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7 **BEFORE THE HEARING EXAMINER**
8 **CITY OF SEATTLE**

9 In the Matter of the Appeals of
10 Baja Concrete USA Corp., Newway
11 Forming Inc., and Antonio
Machado,
12 From a Final Order of the Director,
13 City of Seattle Office of Labor
Standards, Respondent.
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Hearing Examiner Files:
LS-21-002, LS-21-003, LS-21-004
(consolidated)

**APPELLANT BAJA CONCRETE USA
CORP.'S MOTION FOR PARTIAL SUMMARY
JUDGMENT**

HER 2.16, CR 56

Department Reference: 2020-00186-LS

17 **I. ORDER REQUESTED AND BASIS**

18 COMES NOW Appellant Baja Concrete USA Corp. ("Baja Concrete"), pursuant to
19 Hearing Examiner Rules of Practice and Procedure ("HER") Section 2.16 and Washington State
20 Rule of Civil Procedure ("CR") 56, through the undersigned counsel, and submits this Motion
21 for Partial Summary Judgment. Specifically, Baja Concrete is seeking an Order declaring that
22 Baja Concrete is not an employer of the workers at issue in this matter, under the legal doctrine
23 of joint employment.
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II. EVIDENCE RELIED UPON

The evidence that the Hearing Examiner of the City of Seattle (“Hearing Examiner”) is asked to rely upon is set forth in the Declaration of Alex T. Larkin in Support of Baja Concrete’s Motion for Partial Summary Judgment submitted herewith.

III. BACKGROUND

In the City of Seattle Office of Labor Standards (“OLS”) Findings of Fact, Determination and Final Order, dated August 25, 2021 (the “Determination”), issued against Appellants in the instant consolidated appeal before the Hearing Examiner, the Director of the OLS relies heavily on the legal doctrine of “joint employers” to support its finding that Baja Concrete, and the other Appellants, are joint employers of the workers identified in Attachment B to the Determination (the “Workers”). (*see discussion of joint employment at pages 16-19 of the Determination*). As discussed herein, Baja Concrete should not be regarded as an employer of the Workers. The caselaw on the doctrine of joint employers uses 13 factors to determine whether an entity or a person is a joint employer. In the instant case, Baja Concrete meets no more than three of the factors, and therefore should not be regarded as a joint employer.

IV. DISCUSSION AND AUTHORITY

A. Summary Judgment Generally

The underlying purpose of a summary judgment is to avoid trial over matters about which there is no issue of material fact. *Davis v. West One Automotive Group*, 140 Wn. App. 449, 456, 166 P.3d 807 (2007). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wash. 2d 545, 192 P.3d 886 (2008). A “material fact” is one on which the

1 outcome of the litigation depends. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850
2 P.2d 1298 (1993). When reasonable minds could reach but one conclusion on the evidence,
3 summary judgment is proper. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274
4 (2003). On a motion for summary judgment, the moving party bears the initial burden of
5 showing absence of issue of material fact. *Ernst Home Ctr., Inc. v. United Food & Commercial*
6 *Workers Int'l Union, AFL-CIO, Local 1001*, 77 Wn. App. 33, 888 P.2d 1196 (1995). However,
7 unless the non-moving party presents admissible evidence that establishes an issue of material
8 fact exists, summary judgment is proper. The purpose of a motion for partial summary judgment
9 is to resolve issues over which there is no factual dispute in order to speed up trial and to focus
10 the trier of fact's attention to the core factual dispute between the parties. *Crosthwaite v.*
11 *Crosthwaite*, 56 Wn.2d 838, 843, 358 P.2d 978 (1960).
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14 **B. The OLS' Authority Regarding the Legal Doctrine of Joint Employment**

15 The OLS made its finding regarding joint employment based on caselaw and certain
16 provisions of the Seattle Municipal Code ("SMC"). (*Determination at pg. 16*). The cited SMC
17 provisions are SMC 14.16.010, SMC 14.19.010 and SMC 14.20.010, relating to paid sick time
18 and paid leave time, minimum wage and minimum compensation rates for employees
19 performing work in Seattle, and wage and tip compensation requirements, respectively. Each of
20 those provisions includes the following definition of Employer:

21 "Employer means any individual, partnership, association,
22 corporation, business trust, or any entity, person or group of persons,
23 or a successor thereof, that employs another person and includes any
24 such entity or person acting directly or indirectly in the interest of
25 an employer in relation to an employee. More than one entity may
be the employer if employment by one employer is not completely
disassociated from employment by the other employer."

