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7 BEFORE THE HEARING EXAMINER  
8 CITY OF SEATTLE  
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10 In the Matter of the Appeal of:

11 BAJA CONCRETE USA CORP., ROBERTO  
12 CONTRERAS, NEWWAY FORMING,  
13 INC., and ANTONIO MACHADO

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

Hearing Examiner File Nos.:

LS-21-002  
LS-21-003  
LS-21-004

**APPELLANT NEWWAY FORMING,  
INC.'S MOTION FOR SUMMARY  
JUDGMENT**

16  
17 **I. INTRODUCTION**

18 The Office of Labor Standards (“OLS”) wrongfully determined that Newway Forming  
19 Inc. (“Newway”) was a joint employer with its subcontractor, Respondent Baja Concrete USA  
20 Corp. (“Baja”). The OLS failed to provide any competent evidence to support its mistaken  
21 assertion that Newway is a joint employer. The OLS, without conducting an onsite  
22 investigation, and without speaking to principal decision makers of any of the parties involved,  
23 instead relies on anonymous, unsigned, and unreliable “witness statements” to support the idea  
24 that Newway and Baja are joint employers. Newway should be dismissed from this lawsuit.

25 **II. STATEMENT OF FACTS**

26 **A. Newway is a Contractor who Did Not Employ Any of the Subject Workers**

1 Newway is a contractor operating in both Canada<sup>1</sup> and the United States. Newway's U.S.  
2 based company contracted with Baja Concrete's U.S affiliate to provide concrete services for  
3 construction projects located in downtown Seattle. The primary project at issue in this current  
4 action is located at 1120 Denny Way, Seattle, WA 98109 (the "Project").<sup>2</sup> The Project was  
5 owned/developed by Onni Group. Onni Contracting, Inc. was the general contractor, with  
6 whom Newway subcontracted to perform concrete work. Newway then subcontracted with  
7 Baja where Baja agreed to perform a portion of the concrete work – primarily concrete  
8 finishing.

9 Baja Concrete is a concrete finishing contractor, representing its nature of business to  
10 be "construction" on the Secretary of State's Corporations Filing System, and registered as a  
11 general contractor with the Department of Labor & Industries ("LNI").<sup>3</sup> Baja hired Roberto  
12 Soto Contreras, allegedly to provide labor services for Baja.

13 There is no dispute that the employees subject to the current wage claims were  
14 employed directly by Baja Concrete and/or Roberto Soto Contreras. Nor is there any dispute  
15 Baja was solely responsible for compensating those employees. OLS did not find any of the  
16 subject employees were direct employees of Newway. Instead, the OLS's sole basis for  
17 including Newway in its Findings of Fact, Determination, and Final Order, dated August 24,  
18 2021 (the "Determination") is the unfounded allegation that Newway is somehow a joint  
19 employer.  
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23 <sup>1</sup> In Canada, Newway operates under separate corporate entities: Newway Concrete Forming Ltd. And Newway  
24 Concrete Structures, Ltd. Any work Baja performed for Newway in Canada was for these Canadian entities, not  
Respondent Newway Forming, Inc.

25 <sup>2</sup> The other projects are referred to as "707 Terry" and "Fairview."

26 <sup>3</sup> Baja's contractor's license has been suspended since May 12, 2021 after it let its required insurance lapse.

1                   **B. OLS Findings of Fact, Determination, and Final Order**

2                   After receiving a tip from Casa Latina into potential violations of Wage Theft  
3 Ordinance and the Paid Sick and Safe Time Ordinance, the OLS initiated a remote  
4 investigation on May 22, 2020. *See* the OLS Findings of Fact, Determination, and Final Order  
5 dated February 5, 2021 (“Determination”), attached as Exhibit 1 to Wolfe Dec. The alleged  
6 violations involved work that occurred between February 2018 and August 2020.

7                   On February 5, 2021, the OLS issued its Findings of Fact, Determination and Final  
8 Order (“Determination”). The OLS investigation consisted of interviewing eight employees  
9 who received their pay from Baja Concrete USA Corp for work performed at sites where both  
10 Newway Forming and Baja operated. *See* Determination at page 1, attached as Exhibit 1 to  
11 Wolfe Dec. Of the eight employees interviewed, seven of them remain anonymous and  
12 Newway has not had the opportunity to ask questions or conduct further inquiry into their  
13 unsworn statements. The investigation also included an interview of Antonio Machado,  
14 Newway’s site superintendent, as well as an interview of a foreman for Newway Forming who  
15 previously worked at the Denny Way site, and whose identity has been shielded by OLS from  
16 disclosure.

