BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: BAJA CONCRETE USA CORP., ROBERTO CONTRERAS, NEWWAY FORMING, INC., and ANTONIO MACHADO from a Final Order of the Decision issued 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 OPPOSITION TO CITY OF SEATTLE'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The City of Seattle's (the "City") Motion for Summary Judgment again fails to provide any competent evidence to support its mistaken assertion that Newway is a joint employer. Instead, the City misrepresents the deposition testimony and in sharp contrast to Newway's motion, fails to provide the Examiner with direct excerpts from the deposition transcripts. In doing so, the City attempts to spin the testimony to make it appear that Newway exercises significant control over the Baja workers. In reality, what the City is describing is nothing more than a typical contractor-subcontractor relationship.

Because City investigators never actually visited the job site, the City relies on a single, self-serving declaration of one of the Baja workers (even though they claim over 40 Baja

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workers were "jointly employed" by Newway), Jonathan Ivan Parra Ponce, in support of its motion.

While there are far more details in this "new" declaration than the original interview transcript that the City provided in discovery, the City actually chooses to ignore many of those details. For example, in the declaration, Mr. Parra Ponce confirms that it was Baja, not Newway, who employed him: "*When I began working for Baja*…", and on multiple occasions, distinguished Newway employees from Baja employees: "… ***but I imagine*** *that Roberto was taking orders on start and end times from someone at Newway, because we always started and ended at the same time as the Newway workers*," . . . "*Workers at the 1120 Denny Way construction site on Baja's payroll earned significantly less than workers on Newway's payroll who were doing the same work. I knew this because I had frequent contact with the Newway workers, and we would compare our pay*." Emphasis added.[1]

Nevertheless, even assuming the "facts" put forward in this declaration are true, a balancing of the factors weighs heavily in favor of Newway not being a joint employer. The City of Seattle's Motion for Summary Judgment should be denied, as the direct and reliable evidence demonstrates that Newway is not liable as a joint employer for Baja's alleged failure to pay its workers.

II. OPPOSITION

A. The City Misrepresents the Deposition Testimony

The City's motion contains almost no direct excerpts from the deposition testimony of the various witnesses. This is for good reason – the City loosely paraphrases the testimony in order to manipulate the evidence to meet its own theory of the case. It really had no choice, given its

[1] Note Mr. Parra Ponce's use of the phrase "*but I imagine…"* This is indicative of the majority of testimony Mr. Parra Ponce puts forth in his sworn declaration. It is not based on personal knowledge and is rather his guess as to what the relationship was between Newway and Baja personnel.

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investigators never actually visited the job sites to confirm their suspicions which had been built entirely on self-serving hearsay evidence from a small sampling of Baja employees. For example, in the City's motion, it argues *"Newway and Baja agreed on the hourly rate that Newway was to pay Baja for Workers' labor"* and cites to the 30(b)6 deposition of Newway in support at page 64, lines 15-17. However, below is an actual excerpt from page 64, which states that Newway did not dispute the hours or rates Baja submitted to Newway via its invoices. This, however, does not mean Newway agreed (or even knew) with what Baja was paying its hourly workers – the rates and hours that Baja submitted to Newway included traditional markup, like profit and overhead, which compensated Baja, not the individual workers. This is industry standard. What Newway paid Baja has nothing to do with what Baja decided to pay its workers. This is one example of clear misrepresentation of the deposition testimony.

Q. Okay. Besides situations like that where they put something on the invoice, an item that Newway was not supposed to pay, were there other situations where Newway would not pay the full amount of a Baja invoice?
A. No.
Q. Did Newway ever dispute the number of hours submitted on a timesheet?
A. I don't remember any time ever, no.
Q. Did Newway ever dispute the rate submitted on a timesheet?
A. No, that was already in stone.
Q. To Newway's knowledge were the amounts that Baja billed for workers actually going to those workers?
A. No idea. You'd need to ask them.
Q. Was Newway aware at any point during the relevant period that workers on Baja's payroll were being underpaid?
A. No.

