

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:

) Hearing Examiner File:

) No.: LS-21-002

BAJA CONCRETE USA CORP., ROBERTO)

LS-21-003

CONTRERAS, NEWWAY FORMING INC.,)

LS-21-004

and ANTONIO MACHADO

)

) CITY'S RESPONSE TO APPELLANT

From a Final Order of the Decision issued by

) BAJA CONCRETE USA CORP.,

the Director, Seattle Office of Labor Standards

) PREHEARING MOTIONS TO EXCLUDE

) EVIDENCE

)

)

I. INTRODUCTION AND RELIEF REQUESTED

Respondents, the City of Seattle and the Seattle Office of Labor Standards (collectively "City") ask the Hearing Examiner to deny Appellant Baja Concrete USA Corp's ("Baja Concrete") Motions to Exclude Evidence pursuant to Hearing Examiner General Rule ("HER") 3.18. All of Baja Concrete's motions have no basis in the law, if any provided and should be denied.

II. FACTS RELEVANT TO THIS RESPONSE

A. Relevant Evidence Should Not Be Excluded

The appellants, Baja Concrete and Newway Forming Incorporated ("Newway") had litigation against each other in case no 22-2-04760-7 in King County Superior Court. The cases

1 allege money being owed by one party to the other. A counterclaim was also made by Appellant
2 Newway against Appellant Baja Concrete. These cases may be ongoing and could affect the
3 outcome of the current case. Notwithstanding the outcome of these cases, the two complaints by
4 Baja Concrete and the counterclaim by Newway are relevant in this case to show their working
5 relationship and for rebuttal purposes.

6 **B. Exhibit No. 81 is a Relevant Email between Appellants Newway and Baja Concrete**

7 The email exchange between Appellant Newway and Appellant Baja Concrete pertains to
8 their discussion about Baja Concrete and/or Newway employees. This information is relevant to
9 show the Appellants Baja Concrete's and Newway's employment relationship and interactions in
10 regard to the 53 employees that are seeking financial remedies. It also shows that a Newway
11 employee identified that the relationship between Newway and Baja was not a typical contracting
12 relationship.

13 **C. Exhibit No. 92 is Provides Relevant Information about the "Governor" of Baja**
14 **Concrete**

15 Baja Concrete is a party that appealed the findings of the Office of Labor Standards Hearing
16 Examiner. The "governor" of Baja Concrete's business information was produced by the City as
17 Exhibit 92 in the City's Witness and Exhibit List. This information provides a complete picture of
18 other businesses that Appellant Baja Concrete may be involved in. This exhibit is also relevant for
19 rebuttal purposes.

20 **D. Interview Statements are of Testifying Witnesses**

21 Seattle Office of Labor Standards Investigators follow a standard procedure to obtain written
22 Interview Statements from material witnesses. The City will present testimony that describes this
23 procedure in detail. Investigators attempt to include as many relevant details as possible and strive

1 to draft an accurate reflection of the witnesses' statements. Accuracy is critical regardless of whether
2 or not the details of the statement support a finding of discrimination or retaliation.

3 The interview statements offered by the City are for witnesses that will be testifying at the
4 hearing that starts on Monday, June 12, 2023. The interviews of these witnesses were conducted by
5 investigators of the Office of Labor Standards as part of their investigation to determine if the
6 appellants committed any violations. The interviews were summarized in an Interview Statement,
7 pursuant to the typical practice for investigations by the Office of Labor Standards. These interview
8 statements can be used to refresh the memory of the witnesses that are testifying.

