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7 BEFORE THE HEARING EXAMINER
8 CITY OF SEATTLE
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10 In the Matter of the Appeal of:

11 BAJA CONCRETE USA CORP., ROBERTO
12 CONTRERAS, NEWWAY FORMING, INC.,
13 and ANTONIO MACHADO

14 from a Final Order of the Decision issued
15 by the Director, Seattle Office of Labor Standards

Hearing Examiner File Nos.:

LS-21-002
LS-21-003
LS-21-004

**APPELLANT NEWWAY FORMING,
INC.'S REPLY TO BAJA'S OPPOSITION**

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17 **I. REPLY**

18 Baja is attempting to distance itself from the reality of this case by deflecting the blame of
19 the alleged labor violations onto Newway. However, the uncontroverted evidence plainly demonstrates
20 that Baja, not Newway, employed the workers. In fact, Baja considered the workers to be its employees
21 up until this appeal. This is clearly evidenced by a document titled "BAJA CONCRETE USA CORP
22 Employee Details," provided by Baja, which identifies all the workers, their position, address, location,
23 rate pay, and hired date. See Baja Concrete USA Corp Employee Details Sheet, Bates No.
24 APPBAJA0004, attached as **Exhibit 1** to Declaration of Nicole E. Wolfe ("Wolfe Dec.").

25 Baja argues that there are genuine issues of material fact that preclude granting
26 Newway's motion for summary judgment, but Newway's motion is directed at the City of

1 Seattle's allegations, not Baja. While the evidence is clear that Baja employed the workers in
2 question and was responsible for the allegations asserted by the City, Newway will let Baja
3 raise its own objections to the City's allegations. The argument presented by Baja in response
4 to Newway's motion for summary judgment are nonsensical, and the "questions" of fact Baja
5 "cites" actually support Newway's motion vis-à-vis the City's claims.

6 Specifically, Baja claims Newway's motion should be denied because 1) Newway
7 mistakenly identifies Roberto Soto Contreras as an employee of Baja; 2) Newway stated that
8 if a Baja employee was sick, they would call Contreras to pick them up; 3) Newway had a time
9 clock on the work site; 4) Newway points out that OLS never once went to the project; and 5)
10 Newway states that actual control of the Baja workers originated with the general contractor.
11 None of these facts weigh against Newway's motion for summary judgment asserted in
12 response to the City's misplaced allegation that Newway is a joint employer of Baja's workers
13 and Baja's Response is simply a distraction.

14 As outlined in detail in Newway's motion for summary judgment, applying the reliable
15 facts to the factors outlined in *Becerra v. Expert Janitorial, LLC* 181 Wn.2d 186 (2014) shows
16 that Newway was not a joint employer of Baja's workers. Despite this, the errors of Baja's
17 arguments in its opposition must be addressed.

18 1. Roberto Soto Contreras was Hired and Employed by Baja, not Newway

19 Although the evidence reveals the opposite, Baja disputes that it actually employed
20 Roberto Soto Contreras. Baja hired and paid Roberto. Roberto reported directly to Baja and is
21 a partner of Baja LTD, Baja USA's Canadian affiliate. See 30(b)6 Deposition of Baja at
22 130:14-23, attached as **Exhibit 5** to Wolfe Dec. Even more, Roberto held himself out as an
23 employee of Baja USA, where his name is listed on a Baja Concrete USA business card:
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See SEATTLE-OLS-0985, attached as **Exhibit 2** to Wolfe Dec.

Further, Newway's 30(b)6 representative, who has been employed with Newway for 22 years and has been a senior manager for 10 years, understood that Roberto was Baja's superintendent. See 30(b)6 Deposition of Newway at 14:5-13, attached as **Exhibit 3** to Wolfe Dec. Regardless, whether Baja wants to argue Roberto Soto Contreras isn't a Baja employee is immaterial to Newway's argument. What is absolutely clear and undisputed is that Newway did not hire and/or employ Roberto Soto Contreras. This undisputed fact only supports Newway's position that it was not a joint employer.

2. Baja, not Newway, Controlled the Workers

It was Baja and Roberto Soto Contreras who controlled the Baja workers. It was not until this appeal, and Baja's counsels' involvement, that Baja decided to argue that its workers were not their employees. The evidence, however, clearly demonstrates the contrary. Baja listed the workers as its own employees on an employee detail sheet. See Baja Concrete USA Corp Employee Details Sheet, Bates No. APPBAJA0004, attached as **Exhibit 1** to Wolfe Dec.

1 Baja is listed as the employer on the workers' paystubs. See Deposition of Mercedes De Armas
2 at 105:4-21, attached as **Exhibit 4** to Wolfe Dec. Even more, Baja frequently referred to the
3 workers as its "employees" during the OLS investigation. Now, Baja is trying to divert its
4 responsibility by claiming that it was Newway who actually employed the workers, despite all
5 evidence and reliable testimony stating the opposite. In fact, there is not one tangible piece of
6 contemporary documentary evidence that supports Baja's new position. The only support Baja
7 offers is the newly formulated argument of its counsel.

