

1
2
3
4
5
6 BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

7 **In the matter of the Appeal of:**) Hearing Examiner File:
8)
9 **BAJA CONCRETE USA CORP., ROBERTO) No.: LS-21-002**
CONTRERAS, NEWWAY FORMING INC.,) LS-21-003
and ANTONIO MACHADO,) LS-21-004
10)
11 from a Final Order of the Decision issued by) RESPONDENT CITY OF SEATTLE'S
the Director, Seattle Office of Labor Standards.) SUPPLEMENTAL CLOSING BRIEF
12)
_____)

13 **I. INTRODUCTION**

14 Appellant Baja Concrete USA Corp. (“Baja”) asserts it is not a joint employer and has so
15 argued in prior closing briefs.¹ Baja also claims that its relationship with Respondent Roberto Soto
16 Contreras is that of an independent contractor. This is incorrect. Appellant Baja is an employer of
17 Respondent Roberto Soto Contreras. If Respondent Contreras is somehow not a Baja employee, he
18 is definitely Baja’s agent. Either way, Baja should be held liable for their violations of SMC 14.16,
19 14.19 and 14.20.

20 **II. STATEMENT OF FACTS RELEVANT TO THE QUESTION PRESENTED**

21 Respondent Roberto Soto Contreras did not participate in the OLS investigation or any legal
22 proceedings throughout this case.

23 _____
¹ City’s Closing Arg. filed Oct. 25, 2023 (“City’s Closing”); City’s Resp. to Appellants’ Closing Arg.’s filed Nov. 15, 2023 (“City’s Resp.”).

1 A detailed Statement of Facts is provided in the City’s Closing Brief and the City’s Response
2 Brief.² The prior briefs describe Respondent Contreras’s role in managing the hiring of the Workers
3 for Baja, making living or housing arrangements for some of the Workers, collecting the timesheets
4 of the Workers and transporting the Workers back and forth to the worksites.³

5 Respondent Contreras’s name did not appear on Workers’ paystubs, only Baja’s. Each
6 Worker testified that they worked for, and were paid by Baja Concrete USA, even though Respondent
7 Contreras was the Baja employee who hired them. Respondent Contreras did not have any authority
8 to approve or sign off on any timesheets, only the authority to provide the information to Newway
9 (for approval of payment to Baja) and to Baja (so Workers would be paid).

10 **III. ISSUES RELATED TO THE HEARING EXAMINER’S REQUEST FOR**
11 **ADDITIONAL BRIEFING**

12 Is Respondent Roberto Soto Contreras an employee or agent of Appellant Baja Concrete USA
13 Corporation? Yes.

14 Is Respondent Roberto Soto Contreras an agent of Baja Concrete USA Corporation such that
15 Baja Concrete USA is liable for his actions? Yes.

16 **IV. ARGUMENT**

17 **A. THE ECONOMIC REALITIES STANDARD.**

18 Washington state courts and the majority of federal circuit courts use the economic realities
19 test to determine if a worker is an employee or an independent contractor. In *Anfinson v. FedEx*
20 *Ground Package System, Inc.*,⁴ these six factors are:

- 21 (1) The permanence of the working relationship between the parties;
22 (2) The degree of skill the work entails;
23 (3) The extent of the worker’s investment in equipment or materials;

² *Id.*

³ “Workers,” unless otherwise specified, refers to the workers whose payroll was processed by Baja.

⁴ *Anfinson v. FedEx Ground Package System, Inc.* 159 Wash. App. 35, 40-41, 244 P.3d 32 (2010), *aff’d*, 174 Wash. 2d 851, 281 P.3d 289 (2012).

- 1 (4) The worker’s opportunity for profit or loss;
2 (5) The degree of the alleged employer’s control over the worker;
3 (6) Whether the service rendered by the worker is an integral part of the alleged employer’s
4 business.⁵

5 In *Anfinson*, the court focused on this legal standard to determine whether workers were
6 employees or independent contractors as applied to the Washington Minimum Wage Act (MWA).⁶
7 Anfinson appealed a jury’s determination that the FedEx drivers were independent contractors.⁷
8 Anfinson argued that the jury instructions given to determine worker status were incorrect.⁸ The
9 court reversed, holding that the instruction was erroneous.⁹ The court held that the common-law
10 “right to control” test and the “economic realities” test overlap, but the focus of each is different.¹⁰
11 The ultimate inquiry under the FLSA test is whether the worker is dependent on the alleged
12 employer.¹¹ The court held that the proper legal test for determining whether a worker is an employee
13 under the MWA is the economic realities test.¹² Federal courts have held that no single factor is
14 determinative, but that the test depends “upon the circumstances of the whole activity” and ultimately,
15 whether as a matter of economic reality, the individual is dependent on the business to which s/he
16 renders service.”¹³

16 //

17 //

18 //

20 ⁵ *Id.* at 40-41.

21 ⁶ *Id.* at 36.

22 ⁷ *Id.*

23 ⁸ *Id.* at 37.

⁹ *Anfinson v. FedEx Ground Package System, Inc.* 159 Wash. App. 35, 37, 244 P.3d 32 (2010), *aff’d*, 174 Wash. 2d 851
at 857, 281 P.3d 289 (2012).

¹⁰ *Id.* 159 Wash. App. at 41.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* 159 Wash. App. at 40.

