

**FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE**

In the Matter of the Appeals of:

**BAJA CONCRETE USA CORP.,
ROBERTO CONTRERAS, NEWWAY
FORMING INC., and ANTONIO MACHADO**

Hearing Examiner File:
**LS-21-002, LS-21-003, and
LS-21-004**

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

Baja Concrete USA Corp. (“Baja Concrete”), Newway Forming Inc. (“Newway”), and Antonio Machado (“Machado”) (collectively herein “Appellants”) filed appeals of a final order entered by the Director of Labor Standards, finding that they had violated the Seattle Municipal Code (“SMC” or Code), including the Wage Theft Ordinance, SMC 14.20; Minimum Wage Ordinance, SMC 14.19; and, the Paid Sick and Safe Time Ordinance, SMC 14.16. The matter was heard over fourteen days of hearing between June 12, 2023 and September 20, 2023, before the Hearing Examiner. Final closing briefing was submitted on November 15, 2023, and final supplemental briefing requested by the Examiner was submitted on January 12, 2023, and the record closed on that date.

Having considered the evidence in the record and the arguments of counsel, the Examiner enters the following findings of fact, conclusions, and decision on the appeals.

Findings of Fact

1. The Office of Labor Standards (“OLS” or “Department”) initiated an investigation on March 4, 2020, and alleged violations of the Wage Theft Ordinance, SMC 14.20; Minimum Wage Ordinance, SMC 14.19; and, the Paid Sick and Safe Time Ordinance, SMC 14.16. The alleged violations involved work that took place in Seattle and occurred between February 2018 and August 2020.
2. As a result of the investigation OLS issued a Findings of Fact, Determination and Order on August 25, 2021 for Case Number CAS-2020-0018 (“OLS Findings of Fact, Determination and Final Order”). The Appellants appealed the OLS Findings of Fact, Determination and Final Order to the Office of Hearing Examiner and those appeals are the subject of this matter.
3. Baja Concrete is a company based in Miami, Florida, which performs work in Seattle and the surrounding region. At hearing, Claudia Penunuri testified that she is the owner and president of Baja Concrete. She testified that she registered Baja Concrete in Florida, and as a foreign corporation in Washington, with the intention of engaging in numerous business activities, including payroll processing, realty,

- real estate remodeling and construction.¹ She testified that Baja Concrete engaged the services of Mercedes Accounting to handle payroll processing services for Baja Concrete's contractual relationship with Newway because Baja Concrete needed to work with someone familiar with conducting business in Washington. Baja Concrete was officially incorporated in Florida on September 15, 2017, and registered in Washington on May 1, 2018. Baja Concrete has no local office (all documents list either the business address in Miami, the apartment where Roberto Contreras lived, or the accountant's office in Bellevue).
4. Newway is a concrete forming company, with an office in Lynnwood, Washington. Newway also operates in Canada. Newway has been operating in the US for over 25 years. Newway first contracted with Baja Concrete in approximately 2018 to provide concrete finisher employee services at 1120 Denny Way, Seattle, WA 98109, and other worksites. Onni Group was the general contractor for the 1120 Denny Way, Seattle, WA 98109 project site. "Onni subcontracted with Newway to perform concrete work. Newway then subcontracted with Baja Concrete . . . where Baja [Concrete] agreed to perform concrete work - primarily concrete finishing and labor." Newway Closing at 2.
 5. Antonio Machado² is one of Newway Forming's general foremen at 1120 Denny Way in Seattle. In the interview OLS conducted with Machado on October 20, 2020, he stated that he had been working at 1120 Denny Way for "three years, as superintendent." Machado exercised control over the employees' hours, schedules and whether they worked overtime, and he directly supervised both the Newway Forming foremen and the Baja Concrete representative who directed the employees' day-to-day work.
 6. Per its contract with Onni Contracting (Washington) Inc., the owner and developer of the site at 1120 Denny Way, Newway, was scheduled to begin work at the site on August 28, 2017, as a concrete formwork subcontractor.
 7. OLS interviewed eight employees who received their pay from Baja Concrete for work performed at sites where both Newway and Baja Concrete operated. OLS concluded that Baja Concrete provided services as a sub-tier subcontractor to Newway at multiple sites in Seattle and the surrounding area.
 8. OLS interviewed Machado, who affirmed OLS' notes of his testimony in a signed statement with no edits or clarifications. OLS also interviewed a foreman for Newway who had previously worked at the 1120 Denny Way site, a two-tower mixed-use development under construction in Seattle's South Lake Union

¹ Claudia Penunuri's brother Carlos Penunuri Ibarra was also listed as an officer in the original filings for Baja Concrete. Carlos Penunuri Ibarra also runs a concrete company in Canada called Baja Company Ltd.

² Antonio Machado is also referred to as "Tony Machado" in the record.

neighborhood for which Onni Contracting (Washington) Inc. is the general contractor.

9. Baja Concrete did not make any of its officers or representatives available for an interview. Company president Claudia Penunuri agreed to an interview time by phone but did not answer OLS' phone calls at the appointment time or follow-up calls shortly thereafter. Ms. Penunuri also did not respond to a voice mail message or a follow-up email requesting a new interview time. Baja Concrete's representative, accountant Mercedes de Armas, failed to confirm an interview time with OLS but did respond to written questions and document requests on behalf of her client.
10. OLS submitted written Requests for Information to Appellants, and issued a Subpoena Duces Tecum when it did not receive complete and timely responses from all Appellants. Evidence reviewed in this case also includes the following documents:
 - Written responses to Requests for Information from Baja Concrete and Newway.
 - Written responses to a Request for Information from Onni Contracting (Washington) Inc. prior to its dismissal from the case, along with a copy of the contract between Onni Contracting (Washington) Inc and Newway.
 - Payroll records provided by Baja Concrete.
 - Newway produced copies of Baja Concrete's invoices for payment, along with the underlying timesheets from the 1120 Denny Way site and two additional worksites in Seattle. The timesheets show the daily hours of work for Baja Concrete employees, on a Sunday – Saturday weekly calendar basis and reflecting two work weeks in each pay period / invoice period. The documents date from November 2018 to early June of 2020.
 - Text message records from workers showing the hours they tracked and self-reported to Baja Concrete.
11. OLS received no records related to Paid Sick and Safe Time.
12. OLS did not receive the following subpoenaed information from any of the parties:
 - All written communications (including text and/or email) between Antonio Machado, Roberto Contreras³, Carlos Penunuri Ibarra⁴, and/or any employee of Baja Concrete, from 2017 to date of production pertaining to Baja Concrete and/or Newway, including but not limited to: ... requested sick leave for Baja Concrete employees, and the 1120 Denny Way, Seattle WA 98109 construction site.

³ Roberto Cesar Soto Contreras, Roberto Contreras and Roberto Soto are names by which Roberto Contreras is known.

⁴ Carlos Penunuri Ibarra was initially named as an individual Respondent when the Notice of Investigation was filed, and he was dismissed as a Respondent at the Director's discretion on December 8, 2020.

- Documents sufficient to show the complete addresses of all buildings and construction projects/sites in Seattle on which Baja Concrete acted as a contractor or subcontractor from 2017 to the present, and the dates during which any of these entities or individuals acted as a contractor or subcontractor.
 - All documents that relate to Baja Concrete's Paid Sick and Safe Time Policy, including records indicating when employees can use Paid Sick and Safe Time; how they accrue Paid Sick and Safe Time hours; how much Paid Sick and Safe Time they can use each year; how much Paid Sick and Safe Time can employees carry over to the next year; how often employees were notified of their Paid Sick and Safe Time balances; and how notification of Paid Sick and Safe Time balances is provided to employees.
 - All documents that relate to employees' use of Paid Sick and Safe Time hours for the period from January 12, 2017, to the date of production, including dates of paid sick and safe time use and the amount paid sick and safe time used on each date.
 - Employee phone numbers.
13. At hearing, the following ten employees (collectively herein "Workers"⁵) provided testimony: Jonathon Parra Ponce, Matias Catalan Torro, Hector Amin Cespedes Rivera, Raul Alejandro Fiol Martinez, Claudio Ivan Gambao Lopresti, Angel Martin Gomez Chavez, John Edward Hinestroza Diaz, Jose Alfredo Acosta Caballero, Patricio Fernandez Borquez, and Jose Ascension Estrada Parra.⁶
14. The Workers believed they were working for Baja Concrete, based on representations from Roberto Contreras. Testimony of Jonathon Parra Ponce, Matias Catalan Torro, Raul Alejandro Fiol Martinez, Angel Martin Gomez Chavez, John Edward Hinestroza Diaz, and Jose Alfredo Acosta Caballero. Jose Alfredo Acosta Caballero testified that he was certain he worked for Baja Concrete, and that 'Baja' "was the name that we heard every day." Testimony of Jose Alfredo Acosta Caballero.
15. Roberto Contreras managed the hiring of the workers for Baja Concrete. The Workers testified that Roberto Contreras hired them to work for Baja Concrete at the Denny Way location in Seattle. Testimony of Jonathon Parra Ponce, Matias Catalan Torro, Hector Amin Cespedes Rivera, Raul Alejandro Fiol Martinez, Claudio Ivan Gambao Lopresti, Angel Martin Gomez Chavez, John Edward

⁵ Herein the terms "employee(s)" or "worker(s)" apply to any or all concrete finishers and laborers employed by Baja Concrete to provide their services to Newway. The term "Workers" specifically refers to the workers who appeared as witnesses at the hearing. Newway employees are specifically identified as such.