8 The majority of testimony that Baja provides in support of its opposition is from Baja's
9 30(b)6 deponent, Mercedes De Armas, who in sharp contrast to Newway's designated
10 deponent, has never been an employee of Baja (the company who she is speaking on behalf
11 of) and had very limited knowledge regarding Baja's operations. Ms. De Armas operates her
12 own accounting and payroll processing company. Baja is her client, not her employer. Her
13 only connection to Baja is limited to her company's payroll processing and performance of
14 "some kind of" accounting for them. See 30(b)6 Deposition of Baja at 15: 16-22, attached as
15 **Exhibit 5** to Wolfe Dec. Despite not being involved with Baja's day-to-day business, Ms. De
16 Armas only spent about "10, 15 minutes" preparing for the deposition. See 30(b)6 Deposition
17 of Baja at 12:5-11-20, attached as **Exhibit 5** to Wolfe Dec. During the deposition, Ms. De
18 Armas revealed that she had no knowledge about Newway and Baja's formation and had never
19 been to the site. See 30(b)6 Deposition of Baja at 86:22-24; 135:17-19, attached as **Exhibit 5**
20 to Wolfe Dec. Further, when asked to describe Roberto's interaction with the workers on the
21 jobsite, she testified that she didn't know. *Id.* at 75:14-18. Mercedes De Armas' pure
22 speculation regarding Newway's relationship to the Baja workers should not be considered in
23 determining whether Newway was a joint employer.

24 Baja's motion essentially ignores all the trustworthy deposition testimony that
25 establishes Newway was not an employer of the subject Baja employees. Further, like the
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1 City's motions, the testimony paraphrased by Baja does not even accurately reflect the actual
2 testimony. For example, Baja claims that "Contreras, together with Newway" determined
3 when Baja workers would work overtime, set the pace of work, and communicated with Baja
4 workers about when they needed to report to work. This is blatantly untrue and not supported
5 by testimony.¹ There is no reliable testimony to establish that Newway directed the Baja
6 worker's day-to-day activities. In fact, all dependable testimony states the opposite. Newway
7 had no authority over in determining how many hours were available to Baja workers,
8 determining compensation, authorizing sick days, or processing payroll. *See* 30(b)6 Deposition
9 of Newway Forming at 74:16-19; 75:15-24; 76:5-16, attached as **Exhibit 3** to Wolfe Dec. It
10 was Baja, not Newway, who determined how the Baja workers performed their work:

11 Q: Is it the subcontractor's responsibility to determine how they perform that
12 scope of work?

13 A: Yes.

14 Q: Is it their responsibility to determine how many people they need to complete
15 that scope of work?

16 A: Yes.

17 Q: Does Newway have any say in the means and methods and the labor that
18 goes into a subcontractor's performance of their scope of work?

19 A: No.

20 *See* 30(b)6 Deposition of Newway Forming at 111:21- 112:6, attached as **Exhibit 3** to
21 Wolfe Dec.

22 3. Baja and Roberto Supervised the Baja Workers

23 Baja and Roberto were the supervisors of the Baja workers. Baja admitted in its
24 deposition that it played a supervisory role: "*obviously, Baja Concrete USA is the one in charge*
25 *here, right?'*" *See* 30(b)6 Deposition of Baja at 164:24-165:15, attached as **Exhibit 5** to Wolfe
26 Dec. By contrast, Newway did not supervise the workers – the only "supervisory function"

¹ Ms. De Armas testified that "Roberto would handle" with Newway when workers needed to report to work. Newway disputes this allegation as Ms. De Armas has no actual knowledge regarding interactions at the site and is purely speculating.

1 Newway performed was requiring workers to attend safety meetings, which was in fact a
2 requirement of the general contractor, Onni. This is a typical contractor-subcontractor
3 relationship as worksite safety meetings are a critical component of construction sites. It should
4 also be noted that all subcontractors attended safety meetings – not just Baja workers. See
5 30(b)6 deposition testimony of Newway at 79:15-19, attached as **Exhibit 3** to Wolfe Dec.
6 There is no evidence that Newway supervised the day-to-day operations of the workers.

7 4. Baja and Roberto Determined Pay Rates and Methods of Payment

8 Baja does not allege, nor provide any evidence that Newway determined the pay rates
9 and methods of payment. However, there is evidence that Baja determined the pay rates of the
10 Baja workers, as they were on Baja's payroll and received their pay from Baja. See 30(b)6
11 Deposition of Baja at 50:24-51:11; 96:18-20, attached as **Exhibit 5** to Wolfe Dec.

