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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 CLOSING ARGUMENT**

Department Reference: 2020-00186-LS

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15 **I. INTRODUCTION**

16 COMES NOW Appellant Baja Concrete USA Corp. (“Baja USA”), following a 14-day
17 hearing conducted before the City of Seattle Office of the Hearing Examiner (“Examiner”) in the
18 above-captioned matter (the “Hearing”), and presents the following closing argument.¹

19 The City of Seattle Office of Labor Standards (“OLS”) issued its Findings of Fact,
20 Determination and Final Order, dated August 25, 2021 (*See Exhibit 87*)² (the “Determination”),
21 against Baja USA, Newway Forming Inc. (“Newway”), Antonio Machado (“Machado”) and
22 Roberto Soto Contreras (“Contreras”). Baja USA, Newway and Machado appealed the
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24 ¹ The Hearing was conducted on June 12, 13, 14, 15, 20, 21, August 16, 17, 22, 23, 28, 29, 30, and September 20,
25 2023.

² As used herein, references to Exhibits are references to the exhibits admitted during the Hearing, as listed in the
Exhibit List provided by the Office of the Hearing Examiner.

1 Determination by filing requests for a contested hearing with the Examiner. Notably, Contreras
2 did not file an appeal and did not contest the OLS Determination. The OLS was aware, prior to
3 issuing the Determination, that Contreras was not an employee of Baja USA and that he was an
4 independent contractor. (*Exhibit 100 – email correspondence between Mercedes De Armas and*
5 *OLS investigators*). Specifically, Mercedes De Armas stated clearly in an email message dated
6 December 7, 2020, to Daron Williams (with Ashley Harrison in copy) of the OLS, that “Roberto
7 Soto is not an employee of Baja USA.” The OLS acknowledged this fact on page 2 of the
8 Determination, stating: “Respondent Baja Concrete, through Ms. De Armas, referred to
9 Respondent Roberto Soto Contreras as an ‘independent contractor’ and stated that he was
10 employed by Baja Concrete, Ltd. in Canada, not by Baja Concrete USA Corp.”

11 The OLS found that the three appellants and Contreras were joint employers of the
12 workers identified in Attachment B to the Determination (the “Workers”). (*Exhibit 87 - see*
13 *discussion of joint employment at pages 16-19 of the Determination*). The caselaw on the
14 doctrine of joint employers uses 13 factors to determine whether an entity or a person is a joint
15 employer. In the instant case, Baja USA meets no more than two of the factors, and therefore
16 should not be regarded as a joint employer.

17 Further, the OLS’ calculations of purported unpaid wages, in the form of missed rest and
18 meal breaks, underpaid overtime premium, and failure to pay minimum wage, are highly
19 exaggerated and overstated. The OLS’ imposition of liquidated damages, fines and penalties is
20 unwarranted. Based on the evidence presented at the hearing, the Examiner should dismiss Baja
21 USA from this matter with prejudice, and should reverse the OLS’ Determination.
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II. STANDARD OF REVIEW

The provisions cited in the Determination are SMC 14.16, SMC 14.19 and SMC 14.20, relating to paid sick and safe time, minimum wage, and wage theft, respectively. Baja USA appealed the Determination pursuant to SMC 14.16.085, SMC 14.19.085 and SMC 14.20.065. Pursuant to SMC 14.16.090, SMC 14.19.090 and SMC 14.20.070, the appeal was to be conducted de novo and the Director of the OLS (“Director”) had the burden of proving by a preponderance of the evidence that the violation or violations occurred. The Director failed to prove, by a preponderance of the evidence, that Baja USA was an employer of the Workers or that the amounts claimed are warranted.

III. ARGUMENT

A. Joint Employer Doctrine

The OLS relies primarily on *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 332 P.3d 415 (2014) in support of its joint employment analysis, based on the economic realities test. (*Exhibit 87 - Determination at pg. 16*). While *Becerra* is good law as to the question of joint employers, the OLS misconstrued *Becerra* in this case. The 13-factor test for joint employment under *Becerra* consists of five regulatory factors and eight non-regulatory factors as discussed in Section III(B) below, citing the U.S. Court of Appeals for the Ninth Circuit in *Torres-Lopez v. May*, 111 F.3d 633, 639-640, 1997 U.S. App. LEXIS 6939, 1997.

A central issue in *Becerra* was whether Fred Meyer Stores Inc. (“Fred Meyer”) and Expert Janitorial LLC (“Expert Janitorial”) were joint employers of certain janitors who worked night shifts cleaning Fred Meyer stores. *Becerra at 189*. Expert Janitorial acquired a management contract to provide Fred Meyer with outsourced facility maintenance. *Id at 190*. Under that contract, Expert Janitorial subcontracted with independent janitorial companies who provided, managed and supervised

1 workers who would clean Fred Meyer stores, while neither Expert Janitorial nor Fred Meyer directly
2 employed the workers. *Id.* Expert Janitorial and Fred Meyer agreed on the specific work the janitors
3 would do and the specific price Fred Meyer would pay Expert Janitorial for completing the work to
4 Fred Meyer's reasonable satisfaction. *Id.* The workers could not leave the store until Fred Meyer
5 supervision personnel signed off on their daily Work Order sheet. *Id at 193.*