⁶ It was common for Baja Concrete workers to utilize an alias for timesheets, safety meeting sign in sheets etc.

Hinestroza Diaz,⁷ Patricio Fernandez Borquez, and Jose Ascension Estrada Parra. They all testified that Roberto Contreras worked for Baja Concrete. They testified that Roberto Contreras recruited them, arranged for their travel to Seattle, managed their housing, kept their identification documents, drove one of the vans which brought them to work, and picked them up from work. At hearing, a Newway representative testified that Baja Concrete also had another site supervisor present at the 1120 Denny Way site for at least some period, that individual was named Noe Rios. Testimony of Kwynne Forler-Grant. OLS made its determination that workers were employees of Baja Concrete based on a list of employees provided by Baja Concrete and who the employees thought they worked for. Testimony of Ashley Harrison.

16. Claudia Penunuri knew Roberto Contreras and communicated with him about Baja Concrete payroll and administrative needs. She indicated Roberto Contreras would find employees and testified that he did so as an independent contractor. She did not identify who Roberto Contreras was an independent contractor for, and seemed to testify at times that she did not know what work Roberto Contreras engaged in despite knowing him and being in consistent communication with him at a minimum for payroll. Testimony of Claudia Penunuri. She testified that Roberto Contreras decided which workers to offer for employment. She claimed that Baja Concrete was only processing payroll for the workers and was not their employer. She was unable to explain why she had named what was allegedly only a payroll company “Baja Concrete.” In her testimony Ms. Penunuri indicated that she is the only employee of Baja Concrete, and of never meeting Roberto Contreras, but also testified that Roberto Contreras knew her brother Carlos Penunuri from Canadian concrete work, that she spoke with Roberto Contreras by phone (and that this was the manner in which she was introduced to him), and that she had email correspondence with him. Although she claimed that Roberto Contreras did not work for Baja Concrete, in response to being asked what his role with Baja Concrete was, she described Roberto Contreras as a person “in charge,” and who would look for and retain workers, and decided which workers to offer work to. She gave vague descriptions of what the company had been formed for originally indicating that it was for business consulting, business advising, negotiating different types of business, but was unable to describe any actual work except payrolling. She testified that she never spoke to anyone from Newway. She also stated on cross examination that Roberto Contreras had arranged an agreement between Newway and Baja Concrete, and then said Mercedes de Armas had talked to Newway. Exhibit 19 indicates that Baja Concrete had approved a verbal agreement between Baja Concrete and Newway. On cross examination she testified that Roberto Contreras, her brother Carlos Penunuri (both in the concrete construction and labor

⁷ John Edward Hinestroza Diaz testified that Carlos Penunuri was responsible for originally connecting him with concrete work in Canada, and Roberto Contreras brought John Edward Hinestroza Diaz to Seattle for concrete work here.

providing business), and Mercedes de Armas were consultants for Baja Concrete, but did not define what services they provided. The individuals Roberto Contreras identified as workers were the same individuals on the Baja Concrete payroll. Timecards for the Workers state the employer is “Baja Concrete USA Corp.” Exhibit 16. Baja Concrete paid taxes for the employees.

17. Claudia Penunuri’s testimony is inconsistent with the information alleged in a complaint filed by Baja Concrete in King County Superior Court case #22-2-04760-7-SEA. Exhibit 35 at 3 ln. 7-9. Baja Concrete filed this action claiming Newway did not pay Baja Concrete for the labor provided at 1120 Denny. Baja Concrete indicated that it was a “licensed contractor and maintained appropriate bond, insurance, and license,” in Washington State, and provided “services, in the form of labor” to Newway and Onni, was a “labor provider,” and complained that it had not been paid for work performed. Exhibit 35. Baja Concrete had a construction license (which is completely unnecessary for payroll services). Baja Concrete did not allege that it was only providing payroll services.
18. Although Claudia Penunuri testified that Baja Concrete only processed payroll and did not provide any labor to Newway, her testimony was inconsistent with the testimony of the Workers and Newway witnesses who stated that the Workers’ employer was Baja Concrete and that Roberto Contreras worked for Baja Concrete.
19. More likely than not, Roberto Contreras was hired by either Claudia or Carlos Penunuri. No written contract between Roberto Contreras and Baja Concrete was produced. Based on the record at hearing, Baja Concrete and Roberto Contreras had an employee/employer type of relationship. Roberto Contreras had a Baja business card which listed his first name only (Roberto) and the first name of Carlos Penunuri, and this card was identified by a Newway witness. Ex. 20. Carlos Penunuri is the brother of Claudia Penunuri. Claudia Penunuri first testified that she did not know Carlos Ibarra, but when asked about Carlos Penunuri Ibarra, she stated he was her brother. She similarly stated that she had not met Roberto Contreras, but then her later testimony indicated she had had multiple points for contact with him. Claudia Penunuri also testified that Roberto Contreras would find employees and she would take care of the payroll. She later testified that Roberto Contreras had some kind of contract with her brother in Canada, but she was not privy to the details. The Articles of Incorporation listed both Claudia Penunuri and Claudio Penunuri as officers and/or directors of Baja Concrete in 2017. Ex. 33. Claudia Penunuri testified that she was the sole owner of Baja Concrete as the President, and that the only employee was herself. The testimony of Mercedes De Armas of Mercedes Accounting also contradicted Claudia Penunuri’s testimony because De Armas testified that she told Labor and Industries that Baja Concrete employed between 21 and 30 employees. Lastly, OLS requested information from Baja Concrete as follows:

Describe the process by which you publicize job openings, solicit job applicants, and hire new employees. Include the names and titles of individuals with authority to make decisions in this process.

Exhibit 32.

The response from Baja Concrete was:

Applicants go to the job sites to request employment. Roberto Soto, independent contractor select [sic] candidates and makes decisions with President of Company.

Id.

Claudia Penunuri was identified as the president of the company. Therefore, in its response to OLS, Baja Concrete indicated that Roberto Contreras and Claudia Penunuri consulted with regard to hiring of workers.

20. Baja Concrete processed payroll for the Workers. It also billed Newway for all the Workers' hours. Mercedes De Armas testified that she is the founder, owner and manager of Mercedes Accounting & Associates, LLC, and that her firm was engaged by Baja Concrete for bookkeeping services, tax related services, filings with the Washington Secretary of State and processing payroll for employees. She testified that Mercedes Accounting corresponded with Claudia Penunuri of Baja Concrete for purposes of their business engagement, and that the information and documentation for processing payroll was provided to her by Roberto Contreras. The information and documentation for processing payroll was provided by email, approximately once every two weeks, from Roberto Contreras to Mercedes Accounting. Testimony of Mercedes de Armas and Claudia Penunuri. This information included hours, wage rates and deductions from wages. Paystubs prepared by Mercedes Accounting in the processing of payroll are in the hearing record and are issued under the name of Baja Concrete.
21. The Workers described Roberto Contreras's role as that of a labor broker providing Newway with a supplemental workforce on behalf of Baja Concrete.
22. According to Newway and Baja Concrete, no written contract existed between the two companies. Kwynne Forler-Grant testified that she was informed that a verbal agreement had been reached between Newway and Baja Concrete in Canada, and that verbal agreements were common for Newway.
23. Newway characterized the agreement between Baja Concrete and Newway as follows:

The agreement between Newway and Baja was an oral agreement. For Newway to pay Baja (the entity), Baja would submit periodic invoices with timesheets or timecards attached to them. Newway paid Baja for each hourly unit of work that Baja provided. The timesheets were prepared by Baja superintendent Roberto Contreras and provided to Newway supervisors as back-up for Baja's invoices. As demonstrated in HEX Exhibit 13, the invoices that Baja provided to Newway provided limited information - the dates, number of hours worked, and the rate that Baja charged Newway (i.e. "178 hours of cement finishers at \$40 per hour, for a total of \$7,120.00). Baja did not provide Newway with any information regarding what Baja was paying its Workers, and Newway never exercised any control over the rate that Baja paid its Workers.

