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**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeals of
Baja Concrete USA Corp., Newway
Forming Inc., and Antonio
Machado,
From a Final Order of the Director,
City of Seattle Office of Labor
Standards, Respondent.

Hearing Examiner Files:
LS-21-002, LS-21-003, LS-21-004
(consolidated)

**APPELLANT BAJA CONCRETE USA
CORP.’S RESPONSE TO APPELLANT
ANTONIO MACHADO’S MOTION FOR
SUMMARY JUDGMENT AND MOTION FOR
EXCLUSION OF EVIDENCE**

HER 2.16, CR 56

Department Reference: 2020-00186-LS

I. INTRODUCTION

COMES NOW Appellant Baja Concrete USA Corp. (“Baja Concrete”), pursuant to
Hearing Examiner Rules of Practice and Procedure (“HER”) Section 2.16 and Washington State
Rule of Civil Procedure (“CR”) 56, through the undersigned counsel, and submits this Response
to Appellant Antonio Machado’s (“Machado”) Motions for Summary Judgment and for
Exclusion of Evidence.

II. EVIDENCE RELIED UPON

1 The evidence that the Hearing Examiner of the City of Seattle (“Hearing Examiner”) is
2 asked to rely upon is set forth in the Declaration of Alex T. Larkin in Support of Baja Concrete’s
3 Motion for Partial Summary Judgment submitted previously in this matter.
4

5 III. RESPONSE TO MOTION FOR SUMMARY JUDGMENT

6 While Baja Concrete does not oppose Machado’s Motion for Summary Judgment in
7 which Machado seeks to be dismissed from this matter on grounds that he asserts he was not an
8 employer of the workers at issue, Baja Concrete does seek to clarify its position, as explained in
9 detail in Baja Concrete Motion for Partial Summary Judgment currently before the Hearing
10 Examiner, that it is not an employer of the workers. In the interest of brevity, a brief summary of
11 the arguments presented in Baja Concrete’s Motion for Partial Summary Judgment, supported by
12 the Declaration of Alex T. Larkin submitted therewith, is provided here.
13

14 The case of *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 332 P.3d 415
15 (2014) sets out the 13-factor test for determining whether a person or entity is a “joint
16 employer.” The 13 factors consist of five regulatory factors and eight non-regulatory factors as
17 follows, citing the U.S. Court of Appeals for the Ninth Circuit in *Torres-Lopez v. May*, 111 F.3d
18 633, 639-640, 1997 U.S. App. LEXIS 6939, 1997:

19 Regulatory factors:

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

25 Non-regulatory factors:

- 1 1. Whether the work was a specialty job on the production line;
- 2 2. Whether responsibility under the contracts between a labor contractor and an employer
- 3 3. Whether the premises and equipment of the employer are used for the work;
- 4 4. Whether the employees had a business organization that could or did shift as a unit from
- 5 5. Whether the work was piecework and not work that required initiative, judgment and
- 6 6. Whether the employee had an opportunity for profit or loss depending upon the alleged
- 7 7. Whether there was permanence in the working relationship; and
- 8 8. Whether the service rendered is an integral part of the alleged employer's business.

9 Of the above 13 factors, at most, three of them apply in the context of the Workers and Baja
10 Concrete. Notably, the above factors are not exclusive and are not to be applied mechanically. *Berry*
11 *v. Transdev Servs.*, *U.S. District Court for the Western District of Washington, 2017 U.S. Dist. LEXIS*
12 *58398, 12, 2017*. In *Berry*, the Court found that two of the regulatory factors and five of the non-
13 regulatory (common law) factors applied (a total of 7 of the 13 factors), and thus found the existence
14 of a joint employment relationship. This is in stark contrast to the instant case, in which no more than
15 three of the 13 factors apply to Baja Concrete.

16 Here, the roles of Appellant Newway Forming Inc. (“Newway”) and Roberto Soto Contreras
17 (“Contreras”) are remarkably similar to those of Fred Meyer and Expert Janitorial respectively in
18 *Becerra Becerra*¹. Contreras recruited and hired all workers and the workers worked at Newway
19 project work sites. The Workers were expected to complete their work to the satisfaction of Newway.
20 Baja Concrete had no role in these activities.

21
22 Applying the factual background of this case as provided in Baja Concrete’s Motion for
23 Partial Summary Judgment to the joint employer factors set out in *Becerra Becerra*, it becomes
24

25 ¹ See more detailed discussion of *Becerra Becerra* in Baja Concrete’s Motion for Partial Summary Judgment.

1 clear that Baja Concrete should not be regarded as an employer of the workers at issue in this
2 matter.