6 The Supreme Court in *Becerra* reversed the trial court's summary judgment finding that Fred
7 Meyer was not a joint employer of the janitors and remanded the matter for further consideration based
8 on a 13-factor analysis, known as the economic reality test, for determining whether joint employment
9 existed. *Id at 196.*

10 In *Berry*, the Court found that five factors applied, and thus found the existence of a joint
11 employment relationship. *Berry v. Transdev Servs., U.S. District Court for the Western District of*
12 *Washington, 2017 U.S. Dist. LEXIS 58398, 12, 2017.* This is in stark contrast to the instant case, in
13 which no more than two of the 13 factors apply to Baja USA.

14 Here, the roles of Newway and Contreras are remarkably similar to those of Fred Meyer and
15 Expert Janitorial respectively in *Becerra*. Contreras recruited and hired the Workers and the Workers
16 worked at Newway project work sites. The Workers were expected to complete their work to the
17 satisfaction of Newway. Baja USA had no role in these activities and Baja USA had no presence (no
18 office, desk, large equipment, supervisor) at the work sites. Importantly, Contreras was at no time an
19 employee of Baja USA and no testimony or other evidence to the contrary was offered during the
20 Hearing. As discussed below, it appears that Contreras kept two different sets of books regarding
21 hours worked by Workers. He invoiced Newway for hours, and provided information regarding hours
22 to Baja USA, for purposes of payroll processing, which differed from his invoicing to Newway.
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1 **B. Baja USA was Not an Employer Under the Joint Employer Doctrine**

2 Following is a summary of the relevant testimony of each Worker who testified during
3 the Hearing.

- 4 - Worker Jonathan Parra Ponce (“Ponce”) testified that Machado was in charge
5 of the work site, Newway was in charge of safety meetings, he signed in for
6 safety meetings as a Newway employee, the work schedule was set by
7 Contreras, he and Contreras agreed to his pay rate, Machado would give orders
8 to Contreras to provide more people, and timecards were checked by Machado
9 and Contreras.³ (*Exhibit 7 – Safety Sign in Sheet dated March 21, 2019*). This
10 testimony is supported by Ponce’s prior declaration of May 26, 2022, in which
11 he stated: (i) he was recruited by Contreras; (ii) he commuted to the work site
12 in Contreras’ van; (iii) at the worksite, Machado was the boss, he coordinated
13 workers and supervised everyone; (iv) Baja USA workers were also supervised
14 by various Newway foremen; (v) Contreras took orders from Machado; (vi)
15 workers on Baja USA’s payroll were told to mark their employer as Newway
16 on sign-in sheets for safety meetings; and (vii) Contreras would tell workers
17 when to begin and end each work day. (*Exhibit 2 – Statement of Ponce*).
- 18 - Worker Matias Catalon testified that he was hired by Contreras, Contreras was
19 the supervisor, Contreras told him where to work, Machado would tell him
20 when to finish work, a Newway supervisor named Pedro would tell workers
21 where to work on the site, he would raise work questions with Pedro, he was
22 instructed by Machado, Machado was in charge of the entire work site, he used
23 electrical tools that belonged to Newway, his work hours had to be reviewed
24 by Contreras and reported to Machado, and he was told by Contreras, Machado
25 and Pedro when to take breaks.⁴
- Worker Alejandro Fiol testified that he never saw any document that states
Contreras was an employee of Baja USA, he was hired by Contreras, that
Machado was the general superintendent at the work site, he knew that
Machado worked for Newway, tools belonged to Newway, he received rest
breaks and lunch breaks, he would inform Contreras if he was sick, and he did
not know where Baja USA was located.⁵
- Worker Hector Cepedes testified that timecards and a timeclock were kept in
a Newway office at the worksite, Machado, Pedro and Adam (Pilling) of
Newway checked timecards, he was hired by Contreras, Contreras arranged
for his housing, Machado managed the whole operation, if he had questions
about work he would ask Pedro, electrical tools used on site belonged to
Newway and some to Contreras, he would mark Newway as his employer for

³ Hearing days 1-2, June 12 and 13, 2023.

⁴ Hearing day 2, June 13, 2023.

⁵ Hearing day 3, June 14, 2023.