17                   Baja Concrete did not make any of its officers or representatives available. *See*  
18 Determination at page 1, attached as Exhibit 1 to Wolfe Dec. Mercedes De Armas, the  
19 accountant and representative of Baja (who is not in actuality an employee or officer of Baja),  
20 responded to written questions and document requests. *See* Determination at page 1, attached  
21 as Exhibit 1 to Wolfe Dec. Further, Roberto Soto Contreras, who was employed by Baja, failed  
22 to respond to OLS’ Requests for Information, its subpoena, or initial offer of settlement. The  
23 OLS was not able to interview Mr. Soto Contreras. *See* Determination at page 2, attached as  
24 Exhibit 1 to Wolfe Dec.

1           The OLS also reviewed written responses to Requests for Information issued to  
2 Newway, Baja, and Onni Contracting, as well as payroll records, Baja Concrete's invoices for  
3 payment with supporting timesheets, and text message records from Baja workers showing the  
4 hours they tracked and self-reported to Baja.<sup>4</sup> *See* Determination at page 2, attached as Exhibit  
5 1 to Wolfe Dec.

6           In its Determination, the OLS incorrectly concluded that Newway was a joint employer  
7 of Baja employees, even though Newway and Baja had a typical contractor-subcontractor  
8 relationship. While never actually observing the daily activities of the workers at the site, the  
9 OLS mistakenly found that Newway exercised extensive control over the employment  
10 relationship, and provided the following evidence in support: 1) Baja billed Newway for all  
11 employees' hours (typical subcontractor relationship); 2) unreliable witness statement that  
12 Newway allegedly told Roberto Soto Contreras what time the work day ended for a short  
13 period of time; 3) Antonio Machado's statement that if a Baja employee was sick he would  
14 call Roberto to come and pick him up and Roberto would relay this onto Newway (again,  
15 typical subcontractor relationship); 4) Newway provided a timeclock for Baja employees to  
16 track hours (the clock was actually used to track which workers were on site, not the hours  
17 they worked. *See* 30(b)6 Deposition of Kwynne Forler-Grant at 109:22-110:1 attached as  
18 Exhibit 2 to Wolfe Dec.). Importantly, during the entire investigation, the OLS never once  
19 went to the Project to observe the actual relationship between Newway, Baja, or the Baja  
20 employees. *See* 30(b)(6) Deposition of City of Seattle (Daron Williams) at 28:1-7, attached as  
21 Exhibit 3 to Wolfe Dec.

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26 <sup>4</sup> Baja failed to provide any documents during the investigation, while Newway continued to cooperate.  
Newway provided any records it received from Baja during the Project.

1 i. Unreliable Witness Statements

2 The OLS conducted eight witness interviews of Baja employees, seven of which are  
3 heavily redacted and anonymous. None of the interviews were taken under oath, and there was  
4 no court reporter present. *See* 30(b)(6) Deposition of City of Seattle (Daron Williams) at 45:15-  
5 46:3; 84:2-9, attached as Exhibit 3 to Wolfe Dec. The employees' primary language was  
6 Spanish, and there is no reliable evidence that official translators were present at the interviews.  
7 *See* Deposition of Daron Williams at 202:15-203:2, attached as Exhibit 4 to Wolfe Dec. The  
8 interviews consisted of OLS employees asking questions to the employees and typing out the  
9 responses. *See* Deposition of Daron Williams at 83:19-84:4, attached as Exhibit 4 to Wolfe  
10 Dec. The employees never reviewed the questions and responses typed out by OLS employees  
11 for accuracy and did not sign them. *See* 30(b)(6) Deposition of City of Seattle (Daron Williams)  
12 at 79:14-20, 83:21-23; 44:14-44:25, attached as Exhibit 3 to Wolfe Dec.

13 ii. Exorbitant Fine

14 Despite very limited "evidence" and unreliable witness statements indicating that  
15 Newway was a joint employer, and notwithstanding Newway's full cooperation with the OLS  
16 investigation, the OLS assessed a massive fine in the amount of \$2,223,945.11 against both  
17 Baja and Newway.

18 **III. ISSUES**

19 1) Whether this court should dismiss Newway Forming, Inc. from this action when  
20 there is no reliable evidence that Newway was a joint employer of Baja's employees and there  
21 is no dispute that Newway did not directly employ any of the worker's whose wage claims are  
22 at issue herein?

