

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)
) DECLARATION OF LABOR
from a Final Order of the Decision issued by) STANDARDS ENFORCEMENT
the Director, Seattle Office of Labor Standards) MANAGER KATIE JO KEPPINGER
_____)

I, Katie Jo Keppinger, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

1. I am employed by the City of Seattle, Office of Labor Standards (“OLS”) as an Enforcement Manager. I have held this position since June 2018.
2. I possess personal knowledge of the matters set forth in this declaration. I am competent to testify to the same, and if called to testify my testimony would be as stated in this declaration.
3. I was the Director’s designee for the purpose of approving the Findings of Fact, Determination and Final Order (“Determination”) for this case. I was also the Director’s designee for purposes of calculating penalties, back wages, interest, and liquidated damages in the investigation of the Appellants in this case.
4. OLS conducted an investigation of the Appellants, after which OLS issued a Determination on August 5, 2021. In the Determination, OLS concluded that Appellants, together with Respondent Roberto Soto Contreras, violated the following Ordinances:
 - a. SMC 14.20.020 for failing to pay an overtime premium rate for hours worked over 40 hours in a week;
 - b. SMC 14.19.030 for failing to pay the proper hourly minimum wage in 2019;
 - c. SMCs 14.20.020 and 14.20.030.A for failing to pay workers for all hours worked;

DECLARATION OF LABOR STANDARDS ENFORCEMENT MANAGER
KATIE JO KEPPINGER- 1

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

- d. SMC 14.20.020 for failing to pay all compensation owed by imposing various deductions without prior written authorization;
- e. SMC 14.20.020 for failing to provide the required meal and rest breaks based on hours worked in a day;
- f. SMC 14.16.045.B for failing to provide the proper notice of rights poster for paid sick and safe time;
- g. SMC 14.16.045.C for failing to provide workers with the written paid sick and safe time policy;
- h. SMC 14.16.025 for failure to provide the proper paid sick and safe time accrual;
- i. SMC 14.16.030.K for failure to provide written notification of updated amounts of accrued and used paid sick and safe time hours, each time wages were paid;
- j. SMC 14.16.030.A for failing to allow workers to use paid sick and safe time;
- k. SMCs 14.16.045.B, 14.19.045.B, and 14.20.045.B for failing to properly display an OLS poster, in English and in the workers' primary language;
- l. SMCs 14.16.050, 14.19.050, and 14.20.030, for failing to retain all the necessary payroll records for three years after an employee works the hours;
- m. SMC 14.20.025.D for failing to provide written notices of employment information at the time of hire or as soon as practicable or to any existing employees;
- n. SMC 14.20.025.E for failing to provide written notice, each time wages were paid, of all hours worked, with overtime hours listed separately and by failing to list number of units completed for any piece work;
- o. SMC 14.20.060.E for willfully hindering, preventing, impeding, or interfering with the Director in the performance of his duties by failing to provide to OLS employee contact information, interviews, and all the requested records, timesheets, paystubs, and timecards in a timely manner.

5. OLS concluded that Appellants were collectively Schedule 1 employers since Newway employs more than 500 employees. The hourly minimum wage compensation requirements for Schedule 1 employers are as follows: \$15.00 in 2018, \$16.00 in 2019, and \$16.39 in 2020. The authority for treating the employers as collective Schedule 1 employers is SHRR 90-045; Seattle's Minimum Wage Ordinance – Questions and Answers, OLS at 9 (Jan. 28, 2022); U.S. DOL, Factsheet #35 (Jan. 2016); Becerra.
6. Based on Appellants' failure to pay the overtime premiums in violations of SMC 14.20.020 and SMC 14.20.030.A, OLS calculated back wages by examining employees' 2018, 2019, and 2020 payroll reports, paystubs, and timesheets from the Baja and Newway work sites at 1120 Denny Way, 2014 Fairview Avenue, and 707 Terry Avenue in the city of Seattle. From these records, OLS identified the weeks in which employees exceeded 40 hours of work to determine the number of overtime-eligible hours which had not been paid at time-and-a-half as indicated by their paystubs.
7. For each affected employee, OLS multiplied the employee's overtime-eligible hours by .5 to determine the amount still owed. After multiplying the overtime eligible hours by .5, OLS multiplied that number by the employee's hourly pay rate, resulting in the amount of back wages still owed.