1 safety meeting sign-in sheets, Contreras set work start and end times, and he
2 was given breaks including a 30 minute lunch break. (*Exhibits 10, 16 –*
3 *timecards of Hector Cepedes, Exhibit 7 - safety meeting sign in sheet dated*
4 *March 21, 2019, Exhibits 4, 8, 9 – safety meeting sign in sheets for 2018 - 2019*
5 *with Hector Cepedes' name signed in multiple times as a Newway employee*).⁶

- 6 - Worker Gamboa Lopresti testified that he was recruited and hired by
7 Contreras, he did not know who Contreras worked for, Contreras was the boss,
8 Contreras gave him orders, Contreras provided transportation, Contreras paid
9 him, he was paid for every time period he worked at the work site, Baja USA
10 did not have an office or a desk at the work site, Machado and Victor (of
11 Newway) were in charge at the work site, he signed Newway safety meeting
12 sign-in sheets as a Newway employee, he reported his work hours to Contreras,
13 Contreras and Machado would check the work hours, and he informed
14 Contreras when he resigned. (*Exhibit 8 - safety meeting sign in sheet with*
15 *Gamboa Lopresti's name on it*).⁷
- 16 - Worker Angel Chavez testified that he was hired by Contreras, his work at the
17 work site was directed by Pedro (of Newway), he was paid for every pay period
18 he worked at the work site, Baja USA did not have an office or a desk at the
19 work site, he was given a 15 minute break and a 30 minute break each work
20 day, he never saw anything in writing showing that Contreras was an employee
21 of Baja USA, and he informed Contreras when he resigned.⁸
- 22 - Worker John Edward Hinestroza Diaz testified that Baja USA did not have an
23 office or a desk at the work site, Contreras was in charge of keeping track of
24 hours, he never saw a contract between Contreras and Baja USA, he commuted
25 in a van that Contreras was in charge of, Machado ran safety meetings and was
in charge of the work, Victor – a Newway foreman – directed his work, the
tools he used belonged to Newway and not to Baja USA, his work hours were
provided to Machado and Machado would give them to Victor who would
provide them to Contreras, he took 15 minute breaks at 10:00 am and 30-45
minute breaks at 12:00 pm, Machado or Victor told him when to take breaks,
and he informed Contreras when he resigned.⁹
- Worker Jose Alfredo Acosta Caballero testified that he was hired by Contreras,
Contreras arranged for his living accommodations, his work was directed by
Juan Carluto (sp?) who worked for Machado and Machado worked for
Newway, Juan Carluto determined when he got off work, he took breaks, he
did not object to deductions from his pay, Machado was the boss of the work
site, the big tools belonged to Newway, all work was corrected by Newway
foremen, he wrote down his hours in a notebook, took pictures of his hours and

⁶ Hearing day 3, June 14, 2023.

⁷ Hearing day 4, June 15, 2023.

⁸ Hearing day 4, June 15, 2023.

⁹ Hearing day 5, June 20, 2023.

1 sent them to Contreras, Newway put up a time clock, he was instructed to mark
2 his employer as Newway on safety meeting sign-in sheets, and he used
3 timecards kept at Newway's office (*Exhibits 16, 22, 23, timecards with Jose*
4 *Acosta's name on them*).¹⁰

- 5 - Worker Patricio Fernandez Borquez testified that Baja USA did not have an
6 office or a desk at the work site, he never saw anything in writing showing who
7 Contreras worked for, Contreras hired him, he commuted in a van driven by
8 Contreras, Machado was the site manager, Pedro directed his work, he marked
9 Newway as his employer on safety meeting sign-in sheets, he recorded his time
10 in a notebook and gave it to Contreras for him to approve, his pay was
11 determined by Contreras, he took 15-20 minute and 30 minute breaks, he used
12 time cards, and he informed Contreras when he resigned, (*Exhibits 4, 8 – safety*
13 *meeting sign-in sheets, Exhibit 27 – timecards with Patricio Fernandez*
14 *Borquez's name on them*).¹¹
- 15 - Worker Jose Ascension Estrada Parra testified that he was paid for every pay
16 period in which he worked, he signed safety meeting sign in sheets marking
17 his employer as Newway, he never saw anything is writing showing that
18 Contreras worked for Baja USA, Pedro (of Newway) supervised his work and
19 Machado also provided instructions, Baja USA did not have an office, a desk
20 or equipment on the work site, he was hired by Contreras, he believed
21 Contreras worked for Baja USA an perhaps Newway, time sheets were filled
22 out at Newway's office, and he took 15 minute and 30 minute breaks when
23 instructed to by Pedro, (*Exhibits 4, 7, 8 – safety meeting sign in sheets*).¹²

24 The above testimony of the Workers clearly shows that Baja USA was not their employer
25 under the applicable case law. *Becerra* factors 1-5 (regulatory factors) are: (i) the nature and
degree of control of the Workers; (ii) the degree of supervision, direct or indirect, of the work;
(iii) the power to determine pay rates or the methods of payment of the workers, (iv) the right,
directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and (v)
preparation of payroll and the payment of wages. The first four of these factors were entirely
under the control of Contreras, Newway, and various Newway foremen, and not within Baja
USA's scope of services. Baja USA had no presence on the work site, did not supervise work

¹⁰ Hearing days 5 and 6, June 20 and 21 2023.

¹¹ Hearing day 6, June 21, 2023.

¹² Hearing day 7, August 16, 2023.