23 **IV. EVIDENCE RELIED UPON**

24 Newway relies upon the Declaration of Nicole E. Wolfe, the exhibits thereto, and the  
25 pleadings and filings herein.  
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## V. ARGUMENT

### A. Summary Judgment Standard

Summary judgment is appropriate “if the pleadings, affidavits, depositions and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005); Civil Rule 56. Once the moving party demonstrates there are no genuine issues of material fact, the opposing party must go beyond the pleadings and designate “specific facts” to rebut the moving party’s contentions and show that there is a genuine issue for trial. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012). The opposing party “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.” *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). As here, summary judgment should be granted “if reasonable minds could reach only one conclusion from the evidence presented.” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

In determining whether a joint employment relationship exists, the Court balances factors laid out in *Becerra v. Expert Janitorial, LLC*, 181 Wash. 2d 186, 194, 332 P.3d 415, 419 (2014). However, not every factor needs to weigh in Newway’s favor in order for the Court to grant summary judgment – in the joint employment context, summary judgment may be available even if the joint employment factors are split between finding and not finding the relationship exists. *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 77 (2d Cir.2003) (“[T]he Court need not decide that every factor weighs against joint employment.” (emphasis omitted) (citing *Moreau v. Air France*, 343 F.3d 1179, 1188–89 (9th Cir.2003))). *Becerra v. Expert Janitorial, LLC*, 181 Wash. 2d 186, 194, 332 P.3d 415, 419 (2014)

1           **B. There is No Evidence that Newway Was a Joint Employer**

2           With regard to the establishment of a “joint employer” status, the Seattle Municipal  
3 Code (“SMC”) mirrors the Washington Minimum Wage Act (“MWA”) and federal labor law  
4 and the FLSA. Washington law, using federal law as a guideline, uses an “economic reality”  
5 test to determine whether a joint employment relationship exists. *Becerra v. Expert Janitorial*  
6 *LLC*, 181 Wn.2d 186, 196 (2014). As the Determination admits, OLS follows the same test.  
7 When determining whether a joint employer relationship exists, the court considers 13  
8 nonexclusive factors, beginning with 5 formal or regulatory factors:

- 9           1) The nature and degree of control of the workers;  
10          2) The degree of supervision, direct or indirect, of the work;  
11          3) The power to determine the pay rates or the methods of payment of the  
12             workers;  
13          4) The right, directly or indirectly, to hire, fire, or modify the employment  
            conditions of the workers; [and]  
14          5) Preparation of payroll and the payment of wages.

15          *Id.* at 639–40 (alteration in original) (quoting 29 C.F.R. § 500.20(h)(4)(ii)). Courts also  
16 consider 8 common law (sometimes called “functional”) factors:

- 17          6) whether the work was a “specialty job on the production  
18             line,” *Rutherford [Food Corp. v. McComb]*, 331 U.S. [722,] 730, 67 S.Ct.  
19             [1473, 91 L.Ed. 1772 (1947)];  
20          7) whether responsibility under the contracts between a labor contractor and an  
21             employer pass from one labor contractor to another without “material  
22             changes,” *id.*;  
23          8) whether the “premises and equipment” of the employer are used for the  
24             work, *id.*; *see also Real*, 603 F.2d at 754 (considering the alleged  
25             employee’s “investment in equipment or materials required for his task, or  
26             his employment of helpers”);  
27          9) whether the employees had a “business organization that could or did shift  
            as a unit from one [worksite] to another,” *Rutherford*, 331 U.S. at 730, 67  
            S.Ct. 1473 ...;  
28          10) whether the work was “piecework” and not work that required “initiative,  
            judgment or foresight,” *id.*; *see also Real*, 603 F.2d at 754 (considering  
            “whether the service rendered requires a special skill”);  
29          11) whether the employee had an “opportunity for profit or loss depending upon  
            [the alleged employee’s] managerial skill,” *Real*, 603 F.2d at 754;

12) whether there was “permanence [in] the working relationship,” *id.*; and  
13) whether “the service rendered is an integral part of the alleged employer's  
business,” *id.*

*Becerra v. Expert Janitorial, LLC*, 181 Wash. 2d 186, 196–97, 332 P.3d 415, 421  
(2014).