- 1 8. In some cases, records of workers' hourly rates were missing; in those instances, OLS
2 calculated their average hourly rate first. If the average hourly pay rate fell below the
3 minimum wage and the employee qualified for overtime premium pay, OLS increased the
4 hourly rate to the minimum wage for the corresponding year.
- 5 9. To determine whether Appellants paid employees the required minimum wage, OLS divided
6 the gross wages from the paystub records by the total hours worked from the timesheets for
7 that pay period. If the wages fell below the minimum wage, OLS calculated the difference
8 between what the employee received in pay and what the employee should have received at
9 the higher minimum wage rate and assessed interest based on the length of time that the
10 wages had been overdue.
- 11 10. OLS concluded that Appellants had violated SMC 14.20.020 and 14.20.030 by not paying
12 workers for all hours worked. In some pay periods, employees appeared on timesheets, but
13 Appellants did not provide any corresponding paystubs. For those employees, OLS
14 computed back wages by multiplying the hours worked listed on the timesheets by an average
15 hourly rate calculated by averaging all other workers' hourly rates in the same pay period.
- 16 11. OLS calculated back wages based on the total amount withheld through deductions from
17 each employee, and assessed interest based on the length of time elapsed since each
18 deduction. Workers who did not appear on timesheets at the three Seattle locations were
19 excluded.
- 20 12. OLS further determined that Appellants had violated SMC 14.20.020 by failing to pay all
21 compensation due to employees based on their failure to provide proper meal and rest breaks.
22 OLS made this determination because meal and rest breaks were missing from the
23 timesheets, workers informed OLS that they never received more than two breaks each day
regardless of the length of their shift, and Antonio Machado informed OLS that workers were
given two breaks a day. Also, Appellants provided no records demonstrating compliance
with law that requires meal and rest breaks.
13. To calculate back wages for the meal and rest breaks, OLS reviewed the timesheets and
assessed 10 minutes of back wages for one missed rest break if an employee's shift exceeded
five hours but was less than 10. OLS assessed 10 minutes of back wages for one missed rest
break and 30 minutes of back wages for one missed meal break if, according to the
timesheets, a shift exceeded 10 hours but was less than 12. OLS assessed 20 minutes of back
wages for two missed rest breaks and 30 minutes of back wages for one missed meal break
for shifts that were 12 hours or longer, and 15 hours or less. OLS assessed 20 minutes of
back wages for two missed rest breaks and one hour of back wages for two missed meal
breaks if a shift was longer than 15 hours but less than 16 hours. OLS assessed 30 minutes
of back wages for three missed rest breaks, and one hour of back wages for two missed meal
breaks for shifts between 16 and 19.99 hours. OLS added the total missed breaks per worker,
per year to calculate back wages.
14. For those instances that involved missed meal breaks with overtime pay, OLS calculated
back wages by computing the percentage of weeks within the year that each employee

exceeded 40 hours and used that percentage to determine the portion of back wages for missed breaks that should be paid using the overtime premium. Whenever an employee worked more than 40 hours in a week and was owed for missed breaks, those breaks were multiplied by time and a half because they were in addition to the 40 hours and because the employee had never received the straight time pay for the breaks.