1 carried out on site, and did not recruit, hire, or set wage rates for Workers. Both Claudia
2 Penunuri, owner of Baja USA, and Mercedes De Armas (“Armas”), owner of Mercedes
3 Accounting & Associates LLC (“Mercedes Accounting”), testified that Contreras was, at no
4 time, an employee of Baja USA and acted as an independent contractor in relation to recruiting,
5 hiring, setting pay rates, and other relevant matters as to the Workers.¹³ They further testified
6 that Baja USA’s sole role in relation to this matter was to process payroll for the Workers based
7 on information provided by Contreras, and that Baja USA engaged the services of Mercedes
8 Accounting to process payroll and to provide certain bookkeeping services. Claudia Penunuri
9 testified that there was a contractual relationship between Baja USA and Newway for the
10 services Baja USA provided, despite there being no written agreement for that purpose.

11 Turning now to the remaining eight caselaw factors (non-regulatory factors) for joint employer
12 analysis, as follows:

- 13 1. **Whether the work was a specialty job on the production line.** The Workers were
14 laborers and cement finishers, requested by Newway and recruited and provided by
15 Contreras. The record does not indicate that the Workers were 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 here indicates that there were no written employment contracts for the workers. The
19 record indicates that terms of employment were negotiated between each worker and
20 Contreras, with no input from Baja USA.
- 21 3. **Whether the premises and equipment of the employer are used for the work.** The
22 testimony during the Hearing and the Exhibits clearly demonstrate that the premises and
23 equipment used for the work in this matter were entirely those of Newway and parties other
24 than Baja USA. Baja USA had no presence at the worksite.
- 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 to enable the Workers to shift from the worksite to Baja USA’s
location.
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 were

¹³ Hearing days 7, 8, 9 (Penunuri), 14 (Armas), August 16, 17, 22, September 20, 2023.

1 general laborers and cement finishers. The record does not indicate that they rendered
2 services requiring a special skill.

- 3 6. **Whether the employees had an opportunity for profit or loss depending upon the**
4 **alleged employee’s managerial skill.** The Workers were general laborers and cement
5 finishers, and did not involve managerial skill. Supervision of the Workers was carried out
6 by Newway personnel and by Contreras.
- 7 7. **Whether there was permanence in the working relationship.** The record indicates that
8 the Workers were hired for specific projects and there was no permanence in the working
9 relationship.
- 10 8. **Whether the service rendered is an integral part of the alleged employer’s business.**
11 The services rendered by the Workers were essential to the work Newway was engaged to
12 perform at the worksite. To the extent that Baja USA’s business involved processing of
13 payroll and billing Newway for the same, such labor was important to Baja USA’s
14 business.

15 *Becerra* provides further guidance on the issue of whether a party should be held liable as a
16 joint employer, depending on the degree of knowledge of wage or hour violations. *Becerra* at 198.
17 Specifically, the *Becerra* Court stated: “Here, our Court of Appeals properly found that these factors
18 may include whether the putative joint employer knew of the wage and hour violation ...” *Id* (*emphasis*
19 *added*). Following the Hearing in this matter, the record is clear that Baja USA, through the services
20 of Mercedes Accounting, processed payroll based on the information provided by Contreras, an
21 independent contractor. The evidence does not show that Baja USA had knowledge of any purported
22 lack of overtime compensation, missed breaks, or hours worked that may have exceeded the hours
23 Contreras reported to Baja USA. Under *Becerra*, the Supreme Court makes it clear that such lack of
24 knowledge is a consideration tending to discourage a finding that such a party is an employer under
25 the joint employer doctrine.

 In addition to the *Becerra* line of cases, recent caselaw is also informative on the issue of
joint employment. In a case involving alleged violations of the Washington Industrial Safety and
Health Act of 1973 (“WISHA”), although not in the context of wages, the Supreme Court

1 focused on control of the workers and control of the physical work environment as primary
2 considerations in determining employer liability under WISHA. *Dep't of Labor & Indus. v.*
3 *Tradesmen Int'l, LLC*, 198 Wn.2d 524, 541, 497 P.3d 353 (2021)¹⁴. “Key factors include who
4 has responsibility and power to control the workers and work site and whether the alleged
5 employer has the power to hire, fire, or modify the employment conditions.” *Id* at 542. “The
6 inquiry is whether the staffing agencies retained substantial control over the workers and work
7 environment such that they could abate the relevant safety hazards.” *Id* at 543. The Supreme
8 Court affirmed the Court of Appeals decision that staffing agency Tradesmen Int'l LLC
9 (“Tradesmen”) was not an employer of workers that it had provided to a separate entity. *Id* at
10 545. “Tradesmen was responsible for paying wages, determining compensation, and handling
11 taxes, unemployment insurance and workers’ compensation”. *Id* at 544. “There was no
12 evidence that Tradesmen actively supervised the workers, controlled the methods of work or
13 work conditions, or provided on-site supervision.” *Id*. In the instant case, Baja USA’s sole role
14 regarding the workers was processing payroll. As in the *Tradesmen* case, Baja USA did not
15 supervise the workers, control the methods of work or work conditions, or provide on-site
16 supervision. As such, Baja USA should not be regarded as an employer of the Workers.