1 **B. CONTRERAS WAS AN EMPLOYEE OF BAJA.**

2 **a. The working relationship between Contreras and Baja was permanent.**

3 The first factor of the economic realities test is the permanence of the working relationship.¹⁴
4 Respondent Contreras presented workers to Newway on behalf of Baja. These Workers worked at
5 two locations in Seattle, WA – 1120 Denny Way and 707 Terry Avenue. When Contreras no longer
6 supplied workers to Newway on behalf of Baja, then Baja was no longer in business with Newway
7 or any other companies. According to Claudia Penunuri, Baja has not done any work since 2021.¹⁵
8 Aside from payroll, there was no evidence that Baja’s operations occurred without Contreras’s
9 involvement.

10 **b. Contreras’s work required minimal skills.**

11 The second factor in the economic realities test is the degree of skill required to perform the
12 work.¹⁶ Respondent Contreras recruited the Workers for Baja. He determined their pay per hour,
13 provided them with a place to live (if needed) and transported them back and forth to work.¹⁷
14 Locating workers and finding them a place to live and establishing an hourly rate required no special
15 skills of Respondent Contreras.

16 In *Real v. Driscoll Strawberry Associates, Inc.* 603 F.2d 748 (1979), strawberry growers (also
17 known as sublicensees) brought an action for violation of the Fair Labor Standards Act’s minimum
18 wage standards against the licensor and licensee/sub licensor.¹⁸ The District Court for the Northern
19 District of California dismissed the action and the Court of Appeals reversed and remanded because

21 _____
¹⁴ *Id.* 159 Wash. App. at 40 and 41.

¹⁵ HE Hr’g, Claudia Penunuri (“Penunuri”) Test., Day 7, Part 4 at 53:23-53:55; Day 8, Part 4 at 1:37:04-1:37:45.

22 ** As used throughout, HE Hearing Testimony (“HE Hr’g Test.”) refers to the day number of trial (Day 1-14). The “Part”
23 number refers to the corresponding Part number (of the specified day) of the Hearing Examiner’s audio file record that is
the Court file.

¹⁶ *Id.* 159 Wash. App. at 41.

¹⁷ HE Ex. 87 (OLS Final Order) at TRIAL 00358.

¹⁸ *Real v. Driscoll Strawberry Associates, Inc.* 603 F.2d 748 (1979).

1 plaintiffs raised a genuine issue of fact as to whether they were employees.¹⁹ *Real* stated “although
2 the appellants may hire and control their own helpers, that factor does not prevent a finding that they
3 are employees.”²⁰ This is similar to Contreras’s role. He hired the workers to work on Newway’s
4 projects, and he did so as an employee of Baja. Also, the services performed by the appellants in
5 *Real* did not require any special technical knowledge or skill.²¹ Contreras did not require any special
6 technical knowledge to hire, set pay rates, and transport the Workers for Baja.

7 **c. Contreras had Minimal Investment in Equipment or Materials.**

8 The next factor is the extent of the worker’s investment in equipment or materials.²² Some
9 of the Workers testified that they purchased their own small tools, or the cost of tools was deducted
10 from their pay and that they also used the large equipment onsite provided by Newway.²³ This
11 testimony implies that Contreras purchased the tools and Baja deducted the cost of the tools from the
12 Workers paychecks. In *Real*, the sublicensees furnished their own hoes, shovels, clippers for pruning
13 the strawberry plants, and hand carts used in picking the berries but Driscoll selects and supplies all
14 heavier equipment...²⁴ In *Real*, the Appellants’ investment in light equipment is minimal in
15 comparison with the total investment in land, heavy machinery and supplies needed for growing
16 strawberries.²⁵ Because Baja (through Roberto Soto Contreras) was involved in supplying
17 equipment, this supports a finding that Contreras is an employee of Baja.

18 //

19 //

20 ¹⁹ See *Real*, 603 F.2d at 748.

21 ²⁰ See *Real*, 603 F.2d at 755 (citing *Mednick v. Albert Enterprises*, 508 F.2d, 297, 301 (5th Cir. 1975)).

22 ²¹ *Id.*

23 ²² *Id.* 159 Wash. App at 41.

24 HE Hr’g, Jonathan Ivan Parra Ponce (“Parra Ponce”) Test., Day 1, Part 3 at 35:58-36:24; HE Hr’g, Matias Catalan
25 Toro (“Toro”) Test., Day 2, Part 3 at 1:10:36-1:12:21; HE Hr’g, Hector Cespedes Rivera Test., Day 2, Part 5 at 47:32-
48:31; HE Hr’g, Raul Alejandro Fiol Martinez Test., Day 3, Part 1 at 25:30-27:25; HE Hr’g, John Edward Hinestroza
Diaz Test., Day 5, Part 3 at 27:09-29:17; HE Hr’g, Patricio Fernandez Borquez Test., Day 6, Part 2 at 30:39-31:45; HE
Ex. 2 (Para Ponce Statement) at 4 (#8).

²⁴ See *Real*, 603 F.2d at 752.

²⁵ See *Real*, 603 F.2d at 755.