While OLS does not specifically identify which regulatory factors it believes support a finding of joint employer liability, it appears that OLS relies upon regulatory factors 1, 2, and 5, and functional factors 8, 12 and 13 in its Determination. OLS’s finding that an analysis of these factors weighs in favor of a determination that Newway is a joint employer with Baja is based on inaccurate facts largely based solely on not credible, unreliable witness statements, and is simply incorrect.

i. The Witness Statements are Not Reliable

The main source of “evidence” that the OLS provides to support its mistaken argument that Newway is a joint employer relies on eight witness statements. Seven of these witness statements are anonymous and heavily redacted. Newway has been given absolutely no opportunity to ask these Baja employees any questions and will not be given the opportunity to cross-examine these employees at the upcoming hearing. Even more, the statements are completely unreliable. The interviews consisted of one or two City of Seattle employees, one taking notes and the other one asking leading questions. *See* Deposition of Daron Williams at 213:3-19, attached as Exhibit 4 to Wolfe Dec.

The anonymous employees primary first language is Spanish, not English, and the City of Seattle was not even sure if an interpreter was present during these interviews. During some of these interviews, no interpreter was present:

Q: Do you recall whether [this interview] was done through an interpreter?

**A: I can’t remember.**

...



1 Q: And you mentioned translators. If a witness' first language isn't English,  
2 do you typically provide them with a translator?

3 **A: Well, it depends on the request, so- but if they can't speak any English,**  
4 **so we find a translator, so- but if they can speak some English, we ask**  
5 **them if they want a translator or not, so-**

6 Q: Okay. And if you had a translator, would that be documented on the  
7 interview notes?

8 **A: Sometimes it is.**

9 Q: But not always?

10 **A: Not always, yeah.**

11 *See* Deposition of Daron Williams at 89:4-6; 202:15-203:2, attached as Exhibit 4 to  
12 Wolfe Dec.

13 The redacted witness statements are not even verbatim report of what the worker told  
14 OLS:

15 Q: And this isn't a verbatim transcript of what a witness told you?

16 **A: I don't think so. I'm not a hundred percent sure on that.**

17 *See* Deposition of Daron Williams at 194:4-11, attached as Exhibit 4 to Wolfe Dec.  
18 The employees were not given an opportunity to review or sign the typed-up report:

19 Q: Was this witness given an opportunity to review this statement and correct  
20 any inaccuracies that may be in here?

21 **A: I don't believe so.**

22 *See* 30(b)(6) Deposition of City of Seattle (Daron Williams) at 85:7-10, attached as  
23 Exhibit 3 to Wolfe Dec. There was no court reporter present at any of the interviews, and the  
24 workers were not sworn in under oath. *See* 30(b)(6) Deposition of Daron Williams at 45:25-  
25 46:3.

26 The OLS did not even ask if the answers from the workers were hearsay or something  
that they directly observed:

Q: So do you ask any of the witnesses that you interviewed whether they  
actually observed or heard somebody saying whatever it is that they're  
reporting to you?

**A: No, I don't think I do.**

1           See Deposition of Daron Williams at 199:1-10, attached as Exhibit 4 to Wolfe Dec.

2           The workers did not even review or sign the statements after the OLS typed up their  
3 alleged responses. See 30(b)(6) Deposition of City of Seattle (Daron Williams) at 44:14-25,  
4 attached as Exhibit 3 to Wolfe Dec.

5           Simply put, there is no indication that the witness “statements” that the City  
6 investigators typed up have any indicia of reliability.

7           In *Henley v. United States*, the court decided the hearsay evidence was insufficient.  
8 379 F. Supp. 1044 (M.D. Pa. 1974). The agency presented two live witnesses (agency  
9 employees), but who had no direct personal knowledge of the charges against the plaintiff,  
10 and documentary evidence that consisted of unsigned and unsworn statements. The court  
11 criticized the evidence, stating “the already undesirable nature of hearsay was compounded  
12 by the inability of the witnesses to verify anything about credibility.” *Id.* at 1053.

13           Here, the questions asked by the City were leading and likely riddled with hearsay, as  
14 the City did not attempt to differentiate between the workers’ direct knowledge or what they  
15 heard from other workers. Even more compounding is that Newway does not have the  
16 opportunity to question these anonymous workers, nor are they able to contest any of the  
17 worker’s statements. These workers, and the OLS, are also not impartial – they have a direct  
18 financial benefit from finding that Newway and Baja were joint employers and that they  
19 allegedly violated the wage ordinances.

20           Instead, the evidence that is reliable, such as deposition testimony of the City of Seattle  
21 and its investigators, Newway, Anthony Machado, and Baja, demonstrate that Newway was  
22 not a joint employer of the subject employees and should be dismissed from this case.