18 The OLS also discussed the “economic realities test” in its Determination, as part of its joint
19 employer analysis. The above caselaw is informative in this regard as well. “Given that the economic
20 realities test articulates nonexclusive factors, knowledge of a hazard may be a relevant consideration
21 where it is paired with some level of control and ability to abate the relevant hazard.” *Tradesman* at
22 542. “In *Kamla*, we held that jobsite owners did not have a per se duty to comply with WISHA
23 compliant work conditions, so to is unrealistic to conclude all jobsite owners necessarily control work
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¹⁴ The *Tradesmen* case was a King County Superior Court case, case no. 18-2-08751-7.

1 conditions.” *Id* at 542-543. Drawing a parallel between *Tradesmen* and the instant case, knowledge of
2 an alleged wage-related violation should be paired with a party’s level of control and ability to abate
3 (remedy) such a violation. Baja USA was not in a position to have knowledge of purported wage-
4 related violations and was not in a position to control and remedy the same, and therefore should not
5 be held liable as a joint employer for such purported wage-related violations.

6 Additionally, the OLS relies on Section 90-045(3) of the OLS Seattle Human Rights
7 Rules (“SHRR”) for the proposition that joint employment “depends on all the facts in the
8 particular case.” (*Exhibit 87 - Determination at pg. 16*).

9 The OLS’ reliance on SHRR 90-045(3) fails because none of the three criteria set out in
10 the provision by which a joint employment relationship may be considered to exist are present in
11 this case. SHRR 90-045(3) states, in relevant part:

12 “[a] joint employment relationship generally will be considered to exist in
13 situations such as:

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

24 There is nothing in the record to support a finding that any of the three above criteria set
25 out in SHRR 90-045(3) exist in this case. Claudia Penunuri and Kwynne Forler-Grant (“Forler-
Grant”), project coordinator of Newway, testified that there is no affiliation between Baja USA
and Newway. They are independent and unrelated business entities.¹⁵

¹⁵ Hearing days 7, 8, 9 (Penunuri), 9 (Forler-Grant), August 16, 17, 22, 2023.

1 In the Determination (*Exhibit 87*), the OLS / Director essentially concedes that Baja USA
2 not an employer of the Workers.

3 Quoting the Determination:

- 4 - “Contreras exercised significant control over the workers and their pay; their Paid Sick and
5 Safe Time; their hiring, firing, and discipline; and their housing, transportation to and from
6 work...” (*Exhibit 87 - Determination, Page 3*).
- 7 - “Respondent Machado exercised significant control over the employees’ hours, schedules
8 and whether they worked overtime and he directly supervised both the Newway Forming
9 foremen and the Baja Concrete representative who directed the employees’ day-to-day
10 work.” (*Exhibit 87 - Determination, page 4*).
- 11 - “The [workers] testified that Roberto Soto Contreras recruited them, arranged for their
12 travel to Seattle, managed their housing ... drove one of the vans which brought them to
13 work, and picked them up from work.” (*Exhibit 87 - Determination, page 4*).
- 14 - “Newway would tell us [workers] what hours we would work.” (*Exhibit 87 -
15 Determination, page 4*).
- 16 - Work schedules and meal and rest breaks were set by Newway Forming. (*Exhibit 87 -
17 Determination, page 5*).
- 18 - Quoting Machado, “Those guys [workers] would come to Newway foremen and the
19 [Newway] foremen would guide them and give them directions, what to work on, when to
20 go home.” (*Exhibit 87 - Determination, page 6*).
- 21 - Newway exercised near-total control over the work of the cement finishers, laborers, and
22 carpenters. (*Exhibit 87 - Determination, page 17*).
- 23 - The workers started their workdays by clocking in at the Newway office onsite, initially
24 using timesheets and later using Newway’s clock-in system to punch in and out. The
25 workers used Newway’s premises and equipment in completing their work. (*Exhibit 87 -
Determination, page 18*).

21 **C. Baja USA Has Been Unfairly Damaged By the OLS Determination**

22 Claudia Penunuri testified that she is the owner and president of Baja USA and that it is
23 not affiliated with the Canadian company Baja Concrete LTD.¹⁶ She testified that she registered
24 Baja USA in Florida, and as a foreign corporation in Washington, with the intention of engaging
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¹⁶ Hearing days 7, 8, 9, August 16, 17, 22, 2023.

1 in numerous business activities, including payroll processing, realty, real estate remodeling and
2 construction. (*Exhibit 34 – Certificate of Registration*). She further testified that Baja Concrete
3 LTD has provided Baja USA with certain consulting services and that Baja Concrete LTD
4 invoiced Baja USA for those consulting services. (*Exhibit 30 – Invoices*). She testified that Baja
5 USA engaged the services of Mercedes Accounting to handle payroll processing services for
6 Baja USA’s contractual relationship with Newway because Baja USA needed to work with
7 someone familiar with conducting business in Washington. Claudia Penunuri did have email
8 exchanges with Forler-Grant of Newway regarding payment of Baja USA invoices. (*Exhibit 36*
9 *– Email from Forler-Grant to Claudia Penunuri dated December 31, 2020*). She further testified
10 that she would receive information about payroll processing for the Workers from Mercedes
11 Accounting, relying on information provided by Contreras, and she would approve payments.
12

13 Claudia Penunuri testified that Baja USA has not conducted business since sometime in
14 2021 because of this case, and she intended that the company continue to conduct business and
15 to increase its scope of business activities, but that was halted due to this case.