1 **d. Contreras had no Profit or Loss Opportunity in providing Workers for Baja.**

2 The next factor to consider is whether Contreras had any opportunity for profit or loss.²⁶
3 Contreras was the point person to hire the Workers on behalf of Baja to work as cement finishers and
4 general laborers. Claudia Penunuri stated that Contreras was not paid by Baja, however Contreras's
5 name appeared on Baja timesheets with hours worked listed on more than one occasion.²⁷ Baja
6 Concrete USA payroll summaries also show Contreras listed as an employee with Zelle payments
7 made to him.²⁸ All of the timesheets listed Baja Concrete USA Corp in the top right corner, Roberto
8 Soto Contreras's name was only listed as an employee as if he had worked hours and needed to be
9 paid by Baja for his hours worked. Contreras had a business card that listed him as a Baja employee
10 and if that is true, Contreras would not have a separate profit or loss opportunity.²⁹ Baja also stated
11 they participated in the investigation of OLS, but OLS received Baja timesheets from Newway, not
12 Baja.³⁰ There was no clear testimony as to how Conteras was compensated from the Newway
13 payments made to Baja. Contreras did not testify or participate in the appeal in any way, and Baja
14 should not benefit from the absence of evidence about his compensation when the only evidence of
15 his compensation came from Baja.

16 **e. Baja had Control Over Contreras.**

17 The next factor is the degree of the alleged employer's control over the worker.³¹ While this
18 factor supports a finding that Newway and Machado were joint employers of the Workers who
19
20

21 ²⁶ See *Anfinson*, 159 Wash. App. at 41.

22 ²⁷ HE Ex. 12 (Baja Invoices and Timesheets) at TRIAL 00950-51, 00956-57, 00959-60, 00963, 00971-72, 00976-77,
23 00981, 00988, 00991, 00993, 00995, 01003, 01005, 01010-11, 01015-16, 01023-24, 01027, 01029, 01031-32, 01038-39
and 01041; HE Ex. 43 (Baja Invoices and Timesheets) at TRIAL 01044-45, 01047-48, 01050-51, 01056-57 and 01060;
HE Hr'g Penunuri Test., Day 7, Part 4 at 46:02-46:13.

²⁸ HE Ex. 101 (Baja Payroll) at APPBAJA1277 (Baja Ex. 16), APPBAJA1279 (Baja Ex. 17).

²⁹ HE Ex. 20 (Contreras' Baja Business card).

³⁰ HE Hr'g, Daron Williams Test., Day 12, Part 4 at 1:08:13-1:08:50.

³¹ See *Anfinson*, 159 Wash. App. at 41.

1 suffered loss due to the labor standards violations³², it also weighs in favor of a finding that Contreras
2 was Baja's employee. Baja controlled Contreras's work. Contreras recruited workers for Baja and
3 communicated to the Workers that they would work for Baja.³³ Claudia Penunuri testified that
4 Contreras negotiated payments from Newway on behalf of Baja.³⁴ Baja also hired Mercedes
5 Accounting to process payroll, not Roberto Soto Contreras.³⁵ Kwynne Forler-Grant testified that after
6 the timesheets/cards were approved by a Newway representative, that Newway then paid Baja, not
7 Contreras. Baja had the authority to terminate the relationship with Mercedes Accounting, Contreras
8 did not have this same authority. This testimony and evidence show Baja's control over Contreras's
9 work.

10 **f. Contreras's Recruitment of Workers was an Integral Part of Baja's Business.**

11 The last factor to consider is "whether the service rendered by the worker is an integral part
12 of the alleged employer's business."³⁶ Respondent Contreras recruited the Workers on behalf of Baja
13 to work for Newway Forming, Inc. Baja's entire purpose was to provide workers to Newway. It is
14 difficult to see how Baja would even exist, let alone fulfill its purpose, without Contreras's actions as
15 Baja's employee.

16 Although there was no written contract between Contreras and Baja nor Contreras and
17 Newway, Baja provided cement workers exclusively for Newway. Without these Workers, Newway
18 would not have been able to complete their Onni project and Baja would have had no value to
19 Newway.

20 //

21 //

22 ³² This argument was addressed in the City's Closing and the City's Resp.

23 ³³ City's Resp. 13:9-13; HE Hr'g, Parra Ponce Test., Day 1, Part 3 at 05:34-05:58, 06:09-06:47, 49:23-49:50; HE Hr'g, Toro Test., Day 2, Part 3 at 53:38-53:53, 57:36-58:42.

³⁴ HE Hr'g, Penunuri Test., Day 8, Part 2 at 33:09-33:46.

³⁵ HE Hr'g, Mercedes De Armas ("De Armas") Test., Day 14, Part 4 at 42:26-42:41.

³⁶ See *Anfinson* 159 Wash. App. at 41.

1 Claudia Penunuri claims that her company is only a payroll company, however there was no
2 evidence that Baja processed payroll for anyone other than the Workers hired for the Newway
3 projects. Baja would not have had any payroll to process if Contreras did not hire workers for Baja.
4 Ms. Penunuri testified that Baja was just getting started and had hopes of expanding, but never did.³⁷
5 This clearly proves that if Contreras had not hired the Workers on behalf of Baja, then there was no
6 reason for Newway to have any relationship with Baja. Ms. Penunuri testified that Baja was not in
7 the construction business. However, when asked about Baja’s Labor and Industries license, she
8 confirmed that the exhibit displayed before her showed that Baja Concrete USA Corp had a
9 construction contractor license.³⁸ Baja would certainly benefit from a finding that Contreras was
10 only an independent contractor. Such a finding, however, is inconsistent with Baja’s limited role to
11 Newway, and the critical role Contreras played for Baja.

