4:16:40 PM (UTC-08:00) Pacific Time (US & Canada)
To: Alexander, Lynn (ATG); mark.c.iden@boeing.com; vicki.winston@bastyr.edu; Leonard, Eric (ATG)
Subject: RE: Iden/Winston v Dept LNI, Court File No. 15-2-13278-4

Hello,

Attached is a copy of the order entered by the court. The original has been filed.

Thank you.

Lisa Zimnisky
Bailiff to Judge Roger Rogoff
YSC, Courtroom 4 206-477-1611
Rogoff.court@kingcounty.gov
<http://www.kingcounty.gov/courts/SuperiorCourt/judges/rogoff.aspx>

RECEIVED

JAN 15 2016

AGO L&I Division
Seattle
Via email

Please be advised that the Clerk's Office does not provide working copies to the court, unless the parties sign up for that additional service. It is the responsibility of the parties to make sure that the court receives working copies, prior to a hearing, in accordance with the rules. Please **DO NOT email working copies** to the bailiff unless you have advanced authorization.

IMPORTANT: In order to avoid inappropriate *ex parte* contact, you are hereby directed to forward this communication to all other counsel/parties not already copied on this email.

From: Alexander, Lynn (ATG) [<mailto:LynnA@ATG.WA.GOV>]
Sent: Wednesday, January 13, 2016 4:34 PM
To: Court, Rogoff <Rogoff.Court@kingcounty.gov>
Cc: mark.c.iden@boeing.com; vicki.winston@bastyr.edu; Leonard, Eric (ATG) <EricL@ATG.WA.GOV>
Subject: Iden/Winston v Dept LNI, Court File No. 15-2-13278-4

Sent on Behalf of Eric Leonard, Assistant Attorney General, Office of the Attorney General

Re: Mark Iden and Vicki Winston v. Department Labor and Industries, Elevator Section
Court File No. 15-2-13278-4 KNT

Dear Ms. Zimnisky –

In follow-up to Judge Rogoff's instructions at the trial on December 28, 2015, we wanted to let you know that the parties did meet on Monday, January 11, 2016 to discuss settlement. However, the parties were not able to reach an

agreement to settle this matter. Judge Rogoff had set a deadline of this Friday, January 15, to issue a written decision and we wanted to advise him of the outcome of the settlement discussion.

Please let us know if you have any questions.

Thank you,

Lynn Alexander

Legal Assistant to Attorneys

Katy Dixon, Eric Leonard and Thomas Vogliano

Office of the Attorney General

Labor & Industries Division

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No.74727-4-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

MARK C. IDEN & VICKI WINSTON,

Appellants,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on August 26, 2016, she caused to be served the Department of Labor and Industries' Brief of Respondent with Appendices and this Certificate of Service in the below-described manner:

Via E-File to:

Richard D. Johnson
Court Administrator/Clerk
Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-1176

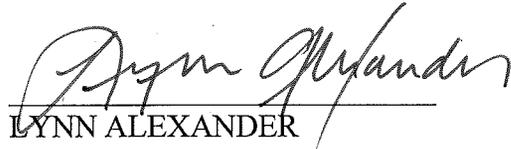
//

//

Via First Class United States Mail, Postage Prepaid to:

Mark Iden
Vicki Winston
14901 - 28th Avenue S.W.
Seattle, WA 98166

DATED this 26th day of August, 2016.

A handwritten signature in cursive script, appearing to read "Lynn Alexander", is written over a horizontal line.

LYNN ALEXANDER
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