16 **D. Other Witness Testimony Also Supports Baja USA’s Position**

17 Kwynne Forler-Grant (“Forler-Grant”) testified that she is a project coordinator for
18 Newway.¹⁷ (*Exhibit 42 – Newway Organizational Chart*). She testified that there was a
19 contractual relationship between Newway and Baja USA, and she acknowledged that there were
20 email exchanges between her and Claudia Penunuri regarding payment of Baja USA’s invoices.
21 (*Exhibit 36 Email Forler-Grant to Claudia Penunuri*). She further testified that when Newway
22 needed more workers, Machado or Adam Pilling would inform Contreras. Newway provided the
23 required scope of work to Contreras. She testified that Newway installed a time clock in
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¹⁷ Hearing day 9, August 22, 2023.

1 Newway’ trailer and started having workers supplied by Contreras use the time clock, to use as a
2 way of providing a check and balance on hours reported. Timecards were provided by Newway
3 and remained in Newway’s office. She further testified that Tom Grant of Newway would meet
4 with Contreras and go over the timecards.

5 Forler-Grant testified that workers used Newway’s large equipment at the work site. She
6 testified that Newway had 150 employees during the OLS investigation and that Newway had
7 never been the subject of a wage claim prior to this matter. She further testified that Newway
8 did have labor posters in the job shack where the guys would meet for lunch and also posters in
9 the office.

10 Appellant Antonio Machado (“Machado”) testified that he was the Newway
11 superintendent at the Denny Way job site since November or December 2017, that he had four
12 foremen reporting to him, and that he has never had an ownership interest in Newway or Baja
13 USA.¹⁸ (*Exhibit 42 – Newway Organizational Chart*). He testified that he would go through his
14 foremen to give directions to workers. He further testified that he did not know who Contreras
15 worked for when they met, he “guessed” that Contreras worked for Baja USA, and that nobody
16 from Baja USA directed work on site. Machado also testified that all workers on the work site
17 took all legally required breaks and worked the same hours, and that Newway had English /
18 Spanish labor posters about sick pay in the trailer for everyone to read. He testified that Baja
19 USA was not involved in the planning each day.

20 Adam Pilling (“Pilling”) testified that he has worked for Newway since October 2010
21 and that he is a superintendent.¹⁹ (*Exhibit 42 – Newway Organizational Chart*). He testified that
22 he was on site every day, walked the site two times per day, and that there were English /
23
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25 ¹⁸ Hearing days 9, 10, August 22, 23, 2023.

¹⁹ Hearing day 13, August 30, 2023.

1 Spanish labor posters in the lunch room. He testified that Contreras was the site representative
2 for Baja USA. He also testified that he would meet with Machado every morning to set out the
3 work day, and that he also met with Onni (the general contractor) once per day for scheduling
4 and organizing. He stated that subcontractors would use Newway's power tools. Consistent
5 with Machado's testimony, Pilling testified that everybody on site would take breaks at the same
6 time or in stages, and that Newway supervisors supervised Baja USA workers. He further
7 testified that Baja USA had no input into scheduling, and that he reviewed and approved
8 timesheets. Pilling explained that there was no proof that Baja USA was reporting incorrect
9 information regarding work hours, and that he had no idea who Contreras reported to. In
10 response to questioning by the Examiner, Pilling further testified that:

- 11 - There was no adjoining door between the two trailers on site.
- 12 - The time clock was in the lunchroom.
- 13 - Timecards were kept in the lunchroom.
- 14 - Contreras was a liaison between Baja USA and Newway.
- 15 - Cannot distinguish on site between Newway and Baja USA workers.

16 **E. Baja USA Paid the Workers**

17 Mercedes De Armas ("Armas") testified that she is the founder, owner and manager of
18 Mercedes Accounting & Associates, LLC ("Mercedes Accounting"), and that her firm was
19 engaged by Baja USA for certain bookkeeping services, tax related services, filings with the
20 Washington Secretary of State ("SOS") and processing payroll for certain workers who worked
21 at the Newway work site.²⁰ (*Exhibit 89 – Baja USA annual report filed with SOS*). Mercedes
22 Accounting did not provide accounts receivable services for Baja USA. She testified that
23 Mercedes Accounting corresponded with Claudia Penunuri of Baja USA for purposes of their
24 business engagement, and that the information and documentation for processing payroll was
25

²⁰ Hearing day 14, September 20, 2023.

1 provided to Mercedes Accounting by Contreras. The information and documentation for
2 processing payroll was provided by email, approximately once every two weeks, from Contreras
3 to Mercedes Accounting, Armas and Claudia Penunuri. This information included hours, wage
4 rates and deductions from wages. Contreras provided to Mercedes Accounting the agreed net
5 pay for each Worker each pay period, and Mercedes Accounting would calculate the gross pay
6 necessary to cover taxes and other deductions. Attached to each email was a file showing a
7 summary of hours worked by each worker during the relevant time period. (*Exhibits 101, 102 –*
8 *emails with attached hours summaries*). Unfortunately, the attachments to emails in Exhibit 102
9 have some legibility issues.

