

## **Independent Contractor Prevented From Suing Jobsite Owner**

by Darren Feider

General contractors have a non-delegable duty to employees on a jobsite to ensure compliance with health and safety regulations set forth in the Washington Industrial Safety and Health Act (“WISHA”). If the workplace is unsafe, subcontractor employees can sue the general contractor. Not only does the general contractor have a non-delegable duty, a project owner also may have such a duty, but that arises only when the owner retains the “right to control” as to the manner in which the independent contractors and its employees perform work. In *Neil v. NWCC Investments V, LLC* (March 15, 2010) the Washington Appellate Court addressed a claim that the project owner had a non-delegable duty to an independent contractor’s employees.

The *Neil* case involved the construction of a retail development project called Snoqualmie Ridge. The project owner had contracted with a general contractor to build the development. A drywall subcontractor employee fell from an elevated wooden plank while taping drywall during the construction of a restaurant. The drywall employee was declared incompetent as a result of the fall, and his parents and guardian filed a lawsuit against the general contractor and the project owner, claiming they had a non-delegable duty to maintain a safe worksite and permitting the use of an elevated wooden plank had created an unsafe worksite leading to the fall. The *Neil* court recognized that Washington statutes impose a general duty on employers to protect their own employees from hazards, including complying with WISHA regulations to protect all employees on the worksite. This duty extends to general contractors who have responsibility to ensure compliance with safety regulations. The injured employee had settled with the general contractor and was pursuing his claims against the project owner. Although project owners can be liable for jobsite injuries when they act as a general contractor, no such duty exists when the jobsite owners do not control work conditions. Jobsite owners can rely on their contractors to ensure WISHA compliance, and the critical analysis is whether the jobsite owner retains control over the manner in which the independent contractor completes its work.

The *Neil* project owner rarely visited the jobsite, never supervised the work being performed and had contracted with the general contractor to be responsible for jobsite safety. In fact, the drywall contractor had been specifically instructed not to use elevated wooden planks when performing the drywall work. Scaffolding or ladders had been requested. Because the general contractor controlled the drywall subcontractor’s jobsite performance, the *Neil* court held that the project owner could not be responsible for the injured employee. The *Neil* court refused to hold the project owner liable by finding that the general contractor was the project owner’s agent for purposes of imposing a non-delegable duty to ensure WISHA compliance. The fact that the general contractor had signed one contract on behalf of the project owner did not convert the general contractor into the project owner’s agent for purposes of WISHA liability. The general contractor was an independent contractor over which the project owner had no right or control over the method or manner in which the work was to be done. Also, the fact that the project owner retained the ability to ensure that the general contractor performed in conformity with the parties’ contract did not mean that the project owner controlled the manner of performance. The general contractor was not the project owner’s agent for purposes of liability.

The take away from *Neil* is that project owners should not be liable for injuries suffered by subcontractor employees as long as project owners do not control the manner and means of the work performance. In larger projects, a good practice would be to use a general contractor that can control the manner and means of performance by the subcontractors. When the project is not sufficiently large or there is a lack of finances to support the retention of a general contractor, a project owner should contract with independent contractors, allowing them to retain the control of the manner and method of production.