3 Regulatory factors:

- 4 1. **The nature and degree of control of the workers.** Baja Concrete did not have control of
5 the workers. Newway's leads, Machado and Contreras did.
- 6 2. **The degree of supervision, direct or indirect, of the work.** Baja Concrete did not
7 supervise, directly or indirectly, the work. These items were carried out by Newway
8 personnel.
- 9 3. **The power to determine pay rates or the methods of payment of the workers.**
10 Contreras set the wage rates of workers. Baja Concrete did have input into the methods of
11 payment.
- 12 4. **The right, directly or indirectly, to hire, fire, or modify the employment conditions of**
13 **the workers.** Contreras handled hiring and firing of workers. Employment conditions at
14 the work sites was determined by Newway and its personnel. Baja Concrete had no input
15 into these factors.
- 16 5. **Preparation of payroll and the payment of wages.** Relying on information about wage
17 rates and work hours provided by Contreras, Baja Concrete did process payroll for the
18 workers.

19 Non-regulatory factors:

- 20 1. **Whether the work was a specialty job on the production line.** The workers at issue in
21 this matter were laborers and cement finishers, requested by Newway and recruited and
22 provided by Contreras. The record does not appear to indicate that the workers were
23 specialists.
- 24 2. **Whether responsibility under the contracts between a labor contractor and an**
25 **employer pass from one labor contractor to another without material changes.** The
record in the instant case indicates that there were no written employment contracts for the
workers at issue. The record indicates that terms of employment were negotiated between
each worker and Contreras, with no input from Baja Concrete.
3. **Whether the premises and equipment of the employer are used for the work.** The
workers at issue in this matter did not work at the business address of Baja Concrete and
did not use any Baja Concrete equipment. All work was performed at the work sites where
Newway was a subcontractor to general contractors.

- 1 4. **Whether the employees had a business organization that could or did shift as a unit**
2 **from one worksite to another.** The record does not indicate that there was any such
3 business organization.
- 4 5. **Whether the work was piecework and not work that required initiative, judgment and**
5 **foresight (whether the service rendered requires a special skill).** The workers at issue
6 were general laborers and cement finishers. The record does not indicate that they rendered
7 services requiring a special skill.
- 8 6. **Whether the employee had an opportunity for profit or loss depending upon the**
9 **alleged employee’s managerial skill.** The workers at issue were general laborers and
10 cement finishers, and did not involve managerial skill. Supervision of the workers was
11 carried out by Newway personnel and to a lesser extent by Contreras.
- 12 7. **Whether there was permanence in the working relationship.** The record indicates that
13 the workers were hired for specific projects and there was no permanence in the working
14 relationship.
- 15 8. **Whether the service rendered is an integral part of the alleged employer’s business.**
16 The services rendered by the workers were essential to the work Newway was engaged to
17 perform at the work sites. To the extent that Baja Concrete’s business involves processing
18 of payroll and billing Newway for labor, such labor was important to Baja Concrete’s
19 business.

20 To a limited extent, factors 3 and 5 of the regulatory factors and factor 8 of the non-
21 regulatory factors may apply to Baja Concrete. The other ten factors do not apply to Baja
22 Concrete. In contrast, regulatory factors 1, 2, 4 and 5, and non-regulatory factors 1, 3, 6 and 8
23 appear to apply to Newway. Regulatory factors 1, 3, 4 and 5, and non-regulatory factors 2, 6 and
24 7 appear to apply to Contreras.

25 Recent caselaw is also informative on the issue of joint employment. In a case involving
alleged violations of the Washington Industrial Safety and Health Act of 1973 (“WISHA”),
although not in the context of wages, the Supreme Court of Washington focused on control of
the workers and control of the physical work environment as primary considerations in
determining employer liability under WISHA. *Dep’t of Labor & Indus. v. Tradesmen Int’l, LLC*,

1 198 Wn.2d 524, 541, 497 P.3d 353 (2021)². “Key factors include who has responsibility and
2 power to control the workers and work site and whether the alleged employer has the power to
3 hire, fire, or modify the employment conditions.” *Id* at 542. “The inquiry is whether the staffing
4 agencies retained substantial control over the workers and work environment such that they
5 could abate the relevant safety hazards.” *Id* at 543. The Supreme Court affirmed the Court of
6 Appeals decision that staffing agency Tradesmen Int’l LLC (“Tradesmen”) was not an employer
7 of workers that it had provided to a separate entity. *Id* at 545. “Tradesmen was responsible for
8 paying wages, determining compensation, and handling taxes, unemployment insurance and
9 workers’ compensation”. *Id* at 544. “There was no evidence that Tradesmen actively supervised
10 the workers, controlled the methods of work or work conditions, or provided on-site
11 supervision.” *Id*. In the instant case, Baja Concrete’s sole role regarding the workers was
12 processing payroll. As in the *Tradesmen* case, Baja Concrete did not supervise the workers,
13 control the methods of work or work conditions, or provide on-site supervision. As such, Baja
14 Concrete should not be regarded as a joint employer.
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16 17 **IV. RESPONSE TO MOTION FOR EXCLUSION OF EVIDENCE**

18 Baja Concrete does not oppose Machado’s Motion for Exclusion of Evidence, and has
19 filed a similar Motion to Exclude Evidence which seeks to exclude the same unsigned witness
20 statements sought to be excluded by Machado.
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22 Respectfully Submitted this 3rd day of August, 2022.
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25 ² The Tradesmen case was a King County Superior Court case, case no. 18-2-08751-7.

MDK LAW

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