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Even more, some of the "facts" presented by the City lack any support or citation. For example, on page 30 of its motion, the City asserts that "*Although Soto Contreras formally hired the Workers on behalf of Baja, he did so at Newway's direction*." There is no citation or evidence to support this incorrect assertion. However, there is deposition testimony that states that Newway did not "hire or fire anybody." See 30(b)6 Deposition of Newway at 89:16-17, attached as Exhibit 1 to Wolfe Dec.

Even more, and in further confirmation that the City is attempting to spin the testimony, the City investigators testified that it was Baja that did the hiring and firing:

> Q: And what else did Baja Concrete do?
> **A: They would hire individuals. They set up their housing. They had people in apartments. They processed their tax documents. They did a few other things.**

See 30(b)(6) Deposition of City of Seattle at 38:18-23, attached as Exhibit 2 to Wolfe Dec.

On page 26, the City states: "*If Workers were sick, Machado, through Soto Contreras would 'threaten [Workers'] immigration status and say he would work to make sure [they] wouldn't get jobs anywhere else if [they] called in sick again*.'" Again, there is no citation to support this inaccurate assertion.[2] Further, Mr. Parra Ponce claims on several occasions that he heard Mr. Machado and Mr. Soto discussing matters that Mr. Ponce is now testifying about. However, Mr. Ponce's declaration is in Spanish and had to be translated by a certified

[2] In his declaration (which the City did not cite to), Mr. Parra Ponce indicated that Machado, through Roberto Soto Contreras, would threaten immigration status, but again, this is hearsay within hearsay. Mr. Parra Ponce never said he personally heard Machado threaten anyone's immigration status. In fact, he never even stated that he was "told" by Roberto Soto Contreras that Mr. Machado was making those threats.

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Spanish interpreter. See Declaration of Laura Hurley, attached to City of Seattle's Motion for Summary Judgment. Based on this, one has to surmise that Mr. Ponce does not speak fluent English. Mr. Machado testified that he only understands a little bit of Spanish. *See* Deposition of Antonio Machado at 63:4-8, attached as Exhibit 3 to Wolfe Dec. Because Mr. Machado does not speak Spanish, it is unlikely that his conversations with Mr. Soto were in Spanish, and therefore the accuracy of the hearsay recantations Mr. Parra Ponce makes regarding Mr. Machado's conversations or dealings with others at the work site who do not speak Spanish must be called into question.

The constant misinterpretation of the testimony and lack of citations in the City's motion evidences that there is no concrete evidence to support the allegation that Newway is a joint employer of the workers.

B. Newway Did Not Control the Conditions of Workers' Employment

Much of the City's motion incorrectly argues that Newway controlled the conditions of the workers' employment. In support of this factor, the City provides essentially two arguments: (1) Newway controlled the schedule at the worksite and (2) Baja used Newway's timeclock.

1. Newway did not schedule the work.

Regarding the schedule of the worksite, the City argues that Newway "*had discretion in determining the order in which to accomplish the required tasks and it imposed those decisions on the subcontractors*." This assertion of course, like the City's other assertions, is unsupported by direct evidence and is in fact contradicted by the facts.

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First, as the City admits, it was Onni, the general contractor, who determined the scope of work and the schedule for the site. Newway was a subcontractor for Onni and subcontracted with Baja to perform a portion of the concrete finishing services Newway agreed to perform under its subcontract with Onni. The City claims that Newway and Baja workers worked similar hours and that they generally took breaks around the same time. The City further argues that Newway ultimately had control over what hours were available for Baja workers to work, and cites to the 30(b)6 deposition of Newway and describes how sometimes Newway would offer Baja superintendents or Roberto Soto Contreras extra concrete work. Unfortunately, the City ignores the preceding testimony, where Newway clearly explained that it was Roberto Soto Contreras - not Newway - who determined how many hours the workers worked. *See* 30(b)6 deposition of Newway, at pages 68:4-9, attached as Exhibit 1 to Wolfe Dec.:

> Q. But was it always a Newway employee who determined how many hours the workers on the relevant worksites worked?
> A. No.
> Q. Can you elaborate on that?
> A. That would be Roberto Soto.
> Q. How did Roberto Soto determine how many hours workers needed to work on a given day?
> A. It was my understanding that it was eight hours every day. And then if there was a concrete pour late then Roberto would tell his people that they need to stay, his employees.

