

SEATTLE OFFICE OF LABOR STANDARDS
OFFICE OF HEARING EXAMINER

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

Respondents.

No. CAS-2020-00186

NEWWAY FORMING INC.'S APPEAL

I. MATTER BERING APPEALED

COMES NOW Appellant Newway Forming Inc. ("Newway"), 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 its undersigned counsel and submits this appeal of the Office of Labor Standards ("OLS") Findings of Fact, Determination, and Final Order, dated August 24, 2021¹ in Case No. CAS-2020-00186 (the "Determination").

II. BRIEF STATEMENT OF INTEREST

The Determination wrongly holds Newway jointly and severally liable for all damages and penalties asserted therein, totaling \$2,225,990.30. This assessment is based on an incorrect finding that Newway was a joint employer with its subcontractor, Respondent Baja Concrete USA Corp. ("Baja") and Baja's employee and individual Respondent, Roberto Contreras. The

¹ The Determination was not served until August 26, 2021.

1 Determination attempts to levy substantial penalties and liquidated damages against Newway
2 despite the fact that the Determination also makes clear that Baja, not Newway, caused the
3 alleged violations and that this is Newway's first ever wage claim. Respondent Newway brings
4 this appeal because Newway has never jointly employed Baja's employees and Newway
5 should not be held responsible for Baja's actions.

6 **III. BRIEF STATEMENT OF ISSUES ON APPEAL**

7 OLS's sole basis for including Newway in this Determination is the unfounded
8 allegation that Newway is a joint employer with its subcontractor, Respondent Baja. Baja
9 Concrete is a concrete finishing contractor, representing its nature of business to be
10 "construction" on the Secretary of State's Corporations Filing System, and registered as a
11 general contractor with the Department of Labor & Industries ("LNI").²

12 Newway is a contractor operating in both Canada³ and the United States. Newway had
13 previously worked with Baja in Canada before Baja sought work with Newway in an effort to
14 break into the Pacific Northwest construction market. Upon information and belief, Baja
15 employed Respondent Roberto Soto Contreras to hire and manage employees, and to act as
16 Baja's regional and on-site supervisor.

17 The primary construction project at issue was located at 1120 Denny Way, Seattle,
18 98109 (the "Project"), and was owned/developed by Onni Group. Onni Contracting, Inc. was
19 the general contractor, with whom Newway subcontracted to perform concrete work. Newway
20 in turn subcontracted with Baja whereby Baja agreed to perform a portion of the concrete work
21 (primarily concrete finishing).

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25 ² Baja's contractor's license has been suspended since May 12, 2021 after it let its required insurance lapse.

26 ³ In Canada, Newway operates under separate corporate entities: Newway Concrete Forming Ltd. And Newway Concrete Structures, Ltd. Any work Baja performed for Newway in Canada was for these Canadian entities, not Respondent Newway Forming, Inc.

1 As OLS notes in its Determination, there is no dispute that the employees subject to the
2 current wage claims were employed directly by Baja. However, OLS's finding that Newway
3 was a joint employer is erroneous.

4 **A. Newway Did Not Jointly Employ Any Baja Employees**

5 The crux of OLS's claims against Newway are that Newway was a joint employer with
6 Baja and thus Newway is jointly and severally responsible for Baja's wage violations.

7 The SMC mirrors the Washington Minimum Wage Act ("MWA") and federal labor
8 law and the FLSA. Washington law, using federal law as a guideline, uses an "economic
9 reality" test to determine whether a joint employment relationship exists. *Becerra v. Expert*
10 *Janitorial LLC*, 181 Wn.2d 186, 196 (2014). As the Determination admits, OLS follows the
11 same test. Under this test, the trier of fact reviews 13 non-exclusive factors, beginning with
12 the following five "formal" or "regulatory" factors:

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

19 *Id.* at 196-197 (citations omitted). While OLS does not specifically identify which regulatory factors
20 it believes support a finding of joint employer liability, it appears that OLS relies upon regulatory
21 factors 1, 2, and 5 for its finding.

22 In addition to the regulatory factors set forth above, courts have considered eight non-exclusive
23 "functional" factors when using the economic realities test:

- 24
- 25 1. Whether the work was a specialty job on the production line;
 - 26 2. Whether responsibility under the contracts between a labor contractor and employer pass
from one labor contractor to another without material changes;
 3. Whether the premises and equipment of the employer are used for the work;
 4. Whether the employees had a business organization that could or did shift as a unit from
one worksite to another;
 5. Whether the work was piecework and not work that required initiative, judgment, or
foresight;

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;
8. Whether the service rendered is an integral part of the alleged employer's business.

Id. at 197 (citations omitted). Based on review of OLS's Determination, it appears OLS is relying on only factors 3, 7, and 8.

OLS's findings that analysis of these factors weigh in favor of a determination that Newway is a joint employer with Baja is based on inaccurate facts and is simply incorrect.