Newway Closing at 3-4 (footnotes references removed).

24. Newway required work of cement finishers and laborers as an integral part of Newway's performance of its contractual duties to Onni. Absence of cement finishers or laborers at the job site would have impeded Newway's capacity to execute its job obligations. The cement finishers were all necessary to perform the work Newway was hired to do by Onni, which was to complete the concrete components of high-rise buildings.
25. Early in the working agreement, Newway had concerns that Baja Concrete was invoicing Newway for work not performed, and implemented a practice of a Newway representative such as Machado or Adam Pilling signing timesheets submitted by Baja Concrete. Testimony of Adam Pilling. At a later date, Newway provided Baja Concrete with a time clock that the workers would use to punch in and out. The record does not show that Newway employees used timesheets or timecards to record their time work, instead they used a phone application called "Time Clock." Testimony of Adam Pilling.
26. The workers all attended safety meetings held onsite and sponsored/conducted by Newway. The workers were instructed to sign in as Newway employees, and not as Baja Concrete employees. See e.g. Testimony of Jonathon Parra Ponce, Hector Amin Cespedes Rivera, Raul Alejandro Fiol Martinez, Angel Martin Gomez Chavez, Jose Alfredo Acosta Caballero, and Patricio Fernandez Borquez. Workers testified that Roberto Contreras told them to sign in as a Newway employee. See e.g. Testimony of Jose Alfredo Acosta Caballero and Patricio Fernandez Borquez.
27. It was Newway that predominantly controlled the work the employees performed at the 1120 Denny Way Site. Newway generally controlled employees' schedules, directed employees' daily work at multiple sites in Seattle, often without, but sometimes with a supervisor from Baja Concrete present. Workers that were

concrete finishers testified that Pedro Ruvalcaba, a Newway foreman for the concrete finishers at 1120 Denny Way, directed their work. Workers that were laborers testified that “Victor,” was a Newway foreman for the laborers at the 1120 Denny Way site and directed laborer work.

28. Kwynne Forler-Grant testified at hearing that she is a project coordinator for Newway. She testified that when Newway needed more workers, Machado or Adam Pilling would inform Roberto Contreras. Newway provided the required scope of work to Roberto Contreras. She said that she had been introduced to Roberto Contreras as the superintendent for Baja Concrete, and Roberto Contreras told her that when he was not on site, he had supervisors under him at the site. She indicated that she had seen a business card with Roberto Contreras’ name and the name of Baja Concrete on it. Ex. 20. She testified that timecards were provided for the workers by Newway and remained in Newway’s office. She further testified that Tom Grant of Newway would meet with Roberto Contreras and go over the timecards. Ms. Forler-Grant testified that workers used Newway’s large equipment at the work site. She further stated that there were email exchanges between her and Claudia Penunuri regarding payment of Baja Concrete’s invoices. She affirmed that Baja Concrete was a subcontractor providing laborers, concrete finishers, and carpenters to Newway (which also had workers that performed some of the same functions).
29. Baja Concrete employees provided concrete finishing for Newway’s concrete pours, an essential aspect of Newway’s role in the overall build. Newway relied on employees paid by Baja Concrete to provide cement finishing services for Newway’s concrete pours.
30. Adam Pilling testified at hearing that he had worked for Newway since October 2010 and that he is a superintendent. Newway staff verified and signed off on billed hours using their own records before paying Baja Concrete’s invoices. He testified that he was on site every day and walked the site two times per day. He also testified that he would meet with Machado every morning to set out the workday, and that he also met with Onni (the general contractor) once per day for scheduling and organizing. He stated that subcontractors would use Newway’s power tools. He further testified that Baja Concrete had no input into scheduling. Mr. Pilling also testified that he signed off on billed hours, and that Newway implemented this practice to verify the billing submitted by Baja Concrete. He further testified that Roberto Contreras was the site representative for Baja Concrete, and liaison between Baja Concrete and Newway. Adam Pilling testified that Machado had no control over pay-rate, hire/fire power, or raises or promotions. Lastly, he testified that it was not possible to distinguish on site between Newway and Baja Concrete workers.

31. During the period covered by the investigation, February 2018 and August of 2020, employees paid by Baja Concrete performed work in significant part, at the direction of, and under the direct control of, Newway while at the Denny Way job site. However, employees were at times directed and controlled at the Denny Way job site, by Roberto Contreras, and through Roberto Contreras, Baja Concrete controlled the Workers by setting schedules for the Workers for which days they would work, providing or denying transportation to or from the job site, providing housing, setting the amount of hourly rate for work, and ensuring Workers were provided with necessary tools, boots and other items for which their pay was deducted. Testimony of Jonathon Parra Ponce, Matias Catalan Torro, Hector Amin Cespedes Rivera, Raul Alejandro Fiol Martinez, Angel Martin Gomez Chavez, and Patricio Fernandez Borquez.
32. Workers testified that Roberto Contreras did at times accompany them to the work site and act as a foreman for the crew when he was present. John Edward Hinestroza Diaz testified that Roberto Contreras was at the Denny Way job site one to three times a week. Jose Alfredo Acosta Caballero testified that he also saw Roberto Contreras at the Denny Way job site, and that when he was there he would do work, and also occasionally direct concrete finisher workers, but not the laborers. Patricio Fernandez Borquez, a concrete finisher, testified that Roberto Contreras would sometimes stay at the Denny Way job site, and would sometimes stay until mid-morning and then leave and come back after buying tools.
33. Roberto Contreras recruited, hired, and determined the worker rate of pay. He submitted worker timesheets to Newway for review and submitted their hours to the Baja Concrete accounting firm. He worked directly with the accountant who processed payroll for employees paid through Baja Concrete by providing her with the information regarding how many hours they worked. Testimony of Mercedes de Armas. Roberto Contreras instructed employees to work the hours and schedules assigned to them by their Newway foremen and report back to him about how much they worked. He also exercised direct control of their schedules by dictating which work site a Worker would go to on a particular day, and which days they could work. See e.g. Testimony of Matias Catalan Torro, Raul Alejandro Fiol Martinez and Angel Martin Gomez Chavez. Roberto Contreras exercised control over employees' pay by Baja Concrete in that he controlled their housing and transportation and determined the rates they were charged for both. These costs were deducted directly from worker paychecks without prior written authorization. Roberto Contreras also took possession of at least some employees' identity documents upon their arrival in Seattle. John Edward Hinestroza Diaz testified that he reported directly to Roberto Contreras when he quit. Jose Alfredo Acosta Caballero testified that he was fired by Roberto Contreras. Jose Ascension Estrada Parra testified that when he left employment with Baja Concrete, he informed Roberto Contreras. Lastly, Roberto Contreras himself received payments from Baja Concrete (see e.g. Ex. 22).

34. Machado acted as one of two site superintendents for Newway at 1120 Denny Way. Testimony reflected that Machado set hours of work for employees regardless of whether they were paid through Newway or through Baja Concrete. He supervised and directed the Newway foremen who oversaw the employees' work. Machado testified that he was the Newway superintendent at the Denny Way job site from November or December 2017, that he had four foremen reporting to him, and that he had never had an ownership interest in Newway or Baja Concrete. Workers testified that, when he was onsite, Machado would give direct work orders and/or corrections to work performed. Machado also testified that all workers on the work site took all legally required breaks and worked the same hours, but he also testified that he would usually go through his foremen to give directions to workers and was not onsite with the workers regularly.
35. OLS located a record of payment from Baja Concrete to Machado in the amount of \$4,878.00 on August 8, 2019. The payment is categorized as 'Reimbursement' and the memo line notes 'Receipt pending' with no further details. The address listed for the payee matches the address which Newway listed for Machado in its initial request for information response. A copy of the check was included in a box of payroll records mailed by Mercedes de Armas to OLS but was not included in payroll summary information that was provided digitally.
36. Baja Concrete employees appear to have been paid an hourly rate for most hours worked. While some pay periods involved fewer hours, employee workweeks commonly exceeded 40 hours. Pay stubs listed hourly rates of pay which sometimes changed between pay periods; and described compensation sometimes as paid hourly, sometimes in piece rate (without any unit specified), and sometimes as bonuses. Workers testified that they were always paid hourly and never received bonuses, nor did they ever work for piece rate. Workers stated that they rarely received pay stubs, if ever. Nothing in the record contradicted the testimony of the Workers. Where paystubs indicated the payment was for a bonus, the payment was for hours worked despite the "bonus" designation. Testimony of Jonathon Parra Ponce, Matias Catalan Torro, and Raul Alejandro Fiol Martinez. Raul Alejandro Fiol Martinez testified that sometimes Roberto Contreras asked employees to sign documents indicating they had only worked 40 hours a week when they had worked more. John Edward Hinestroza Diaz testified that he had been promised a bonus but was never paid one.
37. Workers testified that when performing concrete work at the Denny Way job site, a Newway supervisor called Pedro directed daily activities, that Pedro took orders from Machado, and that at times Machado directly provided work instructions and would critique work completed. When Workers had questions about how to perform the concrete work immediately before them, they would generally ask Pedro. In some instances, Roberto Contreras would correct or provide additional