Even more, what the City is describing here is nothing more than how every construction project is managed. Newway did not have discretion with regard to scheduling its work – that was the general contractor, Onni's responsibility. The general contractor is responsible for project scheduling and coordination. *See*, *Able Elec. Co. v. Vacanti &*

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Randazzo Constr. Co., 212 Neb 619, 324 N.W. 2.d 667 (1982); *S. Leo Harmonay, Inc. v. Binks Mfg. Co.,* 597 F.Supp. 1014 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 990 (2d Cir. 1985).

> "Scheduling the work is a key element to project success and is another responsibility of the prime contractor. The prime contractor will generally establish the required overall completion date and sometimes also interim completion dates for specific elements of the work. However, the actual scheduling of the work within those overall requirements is the prime contractor's responsibility."

James F. Nagle, Douglas S. Oles, David R. Trachtenberg, and Oles Morrison & Rinker, *Washington Building Contracts and Construction Law,* page 8 (1996) (emphasis added).

2. Newway's timeclock was not used to track Baja employee hours.

The City also relies on the timeclock that Newway had Baja employees use in order to ensure that Baja (the entity) was not overbilling Newway. The purpose of this timeclock was to verify that the workers listed on Baja invoices were actually on site on the days Baja claimed. There is no evidence that Newway used the timeclock to track the specific hours of Baja employees for which Baja was billing Newway. *See* 30(b)6 Deposition of Newway Forming at 103:22-104:10, attached as Exhibit 1 to Wolfe Dec. It is undisputed that the use of the timeclock had nothing to do with payment of Baja workers. The City does not disagree, but instead claims that "*instead of demanding better accuracy from its subcontractor due to a potential breach of a contract, Newway simply inserted itself into this supervisory function*." This, however, is pure argument and unsupported by any of the evidence. The City does not provide any explanation (or factual support) to demonstrate how this is even a "supervisory function" as opposed to Newway simply performing its regular due diligence to make sure it was not overcharging Onni for the work allegedly performed by Baja employees. The City

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can't draw the distinction because, again, their investigators never actually visited the job site to "investigate" how or why the timeclock was being utilized.

The City has not provided any direct testimony or evidence in support of this factor, and instead just used loosely paraphrased deposition testimony and unfounded arguments to establish that Newway controlled the conditions of the workers' employment, which is simply false.

C. Newway did not Supervise Workers' Performance

The City next argues that Newway supervised the employees because Mr. Machado was present at the construction site, would monitor workers' performance, and that Newway required workers to attend safety meetings. Again, what the City describes here is a typical contractor-subcontractor relationship. Worksite safety meetings are a critical component of construction sites. If the city investigators had visited the site at any point in their investigation, they would have observed the relationship. The City also ignored testimony that all subcontractors attend safety meetings – not just Baja workers. See 30(b)6 Deposition of Newway Forming at 79:15-19, attached as Exhibit 1 to Wolfe Dec. This was a requirement of the general contractor, not Newway.

The City relies on *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125 (2017), to support its claims that Newway supervised work. However, this matter is easily distinguishable. In *Salinas*, the court found that the contractor provided one-on-one instruction regarding the methods and quality of the Plaintiff's work. *Id*. at 146. The contractor also directed the subcontractor regarding how and when it could pay overtime. *Id*. at 147. Even

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more, the contractor rented a house for the subcontractor's employees. *Id*. at 146. The City fails to acknowledge that none of these critical facts occurred here.