23           ii.     Newway did not Control the Workers or Supervise the Work

24           When discussing control and supervision in the Determination, the OLS is simply  
25 describing a typical contractor-subcontractor relationship that one would find on virtually  
26

1 every construction project in Seattle. OLS's determination twists the facts to fit its desired  
2 narrative, ignoring the realities of construction projects to create a false account that Newway  
3 controlled Baja and its employees from an administrative standpoint as well as controlled who,  
4 when, and how Baja employed its employees. For example, OLS argues that Newway had  
5 control over the employees' days of work, hours of work, day-to-day tasks, and the timing,  
6 frequency, and duration of their meal and rest breaks. However, like on all construction  
7 projects, this "control" originated with the general contractor, Onni, which then directed, on a  
8 daily basis, Newway and all other subcontractors what to work on and when. *See* 30(b)6  
9 Deposition of Newway Forming at 120:2-23 and 121:12-19, attached as Exhibit 2 to Wolfe  
10 Dec. Newway then directed its subcontractor Baja to perform certain portions of the work in  
11 accordance with the general contractor's direction. *See* 30(b)6 Deposition of Newway  
12 Forming at 121:20-25, attached as Exhibit 2 to Wolfe Dec. Newway had very little control  
13 over the daily activities because the work schedule at the job site was primarily based on the  
14 use of the tower crane that Onni controlled at the job site. *See* 30(b)6 Deposition of Newway  
15 Forming at 120:2-23 and 121:12-19, attached as Exhibit 2 to Wolfe Dec. This is simply how a  
16 construction project functions; it does not change the relationship from one of contractor-  
17 subcontractor to a joint employer relationship. Newway's authority with respect to Baja was  
18 no greater than that of any contractor to a subcontractor—it could direct that Baja as a company  
19 perform certain work in certain areas of the project at certain times, but it was ultimately Onni's  
20 schedule that dictated those directions. *See* 30(b)6 Deposition of Newway Forming at 120:2-  
21 23 and 121:12-19, attached as Exhibit 2 to Wolfe Dec.

22  
23 Q: What's the basis for the assignment of those tasks? In other words, who comes up  
with what tasks need to be done and where does that come from?

24 A: **The scope of the work.**

25 Q: Where is that defined?

26 A: **It's defined by a schedule.**

Q: Who creates the schedule?

A: **Onni.**

1 Q: Onni. And Onni is the general contractor?

2 A: Yes.

3 See 30(b)6 Deposition of Newway Forming at 111:5-14, attached as Exhibit 2 to Wolfe  
4 Dec.

5 Had the investigators actually visited the site, they would have observed these  
6 relationships. Instead, they rely on statements from workers who had no role and zero personal  
7 knowledge in how the work was scheduled and how the workers were assigned tasks. Rather,  
8 the evidence from those with actual knowledge of these processes shows that Newway did not  
9 control the workers above and beyond a typical contractor-subcontractor relationship.

10 Nor did Newway determine how many hours would be available to Baja workers- that  
11 was left up to Roberto Soto Contreras, who was hired by Baja:

12  
13 Q: So for Baja workers on Baja's payroll was Newway the decision maker in  
14 determining how many hours would be available to them and offered to those  
workers?

15 A: Roberto would decide the hours. They're their own subcontractor.

16 See 30(b)6 Deposition of Newway Forming at 72:10-15, attached as Exhibit 2 to Wolfe  
17 Dec.

18 Newway had no authority over other aspects of Baja's employees' work, including  
19 hiring and firing, authorizing sick days, determining compensation, or processing payroll. If a  
20 worker needed to take breaks during the day, that would be up to Roberto and Baja. Newway  
21 had no authority over when Baja workers could take breaks:

22 Q: So did Baja workers on the relevant worksites during the relevant time period  
23 take breaks?

24 A: That would have been controlled by Roberto. I'm not sure.

25 ...

1 Q: What if a worker from Baja needed an extra break or a break outside of a  
2 normally scheduled one, who would he have to ask?