12 **C. EVEN IF CONTRERAS WAS NOT BAJA’S EMPLOYEE, HE WAS BAJA’S AGENT.**

13 The Hearing Examiner does not need to find that Contreras is an employee of Baja to find
14 that Baja is liable for its labor standards violations. If Contreras is not found to be Baja’s employee,
15 he is at the very least its agent. An independent contractor to a company can still be its agent. In
16 *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182 (9th Cir. 2002), an individual recruited farm
17 workers from Arizona to work on a farm in New York. The farm workers sued Martin Farms for
18 providing substandard housing in violation of the Agricultural Worker Protection Act (“AWPA”),
19 non-payment of all wages and for failing to provide workers transportation back to Arizona after the
20 work completed.³⁹ The district court dismissed the case for lack of personal jurisdiction and the farm

21
22
23

³⁷ HE Hr’g, Penunuri Test., Day 8, Part 1 at 10:50-11:46; Part 4 at 1:37:04-1:37:45.

³⁸ *Id.* at 10:49-11:47, 13:25-14:25.

³⁹ *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182 (9th Cir. 2002).

1 workers appealed.⁴⁰ The United States Court of Appeals for the Ninth Circuit held that because the
2 recruiter was an agent of Martin Farms, the district had jurisdiction over Martin Farms.⁴¹

3 The appellate court held that “independent contractor” and “agent” are not mutually
4 exclusive.⁴² “An independent contractor who is not an employee of a principal can nevertheless still
5 be that principal’s agent.”⁴³ The final determination from the *Ochoa* Court was that Ramey, as an
6 independent contractor, acted as Martin Farms’ agent when recruiting and managing Appellant farm-
7 workers.⁴⁴ The Court used an eight factor test from *Santiago v. Phoenix Newspapers, Inc.* 164 Ariz.
8 505, 794 P.2d 138, 142 (Ariz. 1990), to determine if Ramey was an independent contractor or an
9 employee. The court considered the same criteria to demonstrate that Ramey was Martin Farms’
10 agent and not a “purely independent contractor.”⁴⁵ Those criteria were:

11 (1) the extent of control over the work and the degree of supervision; (2) the distinct
12 nature of the worker’s business; (3) the occupation’s required specialization; (4) the
13 provider of materials and the place of work; (5) the duration of employment; (6) the
14 method of payment; (7) the relationship of work done to the regular business of the
15 employer; and (8) the belief of the parties.⁴⁶

16 Washington courts consider similar factors, plus two additional factors. *Massey v. Tube Art*
17 *Display, Inc.*, 15 Wash. App. 782, 551 P.2d 1387 (1976). That court considered all the factors listed
18 in *Ochoa* as well as two additional factors: (a) the kind of occupation, with reference to whether, in
19 the locality, the work is usually done under the direction of the employer or by a specialist without
20 supervision; and (b) whether the principal is or is not in business.⁴⁷ All of these factors vary in

21 ⁴⁰ *Id.* at 1187.

22 ⁴¹ *Id.* at 1193.

23 ⁴² *Id.* at 1189.

⁴³ *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1189 (9th Cir. 2002) (citing *Wiggs v. City of Phoenix*, 198 Ariz. 367, 10 P.3d 625, 628 (Ariz.2000) (en banc)).

⁴⁴ *Id.* at 1192.

⁴⁵ *Id.* at 1189-1190.

⁴⁶ *Id.* at 1189 (citing to *Santiago v. Phoenix Newspapers, Inc.* 164 Ariz. 505, 794 P.2d 138, 142 (Ariz. 1990)).

⁴⁷ *Massey v. Tube Art Display, Inc.*, 15 Wash. App. 782,786-787, 551 P.2d 1387, 1391 (1976).

1 importance with the exception of the control element, which is the most important consideration. Not
2 all of the factors need to be present for a court to find an agency relationship.⁴⁸

3 **a. Baja had extensive control over Contreras’s work.**

4 The first factor “is the extent of control the principal exercises or may exercise over the
5 agent.”⁴⁹ In *Ochoa*, Martin Farms exercised very little day-to-day control over Ramey’s recruitment
6 and management of the Arizona migrant workers. Like Contreras, Ramey arranged most of the
7 recruiting logistics and managed the workers once they arrived in New York.⁵⁰ Martin Farms gave
8 Ramey instructions and expected that the instructions were followed.⁵¹ Baja also had this power over
9 Contreras. Angel Gomez Chavez told OLS that Contreras and Carlos (Penunuri) were in constant
10 communications as were Contreras and Claudia Penunuri.⁵² Kwynne Forler-Grant testified that she
11 was given the contact information of Mercedes from Mercedes Accounting to request the Baja
12 paperwork, which included Baja’s license and insurance information.⁵³ She then stated that Contreras
13 brought the requested Baja paperwork to her, and she understood Contreras to be a representative of
14 Baja.⁵⁴ Claudia Penunuri testified that Contreras negotiated Newway’s payments on Baja’s behalf.⁵⁵
15 The extent of Baja’s control over Contreras, demonstrates that Contreras was acting as Baja’s agent.