The City also relies on *Hodgson v. Griffin & Brand of McAllen, Inc*., 471 F.2d 235 (1973), which again is very different than the case at hand. In *Hodgson*, the appellant set the pay of the workers and handled the social security contributions for the workers. *Id.* at 238. There is zero evidence this occurred here and, in fact, the deposition testimony directly contradicts any such inference the City attempts to draw . *See* 30(b)(6) Deposition of City of Seattle at 68:25-69:2, attached as Exhibit 2 to Wolfe Dec. The City further cites to *Chao v. Westside Drywall, Inc.,* 709 F. Supp. 2d 1037 (2010). However, in *Chao*, the defendants controlled all decisions about what materials were used, provided those materials, and required the workers to track their work and turn in the sheets to the contractor for payment. The "putative joint employer" provided supervision and instruction to the workers. *Id.* at 1062-63. Again, there is no evidence of these facts here.

In support of this factor, the City can only point to mandatory safety meetings attended by various subcontractors and that Mr. Machado was present at the construction site and that he would address problems with various foreman, who were direct Newway employees. Contrary to the City's efforts to twist the facts, the admissible, reliable evidence clearly demonstrates that Newway did not supervise the workers as the City would have the Examiner believe. Newway had no authority in determining how many hours were available to Baja workers or how many Baja workers were brought on site. Newway had no authority in determining Baja workers' compensation. Newway had no authority as to when and if Baja workers could take sick days. Newway had no authority over the hiring or firing of Baja

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workers. *See* 30(b)6 deposition of Newway at 85:12-23; 89:9-12; 90:3-12, attached as Exhibit 1 to Wolfe Dec.; *See also,* 30(b)(6) Deposition of City of Seattle (Daron Williams) at 69:3-5, attached as Exhibit 2 to Wolfe Dec. (acknowledging that it was Baja who hired and fired the workers). Newway had no authority over the processing of Baja workers' payroll. *See* 30(b)6 Deposition of Newway Forming at 74:16-19; 75:15-24; 76:5-16, attached as Exhibit 1 to Wolfe Dec. Finally, Newway had no authority over the manner in which the Baja employees performed their work. As the actual evidence proves, that rested solely on Baja:

> Q: Is it the subcontractor's responsibility to determine how they perform that scope of work?
> **A: Yes.**
> Q: Is it their responsibility to determine how many people they need to complete that scope of work?
> **A: Yes.**
> Q: Does Newway have any say in the means and methods and the labor that goes into a subcontractor's performance of their scope of work?
> **A: No.**

See 30(b)6 Deposition of Newway Forming at 111:21- 112:6, attached as Exhibit 1 to Wolfe Dec.

Even more, supervision and control are probative of an employment relationship only when the oversight demonstrates effective control over the schedule and conditions of employment. *Jacobson v. Comcast Corp.,* 740 F. Supp. 2d 683, 690 (D. Md. 2010). This factor does not contemplate the generic control exercised by a supervisor over an independent contractor. *Id*. (citing *Chen v. Street Beat Sportswear,* 364 F.Supp.2d 269, 286 (E.D.N.Y.2005)). Therefore, detailed instructions and a strict quality control mechanism will not, on their own, indicate an employment relationship. *Id*.

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In *Jacobson*, Comcast exercised a high level of supervision and control over the contractors, as it maintained specific standards to which the installation companies and technicians must adhere, regularly monitored the technicians to ensure that their performance satisfied Comcast's expectations and specified the time they were supposed to arrive at the appointments. *Id*. However, the court recognized that Comcast was not responsible for the day-to-day management of technicians, as that was done by the installation companies. The court found that while Comcast's supervision and control may appear substantial in degree, it is different from the control exercised by employers over employees. The *Jacobson* court also distinguished *Torres–Lopez v. May*, 111 F.3d 633, 637 (9th Cir.1997), which the City heavily relies upon, because the farm owner supervised the picking routines, picking quality, schedules, and selected the days each employee should work. *Id*. at 691.

Here, the alleged "examples" of control put forward by the City are even less than the control that Comcast had in *Jacobson*. In addition to not being responsible for the day-to-day management of the workers, Newway did not regularly monitor the workers or ensure that their performance was satisfactory. Even assuming Newway set the concrete schedule (which it did not – that was Onni's responsibility), this fact is not dispositive, as this factor does not contemplate the generic control exercised over an independent contractor. *Chen v. Street Beat Sportswear*, 364 F. Supp. 2d 269 (E.D.N.Y. 2005). The facts related to this factor weigh heavily in support that Newway was not a joint employer.

