

REC'D HEARING EXAMINER
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**CITY OF SEATTLE
OFFICE OF HEARING EXAMINER**

In re Baja Concrete USA Corp.,
Roberto Contreras, Newway
Forming Inc., and Antonio
Machado,

Respondents.

Case No. CAS-2020-00186

**RESPONDENT BAJA CONCRETE USA
CORP.'S REQUEST FOR CONTESTED
HEARING**

**SMC 14.16.085, 14.19.085, 14.20.065
HER 3.01**

Department: Office of Labor Standards

I. MATTER BEING APPEALED

COMES NOW Respondent Baja Concrete USA Corp. ("Baja Concrete"), pursuant to Seattle Municipal Code ("SMC") Sections 14.16.085, 14.19.085 and 14.20.065 and Hearing Examiner Rules of Practice and Procedure ("HER") Section 3.01, through the undersigned counsel, and submits this Request for Contested Hearing before the Office of Hearing Examiner ("HE"), as an appeal of the Findings of Fact, Determination and Final Order of the Director of the Office of Labor Standards ("OLS"), dated August 25, 2021¹, in case No. CAS-2020-00186 (the "Determination").

¹ The Determination was delivered by OLS to counsel for Baja Concrete via email on August 26, 2021.

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23
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1 provision of reimbursements for housing. As explained by OLS in the Determination, Respondent
2 Newway Forming, Inc. (“Newway”) was responsible for keeping records of workers start times and
3 end times, and provided timesheets to Baja Concrete. Baja Concrete processed payroll for the workers
4 and submitted invoices to Newway for reimbursement of such payroll. Respondent Roberto Soto
5 Contreras (“Contreras”) was exclusively responsible for recruiting, hiring, firing, disciplining and
6 setting wages for the workers.

7 Within the Determination, OLS relies on the Washington State Supreme Court’s decision in
8 *Becerra Becerra v. Expert Janitorial, LLC* in support of its finding of joint employment by all
9 respondents. Such reliance is misplaced. In fact, a close comparison of the facts in *Becerra Becerra*
10 to the facts in the instant matter necessarily leads to a conclusion that Baja Concrete was not an
11 employer of the workers at issue here. A central issue in *Becerra Becerra* was whether Fred Meyer
12 Stores Inc. (“Fred Meyer”) and Expert Janitorial LLC (“Expert Janitorial”) were joint employers of
13 certain janitors who worked night shifts cleaning Fred Meyer stores. *Becerra Becerra v. Expert*
14 *Janitorial, LLC, 181 W.2d 186, 189, 332 P.3d 415 (2014)*. Expert Janitorial acquired a management
15 contract to provide Fred Meyer with outsourced facility maintenance. *Id at 190*. Under that contract,
16 Expert Janitorial subcontracted with independent janitorial companies who provided, managed and
17 supervised workers who would clean Fred Meyer stores, while neither Expert Janitorial nor Fred
18 Meyer directly employed the workers. *Id*. Expert Janitorial and Fred Meyer agreed on the specific
19 work the janitors would do and the specific price Fred Meyer would pay Expert Janitorial for
20 completing the work to Fred Meyer’s reasonable satisfaction. *Id*. The workers could not leave the
21 store until Fred Meyer supervision signed off on their daily Work Order sheet. *Id at 193*.

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23 The Supreme Court in *Becerra Becerra* reversed the trial court’s summary judgment finding
24 that Fred Meyer was not a joint employer of the janitors and remanded the matter for further
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1 consideration based on a 13-factor analysis, known as the economic reality test, for determining
2 whether joint employment existed. *Id at 196*.

3 Here, the roles of Newway and Contreras are remarkably similar to those of Fred Meyer and
4 Expert Janitorial respectively in *Becerra Becerra*. Contreras recruited and hired all workers and the
5 workers worked at Newway project work sites; they were expected to complete their work to the
6 satisfaction of Newway. Baja Concrete had no role in these activities.

