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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.

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

**APPELLANT BAJA CONCRETE USA  
CORP.'S REPLY TO RESPONDENT CITY OF  
SEATTLE'S RESPONSE TO BAJA CONCRETE'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

**HER 2.16, CR 56**

Department Reference: 2020-00186-LS

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18 **I. INTRODUCTION**

19 On July 1, 2022, Appellant Baja Concrete USA Corp. ("Baja Concrete") submitted a  
20 Motion for Partial Summary Judgment ("Summary Judgment Motion") in this matter seeking an  
21 Order declaring that Baja Concrete is not an employer of the workers at issue in this matter.  
22 Respondent City of Seattle filed a response to the Summary Judgment Motion dated August 3,  
23 2022 ("Response"). Baja Concrete now submits this brief in reply to the Response. The factual  
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1 background of this matter is explained in the Summary Judgment Motion. In the interest of  
2 brevity, that discussion is not repeated in its entirety here.

## 3 **II. EVIDENCE RELIED UPON**

4 The Hearing Examiner of the City of Seattle (“Hearing Examiner”) is asked to rely upon  
5 the Summary Judgment Motion and the Declaration of Alex T. Larkin in support of that motion.  
6 The Hearing Examiner is also asked to rely on the Declaration of Laura Hurley, which was filed  
7 in this matter by the City of Seattle in support of its motion for summary judgment. The  
8 declaration of Laura Hurley includes, as Exhibit A, an English translation of a declaration of  
9 Jonathan Ivan Parra Ponce (“Mr. Ponce”), who is apparently identified as Ivan A. Ponce in  
10 Attachment B to the Seattle Office of Labor Standards (“OLS”) Findings of Fact, Determination  
11 and Final Order dated August 25, 2021 (the “Determination”), which is the subject of this appeal.  
12 Further, the Hearing Examiner is asked to rely on Baja Concrete’s Motion to Exclude Evidence  
13 which was filed on July 1, 2022, in this matter.

## 14 **III. DISCUSSION AND AUTHORITY**

### 15 **A. Much of the OLS’ Evidence Should be Excluded**

16 In their Response, the City of Seattle summarily states that the OLS “gathered substantial  
17 evidence which led to the conclusion that Baja employed the workers.” (*see Response at pg. 1,*  
18 *lines 22-23*). However, as explained in Baja Concrete’s Motion to Exclude Evidence, a very  
19 substantial part of the evidence the OLS relies on is comprised of inadmissible, unreliable,  
20 unsigned witness statements.

### 21 **B. The Declaration of Mr. Ponce Supports Baja Concrete’s Argument That it Was Not** 22 **an Employer**

23 Mr. Ponce, one of the workers listed in the Determination (the “Workers”), makes  
24 numerous statements in his declaration which supports Baja Concrete’s argument that it was not  
25 an employer of the workers, and that Newway Forming Inc. (“Newway”) and Roberto Contreras

1 (“Contreras”) satisfy the criteria for a finding that they were joint employers of the Workers.

2 Examples of Mr. Ponce’s statements include the following:

- 3 - “Multiple workers would pile into Roberto’s (Contreras’) van to commute between  
4 their apartments in the Lynnwood area to the worksite in downtown Seattle.” (*Hurley  
Decl., Ex. A – Ponce Decl. at ¶9*).
- 5 - “At the worksite, Tony (Antonio Machado) was the boss. He was always present. He  
6 told the laborers what to do, he told the concrete people where to pour concrete, he  
7 coordinated workers, and he supervised everyone. (*Hurley Decl., Ex. A – Ponce  
Decl. at ¶14*).
- 8 - “Baja workers were also supervised by various Newway foremen. A Newway  
9 foreman named Pedro supervised the concrete workers, and a Newway foreman  
10 named Victor supervised the laborers. There was also a Newway foreman named  
Mario. Both Newway foremen and Tony were responsible for making sure the work  
was being done correctly.” (*Hurley Decl., Ex. A – Ponce Decl. at ¶15*).
- 11 - “To the extent that Roberto supervised the Baja workers, he was taking orders from  
12 Tony. When Roberto was away, Tony would supervise the Baja workers.” (*Hurley  
Decl., Ex. A – Ponce Decl. at ¶16*).
- 13 - “Tony had the authority to hire and fire workers. He would tell Roberto if he needed  
14 more workers or wanted to let someone go.” (*Hurley Decl., Ex. A – Ponce Decl. at  
¶17*).
- 15 - “Workers on Baja’s payroll were required to attend regular safety meetings and were  
16 told to mark their employer as Newway on the sign-in sheets for these safety  
17 meetings.” (*Hurley Decl., Ex. A – Ponce Decl. at ¶18*).
- 18 - “Roberto would tell the workers when to begin and end the workday, because he was  
19 the one transporting them to and from the worksite, but I imagine that Roberto was  
20 taking orders on start and end times from someone at Newway, because we always  
started and ended at the same time as the Newway workers.” (*Hurley Decl., Ex. A –  
Ponce Decl. at ¶19*).

21 The above statements, provided under penalty of perjury, clearly support the argument  
22 that Newway and Contreras were employers of the workers. The only mention of Baja Concrete  
23 relates to payroll processing, which is only one factor, out of 13, under the *Becerra* joint  
24 employer analysis. Out of the other twelve factors, only two more are even arguably present  
25

1 with regard to Baja Concrete. An important fact that the OLS and other parties in this matter  
2 appear to miss is that Contreras was, at no time, an employee of Baja Concrete.