D. Newway did not have an Influence on Worker Pay

It is undisputed that Newway had no role whatsoever in the payment of Baja employees. Newway did not issue the workers their paycheck or process the workers' payroll.

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The City knows this, and instead, again relies only upon its unsupported conclusory assertions regarding a Newway timeclock, the use of which the City and its investigators never actually observed. But, as the evidence clearly demonstrates, the timeclock was only used to verify billing discrepancies between Newway and Baja – it had absolutely nothing to do with tracking worker hours or payments to those workers. *See* 30(b)6 Deposition of Newway Forming at 103:22-104:10, attached as Exhibit 1 to Wolfe Dec.

In an effort to establish that this factor weighs in favor of its determination of "joint employer" status, the City once more cites to *Salinas, supra*, where the court found that the contractor and subcontractor were not "completely disassociated" with respect to the workers' employment because the contractor provided a house for the subject employees to live in while working at the jobsite, recorded the workers' hours on timesheets, maintained those timesheets, and required the workers to sign in and out each day. Here, Newway did not do any of these things – it simply provided a mechanism to double-check billing discrepancies in the invoices and timecards that Baja maintained. Further, the City claiming that "*it is undisputed that Newway collected and maintained records establishing the number of hours Workers worked*" is blatantly wrong and not supported by evidence. Newway did not maintain any records showing how many hours each worker worked. The actual evidence established that the only thing they tracked was whether the workers were actually on site the days that Baja claimed. See 30(b)6 Deposition of Newway Forming at 57:4-8, attached as Exhibit 1 to Wolfe Dec. The time clock records did not reflect what hours the workers actually worked, as it only recorded times punched in and punched out and did not reflect breaks. *Id*. at 62:13-20.

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The City also relies on *Barfield v. New York City Health and Hospitals Corp*., 537 F.3d 132 (2008), but that case is easily distinguishable because it was decided on facts entirely different then the issue at hand. In *Barfield,* the court determined that the hospital exercised sufficient formal control over a worker to be that worker's employer because it had "undisputed power to hire and fire" the subject workers, supervised and controlled the employees' work schedules and conditions of employment, and maintained employment records confirming the worker's certifications and shifts they worked. *Id*. at 144. Here, Newway did none of those things.

The City's arguments are a yet another example of its effort to twist the facts to meet a particular narrative. They represent an attempt to distract the Examiner from the actual facts established by reliable evidence, which clearly establishes beyond doubt that Newway had absolutely no role in determining the pay rate of the Baja workers. In fact, Newway had no knowledge of what Baja workers were paid, or whether they ever got paid for overtime. *See* Deposition of Antonio Machado at 96:7-19; 101:1-17, attached as Exhibit 3 to Wolfe Dec. The OLS even determined that Baja, not Newway, set the wages and pay rates for the workers. See 30(b)(6) Deposition of City of Seattle (Daron Williams) at 68:25-69:2, attached as Exhibit 2 to Wolfe Dec. Despite the City's arguments on summary judgment, the actual evidence points in a different direction - Newway had absolutely no involvement with determining the workers' pay.

E. Newway did not Hire or Fire Workers

The City acknowledges that Newway did not directly hire or fire workers, instead the City again manipulates the testimony and relies on a self-serving, unreliable declaration to try

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to establish that Newway "played an indirect role" in Baja worker hiring and firing. The City first claims that Soto Contreras formally hired the workers, but did so at Newway's direction, and, as with many of the its other arguments, provides absolutely no evidence to support this incorrect assertion.

The City then relies on a declaration of the only identified worker, Johnathan Parra Ponce, who allegedly claims that "Tony [Machado] had the ability to hire and fire workers. He would tell Roberto if he needed more workers or wanted to let someone go." Mr. Ponce's interpretations of what he thought were Mr. Machado's abilities, as set forth in his declaration in support of the City's motion, are not reliable and directly contradict his statements given over two years earlier during the City's investigation. For example, regarding Mr. Machado's role in the hiring of Baja employees, Mr. Ponce offered the following in his 2020 interview:

Q: Who hired you?