7 The 13-factor test mentioned above consists of five regulatory factors and eight non-regulatory
8 factors as follows, citing the U.S. Court of Appeals for the Ninth Circuit in *Torres-Lopez v. May*, 111
9 *F.3d 633, 639-640, 1997 U.S. App. LEXIS 6939, 1997*:

10 Regulatory factors:

- 11 1. The nature and degree of control of the workers;
- 12 2. The degree of supervision, direct or indirect, of the work;
- 13 3. The power to determine pay rates or the methods of payment of the workers;
- 14 4. The right, directly or indirectly, to hire, fire, or modify the employment conditions of the
workers; and
- 15 5. Preparation of payroll and the payment of wages.

16 Out of the above regulatory factors, Baja Concrete's activities were limited to the fifth factor
17 only, preparation of payroll and payment of wages, an activity in which Newway also played a role as
18 explained below.

19 Non-regulatory factors:

- 20 1. Whether the work was a specialty job on the production line;
- 21 2. Whether responsibility under the contracts between a labor contractor and an employer
pass from one labor contractor to another without material changes;
- 22 3. Whether the premises and equipment of the employer are used for the work;
- 23 4. Whether the employees had a business organization that could or did shift as a unit from
one worksite to another;
- 24 5. Whether the work was piecework and not work that required initiative, judgment and
foresight (whether the service rendered requires a special skill);
- 25 6. Whether the employee had an opportunity for profit or loss depending upon the alleged
employee's managerial skill;
7. Whether there was permanence in the working relationship; and

1 8. Whether the service rendered is an integral part of the alleged employer’s business.

2 Arguably, none of the above eight non-regulatory factors apply to the workers in relation to
3 Baja Concrete. At most, factor eight may apply. This means that, of the above 13 factors, at most,
4 two of them apply in the context of the workers and Baja Concrete. Notably, the above factors are not
5 exclusive and are not to be applied mechanically. *Berry v. Transdev Servs., U.S. District Court for the*
6 *Western District of Washington, 2017 U.S. Dist. LEXIS 58398, 12, 2017.* In *Berry*, the Court found
7 that two of the regulatory factors and five of the non-regulatory (common law) factors applied, and
8 thus found the existence of a joint employment relationship. This is in stark contrast to the instant
9 case, in which only one or two of the 13 factors apply to Baja Concrete. Baja Concrete was not a joint
10 employer of the workers at issue in this matter. Quoting OLS in its Determination:

12 “Contreras exercised significant control over the workers and their pay; their Paid Sick and
13 Safe Time; their hiring, firing, and discipline; and their housing, transportation to and from work...”
14 (Determination, Page 3).

15 “Respondent Machado exercised significant control over the employees’ hours, schedules and
16 whether they worked overtime and he directly supervised both the Newway Forming foremen and the
17 Baja Concrete representative who directed the employees’ day-to-day work.” (Determination, page 4).

18 “The [workers] testified that Roberto Soto Contreras recruited them, arranged for their travel to
19 Seattle, managed their housing ... drove one of the vans which brought them to work, and picked them
20 up from work.” (Determination, page 4).

21 “Newway [Forming] would tell us [workers] what hours we would work.” (Determination,
22 page 4).

1 Work schedules and meal and rest breaks were set by Newway Forming. (Determination, page
2 5).

3 Quoting Respondent Antonio Machado, “Those guys [workers] would come to Newway
4 [Forming] foremen and the [Newway Forming] foremen would guide them and give them directions,
5 what to work on, when to go home.” (Determination, page 6).

6 Quoting one of the workers, “Roberto [Soto Contreras] would mostly be in charge of paying
7 us...” (Determination, page 6).

8 Newway Forming exercised near-total control over the work of the cement finishers, laborers,
9 and carpenters. (Determination, page 17).

10 The workers started their workdays by clocking in at the Newway Forming office onsite,
11 initially using timesheets and later using Newway Forming’s clock-in system to punch in and out. The
12 workers used Newway Forming’s premises and equipment in completing their work. (Determination,
13 page 18).