3 **A: Roberto.**

4 Q: And what would Roberto do when he got that request?

5 **A: I have no idea. You'd have to ask Baja.**

6 Q: Did Newway have any authority over when Baja workers could take breaks?

7 **A: No.**

8 *See 30(b)6 Deposition of Newway Forming at 74:16-19; 75:15-24, attached as Exhibit*  
9 *2 to Wolfe Dec. Further, Newway had no control when a Baja worker was sick:*

10 Q: Okay. And what about a Baja worker on a Newway site, what was the  
11 process [for workers calling out sick]?

12 **A: They would ask Roberto Soto.**

13 Q: And what would Roberto Soto do with that request?

14 **A: I have no idea. You would have to ask him.**

15 Q: If a worker from Baja was calling out sick would Newway's personnel be  
16 informed of that?

17 **A: Most times, yes.**

18 Q: Would they have any discretion as to whether or not the worker could call  
19 out sick?

20 **A: Newway, no. No.**

21 *See 30(b)6 Deposition of Newway Forming at 76:5-16, attached as Exhibit 2 to Wolfe*  
22 *Dec.*

23 Newway's onsite superintendent, Antonio Machado, who was responsible for receiving  
24 Onni's daily instructions as to what work was available and passing those down to his foreman,  
25 also confirmed that he had no control over or knowledge of any Baja employees who were  
26 sick:

Q: Were you aware if a Baja worker was- was sick?

**A: No.**

Q: You just had no idea?

**A: No. No idea, no. No.**

*See Deposition of Antonio Machado at 57: 15-23, attached as Exhibit 5 to Wolfe Dec.*

1 Baja and/or Roberto Soto Contreras chose who it staffed on the project and when, as well as  
2 how they would be compensated. It was Baja's responsibility to determine the workers needed  
3 for the scope of work:  
4

5 Q: Is it the subcontractor's responsibility to determine how they perform that  
6 scope of work?

7 A: Yes.

8 Q: Is it their responsibility to determine how many people they need to complete  
9 that scope of work?

10 A: Yes.

11 Q: Does Newway have any say in the means and methods and the labor that  
12 goes into a subcontractor's performance of their scope of work?

13 A: No.

14 See 30(b)6 Deposition of Newway Forming at 111:21- 112:6, attached as Exhibit 2 to  
15 Wolfe Dec. Further, Newway's onsite superintendent had no involvement in hiring, firing, or  
16 discipline of Baja workers on the project:  
17

18 Q: Okay. Do you – even if you weren't personally involved, do you know how  
19 workers were hired to work at the – at 1120 Denny?

20 A: No. I don't know how they did get hired, no.  
21 ...

22 Q: So did you- were you ever involved in firing people on the – on the site?

23 A: Never. I never ever fire one person. Never.  
24 ...

25 Q: And were you involved behind the scenes in decision to fire people?

26 A: No. Never. Never.

Q: Were there any disciplinary actions taken that weren't quite firing? Did- did  
workers ever just get in trouble, and were they subject to discipline?

A: I don't know. Like I said, I – I don't know who was going on between  
the Roberto and the – his employee – his employees or Baja employees. I  
don't – I don't have a clue. I don't know anything.

See Deposition of Antonio Machado at 32:12-23; 76:12-14; 77:7-17, attached as  
Exhibit 5 to Wolfe Dec.

1           iii.     Newway did not Determine Pay Rates or the Methods of Payment of the  
2                 Workers

3           Newway did not determine the pay rates or the methods of payment of any of Baja's  
4 workers. In fact, Newway had no knowledge of what Baja workers were paid, or whether they  
5 ever got paid for overtime. *See* Deposition of Antonio Machado at 96:7-19; 101:1-17, attached  
6 as Exhibit 5 to Wolfe Dec. The OLS further testified that Baja, not Newway, set the wages and  
7 pay rates for the workers. *See* 30(b)(6) Deposition of City of Seattle (Daron Williams) at 68:25-  
8 69:2, attached as Exhibit 3 to Wolfe Dec.

9           iv.     Newway did not Hire, Fire, or Modify the Employment Conditions of the  
10                Workers

11           It was Baja and/or Roberto Soto Contreras – not Newway - who hired, fired, and/or  
12 modified the employment conditions of the workers. Even more, Newway was not even  
13 informed if a Baja worker was hired and/or fired:

14           Q: How were Baja workers on the relevant worksites hired?

15           A: **I have no idea.**

16           Q: Did Newway have any input into the hiring process?

17           A: **No.**

18           Q: Did Roberto keep Newway apprised of the hiring process?

19           A: **No.**

20           Q: And did Newway tell Roberto how many workers it needed?

21           A: **No.**

22           ...

23           Q: Did Newway play any role in firing workers?

24           A: **For Baja?**

25           Q: Yes.

26           A: **No.**

...

Q: And what about Baja workers, was that the same process [referring to worker discipline]?