1 Additionally, the OLS relies on Section 90-045(3) of the OLS Seattle Human Rights
2 Rules (“SHRR”) for the proposition that joint employment “depends on all the facts in the
3 particular case.” (*Determination at pg. 16*).

4 The OLS’ reliance on SHRR 90-045(3) fails because none of the three criteria set out in
5 the provision by which a joint employment relationship may be considered to exist are present in
6 this case. SHRR 90-045(3) states, in relevant part:

7 “[a] joint employment relationship generally will be considered to
8 exist in situations such as:

- 9 a. Where there is an arrangement between the employers to
10 share the employee’s services, as, for example, to
interchange employees; or
11 b. Where one employer is acting directly or indirectly in the
interest of the other employer (or employers) in relation to
12 the employee; or
13 c. Where the employers are not completely disassociated with
respect to the employment of a particular employee and may
14 be deemed to share control of the employee, directly or
indirectly, by reason of the fact that one employer controls,
15 is controlled by, or is under common control with the other
employer.”

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17 There is nothing in the record, and the OLS has produced no evidence, to support a
18 finding that any of the three above criteria set out in SHRR 90-045(3) exist in this case.

19 The OLS relies primarily on *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186,
20 332 P.3d 415 (2014) for caselaw in support of its joint employment analysis, based on the
21 economic realities test. (*Determination at pg. 16*). As discussed below, while *Becerra Becerra*
22 is good law as to the question of joint employers, the OLS has misconstrued *Becerra Becerra* in
23 this case.
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1 C. The Correct Construction of the Legal Doctrine of Joint Employment

2 A close comparison of the facts in *Becerra Becerra* to the facts in the instant matter necessarily
3 leads to a conclusion that Baja Concrete was not an employer of the Workers. A central issue in
4 *Becerra Becerra* was whether Fred Meyer Stores Inc. (“Fred Meyer”) and Expert Janitorial LLC
5 (“Expert Janitorial”) were joint employers of certain janitors who worked night shifts cleaning Fred
6 Meyer stores. *Becerra Becerra* at 189. Expert Janitorial acquired a management contract to provide
7 Fred Meyer with outsourced facility maintenance. *Id* at 190. Under that contract, Expert Janitorial
8 subcontracted with independent janitorial companies who provided, managed and supervised workers
9 who would clean Fred Meyer stores, while neither Expert Janitorial nor Fred Meyer directly employed
10 the workers. *Id*. Expert Janitorial and Fred Meyer agreed on the specific work the janitors would do
11 and the specific price Fred Meyer would pay Expert Janitorial for completing the work to Fred
12 Meyer’s reasonable satisfaction. *Id*. The workers could not leave the store until Fred Meyer
13 supervision signed off on their daily Work Order sheet. *Id* at 193.

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

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

22 Regulatory factors:

- 23 1. The nature and degree of control of the workers;
24 2. The degree of supervision, direct or indirect, of the work;
25 3. The power to determine pay rates or the methods of payment of the workers;

4. The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and
5. Preparation of payroll and the payment of wages.

Non-regulatory factors:

1. Whether the work was a specialty job on the production line;
2. Whether responsibility under the contracts between a labor contractor and an 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 and foresight (whether the service rendered requires a special skill);
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
8. Whether the service rendered is an integral part of the alleged employer's business.