16 **b. The nature of Contreras’s business was to recruit workers and work for Baja.**

17 The next factor is the distinct nature of the employee/agent’s business.⁵⁶ During Matias
18 Catalan Toro’s deposition, he stated that, “Roberto used to work for Baja Concrete.”⁵⁷ Contreras also
19

20 _____
⁴⁸ *Id.* at 787, 1390 (citing *Hollingsberry v. Dunn*, 68 Wash.2d 75, 81, 411 P.2d 431 (1966)).

21 ⁴⁹ See *Ochoa*, 287 F.3d at 1190.

22 ⁵⁰ *Id.*

23 ⁵¹ *Id.*

⁵² HE Ex. 51 (Angel Gomez Chavez OLS Interview Notes 03082020) at TRIAL 02131, 02136-37.

⁵³ HE Hr’g, Kwynne Forler-Grant (“Forler-Grant”) Test., Day 9, Part 1 at 48:39-52:56.

⁵⁴ *Id.*

⁵⁵ HE Hr’g, Penunuri Test., Day 8, Part 2 at 33:09-33:46.

⁵⁶ See *Ochoa*, 287 F.3d at 1190.

⁵⁷ HE Ex. 30 (Toro Dep.) at TRIAL 00809-10.

1 carried a Baja Concrete USA business card that listed his first name, his email address, the first name
2 of Carlos Penunuri and their cell phone numbers.⁵⁸ K. Forler Grant (Newway) testified to seeing this
3 Baja business card.⁵⁹

4 In *Ochoa*, the court defined distinct nature as being whether someone acts to promote his own
5 independent enterprise or to further the business of another.⁶⁰ Ramey was in the business of providing
6 migrant labor to farms, and this business clearly preexisted and is independent of Ramey's
7 relationship with Martin Farms.⁶¹ Ramey made a commission on every hour worked by the migrant
8 worker, which weighed in favor of Ramey's independent contractor status, but it did not preclude a
9 finding that Ramey was Martin Farms' agent.⁶² In Baja's case, Contreras recruited workers for Baja,
10 his business card did not say Roberto Soto Contreras, Incorporated. The card read Baja Concrete
11 USA Corp and did not refer to Contreras as a separate entity. Baja presented no evidence of how
12 Contreras was paid (no paystubs, check stubs and no receipts) outside of the employee payroll
13 summaries showing Zelle payments. Although Contreras recruited workers for Baja, his recruitment
14 was as an employee and not as an independent contractor. This factor weighs in favor of Contreras
15 being Baja's agent.

16 **c. Contreras's Work did not require specialization.**

17 The next factor is the occupation's required specialization.⁶³ The *Ochoa* court states that a
18 fact finder is more likely to classify someone as an independent contractor when the work involved
19 requires highly specialized or educated skills.⁶⁴ This factor weighed in favor of classifying Ramey
20

21 _____
22 ⁵⁸ HE Ex. 20 (Contreras' Baja Business Card).

23 ⁵⁹ HE Hr'g, Forler-Grant Test., Day 9, Part 3 at 38:22-38:27, 39:47-40:18.

⁶⁰ See *Ochoa*, 287 F.3d at 1190.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* (citing *Santiago* 164, Ariz. 505, 794 P.2d at 143).

1 as Martin Farms' agent.⁶⁵ Ramey's process of hiring migrant labor, transporting them from Arizona
2 to New York and managing the Arizona workers while in New York did not require Ramey to be
3 highly educated or skilled although logistical challenges could be presented.⁶⁶ This is comparable to
4 Contreras's role, because he hired the Workers for Baja, arranged for their transportation to Seattle,
5 made living arrangements for them in an apartment complex, presented an hourly wage offer on
6 behalf of Baja, transported the Workers to and from the worksite and occasionally stayed onsite to
7 supervise. These facts illustrate that no specialized skills were needed for Contreras to make logistical
8 arrangements for the Workers. Therefore, even if Contreras was not Baja's employee, this factor
9 weighs in favor of him being Baja's agent.

10 **d. Workers were provided with a place to work but were charged for the cost of tools.**

11 The next factor is the provider of materials and place of work.⁶⁷ When workers are supplied
12 tools and work over a specific area or a fixed route, an independent relationship is not indicated.⁶⁸ In
13 *Ochoa*, Martin Farms provided all the tools and equipment needed but in Baja's case, the Workers
14 purchased their own tools or the cost was deducted from their paychecks if Contreras purchased tools
15 on behalf of Baja.⁶⁹ The relevance of this factor is less clear as to Contreras.

16 **e. Duration of Employment was the Entire Life of Baja Concrete USA Corporation.**

17 The next factor is duration of Contreras's employment with Baja.⁷⁰ The *Ochoa* court
18 considered whether Ramey's services were sought as a one-time job or as part of a continuous
19 working relationship which may indicate that an independent contractor relationship exists, although
20 the duration of employment does not control whether an agency relationship exists.⁷¹ Because

21 ⁶⁵ See *Ochoa* 287 F.3d at 1191.

22 ⁶⁶ *Id.*

23 ⁶⁷ *Id.*

⁶⁸ See *Ochoa* 287 F.3d at 1191 (citing *Santiago* 164, Ariz. 505, 794 P.2d at 144).

⁶⁹ City's Resp. 17:14-17.

⁷⁰ See *Ochoa* 287 F.3d at 1191.