- work directions. Testimony of Jonathon Parra Ponce, Matias Catalan Torro, Hector Amin Cespedes Rivera, Raul Alejandro Fiol Martinez, and Angel Martin Gomez Chavez. Patricio Fernandez Borquez testified that Pedro worked for Newway, and he also testified that Roberto Contreras was the “boss” for the concrete workers, and that at times both Pedro and Roberto Contreras “would both remain and be on site with us.” Testimony of Patricio Fernandez Borquez. Patricio Fernandez Borquez further testified that Machado was “site manager.” The testimony from the Workers and other witnesses indicates that Machado and several foremen (e.g. Pedro and Victor etc.) controlled the work of concrete finishers and laborers with Machado as overall site management control. Roberto Contreras was a foreman equivalent with control of the concrete finishers.
38. Workers and other witnesses familiar with the Denny Way job site testified that the Denny Way job site did not have a Baja Concrete office or dedicated administrative desk. See e.g. testimony of Jonathon Parra Ponce and John Edward Hinestroza Diaz. Other Workers testified that Roberto Contreras had a desk or table at the apartments provided by Baja Concrete for the workers from which he could do administrative work. See e.g. testimony of Raul Alejandro Fiol Martinez.
39. Overtime pay was not accounted for in the wages for the workers, and there is nothing in the record indicating that it was paid to employees when they worked over 40 hours in a week. The Workers testified that they were not paid for overtime. Testimony of Jonathon Parra Ponce, Matias Catalan Torro, Raul Alejandro Fiol Martinez, Angel Martin Gomez Chavez, John Edward Hinestroza Diaz, Jose Alfredo Acosta Caballero, and Jose Ascension Estrada Parra. At least one employee testified that it was common knowledge among the workers that they would be threatened if they asked about overtime. Testimony of Claudio Ivan Gamboa Lopresti.
40. Baja Concrete provided payroll records reflecting deductions from employees’ paychecks between January 2017 and June 2020. Worker testimony at hearing indicated that many of these deductions reflected the employees’ monthly housing and transportation costs, and sometimes other items such as boots or tools. Workers testified that they never authorized any deductions from their paychecks. See e.g. testimony of Jonathon Parra Ponce, Matias Catalan Torro, Raul Alejandro Fiol Martinez, Angel Martin Gomez Chavez, John Edward Hinestroza Diaz, Jose Alfredo Acosta Caballero, and Jose Ascension Estrada Parra. Baja Concrete did not produce any written authorizations for any paycheck deductions in its payroll records, nor did it produce any records related to supposed loans to employees which were repaid through paycheck deductions. No evidence at hearing contradicted the Workers’ testimony that the deductions were made without authorization. Deductions categorized as ‘Advance R’ corresponded with the Workers’ testimony regarding rent deduction amounts and frequency. They ranged from \$200 to \$490 monthly, but the most common charges were \$350 and \$440 per

month. Individual Workers' rent deductions did not vary over time based on the number of people sharing an apartment. With between six and twelve employees per unit being charged on average \$400 per month, the costs charged to the employees seems to have significantly exceeded the cost of the apartment units. Jonathon Parra Ponce testified that he had requested Roberto Contreras to stop taking rent from his paycheck. The Workers testified that they each kept their own records for timesheets, and for at least an initial period of months, gave these to Roberto Contreras for him to record as timecards for later hourly payment. Angel Martin Gomez Chavez testified that in some cases deductions taken from his paycheck exceeded what Roberto Contreras told him they would be.⁸ John Edward Hinestroza Diaz testified that he did not take out any loans from Baja Concrete, and that he had no knowledge of a deduction indicated on one of his paystubs for an \$800 loan. Patricio Fernandez Borquez testified that discrepancies in pay (not being paid in the range of what an employee expected based on his personal timesheet records) commonly resulted in amounts of \$20, \$50, or \$120 to be missing from a paycheck. Patricio Fernandez Borquez also testified that Roberto Contreras would blame the accountant regarding any discrepancies in pay – thus acknowledging the discrepancy but shifting the blame to someone else out of reach for most of the workers.

41. Appellants did not provide OLS with a copy of any paid sick and safe time policy. Workers testified at hearing, that they were not aware of any sick leave policy, and that Appellants did not provide sick leave, and that there was no notification of sick leave used or accrued within the pay period each time wages were due. See e.g. Testimony of John Edward Hinestroza Diaz. Workers testified that they either did not get to take sick leave when they were ill, or if they did, they did not receive sick pay during periods when they were sick during employment. This included Workers that indicated they were sick at sometime during the employment period at issue. Testimony of Jonathon Parra Ponce, Matias Catalan Torro, Raul Alejandro Fiol Martinez, Claudio Ivan Gamboa Lopresti, Angel Martin Gomez Chavez, John Edward Hinestroza Diaz, Jose Alfredo Acosta Caballero, and Jose Ascension Estrada Parra. Workers testified that they were not paid when they missed scheduled days of work due to illness. For example, John Edward Hinestroza Diaz testified that he was injured at the job site, that he could not work for a day, and that he was not paid for the day that he did not work due to the injury. Workers indicated they told Roberto Contreras if they were sick, and no Worker indicated that they would report to any Newway employee if they were sick. Pay stubs in the record do not show paid sick and safe time accrual or balance prior to the initiation of the OLS investigation. A significant number of paystubs introduced into evidence indicated "0.00" hours available for sick leave, even when a Worker had worked for a period of months or more for Baja Concrete.

⁸ Angel Martin Gomez Chavez gave examples including one instance in which he received \$100 of tools, but \$500 showed as a deduction for that pay period.

42. OLS found several pay periods where there were hours worked listed on an employee's timesheets, but no corresponding paystubs showing payments made to that employee. Additionally, there was no record of certain employees' names or hours worked on the payroll records, even though they were listed on the timesheets. Paystubs for Workers indicated variable hourly pay rates. See e.g. Ex. 11. At least one Worker also reported inconsistencies between timesheets and paystubs. Testimony of Claudio Ivan Gamboa Lopresti.

43. The OLS Findings of Fact, Determination and Final Order includes the finding that:

When OLS inquired about the discrepancy between the paystubs and timesheets, Respondent Baja Concrete disputed that it employed some employees listed on the timesheets which Respondent Baja Concrete submitted to Respondent Newway Forming who were not reflected in Baja Concrete's payroll records. Respondent Baja Concrete offered no explanation for why it invoiced Newway Forming for the work of these individuals. Representatives of Respondent Newway Forming signed off on timesheets which included these disputed employees, and this included timesheets on which Respondent Newway Forming's representatives had written "chk [sic] against time cards," indicating that it verified the hours worked by those employees. Respondent Baja Concrete failed to provide evidence that it paid these employees for any of their hours.

Findings of Fact, Determination and Final Order at 13.

44. Worker testimony consistently indicated that it was common for workers to work in excess of eight hours, including occasional days as long as nineteen hours for some of the laborers in the group. Testimony of witnesses at hearing (including Workers See e.g. Matias Catalan Torro, Hector Amin Cespedes Rivera, and John Edward Hinestroza Diaz; and Newway representatives including Machado) indicates workers were given two breaks – one at approximately 10 am and another at approximately 12 pm. Workers testified that they did not receive additional paid rest breaks or unpaid meal breaks when working longer shifts. Nothing in the record disputed this testimony of the Workers.

45. In its response to OLS' Initial Request for Information, Baja Concrete failed to provide evidence that it posts a Seattle Workplace Rights poster at locations where its employees work. Workers testified that they did not see any job-related posters at the Denny Way job site, or any other location. See e.g. Testimony of Jonathon Parra Ponce and Raul Alejandro Fiol Martinez. Suggestions were made at hearing by the Appellants that posters regarding worker's rights were posted in a van used to transport workers to the job site. No evidence at hearing demonstrated that any

- posters were in any transportation van. Ms. Forler-Grant testified that Newway did have labor posters in the job shack where the workers would meet for lunch and also posters in the office but did not explain how she had personal knowledge of this. Machado also testified that Newway had English/Spanish labor posters about sick pay in the trailer for everyone to read. Ms. Forler-Grant's, Mr. Pilling's, and Machado's testimony concerning the presence of posters was contradicted by the testimony of the Workers, the attempt at hearing to imply that posters were present in the Workers' transportation van, and the absence in the record of any such poster (not even a photo of such poster).
46. To calculate unpaid overtime premium for employees, OLS utilized payroll reports, paystubs, and bi-weekly timesheets from hours worked at the 1120 Denny Way job site in 2018, 2019, and 2020.
47. OLS calculated nonpayment of wages by multiplying the hours worked listed on the Baja Concrete's bi-weekly timesheets by an average hourly rate for that employee. Since employees' actual hourly compensation rates fluctuated, the rate was calculated by averaging all hourly rates paid to that worker throughout all pay periods.
48. OLS calculated proposed remedies based on the total amount incorrectly withheld from each employee, including liquidated damages, and assessed interest based on the length of time elapsed since each deduction.