15. OLS assessed interest for all back wages for missed breaks in a given calendar year utilizing an individualized midpoint within the year for each employee. The midpoint was calculated based on the first date and last date when the employee appeared in that year's timesheets and represents an estimated average date from which the missed break wages were due. Interest was based on the time elapsed since the midpoint, at a rate of 1% per month up until to the date of the Determination.
16. For the violations of SMC 14.16.030 which involved the accrual and use of paid sick and safe time, OLS calculated back wages as 30 paid sick and safe time hours per full-time employee for each year of noncompliance for up to three years preceding the initiation of the investigation through the date of the Determination, paid at the employee's rate of pay on the last day of each year of noncompliance, plus interest. For employees working fewer than 2080 hours per year, the number of paid hours was prorated based on hours worked. Because of the workers' variable hourly compensation, OLS used an average hourly pay rate for each worker for each year.
17. Using the calculation methods described above, OLS assessed total back wages and interest due to the affected employees in the amount of \$792,806.92, which includes \$631,288.54 in back wages plus 12% annual interest, calculated monthly.
18. OLS assessed \$1,262,577.19 in liquidated damages.
19. In this case, OLS assessed \$556.30 for each of the 52 aggrieved parties for a first violation of the Wage Theft Ordinance for a total civil penalty of \$28,927.60.
20. Pursuant to the Minimum Wage Ordinance, OLS assessed a civil penalty of \$556.30 for each of the five Workers who had been paid less than minimum wage for a first violation of the Minimum Wage Ordinance for a total civil penalty of \$2,781.50.
21. For violations of the Paid Sick and Safe Time Ordinance, OLS assessed \$556.30 for each of the 38 workers who did not receive Paid Sick and Safe Time for a total civil penalty of \$21,139.40. This was based in part on the fact that this was a first violation of the Paid Sick and Safe Time Ordinance.
22. Based on Appellant's failure to provide OLS with employee contact information, and their failure to provide all paystubs, timesheets, and timecards, and the unreasonable delays in responding to OLS' requests for information, OLS assessed \$5,565.10 for willful interference, the maximum amount allowed, adjusted for inflation.
23. Under the Paid Sick and Safe Time Ordinance, the Director assessed the following fines:

\$556.30 for a violation of the notice of rights/workplace poster; \$556.30 for 38 aggrieved parties for failing to maintain records; \$556.30 for a violation of the notification of balance; and \$556.30 for a violation of the written paid sick and safe time policy.

24. Under the Wage Theft Ordinance, the Director assessed the following fines: \$556.30 per affected employee for failing to provide notice of employment information; \$556.30 for 52 aggrieved parties for failing to maintain records; \$556.30 for violation of the notice of rights/workplace poster; and \$556.30 for 52 aggrieved parties for a violation of the notice of payday information.

25. The first factor the Director's designee considered was the overall circumstances of this case, which justified the amounts assessed.

26. Second, the Director's designee considered Appellants' culpability in the multiple violations OLS found. The Director's designee found the amounts assessed justified because, despite OLS' repeated requests, Appellants failed to provide records that are required to be kept by employers, failed to submit to interviews, and failed to provide employee contact information; and because Appellants failed to provide proper meal and rest breaks, took unauthorized deductions from workers' pay, and did not pay employees any overtime premiums.

27. Third, the Director's designee considered the substantive nature of the violations. Because the employers underpaid employees by thousands of dollars in overtime pay, paid sick and safe time, unauthorized deductions, and missed meal and rest breaks, and the fact that these actions were taken over the course of multiple years, the Director's designee found the amounts assessed justified.

28. Fourth, the Director's designee considered the size, revenue, and human resources capacity of the employers. Because the employers are large, with more than 500 employees with multiple construction projects in Seattle and Bellevue, the Director's designee found the amounts assessed justified.

29. Fifth, the Director's designee considered amounts assessed in similar cases. Because the assessments here are in line with OLS' general approach to Determinations issued to large employers with multiple violations which include willful interference, the Director's designee found the amounts assessed justified.

30. Finally, the Director's designee considered the total amount of unpaid compensation, liquidated damages, penalties, fines, and interest due. Based on the factors identified in the preceding paragraphs, the Director's designee found the amounts assessed justified.

DATED this 28th day of June, 2022 at Seattle, Washington.

/s/ Katie Jo Keppinger
Katie Jo Keppinger