Of the above 13 factors, at most, three of them apply in the context of the Workers and Baja Concrete. Notably, the above factors are not exclusive and are not to be applied mechanically. *Berry v. Transdev Servs.*, U.S. District Court for the Western District of Washington, 2017 U.S. Dist. LEXIS 58398, 12, 2017. In *Berry*, the Court found that two of the regulatory factors and five of the non-regulatory (common law) factors applied, and thus found the existence of a joint employment relationship. This is in stark contrast to the instant case, in which no more than three of the 13 factors apply to Baja Concrete.

Here, the roles of Appellant Newway Forming Inc. ("Newway") and Roberto Soto Contreras ("Contreras") are remarkably similar to those of Fred Meyer and Expert Janitorial respectively in *Becerra Becerra*. Contreras recruited and hired all workers and the workers worked at Newway project work sites. The Workers were expected to complete their work to the satisfaction of Newway. Baja Concrete had no role in these activities.

D. Applying the Facts in the Record to the Caselaw

In a CR 30(b)(6) deposition of Baja Concrete in this matter, Ms. Mercedes De Armas, speaking for Baja Concrete, testified that Contreras is not, and never was, an employee of Baja Concrete. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 169, lines 17-21*). She further testified that Contreras was the boss of the Workers, in terms of management and hiring. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 170, lines 12-22*). Contreras determined the work hours of the Workers. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 77, lines 15-17*). Baja Concrete did not determine when Workers would work overtime, did not set the pace of work, and did not communicate with Workers about when they needed to report to work. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 77, line 21 to pg. 78, line 1*). Contreras, together with Newway, handled those matters. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 78, lines 2-3*). Additionally, if a Worker needed to go home sick, that was handled by Contreras and Newway, not by Baja. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 78, lines 12-18*).

In a CR 30(b)(6) deposition of Newway in this matter, Ms. Kwynne Forler-Grant, speaking for Newway, testified that she has been with Newway for 22 years and has been a senior manager for the last ten years. (*Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway, pg. 7, lines 14-22*). Ms. Forler-Grant testified that Appellant Antonio Machado (“Machado”) was general foreman for Newway for the 1120 Denny Way project. (*Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway, pg. 10, lines 11-24 (organizational chart attached as Ex. 2 to that dep.), and pg. 12, lines 15-20*). Machado oversaw everybody on the organizational chart for the 1120 Denny Way project. (*Id.*). Machado delegated oversight of subcontractors to Newway leads who are listed on the organizational chart. (*Id at pg. 12, line 23 to pg. 13, line 5*). The

1 Newway leads would go to the office in the mornings and they would be instructed where their
2 crews needed to go throughout the building during that day. (*Id at pg. 13, lines 9-12*).

3 Ms. Forler-Grant testified that Baja Concrete's superintendent, Contreras was onsite at
4 1120 Denny Way. (*Id at pg. 14, lines 5-13*). However, as discussed above, Ms. De Armas,
5 testifying for Baja Concrete, stated that Contreras at no time was an employee of Baja Concrete.
6 There is nothing in the record to show that Contreras was an employee of Baja Concrete.

7 Regarding reporting of workers hours, and Baja Concrete's invoicing Newway for those
8 hours, the process involved weekly meetings between Tom Grant¹ of Newway and Contreras at
9 which the two of them would go through timecards, and Contreras would generate invoices. (*Id*
10 *at pg. 18, line 12 to pg. 19, line 1, and g. 27, lines 6-16*). Tom Grant would decide how many
11 laborers were needed, and would inform Contreras. (*Id at pg. 24, lines 4-16*).

12 Regarding directing work at the work site, Newway's leads would inform Contreras of
13 where workers needed to be. (*Id at pg. 25, lines 1-12*).

14 Regarding workers' lunch break and other breaks, Contreras would make those decisions.
15 (*Id at pg. 25, lines 22-25*).

16 Regarding working additional hours, Newway personnel were the decision makers. (*Id at*
17 *pg. 71, lines 20-23*). Contreras would also make decisions regarding work hours based on
18 directions from Newway. (*Id at pg. 72, lines 14-18*).