A: Roberto [Contreras].

See, January 29, 2020 Interview Statement of Jonathan Ivan Parra Ponce at 4:6-8, attached as Exhibit 4 to Wolfe Dec. No mention was made in Mr. Ponce's original interview that Mr. Machado participated in his, or any other Baja employee's hiring.

Instead, the reliable evidence shows that Newway did not even know if a worker was hired or fired:

Q: How were Baja workers on the relevant worksites hired?
A: I have no idea.
Q: Did Newway have any input into the hiring process?
A: No.
Q: Did Roberto keep Newway apprised of the hiring process?
A: No.
Q: And did Newway tell Roberto how many workers it needed?
A: No.

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...
Q: Did Newway play any role in firing workers?
A: For Baja?
Q: Yes.
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.

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

Q: And what else did Baja Concrete do?
A: They would hire individuals. They set up their housing. They had people in apartments. They processed their tax documents. They did a few other things.
See 30(b)(6) Deposition of City of Seattle at 38:18-23.
. . .
Q: Do you know whether Baja recruited, hired, and, let's say, terminated workers?
A: To my understanding, yes.

See 30(b)(6) Deposition of City of Seattle (Daron Williams) at 69:3-5, attached as Exhibit 2 to Wolfe Dec. It is inexplicable that the City ignores its own investigators' findings and now argues that Newway was somehow involved in the hiring and firing of Baja employees. There is simply no reliable evidence that Newway played any role in those functions, which were controlled solely by Baja.

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F. The Workers Worked at the Jobsite that Was Controlled by Onni

The City argues that the workers used Newway premises on a daily basis, but in reality, the workers used the jobsite premises owned by Onni. Baja was a concrete finisher, and the nature of its work requires that the workers be on the construction site owned and run by Onni. The City then again brings up the timeclock, but again does not explain how confirming the billings submitted by Baja creates a supervisory function or demonstrates "the intertwined nature of the two companies." Rather, Newway's mistrust of Baja emphasizes the distinction between the two entities.

The City also admits that the workers supplied their own tools, but claims that the large equipment was provided by Newway. Newway, as the main concrete subcontractor, provided large equipment that its subcontractors could use, such as scissor lifts. This is typical in the construction industry, and it logistically would not be practical, or possible, for each subcontractor to bring their own large equipment to a jobsite. Use of large equipment is certainly not an indication that Baja's workers were also Newway's workers.

G. Work was not an Integral Part of Newway's Business

The work performed by the Baja workers was not an integral part of Newway's business. Newway was a contractor who hired Baja simply because it was busy. Newway has used other subcontractor to provide cement finishers, such as PeopleReady, extensively in the past. *See* 30(b)6 Deposition of Newway Forming at 93:11-23, attached as Exhibit 1 to Wolfe Dec.

In determining the weight and degree of this factor, courts consider the industry custom and historical practice. See *Zheng v. Liberty Apparel Co. Inc*., 355 F.3d 61, 74 (2003). This

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factor should not be interpreted so broadly as to include every subcontracting relationship, because all subcontractors perform a function that a general contractor deems integral to a product or service. *Id*. at 73. Here, Baja performed concrete finishing work. It is common in the construction industry for subcontractors to complete particular tasks such as concrete finishing work, and therefore it is unlikely to be a "mere subterfuge to avoid complying with labor laws." *Id*. Further, the City has not provided any evidence that Newway's hiring of concrete finishers, which is a common practice and historically followed in the industry, was merely an attempt by Newway to avoid labor laws.

Here, similar to *Zheng*, Baja's work was not an integral part of Newway's business. Baja's work is integrated with that of Newway only in the sense that all work performed on a construction site is integrated with all other work at that same construction site. Following the City's logic, every subcontractor on a project could be considered "jointly employed" by the general contractor because each subcontractor performs and "integral part" of the general contractor's business, which is generally to construct the entire project.