14 The above references are non-exhaustive. It is clear from the facts of this matter, and from the
15 OLS Determination itself, that Baja Concrete’s role in this matter was to process payroll and it
16 engaged in no other activities relevant to this matter and was not a joint employer of the workers at
17 issue. Baja Concrete should be dismissed from this case.
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20 *B. BAJA CONCRETE’S LIABILITY, IF ANY, SHOULD BE LIMITED TO ISSUES ARISING*
21 *FROM ITS ROLE IN PROCESSING PAYROLL*

22 Given that Baja Concrete was not a joint employer of the workers at issue in this matter, it
23 should be dismissed. However, in the event that Baja Concrete is not dismissed, its liability, if any,
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1 should be limited to issues arising from its limited role of processing payroll. This assumes that OLS
2 has jurisdiction to make any such findings; that assumption is also in dispute.

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4 *C. CIVIL PENALTIES AND LIQUIDATED DAMAGES ARE EXCESSIVE AND UNWARRANTED*

5 Baja Concrete cooperated with OLS throughout its investigation in this matter, has never been
6 the subject of a wage claim prior to this matter, and did not interfere, willfully or otherwise, with OLS
7 in its investigation. As explained on page 1 of the Determination, accountant Mercedes de Armas, on
8 behalf of Baja Concrete, responded to OLS' written questions and provided documents requested by
9 OLS. At worst, Baja Concrete's failure to provide certain payroll records may give rise to a finding of
10 inadequate record keeping, but certainly not interference with OLS' investigation.

11 Further, prior to this matter, Baja Concrete had never been the subject of a wage claim
12 investigation².

13
14 With reference to the Remedies portion of the Determination, despite the cooperation of Baja
15 Concrete in OLS' investigation and despite the fact that this matter constitutes a first-ever alleged
16 wage claim offense by Baja Concrete, OLS has imposed the maximum liquidated damages, being
17 twice the alleged unpaid compensation, without explanation, and has imposed the maximum
18 permissible civil penalties.

19 OLS is not justified in imposing the maximum liquidated damages and penalties, where it has
20 discretion to impose lesser amounts. The imposed assessments are fundamentally unfair to Baja
21 Concrete insofar as it has, at worst, demonstrated inadequate record keeping.

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25 ² Counsel for Baja Concrete is without knowledge as to whether the other respondents in this matter have been
subject to prior wage claim investigations.

1 Further, the discretionary liquidated damages provisions referenced by OLS are essentially the
2 same as the civil liability for exemplary double damages under RCW Chapter 49.52 related to unpaid
3 wages, wage deductions and the like. Specifically, RCW 49.52.050 provides, in part:

4 “Any employer or officer, vice principal or agent of any employer, whether said
5 employer be in private business or an elected public official, who:

- 6 (1) Shall collect or receive from any employee a rebate of any part of wages
7 theretofore paid by employer to such employee; or
8 (2) Willfully and with intent to deprive the employee of any part of his or her
9 wages, shall pay any employee a lower wage than the wage such employer is
10 obligated to pay such employee by any statute, ordinance, or contract; or

11 Shall be guilty of a misdemeanor.”

12 RCW 49.52.070 further provides that any employer who shall violate the above provisions of
13 RCW 49.52.050 shall be liable in a civil action for twice the amount of the wages unlawfully rebated
14 or withheld by way of exemplary damages, “provided however, that the benefits of this section shall
15 not be available to any employee who has knowingly submitted to such violations.”

16 In the instant case, the workers negotiated their compensation and wage deductions with
17 Respondent Contreras and knowingly submitted to the same. Accordingly, the workers knowingly
18 submitted to such violations (if, in fact, violations occurred) and therefore, exemplary damages, or in
19 this case, the equivalent liquidated damages, should not be imposed.

20 *D. WORKERS AGREED TO LUMP-SUM PAYMENT OF WAGES AND BAJA CONCRETE DID*
21 *NOT WILLFULLY UNDERPAY WAGES*

22 The workers in this matter should be estopped from seeking compensation based on allegations
23 of non-payment of overtime, minimum wage, non-payment for hours worked, unauthorized
24 deductions, and meal and rest breaks, which are discussed on pages 19-21 of the Determination,
25 because they agreed to and accepted all compensation plans as offered by Contreras. In processing

1 payroll, Baja Concrete justifiably relied on information provided by Newway and Contreras and the
2 fact that compensation for workers had been negotiated and agreed to by each worker and Contreras,
3 including agreements as to lump-sum payments, varying numbers of work hours week to week, and
4 deductions from wages.