Applicable Law

49. OLS used the economic realities test from *Becerra v. Expert Janitorial LLC*, 181 Wn.2d 186 (2014), to decide if the Appellants jointly employed the Workers. The parties agree that the *Becerra* test is appropriate for this matter. In *Becerra*, the Washington Supreme Court considered whether employers were jointly liable for violations of Washington's Minimum Wage Act. The trial court dismissed the plaintiff's summary judgment motion, finding that Fred Meyer and Expert Janitorial LLC were not joint employers. *Becerra* at 189. The Washington Supreme Court found that the summary judgment was improperly granted and remanded for further proceedings. The Supreme Court instructed the trial court to apply the factors in *Torres-Lopez*, 111 F.3d 633 (9th Cir. 1997). *Becerra* at 200.

In *Torres-Lopez*, the court used thirteen nonexclusive factors. The first five are regulatory factors and the remaining eight are common law factors.

The five regulatory factors are:

- (A) The nature and degree of control of the workers;
- (B) The degree of supervision, direct or indirect, of the work;

- (C) The power to determine the pay rates or the methods of payment of the workers;
- (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; [and]
- (E) Preparation of payroll and the payment of wages.

The eight common law factors are:

- (1) whether the work was a specialty job on the production line;
- (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes;
- (3) whether the premises and equipment of the employer are used for the work;
- (4) whether the employees had a business organization that could or did shift as a unit from one [worksite] to another;
- (5) whether the work was piecework and not work that required initiative, judgment or foresight;
- (6) whether the employee had an opportunity for profit or loss depending upon managerial skill;
- (7) whether there was permanence [in] the working relationship; and
- (8) whether the service rendered is an integral part of the alleged employer's business.

Torres-Lopez at 639-40 (internal quotation marks and citations omitted; alterations in original).

50. The *Torres-Lopez* factors are not exclusive and are not to be applied mechanically or in a particular order. As the United States Supreme Court noted long ago, “[T]he determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.” (“The court is also free to consider any other factors it deems relevant to its assessment of the economic realities.”). Indeed, as the inimitable Judge Easterbrook observed, the economic reality test “offers a way to think about the subject and not an algorithm. That’s why toting up a score is not enough.” Here, our Court of Appeals properly found that these factors may include whether the putative joint employer knew of the wage and hour violation, whether it paid sufficient amounts to the subcontractors to allow for a lawful wage, and whether the subcontracting arrangement is a ‘subterfuge or sham.’

Becerra at 198 (internal quotation marks and citations omitted).

51. According to Seattle Human Rights Rule 90-045(3), determining whether employment is joint employment, or separate and distinct employment, depends upon all the facts in the particular case. This Rule is consistent with the case law for joint employment.

Conclusions

1. The Hearing Examiner has jurisdiction over this matter pursuant to Chapter 14.16, 14.19, and 14.20 SMC. Under SMC 14.16.090, 14.19.090, and 14.20.070, the general rule is that the hearing is conducted *de novo*, and OLS carries the burden of proof by a preponderance of the evidence.
2. OLS' senior investigators in this case testified as to the correct definitions of an employee and an employer under the SMC ordinances. Under the ordinances, an employer is defined as "someone who suffers or permits an employee to work on their behalf" and an employee is defined as "someone whose work benefits a particular entity or employer." SMC 14.16.010, 14.19.010, and 14.20.010.
3. "More than one entity may be the 'employer' if employment by one employer is not completely disassociated from employment by the other employer." SMC 14.16.010, 14.19.010, and 14.20.010.
4. The Appellants primarily focused their challenges on OLS' determination that each was to be considered a joint employer in the OLS Findings of Fact, Determination and Final Order. Notably, minimal effort was made by Appellants to challenge that the violations occurred, but they instead focused their efforts on shifting blame from themselves. In addition, Appellants raised concerns that the fines assessed by the OLS Findings of Fact, Determination and Final Order were excessive.
5. Roberto Contreras played a crucial role in managing the hiring of the Workers for Baja Concrete, including but not limited to making living or housing arrangements for some of the Workers, collecting the timesheets of the Workers and transporting the Workers back and forth to the worksites. Contreras' name did not appear on Workers' paystubs (only Baja Concrete was listed). Each Worker testified that they worked for and were paid by Baja Concrete. Roberto Contreras did not have any authority to approve or sign off on any timesheets, his role was limited to providing information to Newway and to Baja Concrete. Washington state courts and the majority of federal circuit courts use the "economic realities test" to determine if a worker is an employee or an independent contractor.⁹ As a matter of economic reality, Roberto Contreras was dependent on Baja Concrete to which he rendered service:

⁹ See e.g. *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wash.App. 35 (2010), listing the six factors of the economic realities test as: (1) The permanence of the working relationship between the parties; (2) The degree of skill the work entails; (3) The extent of the worker's investment in equipment or materials; (4) The worker's opportunity for profit or loss; (5) The degree of the alleged employer's control over the worker; (6) Whether the service rendered by the worker is an integral part of the alleged employer's business.

(a) There is no evidence that Roberto Contreras did work for any other entity than Baja Concrete for the period at issue in this matter,¹⁰ and aside from payroll Baja Concrete's operations did not occur without Roberto Contreras' involvement.

(b) Nothing indicates that Roberto Contreras had any special degree of skill to perform his duties. Roberto Contreras recruited the Workers for Baja Concrete. He determined their pay per hour, provided them with a place to live (if needed) and transported them back and forth to work. Locating workers and finding them a place to live and establishing an hourly rate required no special skills of Roberto Contreras. In addition, Baja Concrete indicated that the selection of workers was done in conjunction with the president of Baja Concrete – Claudia Penunuri, and so his functions were controlled by her. Exhibit 32.

(c) Roberto Contreras had a minimal investment in equipment or materials. There is no evidence of Roberto Contreras going to any personal expense for equipment or materials, instead Roberto Contreras purchased tools and other equipment and Baja Concrete deducted the cost of the tools from the Workers' paychecks.

(d) It is unclear if Roberto Contreras had a profit or loss opportunity in providing workers for Baja Concrete. Roberto Contreras was the point person to hire workers on behalf of Baja Concrete to work as cement finishers and general laborers. Claudia Penunuri stated that Roberto Contreras was not paid by Baja Concrete, however, this was not true because Roberto Contreras's name appeared on Baja Concrete timesheets with hours worked listed on more than one occasion. In addition, the record is not clear who at Baja Concrete benefited from what appears to be skimming of deductions from Worker paychecks – Roberto Contreras or others within Baja Concrete.

(e) Baja Concrete had control over Roberto Contreras' important duty of recruiting new workers. Roberto Contreras recruited workers, and then vetted these with Claudia Penunuri. Exhibit 32. In addition, the record demonstrates that Claudia Penunuri (Baja Concrete's President) and Mercedes Accounting were provided with timesheet information by Roberto Contreras to process – he did not have any control over that part of the process and was answerable to Baja Concrete for its execution, e.g. the payroll of Baja Concrete employees.

(f) Roberto Contreras' work of recruiting and helping to manage workers was integral to Baja Concrete's capacity to provide workers to Newway, and to perform

¹⁰ Despite evidence indicating Roberto Contreras was associated with a Canadian entity Baja Concrete, Ltd., apparently owned by Carlos Penunuri (Claudia Penunuri's brother), nothing in the record indicates that this entity had any relation with Newway, or that Roberto Contreras did any work solely for the sake of this entity during the time he was responsible for all of the Baja Concrete workers associated with the Newway/Baja Concrete project at issue in this matter.

payroll for those workers. Baja Concrete would not have had any payroll to process if Roberto Contreras did not hire workers for Baja Concrete.

6. Even if Roberto Contreras were not an employee of Baja Concrete, he would be an agent of Baja Concrete.¹¹

(a) Baja Concrete had control over Roberto Contreras' important duty of recruiting new workers. Roberto Contreras recruited workers, and then vetted these with Claudia Penunuri. Exhibit 32. In addition, the record demonstrates that Claudia Penunuri (Baja Concrete's President) and Mercedes Accounting were provided with timesheet information by Roberto Contreras to process – he did not have any control over that part of the process and was answerable to Baja Concrete for its execution, e.g. the payroll of Baja Concrete employees.