⁷¹ *Id.*

1 Ramsey was hired more than once to provide hiring services for Martin Farms and Martin Farms
2 provided direction on who to hire the second time, this weighed in favor of classifying Ramsey as an
3 independent contractor acting as Martin Farms agent.⁷²

4 In the instant case, Contreras performed the services of hiring laborers and cement finishing
5 workers for Baja. Contreras also was the point of contact on site representing Baja and reviewing the
6 timesheets/timecards with Newway before transmitting to Mercedes Accounting for processing of
7 payroll. According to Baja President Claudia Penunuri, Baja has been out of business since
8 completing the work with Newway and does not have any upcoming projects.⁷³ This shows that
9 Contreras worked for Baja during its entire functional existence and that he is an agent or employee
10 of Baja.

11 **f. The Method of payment is neutral.**

12 The next factor is method of payment, and whether it occurs on a per hour basis.⁷⁴ In *Ochoa*,
13 Ramey's commission was calculated on an hourly basis and based on the hours worked by the farm
14 workers, not by Ramey.⁷⁵ The Court considered this factor to be neutral and did not weigh in favor
15 of either finding.⁷⁶

16 In *Massey*, plaintiffs brought action against backhoe operator and owner of reader board sign
17 - Tube Art Display, Inc (Tube Art) because of damage to their building caused by a fire and an
18 explosion.⁷⁷ The King County Superior Court entered judgment for plaintiffs and Tube Art
19 appealed.⁷⁸ The Court of Appeals affirmed the trial court's decision and held that the backhoe
20

21 _____
22 ⁷² *Id.*

⁷³ HE Hr'g, Penunuri Test., Day 7, Part 4 at 53:23-53:55; Day 8, Part 4 at 1:37:04-1:37:45.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id. Massey* 15 Wash. App. at 784.

⁷⁸ *Id.*

1 operator was an agent of Tube Art and not an independent contractor.⁷⁹ In this case, we have no
2 evidence to determine how Contreras was paid other than conflicting testimony from Ms. Penunuri
3 and Ms. De Armas. Ms. Penunuri testified she did not pay Contreras, and that it was an arrangement
4 with her brother and she lacked specific details, while De Armas testified Zelle payments were made
5 to Contreras by Ms. Penunuri.⁸⁰ We know that Contreras had hours listed in over 30 of the Baja
6 timesheets in 2019 and 2020 like the other Workers, but no information was provided to OLS and
7 conflicting testimony provided during the trial to show how Contreras was paid.⁸¹ The Workers
8 testified to being paid by the hour, but no clear evidence was provided about how Contreras was paid
9 so this factor, like in Ochoa, is not in favor of a strong finding either way.

10 **g. Contreras's work played a critical role in Baja's business.**

11 The next factor is the relationship of work to the regular business of Baja.⁸² Baja states that
12 it is only a payroll processing company, but according to the Request for Information by the Office
13 of Labor Standards, Baja stated that applicants go to job sites to request employment and that
14 Contreras selects candidates and makes decisions with the President of Company, Claudia Penunuri.⁸³
15 Although Ms. Penunuri testified that she was not involved in the hiring of the Workers, it shows that
16 she was involved in the selection of the Workers and directed Contreras's activities.

17 Although Baja has repeatedly stated and provided testimony that they only process payroll,
18 Ms. Penunuri testified from a document on the Washington State Department Labor & Industries
19 website which stated Baja Concrete USA Corp held a construction contractor license.⁸⁴ Ms. Penunuri

20 _____
21 ⁷⁹ *Id.* at 788-789.

22 ⁸⁰ HE Hr'g, Penunuri Test., Day 7, Part 4 at 46:02-46:51; HE Hr'g, De Armas Test., Day 14, Part 4 at 2:12:08-2:13:28.

23 ⁸¹ HE Ex. 12 (Baja Invoices and Timesheets) at TRIAL 00950-51, 00956-57, 00959-60, 00963, 00971-72, 00976-77, 00981, 00988, 00991, 00993, 00995, 01003, 01005, 01010-11, 01015-16, 01023-24, 01027, 01029, 01031-32, 01038-39 and 01041; HE Ex. 43 (Baja Invoices and Timesheets) at TRIAL 01044-45, 01047-48, 01050-51, 01056, 01057 and 01060; HE Hr'g, Penunuri Test., Day 7, Part 4 at 46:02-46:51.

⁸² See *Ochoa* 287 F.3d at 1191.

⁸³ HE Ex. 32 (Baja Resp. to OLS RFI) at TRIAL 01092.

⁸⁴ HE Hr'g, Penunuri Test., Day 8, Part 1 at 10:49-11:47, 13:25-14:25.

1 testified that Contreras did not work for Baja and that he provided labor.⁸⁵ Ms. Penunuri also testified
2 that Contreras negotiated payment terms with Newway on Baja’s behalf.⁸⁶ Yet in the Complaint that
3 Baja filed in King County Superior Court against Newway, it states on page TRIAL01102, that Baja
4 provided services in the form of labor for Newway at the property located at 1120 Denny Way.⁸⁷
5 Although the dates are beyond the scope of the OLS investigation in this complaint, the labor service
6 provided at the 1120 Denny Way location is likely the same labor service that was provided during
7 the February 2018 – August 2020 timeframe.