For instance, for the first two regulatory factors, OLS is simply describing a common contractor-subcontractor relationship. OLS's determination twists the facts to fit its desired narrative, ignoring the realities of construction projects to create a false narrative that Newway controlled Baja and its employees from an administrative standpoint as well as controlling who, when, and how Baja employs its employees. In reality, like on all construction projects, the general contractor, Onni, directed Newway and all other subcontractors what to work on and when on a daily basis. Newway then directed its subcontractor Baja to perform certain portions of the work in accordance with the general contractor's direction. This is simply how a construction project functions; it does not change the relationship from one of contractor-subcontractor to a joint employer relationship. Despite OLS's incorrect claims to the contrary, Newway's authority with respect to Baja was no greater than that of any contractor to a subcontractor—it could direct that Baja as a company perform certain work in certain areas of the project at certain times. Newway had no authority over other aspects of Baja's employees' work, including hiring and firing, authorizing sick days, determining compensation, or processing payroll. Baja chose who it staffed on the project and when, as well as how they would be compensated.

As for regulatory factor 5 and functional factor 3, OLS significantly misstates facts with respect to the purpose of the timeclock on the project and how Baja processed payroll for its employees. Newway did not play any roll in determining the hours worked by Baja employees or how much they would be paid. Rather, Baja created and submitted invoices to Newway, which Newway paid in full.

1 As to the two remaining functional factors identified by OLS, both once again represent
2 OLS twisting the facts and reaching to create a false narrative. First, for factor 7, OLS claims
3 Newway and Baja are closely related business entities that share employees. This is incorrect.
4 Newway and Baja had worked together on certain projects in Canada before Baja attempted to
5 enter the Pacific Northwest market. Baja was new to the market. It's first jobs it subcontracted
6 with a cement forming contractor (Newway) that it had worked with in the past. This is nothing
7 more than a typical way of a subcontractor entering a market it is unfamiliar with. The
8 remaining allegations related to this factor are unsupported by any actual evidence.

9 As for factor 8, Newway needed to hire a subcontractor to assist with its scope of work
10 on the multiple large projects it was working on. This does not indicate a joint employer
11 relationship; it simply shows that Newway was busy and subcontracted out some of its work.

12 OLS is reaching to find a joint employer relationship between Baja and Newway. It is
13 obvious why it is doing so; OLS is concerned that Baja, a new entrant to the Pacific Northwest
14 market, and Baja's employee Roberto Soto Contreras, who, upon information and belief, is
15 known to have left the US and is believed to be residing in Mexico, will not pay for the
16 violations they allegedly committed. As a result, OLS is looking to make Newway, an innocent
17 third party, pay for their alleged wrongdoing. There is no evidence whatsoever supporting a
18 joint employer relationship and Newway should not be made to atone for OLS's inability to
19 recover payment from the actual parties that caused the harm.

20 **B. OLS Has Only Identified Eight Employees**

21 As OLS notes, it only has spoken with eight Baja employees. It is unclear whether
22 OLS has identified any remaining employees or what evidence it is using to determine that the
23 remaining employees were not properly paid. While Newway vigorously disputes the OLS's
24 finding that Newway is liable, even if it was, it should only be liable for the specific claims
25 relating to the eight identified employees. A \$2 million assessment, including significant fines
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1 and penalties, should not, and cannot be based solely on OLS' assumption that more than 8
2 employees were subject to the same wrongful acts by Baja without specific evidence to
3 support.⁴

4 **C. OLS Cannot Meet Its Burden of Proving Any of the Wage Violations**

5 All of OLS's allegations are based solely on hearsay and conjecture. OLS'
6 Determination is unsupported by sufficient documentary evidence to find that Newway
7 committed any wage violations and OLS's claims should fail as a result.

8 **D. Newway Avails Itself to Any Substantive Defenses Offered by Baja**

9 Newway understands that Baja has already submitted its appeal in this matter. As OLS
10 alleges that it was Baja that committed the actual wage violations and Newway's liability is
11 limited to that of a joint employer, Newway avails itself to any substantive defenses offered by
12 Baja. Because Newway and Baja are unrelated entities, Newway has had no access to Baja
13 employee records or any other documents that may or may not support Baja's appeal, and Baja
14 has been unwilling to share its substantive defenses with Newway to this point (aside from
15 Baja providing a copy of its appeal on September 8, 2021).

16 **E. OLS's Damages and Penalties Are Excessive**

17 Newway has worked closely with OLS throughout this matter and has never been
18 subject of a wage claim prior to this matter. As OLS will confirm, Newway has attempted to
19 resolve this, despite Baja refusing to participate in any way. Newway is being held liable for
20 actions OLS does not claim Newway committed. OLS has imposed maximum liquidated
21 damages and penalties against Newway, despite Baja being the entity OLS alleges committed
22 the actual violations. OLS has discretion to impose lesser penalties and the penalties assessed
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⁴ This is especially problematic given that OLS has an obligation to make payments to the employees for whom
26 it recovered damages. There are over 50 employees identified as having been potentially impacted by Baja's
actions, yet OLS can only identify 8 specific individuals.

1 against Newway are fundamentally unfair given its role as a third party who did not commit
2 the actual wage violations alleged in the determination.

3 **IV. RELIEF REQUESTED**

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5 Newway requests that it be dismissed as a Respondent in this matter. Newway is not
6 a joint employer with Baja, Newway did not commit any wage violations itself, and Newway
7 should not be held liable for Baja's actions. In the alternative, Newway asks that its liability
8 be limited to the violations that can be actually proven by OLS, in no case to exceed violations
9 against the eight employees actually spoken to by OLS. Further, Newway requests that all
10 liquidated damages and civil penalties be eliminated.

11 DATED this 10th day of September, 2021.

12 OLES MORRISON RINKER & BAKER LLP

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14
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