(b) There is no evidence that Roberto Contreras worked to promote his own independent enterprise, but the record strongly reflects that he worked to further the business of Baja Concrete. Testimony at hearing from the Workers, Newway witnesses and Mercedes de Armas indicates that Roberto Contreras consistently indicated that he represented Baja Concrete, including presenting a Baja Concrete business card to at least one individual. There is no indication that there would be any benefit to Roberto Contreras personally for recruiting workers, and instead it is clear that Baja Concrete could not have functioned without Roberto Contreras' recruitment of workers. As indicated above, even if Baja Concrete's activity were limited to conducting payroll, as alleged by Baja Concrete witnesses, Baja Concrete would not have had any payroll to process if Roberto Contreras did not hire workers for Baja Concrete.

(c) Nothing indicates that Roberto Contreras had any special degree of skill to perform his duties. Roberto Contreras recruited the Workers for Baja Concrete. He determined their pay per hour, provided them with a place to live (if needed) and transported them back and forth to work. Locating workers and finding them a place to live and establishing an hourly rate required no special skills of Roberto Contreras. In addition, Baja Concrete indicated that the selection of workers was done in conjunction with the president of Baja Concrete – Claudia Penunuri, and so his functions were controlled by her. Exhibit 32.

¹¹ Eight factor test from *Santiago v. Phoenix Newspapers, Inc.* 164 Ariz. 505, 794 P.2d 138, 142 (Ariz. 1990): (1) the extent of control over the work and the degree of supervision; (2) the distinct nature of the worker's business; (3) the occupation's required specialization; (4) the provider of materials and the place of work; (5) the duration of employment; (6) the method of payment; (7) the relationship of work done to the regular business of the employer; and (8) the belief of the parties. With an additional two factors from Washington caselaw: (a) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; and (b) whether the principal is or is not in business. *Massey v. Tube Art Display, Inc.*, 15 Wash. App. 782, 551 P.2d 1387 (1976).

- (d) Roberto Contreras performed the services of hiring laborers and cement finishing workers for Baja Concrete. Roberto Contreras was also the point of contact on the job site representing Baja Concrete, and for reviewing timesheets/timecards with Newway before transmitting to Mercedes Accounting for processing of payroll. According to testimony of Baja Concrete President Claudia Penunuri, Baja Concrete has been out of business since completing the work with Newway and does not have any upcoming projects. Thus, Roberto Contreras worked for Baja Concrete during its entire functional existence.
- (e) Roberto Contreras' services of recruiting workers, managing workers, and coordinating timesheet review and preparation was a critical role for Baja Concrete's business of providing labor for concrete work and for overseeing payroll for said workers.
- (f) Roberto Contreras certainly believed he represented and acted on behalf of Baja Concrete. Testimony at hearing from the Workers, Newway witnesses and Mercedes de Armas indicates that Roberto Contreras consistently indicated that he represented Baja Concrete, including presenting a Baja Concrete business card to at least one individual. While Claudia Penunuri testified that Roberto Contreras was an independent contractor, her testimony is inconsistent in several instances, and is therefore unreliable.
- (g) As Baja Concrete explained in Exhibit 35 it provided "services, in the form of labor" to Newway and Onni, and was a "labor provider," in addition to the payroll services that it provided. Baja was the principal business providing these services, and Roberto Contreras was the employee or agent of that business to provide these services.
7. OLS relied 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, and the other parties agreed that this is the appropriate test for joint employment. The Washington Supreme Court held that "[t]hese factors are not exclusive and not to be applied mechanically or in a particular order." *Id.* at 198. Joint employment must be evaluated by the totality of the circumstances. The tribunal "is also free to consider any other factors it deems relevant to its assessment of the economic realities." *Id.* at 198 (quoting *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007)). As the court noted, "that's why totting up a score is not enough." *Id.* at 198 (quoting 495 F.3d at 408-09).
- Becerra Factor 1: Nature and Degree of Control of the Workers**
8. Newway and Machado on Newway's behalf determined the order in which work would be done at the 1120 Denny Way job site with no input from Baja Concrete.

Newway determined the scope of the work. See e.g. Testimony of Kwynne Forler-Grant.

9. Machado's control of the workers precipitated from his role as a superintendent for Newway. Machado was self-described as a site superintendent for Newway. Machado would receive scope of work information from Newway's upper management, and conveyed these instructions to Newway foremen, who would then give direction to the workers. Machado was not involved in setting the scope of work.
10. Baja Concrete significantly controlled workers lives in many aspects away from the Denny Way job site, and to a lesser degree at the job site. Baja Concrete controlled the worker housing, transportation to and from the job site, dictated if a worker could go to work or not, at least in some cases took their personal documentation, purchased items required by Baja Concrete and Newway for the workers, and deducted the cost of these items (rent, transportation, tools, clothing etc.) from the workers' paychecks without authorization from the workers. Nine of the ten Workers testified that Roberto Contreras made living arrangements for them once they were hired to work for Baja Concrete. Rent was deducted from nine of the Workers' pay stubs regularly, irrespective of how many workers lived in the apartment. Almost all of the Workers testified through an interpreter, and most indicated they had come from outside the United States. Therefore, the degree of control exerted by Baja Concrete over workers lives was far more extreme than it would have been for workers if they spoke English and/or were citizens of the United States. Finally, in some instances Baja Concrete directly controlled workers onsite when Roberto Contreras was present. In Roberto Contreras' own words to the workers, "I am your dad, I am your mom, I am your friend, I am your lover – I am everything for you." Testimony of Claudio Ivan Gamboa Lopresti. The nature and degree of control of the employees by Baja Concrete was extreme.
11. Machado had no control over the "purse strings" of either Newway or Baja Concrete. He had no authority to determine pay rates for the workers. He had no hand in preparing payroll or administering payments to workers. He was not involved in the contracts between Newway and its contractors. He did not handle accounts receivable or accounts payable. Mr. Machado had no opportunity for profit or loss depending on Baja workers' skills - Newway paid him the same rate regardless of the Baja workers' productivity. He is not a chief corporate officer of either Newway or Baja USA. He did not exercise operational control over significant aspects of Newway or Baja USA's day-to-day finances, nor is he alleged to have any ownership interest in either company.

Becerra Factor No. 2: Degree of Supervision

12. Newway supervised the Workers directly and indirectly from February 2018 through August 2020. Workers received work assignments from Newway foremen and Newway superintendents (including Machado). The same Newway representatives answered questions about work assignments and corrected them when they did something wrong. Newway foremen engaged in daily oversight of the Workers' work and in some instances Machado (on behalf of Newway) would reassign Workers who had already been given direction by other Newway foremen.
13. Newway supervision included requiring workers to attend Newway sponsored and controlled safety meetings which were held at least weekly, and sometimes in response to a specific safety incident.
14. The degree of supervision by Baja Concrete at the job site was limited to several times a week wherein Roberto Contreras was present at the job site and was limited to the concrete workers.
15. Machado was the site superintendent. To the extent Machado supervised the workers, directly or indirectly, he did so as an employee of Newway Forming and in the interest of his designated role within the company. Machado's supervision did not relate to the alleged violations. See *Moreau v. Air France*, 343 F.3d 1179, 1188 (9th Cir. 2003) ("supervision of workers not indicative of joint employment where principal merely gave 'specific instructions to a service provider' concerning performance under a service contract").

Becerra Factor No. 3: Power to Determine Pay Rates or Methods of Payment

16. Newway required Workers to sign in and sign out each day by using a Newway timeclock for the purpose of enabling Newway to check the timeclock entries against invoices submitted from Baja Concrete. According to Kwynne Forler-Grant's testimony, Newway was in control of whether or not Baja Concrete was able to pay their workers because Newway was in control of when Newway paid Baja Concrete. Newway representatives approved the number of hours worked in the Baja Concrete invoices by signing or initialing the invoice, and Newway signed Baja Concrete timesheets. Baja Concrete invoices reflected Workers frequently working more than 40 hours a week, which was notice to Newway that Workers should be paid overtime.
17. The Workers consistently testified that Roberto Contreras (representing Baja Concrete), made offers to the Workers that determined their pay rates. Worker testimony demonstrated that Baja Concrete controlled methods of payment as Roberto Contreras would pay Workers directly in cash, and in other instances would help the worker to establish a bank account which would be used for direct deposit. Baja Concrete witnesses (e.g. Claudia Penunuri and Mercedes de Armas) consistently testified that Baja Concrete was solely responsible for payroll for the

Workers. Paystubs admitted into evidence clearly identify Baja Concrete as the employer of the Workers.

