

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the matter of the Appeal of:) Hearing Examiner Files:
) No.: **LS-21-002**
BAJA CONCRETE USA CORP., ROBERTO) **LS-21-003**
CONTRERAS, NEWWAY FORMING INC.,) **LS-21-004**
and ANTONIO MACHADO)
) RESPONDENT CITY OF SEATTLE'S
from a Final Order of the Decision issued by) RESPONSE TO APPELLANTS BAJA
the Director, Seattle Office of Labor Standards) CONCRETE USA CORP., NEWWAY
) FORMING INC, AND ANTONIO
) MACHADO'S MOTIONS TO EXCLUDE
) EVIDENCE

I. INTRODUCTION

Appellant Baja Concrete USA Corp. (Baja) has moved for the exclusion of unsworn witness statements and other evidence in this case. Appellant Newway Forming Inc. (Newway), joined in Appellant Baja's motion. Appellant Antonio Machado (Machado) also moved to exclude evidence as part of his Motion for Summary Judgment. To the extent that each Appellant has made a timely Motion to Exclude Evidence, the Seattle Office of Labor Standards (City) responds herein. Because the City is not asking the Hearing Examiner to consider any of these unsworn statements for the purpose of its Motion for Summary Judgment or Responses to Appellants' Motions for Summary Judgment, this motion is premature. The Appellants' Motions are evidentiary motions for trial and are subject to OLS laying a foundation via testimony to aid in a ruling under the Hearing Examiner

1 Rules of Practice and Procedure. The City requests that the Hearing Examiner deny each Appellant's
2 Motion to Exclude Evidence without prejudice.

3 **II. EVIDENCE RELIED UPON**

4 The City relies on the pleadings, declarations, and attachments already on file with the
5 Hearing Examiner, including those filed with any Responses or Replies to opposing parties' Motions.

6 **III. ARGUMENT**

7 **A. The City has not presented the unsworn statements in support of its Motion for** 8 **Summary Judgement against Appellants, therefore the Appellants' Motions to** 9 **Exclude the evidence are premature.**

10 The City relied only upon sworn testimony in its Motion for Summary Judgment. It relied
11 upon deposition excerpts and associated exhibits, as well as sworn declarations. Any Motion to
12 Exclude is, at this time, premature and unnecessary. The untimeliness of this motion is underscored
13 by the authorities cited in Baja's motion. Baja cites to Hearing Examiner Rule (HER) 2.14(a) to
14 support its motion, however HER 2.14(a) specifically relates to "all witnesses testifying at hearing."
15 This rule governs the conduct of evidentiary hearings for which testimony is taken, which is the point
16 at which the Hearing Examiner should render a decision regarding the Appellants' motions to
17 exclude.

18 Baja also cites to SMC 3.02.020 and 3.02.090 in support of its motion, however these sections
19 simply define a "contested hearing" and the procedures the Hearing Examiner is to follow at such
20 hearings. SMC 3.02.090.J states that "[t]he examiner presiding at the hearing shall admit and give
21 probative effect to evidence which possesses probative value commonly accepted by reasonably
22 prudent man in the conduct of their affairs, and shall give effect to the rules of privilege recognized
23 by law." This wording supports HER 2.17(a), which states that "[e]vidence, including hearsay, may
be admitted if the Examiner determines that it is relevant to the issue on appeal, comes from a reliable
source, and has probative (proving) value." The subsection continues, "[s]uch evidence is that on

1 which responsible persons would commonly rely in the conduct of their important affairs.”

2 This rule allows for the admission of hearsay evidence so long as it “comes from a reliable
3 source” and is relevant to the case. SMC 3.02.090.M states that “[e]very party shall have the right
4 of cross examination of witnesses *who testify*, and shall have the right to submit rebuttal evidence.”
5 (Emphasis added.) This subsection’s language plainly states that the right of cross-examination is
6 reserved for witnesses who testify at the contested hearing.