A: **We didn't have any control over their workers for hiring or firing.**

Q. If a Baja worker needed a writeup, would someone from Newway communicate that to Roberto?

A: **I suppose so. It would be Roberto.**

Q: If Roberto fired a worker would Newway be notified?

A: **No.**

1  
2       *See* 30(b)6 Deposition of Newway Forming at 85:12-23; 89:9-12; 90:3-12, attached  
3 as Exhibit 2 to Wolfe Dec. OLS investigator Daron Williams confirmed this in the deposition  
4 of the City of Seattle:

5       Q: And what else did Baja Concrete do?

6       **A: They would hire individuals. They set up their housing. They had**  
7 **people in apartments. They processed their tax documents. They did a**  
8 **few other things.**

9       *See* 30(b)(6) Deposition of City of Seattle at 38:18-23.

10       ...

11       Q: Do you know whether Baja recruited, hired, and, let's say, terminated  
12 workers?

13       **A: To my understanding, yes.**

14       *See* 30(b)(6) Deposition of City of Seattle (Daron Williams) at 69:3-5, attached as  
15 Exhibit 3 to Wolfe Dec.

16       v.       Newway did not Prepare the Payroll or Payment of Wages

17       There is no evidence that Newway prepared the payroll or payment of wages of the  
18 workers. The OLS misconstrues the facts by showing that Baja used Newway's timeclock and  
19 then infers that because of that, Newway was somehow involved with payroll preparation.  
20 However, as discussed in further detail below, Newway's use of the timeclock had nothing to  
21 do with tracking Baja worker hours. Rather it was used to track which Baja employees were  
22 actually on site on any given day. *See* 30(b)6 Deposition of Newway Forming at 103:22-  
23 104:10, attached as Exhibit 2 to Wolfe Dec. Newway never determined the hours worked by  
24 the workers or determined how much they would be paid. *See* 30(b)6 Deposition of Newway  
25 Forming at 67:8-11, attached as Exhibit 2 to Wolfe Dec. Newway issued payment to Baja  
26 based on records Baja submitted, and Baja then distributed money to the workers. *See* 30(b)6  
Deposition of Newway Forming at 18:16-25, 19:1-4, attached as Exhibit 2 to Wolfe Dec.  
Baja's accountant further testified that Roberto Soto Contreras and/or Baja gave her the



1 information necessary to process payroll for the subject workers. *See* Deposition of Mercedes  
2 De Armas at 32:22-33:11, attached as Exhibit 6 to Wolfe Dec. Newway did not provide worker  
3 time sheets or timecards. *See* Deposition of Mercedes De Armas at 36:15-17, attached as  
4 Exhibit 6 to Wolfe Dec.

5 Even the OLS determined that Baja Concrete, not Newway, oversaw paying the  
6 workers:

7 Q: Based on the testimony you provided this morning so far I understand, and  
8 from what we've seen in this document, you believe that Baja Concrete paid  
9 the workers, correct?

10 A: Yes.

11 *See* 30(b)(6) Deposition of City of Seattle (Daron Williams) at 38:5-7, attached as  
12 Exhibit 3 to Wolfe Dec.

13 vi. The Premises and Equipment

14 The premises where Baja employees worked was owned by Onni Group. Baja workers  
15 were subcontracted to work at this site. In its Determination, the OLS relies on Newway's  
16 timeclock to attempt to establish that Baja used Newway's equipment. However, this was just  
17 so Newway knew how much to pay Baja, not its employees. After observing irregularities in  
18 Baja's timesheets that indicated that Baja may be charging Newway for employees who were  
19 not on the job site, Newway asked Baja to have its workers use a time clock in the Newway  
20 office so that Newway could visually observe how many Baja employees reported to the job  
21 site each day. *See* 30(b)6 Deposition of Newway Forming at 103:22-104:10, attached as  
22 Exhibit 2 to Wolfe Dec. Baja tracked their own employees' working hours and Newway did  
23 not independently track the hours of Baja employees. *See* 30(b)6 Deposition of Newway  
24 Forming at 59:5-8, attached as Exhibit 2 to Wolfe Dec. Newway's intention in using the time  
25 clock was to verify that Baja workers were on the job site, not to track their working hours.  
26

1 See 30(b)6 Deposition of Newway Forming at 109:22-110:1, attached as Exhibit 2 to Wolfe  
2 Dec:

3 Q: [How did] Newway use[] the time clock to ensure that they weren't being  
4 overcharged by Baja?

5 A: **So we could visually see them and a physical body had to come into the**  
6 **office and put that in the machine.**