18. No evidence shows Machado had any control in determining the pay rates or methods of payment for workers.

Becerra Factor No. 4: Right to Hire, Fire, or Modify Employment Conditions Directly or Indirectly

19. Newway determined the hiring needs of Baja Concrete by conveying to Baja Concrete the number of workers it needed. It is unclear whether Newway had direct firing powers over the Workers. Evidence from one Worker (Jonathan Parra Ponce) indicated Machado had the right to fire Workers, but this was not consistently identified elsewhere in the record. Adam Pilling testified that Newway had the indirect power to deny work to Workers, because Newway could tell Baja Concrete not to bring workers to the site.
20. Roberto Contreras hired the Workers on behalf of Baja Concrete. All ten of the Workers testified that Roberto Contreras hired them to work for Baja Concrete at the Denny Way location in Seattle. Several of the workers reported that when they quit they reported this to Roberto Contreras, and testimony also indicated he fired employees.
21. Machado testified that he had no authority or influence over hiring or firing employees of either Newway or Baja Concrete. While some Workers indicated they were under the impression he had powers to fire them, there was no testimony indicating that Machado had fired anyone. He also had no hand in the contract arrangement between Newway and Baja Concrete.

Becerra Factor No. 5: Preparation of Payroll and Payment of Wages

22. Baja Concrete paid Mercedes Accounting to process the payroll for the workers. Worker testimony indicates that their first payment was in cash from Roberto Contreras and then Roberto Contreras helped them set up direct deposit to receive payment processed by Baja Concrete. Payroll was processed biweekly. Testimony also established that Newway actively reviewed timesheet submissions prior to payroll processing and was responsible for paying Baja Concrete for invoiced labor.
23. No evidence shows Machado had any control over payroll or methods of payment for workers.

Becerra Factor No. 6: Whether Work was Specialty Job on Production Line

24. The Workers performed a variety of tasks alongside other Newway employees. This included general labor and concrete finishing work. The evidence indicates that the work performed varied day to day. The work that the Workers did was not “production line work.”

Becerra Factor No. 7: Whether Responsibility under the Contracts Between a Labor Contractor and an Employer Pass to Another Without Material Changes

25. The terms of the oral contract between Newway and Baja Concrete are not sufficiently detailed in the record to determine if this factor is met or not.

Becerra Factor No. 8: Premises and Equipment

26. Newway controlled the premises and owned much of the equipment used by Baja Concrete and the Workers at the 1120 Denny Way location. Newway had two trailers on site: a lunchroom trailer and an office trailer. The timeclock used by the Workers were located in the Newway lunchroom trailer and was owned by Newway. Workers were required to purchase some small tool equipment for their own use by Baja Concrete. The equipment was purchased by Roberto Contreras and the cost was deducted from their paycheck. Workers used Newway’s equipment onsite for larger/powered equipment included jack hammers, grinders, vacuums, skill saws and cranes. In addition, some Workers testified that Baja Concrete also had some equipment at the job site for use by the Workers. Baja Concrete controlled employees’ environment off of the job-site, e.g. providing work-related housing, and transport to and from work.

Becerra Factor No. 9: Whether Employees Had Business Organization that Shifted as a Unit from One Worksite to Another

27. The Workers provided by Baja Concrete worked exclusively at Newway job sites between February of 2018 and August of 2020. All the Workers testified that they worked at one or more of three Newway locations in Seattle. They did not work for anyone other than Newway or Baja Concrete. Baja Concrete registered in Washington for the exclusive purpose of providing workers to Newway.

Becerra Factor No. 10: Whether Work was “Piecework”

28. No evidence in the record conclusively demonstrated that any of the work at issue was piecework.

Becerra Factor No. 11: Whether Workers had Opportunity for Profit/Loss

29. No evidence in the record demonstrated that any of the workers had an opportunity for profit or loss within any of the companies.

Becerra Factor No. 12: Whether there was Permanence in Working Relationship

30. Evidence at hearing did not establish that there was permanence in the working relationship between Newway and Baja Concrete.

Becerra Factor No. 13: Whether service rendered was an Integral Part of the alleged employer's business

31. Workers' performance of work of cement finishing and labor was an integral part of Newway's performance of its contractual duties. Absence of cement finishers or laborers at the job site would have impeded Newway's capacity to execute its job obligations. The cement finishers were all necessary to perform the work Newway was hired to do by Onni, which was to complete the concrete components of high-rise buildings. Newway argues that it could have hired other workers, but this is not established in the record. The fact that Newway had some of its own workers performing the same tasks, but still took the effort to acquire additional labor from Baja Concrete for an approximate two-year period demonstrates a need for the Workers. Further, the actual service rendered by the Workers was integral to Newway's business, even if others could eventually be found to perform it – the service itself was integral.
32. Newway argued that its role as the cement contractor who subcontracted with Baja Concrete did not make it a joint employer, but that instead the relationship was simply a construction industry standard relationship in which Baja Concrete was the only actual employer. Newway did not introduce any industry expert establishing industry standards. Further, Newway was complicit in efforts to blend Newway and Baja Concrete workers into a single employee workforce. For example, Newway attempted to but never terminated the practice of Baja Concrete workers signing in at safety meetings as Newway employees (Kwynne Fowler Grant testified she had asked Roberto Contreras to have this practice stopped). Newway reviewed timesheets and otherwise worked closely with the management and control of the employees with Baja Concrete to such a degree, that Newway was clearly intentionally benefiting from Baja Concrete's improper handling of payroll for the employees vis a vis overtime, sick leave etc.
33. OLS emphasized a payment from Baja Concrete to Machado as evidence of a close working relationship, possibly with the implication that Machado was receiving extra funds for maintaining the working relationship with Baja Concrete. Machado testified that the payment was for reimbursement of personal money he loaned Carlos Penunuri in Canada. No evidence aside from this item (and possibly rumors

among the Workers) established any kind of “kick-back” or suspicious payment arrangement between Baja Concrete and Machado, and even if such a relationship existed, OLS failed to demonstrate how such would be relevant to investigation and/or determination in this matter.

34. Newway and Machado raised concerns regarding the policy implications of finding them to be joint employers. Such policy considerations are not within the scope of consideration for the Examiner and have not been considered in reaching this decision.
35. The preponderance of the evidence shows that Baja Concrete and Newway are “employers” and “joint employers” under the Wage Theft Ordinance, SMC 14.20; Minimum Wage Ordinance, SMC 14.19; and, the Paid Sick and Safe Time Ordinance, SMC 14.16, and are liable for the unpaid wages, interest, liquidated damages, and civil penalties imposed by the Seattle Office of Labor Standards.
36. On consideration of the circumstances of the whole activity for which the violations were found, OLS has not demonstrated by a preponderance of the evidence that Machado should be considered a joint employer, or that he should otherwise be liable for any of the imposed civil penalties, liquidated damages etc. Machado was not an employer; he was a superintendent of Newway.
37. Employees were not paid for overtime work. SMC 14.20.020 requires an employer to pay all compensation owed to an employee by reason of employment on an established regular pay day at no longer than monthly payment intervals. Worker testimony demonstrates that they were likely paid for many hours worked but without the overtime premium, and that they regularly worked overtime. Payroll documentation admitted into evidence demonstrates that employees’ pay did not account for an overtime premium when employees worked more than 40 hours in a work week. It appears there were some instances after the start of the OLS investigation in March 2020 until August 2020 where some employees were starting to receive overtime premium pay. A preponderance of the evidence demonstrates that Appellants Newway and Baja Concrete violated SMC 14.20.020 by failing to pay overtime premium for significant periods of work performed by their employees. Appellants failed to introduce any evidence concerning this violation to contradict the OLS findings.
38. OLS calculated the difference between what the employee received in payment and what they should have received at the higher minimum wage rate and assessed interest based on the length of time that these back wages have been overdue. A preponderance of the evidence demonstrates that Appellants Newway and Baja Concrete violated the minimum wage provision of the Minimum Wage Ordinance, SMC 14.19.030.