8 In *Ochoa*, this factor weighed in favor of classifying Ramey as Martin Farms’ agent because
9 growing crops is of no use if a workforce is not available to harvest the crops in a timely manner.⁸⁸
10 In this case, without Contreras recruiting Workers on behalf of Baja, there would be no payroll for
11 Baja to process. Even if Baja only processed payroll, they only provided this service to Newway and
12 Baja Concrete USA, and Baja did not provide labor services to any other companies.

13 **h. The parties in this case believe Contreras is an employee or agent of Baja.**

14 The next factor considered is the belief of the parties.⁸⁹ The *Ochoa* court stated “it is not
15 determinative that the parties believe or disbelieve that the relation of [independent contractor or]
16 master and servant exists, except insofar as such belief indicates an assumption of control by the one
17 and submission of control by the other.”⁹⁰ The Court held that there was not enough evidence about
18 the parties’ belief or intent, so this factor was not helpful in determining the status of the relationship
19 in that case.⁹¹

20
21 ⁸⁵ *Id.* at Day 7, Part 4 at 45:17-46:51.

22 ⁸⁶ *Id.* at Day 8, Part 2 at 33:09-33:46.

23 ⁸⁷ HE Ex. 43 (Baja Complaint v. Newway, KCSC Case No. 22-2-04760-7) at TRIAL 01102.

⁸⁸ *Id. Ochoa* 287 F.3d at 1191.

⁸⁹ *Id. Ochoa*, 287 F.3d at 1182 (citing to *Santiago*, 164 Ariz. at 505, 794 P.2d at 142).

⁹⁰ *Id. Ochoa*, 287 F.3d at 1192 (citing to *Santiago*, 164 Ariz. at 512, 794 P.2d at 145) (quoting Restatement (Second) of Agency § 220 cmt m (1957)).

⁹¹ *Id. Ochoa*, 287 F.3d at 1192.

1 In this case, the Baja business card shows Contreras as an employee of Baja, as does testimony
2 from other witnesses at trial. Claudia Penunuri testified that Contreras negotiated payment terms
3 with Newway on Baja's behalf.⁹² Also, Newway's Kwynne Forler-Grant testified that Contreras was
4 Baja's Superintendent.⁹³ Antonio Machado testified that Contreras was a manager at Baja and that he
5 thought Contreras worked for Baja.⁹⁴ Only Baja testified that Contreras was an independent
6 contractor.⁹⁵ Such testimony is a self-serving attempt to escape Baja's liability by blaming a person
7 who is absent from the proceeding. Everyone else testified Contreras worked for Baja. The evidence
8 supports a finding that Contreras was either an employee or agent of Baja, and not an independent
9 contractor.

10 **i. Contreras's work in this case was directed by Baja.**

11 One of the factors listed in *Massey* to determine if a person is an independent contractor or an
12 agent is if the kind of occupation, and whether that type of work is usually done under the direction
13 of the employer or by a specialist without supervision.⁹⁶ Contreras's work can best be described as
14 a recruiter and manager. There is no evidence he provided this service for any other company so this
15 is not a situation where he was an independent specialist. All his work was performed specifically
16 for Baja. Contreras did not hire the Workers to work for him, they were hired to work for Baja
17 Concrete USA Corp. to perform cement finishing for Newway, not Contreras. Also, the timesheets
18 had Baja Concrete USA Corp printed at the top and the paychecks listed Baja as the employer, not
19 Contreras. Contreras could not have hired these Workers to work for Baja without Baja's approval.
20 There was no evidence provided showing that Contreras performed these services for any other
21 company other than Baja.

22 _____
23 ⁹² HE Hr'g, Penunuri Test., Day 8, Part 2 at 33:09-33:46.

⁹³ HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 48:39-48:54, 49:35-49:45.

⁹⁴ HE Hr'g, Antonio Machado ("Machado") Test., Day 9, Part 4 at 37:08-38:13, 44:38-44:50.

⁹⁵ HE Hr'g, De Armas Test., Day 14, Part 3 at 09:09-09:26.

⁹⁶ *Id. Massey*, 15 Wash. App. at 786.

1 **j. Baja was in business to supply labor to Newway construction sites.**

2 The last factor to consider from *Massey* is whether the principal is or is not in business.⁹⁷ In
3 this case, Ms. Penunuri provided testimony that Baja Concrete USA only processed payroll.
4 Mercedes De Armas testified to being hired by Claudia Penunuri to process payroll for Baja.⁹⁸
5 Although Ms. Penunuri testified that Baja only processed payroll, the evidence shows that Baja
6 functioned as more than a payroll company. Ms. De Armas testified that Ms. Penunuri authorized
7 Mercedes Accounting to pay Antonio Machado by check for a loan he made to Baja Concrete USA
8 Corp.⁹⁹ Machado testified that this loan was a request from Carlos Penunuri to provide cash to
9 Contreras to purchase vehicles, rent apartments and purchase things for the house for the Workers.¹⁰⁰
10 Ms. Penunuri confirmed through her testimony that Baja held a construction contractor license.¹⁰¹
11 The Workers testified that they worked for Baja, not Contreras. Ms. De Armas also testified to
12 completing the Washington L&I paperwork for Baja and listing 21-30 workers because she does not
13 recall a time when they had more than 25.¹⁰² The employer listed on the paystubs was Baja, not
14 Contreras. Baja needed Contreras to provide Workers for the Newway project. Although Baja claims
15 to have only processed payroll, this is contradicted by the evidence.