9 III. ARGUMENT

10 The Washington Rules of Evidence allows trial courts to have discretion to decide whether
11 to admit or exclude evidence. *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 686 P.2d 1102. The
12 granting or denial of a motion in limine is within the discretion of the trial court, subject only to
13 review for abuse. *Id.* The Exhibits offered by the City – numbers 43-45, 82, 91 and all unsigned
14 witness statements are admissible after an adequate foundation is laid by the proffering party. *United*
15 *States v. Chang*, 207 F.3d 1169, 1176 (9th Cir. 2000). Evidence that is relevant is admissible under
16 the Hearing Examiner General Rule 3.18(a) which states:

17 (a) Evidence, including hearsay, may be admitted if the Examiner determines that it is
18 relevant, comes from a reliable source, and has probative (proving) value. Such
19 evidence is that on which responsible persons would commonly rely in the conduct
20 of their important affairs

21 A finding that the City's exhibits are relevant if determined that they have probative
22 (proving) value will allow them to be admissible.
23 //

//

//

1 The Washington Rules of Evidence also allows the trial court to use a writing to refresh the
2 memory of a witness that is testifying. Wash. R. Evid. 612. The unsigned interview statements will
3 be used for this very purpose.

4 **A. Evidence Used to Rebut a Defense or for Relevance May Be Admitted under Seattle**
5 **Hearing Examiner General Rule 3.18(a).**

6 The Hearing Examiner may admit documents from King County Superior Court (“KCSC”) case no. 22-2-04760-7, but before admitting, the trial court must analyze on the record the purpose
7 for admitting the evidence and the relevance of the evidence to the City’s case or to rebut a defense.
8 *State v. Smith*, 106 Wn.2d 772, 775-76, 725 P.2d 951 (1986). In this case, the KCSC case is used
9 for other purposes. The City plans to use documents from KCSC case number 22-2-04760-7 as
10 exhibits for rebuttal purposes of Appellants Baja Concrete or Newway.

11 The Hearing Examiner may admit the email exchanges between employees of the Appellants
12 because they are relevant. The emails will not be utilized in the terms described by Appellant Baja
13 Concrete. Fraud is not what the City is seeking to prove. The City will utilize the email thread to
14 show the Appellants relationship with each other and their joint employment relationship.

15 The information provided as Exhibit #92 showing Claudia Penunuri’s employment
16 information as a realtor is a relevant exhibit. Ms. Penunuri is a realtor and her contact information
17 shown in the exhibit is listed on a website and shown for business purposes. She is considered “the
18 governor of Appellant Baja Concrete USA Corp.” Because she is the leader of Baja Corp, the
19 information provided in the City’s Exhibit #92 is relevant and can be used for rebuttal purposes.

20 **B. All Witnesses with Unsigned Witness Statements Are Testifying at the Hearing**

21 Appellant Baja Concrete implies that the City will ask to admit unsigned witness statements
22 of witnesses that will not testify. This is an assumption and untrue. The City will call witnesses to
23

1 testify that have unsigned witness statements and some witnesses have no interview or written
2 statements at all. Appellant Baja Concrete had the opportunity to conduct depositions with all of the
3 City's witnesses but chose not to do so. Again, the City's exhibits which contain unsigned witness
4 statements are of witnesses that will testify during this contested hearing. The City will use these
5 witness statements to refresh the memory of those witnesses that provided the statements.

6 **V. CONCLUSION**

7 The City respectfully requests that the Hearing Examiner deny the Appellant Baja Concrete's
8 motion to exclude the City's Exhibits #43-45, 81, 92 and all unsigned witness statements for which
9 the witness is not testifying at the hearing.

10 DATED this 9th day of June 2023.

11
12 ANN DAVISON
13 Seattle City Attorney

14 By: /S/TRINA PRIDGEON
15 **Cindi D. Williams, WSBA# 27654**
16 **Lorna S. Sylvester, WSBA, #29146**
17 **Trina L. Pridgeon, WSBA #54697**
18 Assistant City Attorneys
19 705 Fifth Avenue, Suite 2050
20 Seattle, Washington 98104-7097
21 *Attorneys for Respondent,*
22 *The Seattle Office of Labor Standards*
23

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23

Nicole Wolfe
701 Pike Street, Suite 1700
Seattle, WA 98101
*Attorneys for Appellant,
Newway Forming Inc.*

(x) Email: wolfe@oles.com

(x) Email: mkimball@mdklaw.com

(x) Email: alarkin@mdklaw.com

(x) Email: aaron@rockelaw.com

(x) Email: allen@rockelaw.com

DATED this 9th day of June 2023, at Seattle, Washington.

Natasha Iquina