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 NEWWAY FORMING INC.'S MOTION FOR SUMMARY JUDGMENT** **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 Newway Forming Inc.'s ("Newway") Motion for Summary Judgment.

II. EVIDENCE RELIED UPON

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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 previously in this matter.

III. AUTHORITY AND ARGUMENT

A. SUMMARY JUDGMENT GENERALLY

Case law construing Civil Rule 56 is extensive. The general proposition, however, is that summary judgment cannot be granted where there is an issue of material fact. *Gingrich v. Unigard Security Insurance Company,* 57 Wn. App. 424, 429, 788 P.2d 1096 (1990). Moreover, it is not simply the facts themselves which if controverted bar summary judgment. A central tenet of the body of authority relating to the application of Civil Rule 56 is that not only the facts, but any and all inferences therefrom, must be construed in favor of the non-moving party. *Hash Ex Rel Hash v. Children's Orthopedic Hospital & Medical Center,* 49 Wn. App. 211, 216-17, 741 P.2d 1039 (1987). Furthermore, in reviewing the evidence presented in support and opposition of a motion for summary judgment, the court may not weigh the credibility of testimony. *Hudesman v. Foley*, 73 Wn.2d 880, 887, 441 P.2d 532 (1968).

Here, there are genuine issues of material fact regarding whether Newway was an employer of the workers at issue in this matter, under the *Becerra Becerra* factor test used by the Courts in determining whether a person or an entity is a joint employer. The facts, and any and all inferences therefrom must be construed in favor of the non-moving party, in this case Baja Concrete.

B. ISSUES OF FACT, AND INFERENCES THEREFROM RAISED IN NEWWAY'S MOTION FOR SUMMARY JUDGMENT

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In their Motion for Summary Judgment, Newway actually raises a number of genuine issues of material fact and inferences therefrom which preclude the Court from granting its motion. We summarize some of these genuine issues here:

- Newway mistakenly identifies Roberto Soto Contreras ("Contreras") as an employee of Baja Concrete. (*Newway Motion at pg. 3, line 21*).
- Newway stated that if an employee was sick, they would call Contreras to pick them up, raising an inference that Contreras, and not Baja Concrete, was their employer. (*Newway Motion at pg. 4, lines 13-14*).
- Newway had a timeclock on the work site to track which workers were on site, raising an inference that Newway may be the employer. (*Newway Motion at pg. 4, lines 15-16, pg. 17, lines 15-16*).
- Newway points out that the Office of Labor Standards ("OLS") never once went to the project to observe the actual relationship between Newway, Baja or the workers, raising an inference that Newway may have been the employer. (*Newway Motion at pg. 4, lines 18-20)*.
- Newway states that actual control of the workers originated with the general contractor, Onni, which directed, on a daily basis, Newway and all other contractors, raising an inference that Baja Concrete was not the employer. (*Newway Motion at pg. 11, lines 6-8, lines 13-14*).

C. NEWWAY WAS AN EMPLOYER OF THE WORKERS UNDER THE BECERRA BECERRA FACTOR TEST

Here, we reiterate the correct construction of the *Becerra Becerra* factor test used by the Courts to determine whether a person or an entity is a joint employer. A comparison of the facts in *Becerra Becerra* to the facts in the instant matter necessarily leads to a conclusion that Baja Concrete was not an employer of the workers and that Newway met more of the applicable factors than did Baja Concrete. A central issue in *Becerra Becerra* was whether Fred Meyer Stores Inc. ("Fred Meyer") and Expert Janitorial LLC ("Expert Janitorial") were joint employers of certain janitors who worked night shifts cleaning Fred Meyer stores. *Becerra Becerra v. Expert Janitorial, LLC,* 181 Wn.2d 186, 189, 332 P.3d 415 (2014). Expert Janitorial acquired a management contract to provide Fred Meyer with outsourced facility maintenance. *Id at 190.*

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Under that contract, Expert Janitorial subcontracted with independent janitorial companies who provided, managed and supervised workers who would clean Fred Meyer stores, while neither Expert Janitorial nor Fred Meyer directly employed the workers. *Id*. Expert Janitorial and Fred Meyer agreed on the specific work the janitors would do and the specific price Fred Meyer would pay Expert Janitorial for completing the work to Fred Meyer's reasonable satisfaction. *Id.* The workers could not leave the store until Fred Meyer supervision signed off on their daily Work Order sheet. *Id at 193*.