5 Equitable estoppel is based on the notion that a “party should be held to a representation made
6 or position assumed where inequitable consequences would otherwise result to another party who has
7 justifiably and in good faith relied thereon.” *Kramarevsky v. Department of Soc. & Health Servs.*, 122
8 *Wn.2d* 738, 743, 863 *P.2d* 535 (1993) (quoting *Wilson v. Westinghouse Elec. Corp.*, 85 *Wn.2d* 78, 81,
9 530 *P.2d* 298 (1975)). The elements of equitable estopped are: (1) an admission, statement or act
10 inconsistent with a claim afterward asserted, (2) action by another in reasonable reliance upon that act,
11 statement or admission, and (3) injury to the relying party from allowing the first party to contradict or
12 repudiate the prior act, statement or admission. *Board of Regents v. City of Seattle*, 108 *Wn.2d* 545,
13 551, 741 *P.2d* 11 (1987).

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15 Here, each worker came to an agreement, whether verbal or in writing, with Contreras, as to
16 wages and deductions. Baja Concrete reasonably relied on the representations of each worker,
17 Contreras and Newway as to such agreements, and Baja Concrete will be seriously injured if the
18 assessed amount stated in the Determination is enforced against it.

19 As discussed in the preceding section, particularly with reference to RCW 49.52.050, whether
20 an employer’s underpayment of wages was willful is an important consideration in any wage claim
21 matter.

22 Nonpayment of wages is willful when it is the result of a knowing and intentional action. There
23 are two instances when an employer’s failure to pay wages is not willful: either by a finding of
24 carelessness or by the existence of a bona fide dispute. Carelessness suggests errors in bookkeeping or
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1 other conduct of accidental character, and a bona fide dispute exists when there is a fairly debatable
2 dispute over whether an employment relationship exists, or whether all or a portion of the wages must
3 be paid. *Allen v. Dameron*, 187 Wn.2d 692, 709, 389 P.3d 487(2017).

4 Here, to the extent Baja Concrete failed to pay workers for any wages, such failure was not
5 willful. There is evidence to support that the critical issues pertaining to Baja Concrete are not a
6 matter of unpaid wages, deductions or missed meal and/or rest breaks, but rather that the issues stem
7 from problems with the organization of recordkeeping, and from Baja Concrete's reliance on other
8 Respondents as to the amounts to be paid as wages. In other words, Baja Concrete's failure to provide
9 wages was a result of mistake, and therefore exemplary/liquidated damages are not warranted.
10 Further, as discussed above, there is a bona fide dispute as to whether an employment relationship
11 existed between Baja Concrete and the workers at issue in this matter. Affirmative evidence of intent
12 to deprive an employee of wages is necessary to establish liability under RCW 49.52.050 relating to
13 willful deprivation of wages. *Pope v. Univ. of Wash.*, 121 Wn.2d 479, 491, 852 P.2d 1055 (1993).
14 OLS has not demonstrated that Baja Concrete willfully deprived any workers of wages.
15

16 17 **IV. RELIEF REQUESTED**

18 Respondent Baja Concrete hereby requests that the Determination be modified to dismiss Baja
19 Concrete as a Respondent in this matter.

20 **In the alternative**, in the event that the above relief is not granted, Respondent Baja Concrete
21 requests that the Determination be modified to reflect the following:

- 22 1. Baja Concrete's liability be limited to issues arising from its role in processing payroll and
23 not as an employer; and
- 24 2. Eliminating the liquidated damages and civil penalties.
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3 Respectfully Submitted this 3rd day of September, 2021.

4 MDK LAW

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6 */s/ Mark D. Kimball*

/s/ Alex T. Larkin

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