10 Importantly, the work hours summaries apparently submitted by Contreras to Newway,
11 which are Exhibits 12, 13, 43 in the record, are not the same hours summaries, Exhibits 101, 102,
12 that were provided by Contreras to Mercedes Accounting and Baja USA. Exhibits 12, 13 and 43
13 were not provided to Mercedes Accounting or to Baja USA. Armas testified that time cards
14 (used in connection with a time clock) were not provided to Mercedes Accounting.
15

16 There is no testimony or other evidence in the record to support any assertion that the
17 Workers did not get paid. This is in contrast to the OLS' position that insufficient
18 documentation of payment of wages supports an assumption of non-payment of wages. As
19 discussed above, the Workers who testified during the Hearing stated that they were paid for
20 every pay period. The paystubs prepared by Mercedes Accounting in the processing of payroll
21 are part of the record of the Hearing. (Exhibits 1, 3, 11, 14, 17, 18, 19, 24, 26, 28, 38, 53 through
22 86 – paystubs).
23
24
25

1 **F. Baja USA Cooperated with the OLS Investigation**

2 The civil penalties and liquidated damages asserted in the Determination are unwarranted
3 and excessive. Baja USA cooperated with OLS throughout its investigation in this matter, has
4 never been the subject of a wage claim prior to this matter, and did not interfere, willfully or
5 otherwise, with OLS in its investigation. Mercedes Accounting, on behalf of Baja USA,
6 responded to OLS' written questions and provided documents requested by OLS, and
7 corresponded with OLS investigators. Exhibit 32 is the OLS request for information submitted
8 to Baja USA, and Baja USA's responses thereto, prepared by Mercedes Accounting at the
9 request of Claudia Penunuri of Baja USA. Exhibit 100 is a series of email correspondence
10 between OLS and Armas of Mercedes Accounting, from September through early December
11 2020, which shows a clear and continuous effort by Baja USA to cooperate with the OLS in its
12 investigation.

13
14 Further, Claudia Penunuri testified that Baja USA had never been the subject of a wage
15 claim. She testified that she did cooperate with the OLS investigation and that she requested the
16 assistance of Mercedes Accounting in this regard given that Mercedes Accounting processed
17 payroll for the workers and was therefore in a good position to provide responses to OLS'
18 requests. She also testified that she reviewed and agreed with the responses provided by
19 Mercedes Accounting to the OLS.

20 With reference to the Remedies portion of the Determination, despite the cooperation of Baja
21 USA in OLS' investigation and despite the fact that this matter constitutes a first-ever alleged wage
22 claim for Baja USA, OLS has imposed the maximum liquidated damages, being twice the alleged
23 unpaid compensation, without explanation, and has imposed the maximum permissible civil penalties.
24 The imposed assessments are fundamentally unfair to Baja USA insofar as it may have, at worst,
25

1 demonstrated inadequate record keeping. Further, on page 20 of the Determination, the employer(s)
2 were assumed to be a Schedule 1 employer, meaning that it employs 500 or more employees pursuant
3 to SMC 14.19. The record clearly shows that the number of employees relevant to the instant matter is
4 fewer than 500, and therefore the employer should be regarded as a Schedule 2 employer. Forler-
5 Grant testified that Newway had 150 employees during the relevant period. Further, given that there
6 were 52 Workers according the Determination, there could not have been 500 employees at any time
7 relevant to the OLS investigation in this matter.

8 **G. The OLS Investigation**

9 Three individuals from the OLS, Daron Williams (“Williams”), Katie Jo Keppinger
10 (“Keppinger”) and Ashley Harrison (“Harrison”) testified during the Hearing.²¹ Harrison
11 testified that the OLS spoke with only eight of the 53 Workers as part of the investigation. She
12 explained that the basis for naming 53 Workers was the OLS’ reconstruction through documents
13 received.
14

15 Reliance on such a small sample size in support of the OLS’ Determination conclusion is
16 absurd and legally unsound. In a recent Division I case, the Court explained: “The Washington
17 State Supreme Court has discussed the problematic nature of small sample sizes in disparate
18 impact claims.” *Arroyo v. Pac. Mar. Ass’n*, 26 Wn. App. 2d 779, 806, 529 P.3d 1 (2023).
19 “Because statistical evidence derived from an extremely small sample size has little predictive
20 value, and is therefore unreliable, the use of such evidence must be closely scrutinized to avoid
21 inferences of disproportionality, which are based upon conjecture, speculation, or chance ...” *Id.*
22 “[T]he size of the data set goes to the probative value of the evidence and ‘is a matter for the
23
24

25 ²¹ Hearing days 10, 11 (Harrison), hearing days 11, 12 (Keppinger), hearing days 12, 13 (Williams), August 23, 28,
29, 30, 2023

1 experts to debate...” *Id* at 807, citing *Freyd v. Univ. of Or.*, 990 F.3d 1211, 1225-26 (9th Cir.
2 2021).