39. Under SMC 14.20.020, employers are required to pay all compensation owed to an employee by reason of employment on an established regular pay day at no longer than monthly payment intervals. Additionally, in accordance with SMC 14.20.030(A) employers are required to keep records for a three-year period demonstrating that employees were paid for all of their work. A failure to maintain such records creates a presumption of a violation. According to timesheets in the record, some employees regularly performed work for extended time periods, but payment for these time periods was not reflected in payroll records provided by Baja Concrete. Even Baja Concrete's joint employment partner Newway found Baja Concrete's timekeeping methods questionable, and as a result implemented additional timekeeping methods – but only to safeguard Newway and not the employees. Appellants failed to provide payroll records demonstrating payment for these hours worked, even when OLS explicitly requested proof of payment for those hours. The failure to maintain records triggers the presumption of a violation. Appellants failed to rebut the presumption of a violation by clear and convincing evidence. A preponderance of the evidence supports that Appellants Newway and Baja Concrete violated SMC 14.20.020 and 14.20.030 (A).
40. Employers must have a paid sick and safe time policy that complies with the requirements of the Paid Sick and Safe Time Ordinance and provide the policy to all employees in writing. SMC 14.16.045(C). In addition, employers must provide employees with a written notification, each time wages are paid, with updated amounts of paid sick and safe time hours accrued and reduced since the last notification, and the balance available for employees to use. SMC 14.16.030(K). An employer has an obligation to demonstrate that they have a paid sick leave policy. None of the Appellants demonstrated the presence of any sick leave policy, and the testimony of the Workers makes it abundantly clear that there was none. Paystubs in the record demonstrate written notification was not provided concerning paid sick and safe time. Worker testimony established that workers were not able to access paid sick and safe time to cover shifts they missed due to personal illness, injury, or other covered reasons. A preponderance of the evidence demonstrates that Newway and Baja Concrete violated the compensation provision of the Paid Sick and Safe Time Ordinance, SMC 14.16.025, 14.16.030, and 14.16.045.
41. Deductions must occur within the context of an advance in writing permission from an employee. Further, deductions must be for the benefit of an employee and not an employer, and the employer may derive no financial benefit from such deductions. RCW 49.52.060. The record unequivocally establishes that regular deductions from employee paychecks occurred. Workers consistently indicated they gave no permission for the deductions, and no evidence of employee permission was provided by any of the Appellants. Further, the evidence shows that the deduction system in this case was abused with workers not being paid what they were owed, and with deductions not being clearly traceable via receipts or

other records showing any benefit to the employee. A preponderance of the evidence demonstrates that Newway and Baja Concrete violated the compensation provision of the Wage Theft Ordinance, SMC 14.20.

42. SMC 14.20.020 requires employers to pay “all compensation owed to an employee by reason of employment on an established regular pay day at no longer than monthly payment intervals.” “Compensation” means payment owed to an employee by reason of employment including, but not limited to, salaries, wages, tips, overtime, commissions, piece rate, bonuses, rest breaks, promised or legislatively required paid leave, and reimbursement for employer expenses.

Under WAC 296-126-092(1), employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift.

Under WAC 296-126-092(4), employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

Workers were not provided all required breaks. While the evidence shows some consistency in a morning break and a lunch break, there is no evidence that any additional break occurred even for days which extended well beyond eight hours. Questions from Appellants of OLS representatives implied that in some cases workers had a long distance to travel to the bathroom, and that this should have been counted as a break period. Workers not able to access the bathroom without going a long distance was an issue within control of the employers and not the employees and is not to be utilized as an excuse to deprive the employees of an actual break.

A preponderance of the evidence demonstrates that Newway and Baja Concrete violated the compensation provision of the Wage Theft Ordinance with regard to meal and rest breaks.

43. Under SMC 14.16.045(B); SMC 14.19.045(B); and, SMC 14.20.025(B), “Employers shall display the OLS poster in a conspicuous and accessible location where any of their employees work, in English and in the primary language of the employees at the particular workplace.”

Appellant witnesses variously alleged that a poster was in the lunch meeting area or in a mobile vehicle. However, Appellants did not provide any photo (or other evidence) actually showing a poster. Additionally, Workers testified they never saw such a poster located at any worksite location. A preponderance of the evidence

demonstrates that Newway and Baja Concrete violated the notice and posting provision of the Ordinances.

44. Under the SMC 14.16.050, SMC 14.19.050, and SMC 14.20.030, for a three-year period after an employee works the hours, employers shall retain payroll records documenting specific information concerning each employee's work record. Appellants failed to provide records of all employees' names and address, total overtime earnings, and dates of employment. A preponderance of the evidence demonstrates that Newway and Baja Concrete violated the record retention provision of the Paid Sick and Safe Time Ordinance, SMC 14.16.050; the Minimum Wage Ordinance, SMC 14.19.050; and, the Wage Theft Ordinance, SMC 14.20.030.
45. Appellants failed to provide written notices of employment information as required by SMC 14.20.025 (D). A preponderance of the evidence demonstrates that Newway and Baja Concrete violated the notice of employment information provision of the Wage Theft Ordinance, SMC 14.20.025.
46. Appellants failed to list any hours worked on most payroll records, and additionally did not separately list any overtime hours worked on pay stubs between February of 2018 and March of 2020. By listing "piece-rate" pay but failing to list the number of units completed, Appellants did not comply with the requirement to provide rate of pay. Appellants provided only the total gross pay without indicating the rate of pay from which it was derived. Appellants did not supply evidence that workers received pay based on the number of units, or pieces, they complete, rather than on the number of hours they work. Employees received pay based on bi-weekly fluctuating hourly rates. By claiming to pay by piece rate when in reality they were paying people by the hour, Appellants did not comply with the requirement to provide pay basis. A preponderance of the evidence demonstrates that Newway and Baja Concrete violated the wage payment notification provision of the Wage Theft Ordinance, SMC 14.20.025.
47. Baja Concrete took issue with the OLS sample size of eight workers. Baja Concrete Closing at 18. However, Baja Concrete offered no expert critique of the sample size to demonstrate that it was inadequate, and instead based its argument on speculation and hyperbole.
48. Baja Concrete argued that "[t]he civil penalties and liquidated damages asserted in the Determination are unwarranted and excessive," because Baja Concrete argued that it had "cooperated with OLS throughout its investigation." Newway and Machado similarly complained about the amount of the civil penalties and liquidated damages. By a preponderance of the evidence OLS demonstrated that it properly exercised its discretion when calculating the civil penalties and liquidated damages. The Appellants complain about these amounts, but submitted no

testimony at hearing that adequately addressed these concerns, and instead simply reserved these concerns as raise and drop issues to be included in closing arguments. Such after-the-fact complaints do not overcome the evidence submitted by OLS, and the record simply does not contain reliable information adequate to overcome the evidence that OLS properly exercised its discretion.

49. Machado raised issues concerning the constitutionality of the fines imposed by OLS. These issues are not properly raised in this venue, are not within the purview of the Examiner to consider and are not addressed by this decision.
50. Machado repeated objections raised at hearing concerning admissibility of witnesses and evidence. These objections were raised and addressed by rulings at hearing and are improperly raised in closing argument. Even if these issues had not already been addressed at hearing, and were appropriate to address at this time, as with the objections as to witness admissibility raised at hearing, Machados's objections are raised with no evidence to demonstrate unreliability of OLS witnesses. Instead, Machados' objections were based solely on subjective opinion and mere assertion.
51. Appellants (especially Baja Concrete and Machado) repeatedly raised objections concerning admissibility of hearsay at the hearing, predominantly by simply stating "objection, hearsay." Appellants repeatedly failed to demonstrate an understanding of Hearing Examiner Rule of Practice and Procedure 3.18(a) which allows hearsay. Appellants at no time actually introduced evidence to substantiate a claim that a witness was not reasonably reliable. Instead, Appellants persisted in the mistaken assumption that all they had to do was raise the issue and that the burden shifted to either the City or even in some instances to the Hearing Examiner to prove that a witness was reliable. It was the objector's responsibility to prove this and to understand the hearing rules as applied in this forum and these repeated objections demonstrated a failure to achieve this despite repeated explanations from the Hearing Examiner.
52. Appellants complain that they were not allowed to examine witnesses that OLS may have relied upon in its decision. The Examiner's decision is significantly based on the testimony of the Workers presented at hearing. The Appellants had a full and fair opportunity to cross examine every witness at hearing.

Decision and Order

The Order entered by the Director of the Office of Labor Standards in Case No. CAS-2020-0018 is **AFFIRMED** with regard to Appellants Baja Concrete USA Corp., and Newway Forming Inc., and is **REVERSED** with regard to Appellant Antonio Machado.

Entered March 26, 2024.

/s/Ryan Vancil
Ryan P. Vancil
Hearing Examiner

CONCERNING FURTHER REVIEW

NOTE: It is the responsibility of the person seeking to appeal this decision to consult Code sections and other appropriate sources to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. Any person aggrieved by the final order of the Hearing Examiner may obtain judicial review by applying for a Writ of Review in the King County Superior Court within 30 days from the date of this decision in accordance with the procedure set forth in Chapter 7.16 RCW, other applicable law, and court rules.

If a court orders a review of the decision, the person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **FINDINGS AND DECISION** to each person listed below, or on the attached mailing list, in the matter of **BAJA CONCRETE USA CORP., ET AL.**, Hearing Examiner File: **LS-21-002, 003, & 004**, in the manner indicated.

Party	Method of Service
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Dated: March 26, 2024.

/s/ Angela Oberhansly
Angela Oberhansly, Legal Assistant