7 See 30(b)6 Deposition of Newway Forming at 107: 9-15, attached as Exhibit 2 to Wolfe  
8 Dec.

9 vii. Permanence in the Working Relationship

10 While Newway and Baja's Canadian affiliates had worked together on certain projects  
11 in Canada, the US companies had not worked together until Baja approached Newway to  
12 discuss its desire to start a new business in the US. Newway Canada is a separate company  
13 than Newway USA. Newway had already established a large presence in the US and indicated  
14 to Baja that it may have work if and when Baja got their business set up. Newway did not  
15 need Baja in order to be successful in the states – it already was. Because of the extensive,  
16 ongoing work it already had, Newway was able to give Baja its first opportunity in the Pacific  
17 Northwest market. This is nothing more than a typical way of a subcontractor entering a market  
18 it is unfamiliar with. See 30(b)6 Deposition of Newway Forming at 48:22-49:18, 87:10-16,  
19 attached as Exhibit 2 to Wolfe Dec.

20 viii. Service Rendered is Not an Integral Part of Newway's Business

21 Again, Baja's service is not an integral part of Newway's business, it was simply a  
22 subcontractor. Newway needed to hire a subcontractor to assist with its scope of work on the  
23 multiple large projects it was working on, something it does on a majority of its projects of this  
24 size and nature. This does not indicate a joint employer relationship; it simply shows that  
25 Newway was busy and subcontracted out some of its work. At any given time, there were  
26 several contractors working on the site who were essential to Newway's and/or Onni's

1 business. Newway also has its own cement finishers on its staff, so they could have performed  
2 the role of cement finishing without hiring Baja. *See* 30(b)6 Deposition of Newway Forming  
3 at 92:19-22, attached as Exhibit 2 to Wolfe Dec. Newway could have also hired other cement  
4 finishers, such as from PeopleReady, who they had used extensively in the past. *See* 30(b)6  
5 Deposition of Newway Forming at 93:11-23, attached as Exhibit 2 to Wolfe Dec.  
6

7 ix. Balancing the Remaining Factors Shows that Newway was not a Joint  
8 Employer

9 The OLS did not focus on functional factors 6, 7, 9, 10, or 11, and for good reason. All  
10 of them further support that Newway was not a joint employer. There is simply no evidence  
11 that the concrete work was a “specialty job on the production line”, no evidence that the  
12 responsibility under the contract between labor contractor and employer passes from one labor  
13 contract to another without material changes; no evidence that the employees had a business  
14 organization that could or did shift as a unit from one worksite to another; no evidence that the  
15 work was piecework and not work that required initiative, judgment, or foresight; and no  
16 evidence that the employees had an opportunity for profit or loss depending upon the alleged  
17 employee’s managerial skill.

18 **VI. CONCLUSION**

19 The “evidence” presented by the City of Seattle allegedly supporting that Newway was  
20 a joint employer, primarily comprised of anonymous witness accounts that were not taken  
21 under oath, is not reliable and should not be considered by the Court. Rather, the reliable  
22 evidence shows that Newway is not a joint employer with Baja, Newway did not commit any  
23 wage violations itself, and Newway should not be held liable for Baja’s alleged actions.  
24 Newway was simply a contractor who hired a subcontractor in the ordinary course of business.  
25 The employees that are the subject of the City’s claim were employed by that subcontractor,  
26

1 Baja and/or Roberto Soto Contreras – not Newway. Newway should be dismissed from this  
2 case.

3 DATED this 1<sup>st</sup> day of July, 2022.

4 OLES MORRISON RINKER & BAKER LLP

5  
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**CERTIFICATE OF SERVICE**

The undersigned certified under penalty of perjury under the laws of the state of Washington that on this 1<sup>st</sup> day of July, 2022, I caused true and correct copies of the foregoing document to be delivered to the following parties and in the manner indicated below:

Office of the Hearing Examiner The Hon. Ryan Vancil, Hearing Examiner 700 Fifth Avenue, Suite 4000 Seattle, WA 98104	<input checked="" type="checkbox"/> E-File <input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Hand Delivery/Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> Email: <a href="mailto:Hearing.Examiner@seattle.gov">Hearing.Examiner@seattle.gov</a>
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SIGNED at Seattle, Washington this 1<sup>st</sup> day of July, 2022.

/s/ Catherine A. Trimbour  
Catherine A. Trimbour