3 C. The OLS' Reliance on the Seattle Human Rights Rules ("SHRR") for its Finding of  
4 Joint Employment Fails

5 The OLS relies on Section 90-045(3) of the OLS Seattle Human Rights Rules ("SHRR")  
6 for its finding that Baja Concrete was a joint employer of the Workers. (*see Response at pg. 7*).  
7 Such reliance fails because none of the three criteria set out in the provision are present in this  
8 case. SHRR 90-045(3) states, in relevant part:

9 "[a] joint employment relationship generally will be considered to  
10 exist in situations such as:

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

23 There is nothing in the record, and the OLS has produced no evidence, to support a  
24 finding that any of the three above criteria set out in SHRR 90-045(3) exist in this case. Baja  
25 Concrete did not share employees with Newway or with Contreras. Nothing in the record shows  
that Baja Concrete, Newway and Contreras acted directly or indirectly in the interest of the  
other(s). Baja Concrete, Newway and Contreras are completely dissociated from each other.

24 D. The Becerra Legal Doctrine of Joint Employment

1 The doctrine of joint employment under *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186,  
2 332 P.3d 415 (2014) and *Torres-Lopez v. May*, 111 F.3d 633, 639-640, 1997 U.S. App. LEXIS 6939,  
3 1997 is thoroughly discussed in the Summary Judgment Motion, and is discussed only briefly here.

4 In a CR 30(b)(6) deposition of Baja Concrete in this matter, Ms. Mercedes De Armas  
5 testified that Contreras is not, and never was, an employee of Baja Concrete. (*Decl. of Larkin at*  
6 *¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 169, lines 17-21*). She further testified that  
7 Contreras was the boss of the Workers, in terms of management and hiring. (*Decl. of Larkin at*  
8 *¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 170, lines 12-22*). Contreras determined the  
9 work hours of the Workers. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg.*  
10 *77, lines 15-17*). Baja Concrete did not determine when Workers would work overtime, did not  
11 set the pace of work, and did not communicate with Workers about when they needed to report  
12 to work. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 77, line 21 to pg. 78,*  
13 *line 1*).

14  
15 In a CR 30(b)(6) deposition of Newway in this matter, Ms. Kwynne Forler-Grant testified  
16 that Appellant Antonio Machado (“Machado”) was the general foreman for Newway for the  
17 1120 Denny Way project. (*Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway, pg. 10, lines*  
18 *11-24 (organizational chart attached as Ex. 2 to that dep.), and pg. 12, lines 15-20*). Machado  
19 oversaw everybody on the organizational chart for the 1120 Denny Way project. *Id.* Machado  
20 delegated oversight of subcontractors to Newway leads who are listed on the organizational  
21 chart. (*Id at pg. 12, line 23 to pg. 13, line 5*). The Newway leads would go to the office in the  
22 mornings and they would be instructed where their crews needed to go throughout the building  
23 during that day. (*Id at pg. 13, lines 9-12*).

1 Regarding the reporting of workers hours and Baja Concrete's invoicing of Newway for  
2 those hours, the process involved weekly meetings between Tom Grant<sup>1</sup> of Newway and  
3 Contreras at which the two of them would go through timecards, and Contreras would generate  
4 invoices. (*Id at pg. 18, line 12 to pg. 19, line 1, and g. 27, lines 6-16*). Tom Grant would decide  
5 how many laborers were needed, and would inform Contreras. (*Id at pg. 24, lines 4-16*).  
6 Regarding working additional hours, Newway personnel were the decision makers. (*Id at pg. 71,*  
7 *lines 20-23*).

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

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

16 Applying the above facts, as well as the Declaration of Mr. Ponce, to the 13 *Becerra*  
17 factors yields the following.

18 Regulatory factors:

- 19
- 20 1. **The nature and degree of control of the workers.** Baja Concrete did not have control of  
21 the workers. Newway's leads, Machado and Contreras did.
  - 22 2. **The degree of supervision, direct or indirect, of the work.** Baja Concrete did not  
23 supervise, directly or indirectly, the work. These items were carried out by Newway  
24 personnel.

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25 <sup>1</sup> See Tom Grant on Newway organizational chart, Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway.

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

11      Non-regulatory factors:

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

- 1 7. **Whether there was permanence in the working relationship.** The record indicates that  
2 the workers were hired for specific projects and there was no permanence in the working  
3 relationship.  
4 8. **Whether the service rendered is an integral part of the alleged employer's business.**  
5 The services rendered by the workers were essential to the work Newway was engaged to  
6 perform at the work sites. To the extent that Baja Concrete's business involves processing  
7 of payroll and billing Newway for labor, such labor was important to Baja Concrete's  
8 business.

9 Of the above 13 factors considered by the courts under *Becerra*, at most, three of them apply in  
10 the context of the workers and Baja Concrete.

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)<sup>2</sup>.

#### 17 IV. CONCLUSION

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

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

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25 <sup>2</sup> The Tradesmen case was a King County Superior Court case, case no. 18-2-08751-7.



1  
2 Respectfully Submitted this 17th day of August, 2022.

3  
4 MDK LAW

5 */s/ Mark D. Kimball*

6 */s/ Alex T. Larkin*

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