12 5. Baja and Roberto Hired and Fired Workers

13 Again, Baja does not provide any evidence to demonstrate that Newway hired or fired
14 the Baja workers – this was done by Baja and Roberto. Roberto selected candidates and made
15 decisions about hiring and firing with Baja. See 30(b)6 deposition of Baja at 144:14-145:15
16 attached as **Exhibit 5** to Wolfe Dec.

17 Q: And what else did Baja Concrete do?

18 **A: They would hire individuals. They set up their housing. They had**
19 **people in apartments. They processed their tax documents. They did a**
20 **few other things.**

21 See 30(b)(6) Deposition of City of Seattle at 38:18-23, attached as **Exhibit 6** to Wolfe
22 Dec.

23 In contrast, the evidence is clear that Newway played no role in hiring or firing the Baja
24 workers. See 30(b)6 Deposition of Newway Forming at 85:12-23; 89:9-12; 90:3-12, attached
25 as **Exhibit 3** to Wolfe Dec.
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1 6. Baja Processed the Payroll

2 Baja admits that it processed the payroll for all of the subject Baja workers, and there
3 is no evidence that Newway participate in any way in that process. See 30(b)6 deposition of
4 Baja at p. 110:14-18 attached as **Exhibit 5** to Wolfe Dec. Baja further admitted that there were
5 no Newway employees on Baja's payroll: "*As far as we know, no employees of Newway were*
6 *in this payroll. Only Baja employees. And Roberto will report employees that were to be paid*
7 *by Baja payroll.*" *Id.* at 13-16.

8 7. The Non-Regulatory Factors Show that Baja/Contreras, not Newway, Employed the
9 Baja Workers.

10 Balancing the remaining factors clearly shows that Baja - not Newway - employed the
11 workers subject to the City's allegations. Baja admits, and Newway agrees, that the work
12 performed was not a specialty job. Baja does not provide any evidence that the Baja workers'
13 terms of the employment were ever negotiated with Newway (because they weren't). The Baja
14 workers supplied their own tools (although Baja most likely provided them because it
15 occasionally deducted the cost of those tools from their employees' paychecks). Baja – through
16 Roberto – provided housing, which was also deducted from the Baja workers' paychecks. See
17 30(b)6 deposition of Baja at 41:5-25, attached as **Exhibit 5** to Wolfe Dec. Nor is the use of
18 Newway equipment a determining factor. Subcontractors and their employees often times used
19 Newway's larger equipment (such as scissor lifts), which is typical in the construction industry.
20 The premises were owned by Onni, not Newway. The work was not an integral part of
21 Newway's business, as Newway could perform the work itself or use other subcontractors. The
22 Baja workers were general laborers and as Baja admits, there was no permanence in the
23 working relationship between Newway and Baja's workers.

24 Finally, Baja cites to *Dep't of Lab. & Indus. v. Tradesmen Int'l, LLC*, 198 Wash. 2d
25 524, 542, 497 P.3d 353, 362–63 (2021), whereby the Washington Supreme Court stated: "...
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1 key factors include who has responsibility and power to control the workers and work site and
2 whether the alleged employer has the power to hire, fire, or modify the employment conditions.
3 This is particularly true in the joint employment context where the putative employer is the
4 primary employer as opposed to the host employer.” Here, the evidence demonstrates that Baja
5 had responsibility and power to control the Baja workers. This was admitted by Baja -
6 “obviously, Baja Concrete USA is the one in charge here, right?” See 30(b)6 Deposition of
7 Baja at 164:24-165:15, attached as **Exhibit 5** to Wolfe Dec. Further, it was Baja - not Newway,
8 who had the power to hire and fire the Baja workers. See 30(b)6 Deposition of Newway
9 Forming at 85:12-23; 89:9-12; 90:3-12, attached as **Exhibit 3** to Wolfe Dec.; See 30(b)(6)
10 Deposition of City of Seattle (Daron Williams) at 69:3-5, attached as **Exhibit 6** to Wolfe Dec.
11 The critical factors discussed in the *Tradesmen* case cited by Baja establish that Baja was the
12 employer of the Baja workers.

13 It is absolutely clear that Baja employed the workers subject to the City’s wage theft
14 claims. It is also clear that Baja considered itself an employer of the employees up until this
15 appeal. Now, it is attempting to distance itself from the reality by misplacing responsibility on
16 Newway. However, analyzing the reliable facts and applying them to the *Becerra* factors
17 demonstrates that Newway was not a joint employer of the subject workers.

18 DATED this 17th day of August, 2022.

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CERTIFICATE OF SERVICE

The undersigned certified under penalty of perjury under the laws of the state of Washington that on this 17th day of August, 2022, I caused true and correct copies of the foregoing document to be delivered to the following parties and in the manner indicated below:

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SIGNED at Seattle, Washington this 17th day of August, 2022.

/s/ Catherine A. Trimbour
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