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

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

Regulatory factors:

1. The nature and degree of control of the workers;
2. The degree of supervision, direct or indirect, of the work;
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;

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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 (a total of seven factors), 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.

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.*

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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 Newway leads would go to the office in the mornings and they would be instructed where their crews needed to go throughout the building during that day. (*Id at pg. 13, lines 9-12*). As such, **Machado, as an employee of Newway and acting on Newway's behalf, was exercising significant control over the workers**.

Ms. Forler-Grant testified that Baja Concrete's superintendent, Contreras was onsite at 1120 Denny Way. (*Id at pg. 14, lines 5-13*). However, as discussed above, Ms. De Armas, testifying for Baja Concrete, stated that **Contreras at no time was an employee of Baja**

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Concrete. There is nothing in the record to show that Contreras was an employee of Baja Concrete.

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

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

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

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

Notably, workers at the 1120 Denny Site who were apparently paid their wages by Baja Concrete indicated that they were employees of Newway. Attached as Exhibit 6 to the deposition transcript of Newway is a Site Safety Stand Down list which workers at the 1120 Denny Way site signed. (*Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway, pg. 28, lines 15-25, pg. 29, lines 1-4, pg. 30, lines 20-25, pg. 31, lines 1-5, Site Safety Stand Down attached as Ex. 6 to that dep.).* The Site Safety Stand Down sign-in list is 11 pages long, includes the signatures of numerous individuals who identified their employers, none of whom listed Baja

[1] See Tom Grant on Newway organizational chart, Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway.

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Concrete as their employer. Ms. Forler-Grant testified that she did not know why Baja Concrete workers signed the list and indicated Newway as their employer. (*Id at pg. 33, lines 9-22, pg. 34, lines 8-10*).

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

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

Regulatory factors:

1. **The nature and degree of control of the workers**. Baja Concrete did not have control of the workers. Newway's leads, Machado and Contreras did.

2. **The degree of supervision, direct or indirect, of the work**. Baja Concrete did not supervise, directly or indirectly, the work. These items were carried out by Newway personnel.

3. **The power to determine pay rates or the methods of payment of the workers**. Contreras set the wage rates of workers. Baja Concrete did have input into the methods of payment.

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 the work sites was determined by Newway and its personnel. Baja Concrete had no input into these factors.

5. **Preparation of payroll and the payment of wages**. Relying on information about wage rates and work hours provided by Contreras, Baja Concrete did process payroll for the workers.

Non-regulatory factors:

1. **Whether the work was a specialty job on the production line**. The workers at issue in this matter were laborers and cement finishers, requested by Newway and recruited and

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provided by Contreras. The record does not appear to indicate that the workers were specialists.

2. **Whether responsibility under the contracts between a labor contractor and an 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.

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 business organization.

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 were general laborers and cement finishers. The record does not indicate that they rendered services requiring a special skill.

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.

8. **Whether the service rendered is an integral part of the alleged employer's business**. The services rendered by the workers were essential to the work Newway was engaged to perform at the work sites. To the extent that Baja Concrete's business involves processing of payroll and billing Newway for labor, such labor was important to Baja Concrete's business.

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

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8 appear to apply to Newway, for a total of eight factors. Regulatory factors 1, 3, 4 and 5, and non-regulatory factors 2, 6 and 7 appear to apply to Contreras, who was acting as an independent contractor, and not as an employee of Baja Concrete.

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*, 198 Wn.2d 524, 541, 497 P.3d 353 (2021)[2]. "Key factors include who has responsibility and power to control the workers and work site and whether the alleged employer has the power to hire, fire, or modify the employment conditions." *Id* at 542. "The inquiry is whether the staffing agencies retained substantial control over the workers and work environment such that they could abate the relevant safety hazards." *Id* at 543. The Supreme Court affirmed the Court of Appeals decision that staffing agency Tradesmen Int'l LLC ("Tradesmen") was not an employer of workers that it had provided to a separate entity. *Id* at 545. "Tradesmen was responsible for paying wages, determining compensation, and handling taxes, unemployment insurance and 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.

[2] The Tradesmen case was a King County Superior Court case, case no. 18-2-08751-7.

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V. CONCLUSION

In the instant case, taking the facts and all inferences there from in the light most favorable to the non-moving party, Baja Concrete, reasonable can certainly conclude that Newway was an employer of the workers by applying the 13-factor *Becerra Becerra* test. The Court should therefore deny Newway Motion for Summary Judgment.

Respectfully Submitted this 3rd day of August, 2022.

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/s/ Alex T. Larkin

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