19 Notably, workers at the 1120 Denny Site who were apparently paid their wages by Baja
20 Concrete indicated that they were employees of Newway. Attached as Exhibit 6 to the
21 deposition transcript of Newway is a Site Safety Stand Down list which workers at the 1120
22 Denny Way site signed. (*Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway, pg. 28, lines*
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25 ¹ See Tom Grant on Newway organizational chart, Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway.

1 15-25, pg. 29, lines 1-4, pg. 30, lines 20-25, pg. 31, lines 1-5, Site Safety Stand Down attached as
2 Ex. 6 to that dep.). The Site Safety Stand Down sign-in list is 11 pages long, includes the
3 signatures of numerous individuals who identified their employers, none of whom listed Baja
4 Concrete as their employer. Ms. Forler-Grant testified that she did not know why Baja Concrete
5 workers signed the list and indicated Newway as their employer. (*Id at pg. 33, lines 9-22, pg.*
6 *34, lines 8-10*).

7 Regarding equipment on site, Ms. Forler-Grant testified that she believed Baja Concrete
8 did not have any larger equipment at the work sites. (*Id at pg. 115, lines 3-6*). She further
9 testified that Baja Concrete did not have an office, any facility at all or even a desk at the work
10 sites. (*Id at pg. 115, lines 7-13*).

11 Finally, Ms. Forler-Grant testified that Newway is a Washington corporation, is a
12 separate business entity from Newway Forming in Canada, that she understood that Baja
13 Concrete is a Florida entity and that the Florida entity is a different business entity than Baja
14 Concrete in Canada. (*Id at pg. 116, lines 4-11*).

15 We now apply above factual background to the joint employer factors set out in *Becerra*
16 *Becerra*.

17 Regulatory factors:

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- 19 1. **The nature and degree of control of the workers.** Baja Concrete did not have control of
20 the workers. Newway's leads, Machado and Contreras did.
 - 21 2. **The degree of supervision, direct or indirect, of the work.** Baja Concrete did not
22 supervise, directly or indirectly, the work. These items were carried out by Newway
23 personnel.
 - 24 3. **The power to determine pay rates or the methods of payment of the workers.**
25 Contreras set the wage rates of workers. Baja Concrete did have input into the methods of
payment.

- 1 4. **The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers.** Contreras handled hiring and firing of workers. Employment conditions at
2 the work sites was determined by Newway and its personnel. Baja Concrete had no input
3 into these factors.
- 4 5. **Preparation of payroll and the payment of wages.** Relying on information about wage
5 rates and work hours provided by Contreras, Baja Concrete did process payroll for the
6 workers.

7 Non-regulatory factors:

- 8 1. **Whether the work was a specialty job on the production line.** The workers at issue in
9 this matter were laborers and cement finishers, requested by Newway and recruited and
10 provided by Contreras. The record does not appear to indicate that the workers were
11 specialists.
- 12 2. **Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes.** The
13 record in the instant case indicates that there were no written employment contracts for the
14 workers at issue. The record indicates that terms of employment were negotiated between
15 each worker and Contreras, with no input from Baja Concrete.
- 16 3. **Whether the premises and equipment of the employer are used for the work.** The
17 workers at issue in this matter did not work at the business address of Baja Concrete and
18 did not use any Baja Concrete equipment. All work was performed at the work sites where
19 Newway was a subcontractor to general contractors.
- 20 4. **Whether the employees had a business organization that could or did shift as a unit from one worksite to another.** The record does not indicate that there was any such
21 business organization.
- 22 5. **Whether the work was piecework and not work that required initiative, judgment and foresight (whether the service rendered requires a special skill).** The workers at issue
23 were general laborers and cement finishers. The record does not indicate that they rendered
24 services requiring a special skill.
- 25 6. **Whether the employee had an opportunity for profit or loss depending upon the alleged employee's managerial skill.** The workers at issue were general laborers and
cement finishers, and did not involve managerial skill. Supervision of the workers was
carried out by Newway personnel and to a lesser extent by Contreras.
7. **Whether there was permanence in the working relationship.** The record indicates that
the workers were hired for specific projects and there was no permanence in the working
relationship.