3 “[E]xpert testimony should be presented to the trier of fact only when the scientific
4 community has accepted the reliability of the underlying principles.” *State v. Copeland*, 130
5 Wn.2d 244, 255, 922 P.2d 1304 (1996), citing *State v. Canaday*, 90 Wn.2d 808, 585 P.2d 1185
6 (1978). “The *Frye* standard recognizes that ‘judges do not have the expertise required to decide
7 whether a challenged scientific theory is correct’ and therefore courts ‘defer this judgment to
8 scientists.’” *Id*, citing *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993).

9 The record shows, and particularly the testimony of Harrison, Keppinger and Williams
10 show, that the OLS haphazardly employed a myriad of assumptions, speculation and conjecture
11 when it extrapolated its interviews of eight individuals to apply to 53 individuals. Based on the
12 caselaw above, and based on common sense good practice, the OLS should have either
13 developed a much larger sample size to support its Determination or engaged the services of
14 qualified disinterested expert witnesses to opine on the sample size of information. The
15 Examiner does not have the expertise required to decide whether the OLS’ methodology for
16 extrapolating data from the small sample size is a scientifically sound approach.
17

18 Harrison testified that she never met Contreras. Note that, on page 2 of the Determination
19 (*Exhibit 87*), the OLS stated that it did not interview Contreras and that Contreras failed to
20 respond to OLS’ requests for information or its subpoena. Harrison further testified that she
21 helped author the Determination and that:

- 22 - Workers did not say to OLS that they disagreed with deductions from wages.
- 23 - No Workers said they did not get paid.
- 24 - She did not know whether Contreras was paid by Baja USA or Baja Concrete Ltd.
- 25 - OLS did not request records regarding when a Worker returned from illness
absence.

- 1 - OLS never visited the work sites and never observed day-to-day activities, breaks,
2 posters, interactions between workers, or observed who exercised control over
3 workers at the work sites.

4 Keppinger testified that she is the main manager and supervisor for all enforcement team
5 staff of the OLS, and has been in that position since June of 2018. She testified that, where there
6 is an absence of records, there is an assumption that the employer did not pay. This is
7 inconsistent with the Worker testimony (discussed above) in which none of them indicated that
8 they did not get paid. Further, the OLS' position on this issue defies common sense. No
9 workers would continue showing up for work if they were not being paid. Keppinger further
10 testified that she did not have any interaction with the Workers, and that she relied on interview
11 notes. She acknowledged that some wage deductions, such as those for rent and gas, did benefit
12 Workers. Keppinger further testified that failure to obtain advance written authorization from
13 employees for wage deductions is a technical, and not substantive, violation of the SMC, and that
14 such a technical violation does not cause economic harm to employees. She also testified that:

- 15 - She has no personal knowledge of whether workers' rights posters were posted at
16 the job site.
17 - Workers may have taken breaks without reporting that they took breaks.
18 - **The City (OLS) did not engage any experts to opine on actual, verifiable**
19 **damages suffered by the Workers.**
20 - Nobody from the OLS actually observed the interactions of the Workers.
21 - Her understanding is that employees can waive their meal breaks.
22 - In response to the Examiner, Keppinger stated that the OLS did not consider
23 construction industry standards regarding wage deductions.

24 Williams testified that he was the senior investigator in this matter and that this OLS
25 investigation began because two Workers (only two) went to Casa Latina. As with Harrison and
Keppinger, Williams testified that he never visited the work sites. Williams drafted the subpoena
in this matter and the Determination. Williams further testified that if employers cannot be
completely disassociated, they are joint employers. As discussed above, Claudia Penunuri and

1 Kwynne Forler-Grant testified that Baja USA and Newway are completely disassociated.

2 Williams further testified that:

- 3 - Contreras hired the Workers.
- 4 - All supervision was by Newway foremen.
- 5 - Workers would ask Machado and Newway foremen about what to do.
- 6 - Newway foremen would correct work.
- 7 - Wages based on piece work is common in construction.
- 8 - He did not ask Workers about intermittent breaks.
- 9 - The OLS could not rely on the paystubs, (contrary to the fact that the OLS did rely on paystubs for calculating overtime).
- 10 - They did weigh the credibility of interviewees, (and somehow apparently extrapolated that credibility to 45 Workers they did not interview).

11 The testimony of the OLS investigators, and the record before the Examiner, shows that the
12 \$2.2 million wage claim against Baja USA and others is based in large part on assumptions and
13 speculation, and that the OLS lacks personal knowledge of the purported facts underlying the
14 wage claim. Baja USA is at risk of being bankrupted as a result of the OLS' failure to properly
15 and thoroughly investigate this matter and, instead, engaging in guess work to support its seven-
16 figure wage claim.

17 V. CONCLUSION

18 For the reasons discussed herein, Appellant Baja Concrete USA Corp. hereby requests that the
19 Hearing Examiner dismiss Baja Concrete USA Corp. with prejudice from this action and reverse the
20 Determination.

21 Respectfully Submitted this 25th day of October, 2023.

22 */s/ Mark D. Kimball*

23 */s/ Alex T. Larkin*

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