16 **D. BAJA IS VICARIOUSLY LIABLE FOR CONTRERAS’S ACTIONS.**

17 Roberto Soto Contreras was an employee of Baja and held himself out as a representative of
18 Baja to Newway Forming, Inc. This is evident in the testimony from the Workers, Newway Forming
19 representatives, and the OLS representatives. Although Baja continues to state they only processed
20 payroll, the evidence shows that Baja also provided labor services. The economic realities test shows
21

22 ⁹⁷ *Id.* at 787.

⁹⁸ HE Hr’g, De Armas Test., Day 14, Part 4 at 42:26-42:41.

23 ⁹⁹ *Id.* at 58:13-59:34; HE Ex. 48 (Baja check [copy] to Machado).

¹⁰⁰ HE Hr’g, Machado Test., Day 9, Part 4 at 1:07:27-1:08:24.

¹⁰¹ HE Hr’g, Penunuri Test., Day 8, Part 1 at 10:49-11:47, 13:25-14:25.

¹⁰² HE Hr’g, De Armas Test., Day 14, Part 5 at 11:51-12:24; HE Ex. 104 at TRIAL 01660 (L&I Coverage Cert.).

1 Respondent Contreras as an employee of Baja and the *Wills/Santiago* factors quoted in *Ochoa*, show
2 that Contreras can also be an agent of Baja.

3 Baja stated that the OLS Director conceded that Baja USA is not an employer of the Workers.
4 This is incorrect and not stated anywhere in the OLS Determination (HE Ex. 11). Since Contreras is
5 either an employee or an agent of Baja, Baja is an employer of the Workers. Respondent Contreras
6 recruited the Workers, determined their hourly rate of pay, submitted their time to Baja for payment,
7 transported them to and from the jobsite, and coordinated their housing, all on behalf of Baja Concrete
8 USA Corp. Baja allowed Contreras to act as its representative to Newway and cannot now claim that
9 Contreras was acting on his own. Such a claim is entirely unsupported by the evidence. Without
10 Contreras's actions in finding and managing the Workers, Baja would have no payroll to process.

11 Whether Contreras is Baja's employee or Baja's agent, Baja should be held liable for the
12 violations of SMC 14.20, SMC 14.19 and SMC 14.16 as found by the OLS Director.

13 V. CONCLUSION

14 The evidence shows that Baja hired Contreras to represent Baja in its relationship with
15 Newway. By a preponderance of the evidence, the City has proven that Appellants Baja, Newway
16 and Machado are all joint employers and that they violated SMC 14.20, SMC 14.19 and SMC 14.16
17 as found by the OLS Director. Baja's relationship with Contreras supports such a finding, as he is
18 either Baja's employee or its agent, rendering Baja liable either way. The City has shown that each
19 Appellant is jointly liable for the total amount of back wages, liquidated damages, civil penalties, and
20 fines assessed by OLS in the amount of \$2,055,204.10 plus interest. The City requests the Hearing
21 Examiner to affirm the Director's Order.

22
23 **[SIGNATURE BLOCK ON FOLLOWING PAGE]**

1 DATED this 5th day of January, 2024.

2 ANN DAVISON
3 Seattle City Attorney

4 By: /s/Trina Pridgeon
5 **Cindi Williams, WSBA #27654**
6 **Lorna S. Sylvester, WSBA #29146**
7 **Trina L. Pridgeon, WSBA #54697**
8 Assistant City Attorneys
9 701 Fifth Avenue, Suite 2050
10 Seattle, Washington 98104-7097
11 Email: cindi.williams@seattle.gov
12 Email: lorna.sylvester@seattle.gov
13 Email: trina.pridgeon@seattle.gov
14 *Attorneys for Respondent,*
15 *The Seattle Office of Labor Standards*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify under penalty of perjury under the laws of the State of Washington that, on
3 this date, I caused to be served a true and correct copy of the foregoing document, **Respondent City of**
4 **Seattle’s Supplemental Closing Brief**, on the parties listed below and in the manner indicated:

5 Nicole Wolfe (x) Email: wolfe@oles.com
6 Jason R. Wandler (x) Email: newolfe@smithcurrie.com
7 701 Pike Street, Suite 1700 (x) Email: wandler@oles.com
8 Seattle, WA 98101 (x) Email: stroeder@oles.com
Attorneys for Appellant, (x) Email: smith@oles.com
Newway Forming Inc.

9 Mark D. Kimball (x) Email: mkimball@mdklaw.com
10 Alex T. Larkin (x) Email: alarkin@mdklaw.com
11 MDK Law (x) Email: paulo@mdklaw.com
12 777 108th Ave NE, Suite 2000
Bellevue, WA 98004
Attorneys for Appellant
Baja Concrete.

13 Aaron Roche (x) Email: aaron@rockelaw.com
14 Roche Law Group, PLLC (x) Email: service@rockelaw.com
15 101 Yesler Way, Suite 603 (x) Email: savannah@rockelaw.com
Seattle, WA 98104
Attorney for Appellant,
Antonio Machado

17 the foregoing being the last known addresses and email addresses of the above-named party
18 representatives, and pursuant to the e-service agreement.

19 Dated this 5th day of January, 2024, at Seattle, Washington.

21 /s/Natasha Iquina
22 NATASHA IQUINA
23 Legal Assistant