7 Baja claims that since the case may be reviewed by Superior Court and the Rules of Evidence
8 apply in that forum, then the Hearing Examiner’s explicit rules should be disregarded. Baja cites no
9 authority for the proposition that a reviewing court should overturn an Order of the Hearing
10 Examiner who has followed the Hearing Examiner’s rules of procedure, which are authorized and
11 supported by SMC Chapter 3.02.

12 **B. Appellants failed to argue in support of the exclusion of any evidence other than the**
13 **unsworn statements.**

14 In addition to its motion regarding the unsworn statements, Baja also moved for the exclusion
15 of “all evidence, findings of fact and conclusions of law which rely on the Unsigned Witness
16 Statements, and all testimony, declarations and other evidence provided by any personnel of the OLS
17 which are based on the interviews conducted or which led to or are based on the Unsigned Witness
18 Statements.”¹ Baja cites no authority for the broad exclusion of all evidence which is “based on”
19 any other statements and makes no specific arguments to support this extreme request. It is also not
20 clear which evidentiary items Baja is moving to exclude. All of the evidence relied upon for City’s
21 Motion for Summary Judgment and responsive briefing are sworn statements, deposition excerpts,
22 or records provided by the Appellants during the investigation (many of which have also been filed
23 by the Appellants in support of their own motions), and there is no authority for excluding any

¹ Appellant Baja Concrete USA Corp’s Motion to Exclude Evidence, p. 2.

evidence of this sort.

IV. CONCLUSION

The City is not relying on unsworn statements in its Motion for Summary Judgment or in its Responses and Replies to the Appellants Motions. The authorities governing the admissibility of hearsay evidence relate to the conduct of evidentiary hearings. Therefore, the Hearing Examiner should deny the Appellants' Motions to Exclude any statement not yet offered as evidence.

DATED this 3rd day of August, 2022.

ANN DAVISON
Seattle City Attorney

By: /s/ Cindi Williams
Cindi Williams, WSBA #27654
Lorna Staten Sylvester, WSBA #29146
Assistant City Attorneys
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
Email: lorna.sylvester@seattle.gov
Email: cindi.williams@seattle.gov
Attorneys for Respondents,
The City of Seattle and
The Seattle Office of Labor Standards

1 **CERTIFICATE OF SERVICE**

2 I hereby certify under penalty of perjury under the laws of the State of Washington that on
3 this date, I caused to be served a true and correct copy of the foregoing document, **City's Response to**
4 **Appellants Baja Concrete USA Corp., Newway Forming, Inc., and Antonio Machado's Motions**
5 **to Exclude Evidence**, on the parties listed below and in the manner indicated:

6 Jason R. Wandler (x) Email: wandler@oles.com
7 Nicole Wolfe (x) Email: wolfe@oles.com
7 701 Pike Street, Suite 1700 (x) Email: stroeder@oles.com
8 Seattle, WA 98101 (x) Email: smith@oles.com
8 *Attorneys for Appellant,*
9 *Newway Forming Inc.*

10 Mark D. Kimball (x) Email: mkimball@mdklaw.com
11 Alex T. Larkin (x) Email: alarkin@mdklaw.com
12 MDK Law (x) Email: paulo@mdklaw.com
13 777 108th Ave NE, Suite 2000
14 Bellevue, WA 98004
15 *Attorneys for Appellant*
16 *Baja Concrete.*

17 Aaron Rocke (x) Email: aaron@rockelaw.com
18 Sara Kincaid (x) Email: sara@rockelaw.com
19 Rocke Law Group, PLLC (x) Email: alex@rockelaw.com
20 101 Yesler Way, Suite 603 (x) Email: tori@rockelaw.com
21 Seattle, WA 98104
22 *Attorney for Appellant,*
23 *Antonio Machado*

the foregoing being the last known mailing address and email addresses of the above-named parties.

DATED this 3rd day of August, 2022, at Seattle, Washington.

20 /s/ Sheala Anderson
21 SHEALA ANDERSON