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

2 The services rendered by the workers were essential to the work Newway was engaged to
3 perform at the work sites. To the extent that Baja Concrete’s business involves processing
4 of payroll and billing Newway for labor, such labor was important to Baja Concrete’s
5 business.

6 To a limited extent, factors 3 and 5 of the regulatory factors and factor 8 of the non-
7 regulatory factors may apply to Baja Concrete. The other ten factors do not apply to Baja
8 Concrete. In contrast, regulatory factors 1, 2, 4 and 5, and non-regulatory factors 1, 3, 6 and 8
9 appear to apply to Newway. Regulatory factors 1, 3, 4 and 5, and non-regulatory factors 2, 6 and
10 7 appear to apply to Contreras.

11 Recent caselaw is also informative on the issue of joint employment. In a case involving
12 alleged violations of the Washington Industrial Safety and Health Act of 1973 (“WISHA”),
13 although not in the context of wages, the Supreme Court of Washington focused on control of
14 the workers and control of the physical work environment as primary considerations in
15 determining employer liability under WISHA. *Dep’t of Labor & Indus. v. Tradesmen Int’l, LLC*,
16 198 Wn.2d 524, 541, 497 P.3d 353 (2021)². “Key factors include who has responsibility and
17 power to control the workers and work site and whether the alleged employer has the power to
18 hire, fire, or modify the employment conditions.” *Id* at 542. “The inquiry is whether the staffing
19 agencies retained substantial control over the workers and work environment such that they
20 could abate the relevant safety hazards.” *Id* at 543. The Supreme Court affirmed the Court of
21 Appeals decision that staffing agency Tradesmen Int’l LLC (“Tradesmen”) was not an employer
22 of workers that it had provided to a separate entity. *Id* at 545. “Tradesmen was responsible for
23 paying wages, determining compensation, and handling taxes, unemployment insurance and
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25 ² The Tradesmen case was a King County Superior Court case, case no. 18-2-08751-7.

workers' compensation". *Id* at 544. "There was no evidence that Tradesmen actively supervised the workers, controlled the methods of work or work conditions, or provided on-site supervision." *Id*. In the instant case, Baja Concrete's sole role regarding the workers was processing payroll. As in the *Tradesmen* case, Baja Concrete did not supervise the workers, control the methods of work or work conditions, or provide on-site supervision. As such, Baja Concrete should not be regarded as a joint employer.

E. The OLS Determination Itself Does Not Support its Own Finding that Baja Concrete was a Joint Employer

The Determination erroneously claims, without elaboration, that "*There is no dispute that Respondent Baja Concrete employed the employees listed on Attachment B*). (*Determination*, pg. 4, *Section II*). In fact, the role of Baja Concrete as to the workers in this matter was limited in essence to a payroll service provider. As explained in the Determination, Newway was responsible for keeping records of workers start times and end times, and provided timesheets to Baja Concrete. Baja Concrete processed payroll for the workers and submitted invoices to Newway for hourly rates charged by Baja Concrete to Newway. Contreras was exclusively responsible for recruiting, hiring, firing, disciplining and setting wages for the workers.

Quoting the Determination:

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

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

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

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

9 Work schedules and meal and rest breaks were set by Newway Forming. (*Determination, page*
10 *5*).

11 Quoting Machado, “Those guys [workers] would come to Newway foremen and the [Newway]
12 foremen would guide them and give them directions, what to work on, when to go home.”
13 (*Determination, page 6*).

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

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

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

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V. CONCLUSION

In the instant case, reasonable minds can reach but one conclusion based on the evidentiary record in this matter, and that conclusion is that Newway and Contreras are joint employers as to the workers at issue in this action, and Baja Concrete is not. There is no genuine issue of material fact as to this conclusion and therefore, as a matter of law, this tribunal should declare that Baja Concrete was not an employer of the workers at issue in this action.

Appellant Baja Concrete hereby requests that the Hearing Examiner grant the requested motion for partial summary judgment, in the form proposed.

Respectfully Submitted this 1st day of July, 2022.

MDK LAW

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