H. Baja USA intended to Work for Other Entities

The City claims that "the unrefuted evidence indicates that Baja Concrete USA was not a freestanding entity at all; it was both incorporated and registered in Washington for the purpose of providing labor to Newway." This argument again evidences the City's attempt to misconstrue the testimonial evidence to fit its narrative that Newway was a "joint employer" of Baja's employees. The City claims its argument is supported by "unrefuted evidence" when in fact, the testimony specifically refutes its argument. Ms. De Armas, Baja's 30(b)6

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representative, specifically emphasized on more than one occasion that Baja's intent was to work with other companies:

> Q: Was the purpose of Baja's formation as a company so that it could provide labor to Newway?
> **A: That was, like, the first contract for the company, but I believe the company wanted to do other contracts too.**
> Q: Okay. Did Baja register in Washington so that it could work with Newway?
> **A: Yeah, correct, because it was the only- the only project, the only agreement that was- that existed at the time. But also the registration would happen because Baja wanted to have other projects from other companies too.**

See 30(b)6 Deposition of Baja at 89:4-15, attached as Exhibit 1 to Wolfe Dec. Further, Newway did not ask Baja to register in Washington nor did it bring Baja to Seattle:

> Q: And did Newway ask Baja to register in Washington in order to do work with Newway in Seattle?
> **A: Not to my knowledge**.
> Q: So to your knowledge did Newway essentially bring Baja to Seattle?
> **A: No.**

See 30(b)6 Deposition of Newway at 49:8-18, attached as Exhibit 1 to Wolfe Dec.

I. The Evidence Overwhelming Demonstrates that Newway Did Not Jointly Employ the Workers

The clear and reliable evidence demonstrates that Newway was not a joint employer of the workers. The only "evidence" the City puts forward consists of a single self-serving declaration of one identified worker (there were in fact over 40 workers for whom the City claims were not paid per Seattle regulations) with no first-hand knowledge of the relationship between Baja and Newway, seven anonymous witness "statements," and deposition testimony that the City has consistently inaccurately paraphrased. The City also provides case law that is easily distinguished from the facts at hand – as those cases involved significant control over

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day-to-day operations, direct payment of employees, and businesses that were integrally intertwined, none of which occurred here.

J. The City's Position Would Turn the Construction Industry Upside Down

The relationship between Newway and Baja is that of a normal construction contractor-subcontractor relationship. Courts have repeatedly recognized the "substantial and valuable place that outsourcing, along with the subcontracting relationships that follow from outsourcing, have come to occupy in the American economy." *Zheng, supra*, 355 F.3d 61, 73. The concrete work occurred on a building site that neither Newway nor any other construction subcontractor owns or controls. Construction is carried out by numerous trades, and work does not pass from one to another. There are often numerous contractors on a site, performing the same or similar functions, and they are not all for that reason joint employers. General contractors are contractually responsible for the whole construction site and for the work of the various trades at the site and have the right or obligation to schedule work. What the OLS has described, and continues to describe, is nothing more than a contractor-subcontractor relationship at a construction site. When analyzing the economic realities test and determining whether an entity is a joint employer, courts should be careful to not "subsume typical independent contractor relationships." *Jacobson, supra*, at 689. The economic realities test is intended to expose outsourcing relationships that lack a substantial economic purpose – but it is manifestly not intended to inhibit normal contracting relationships. *Id.*

The impacts of the City's arguments would upend the construction industry that has long relied on the independent relationships between parties in the construction process. If the City's position were to be upheld, then every general contractor would be a joint employer of every subcontractor's employee, and every subcontractor would be joint employers of every sub-tier subcontractor's employees. The liability this would impose on each participant in the

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construction process would force a significant change in how they conduct their businesses and would lead to considerably increased construction costs. The amount of paperwork and monitoring would increase exponentially. For example, a general contractor, instead of relying on its subcontractors to properly follow all employment laws, would basically have to treat each subcontractor employee as their own, maintaining their own employment records and monitoring the compensation of every worker. On large-scale construction projects, like Denny Way, there are thousands of workers. Having to track each one would lead to massive additional administrative expenses that would have to be passed along to both public and private project owners, driving up construction costs and significantly limiting the size and number of projects. Holding Newway out to be a joint employer would be a dangerous precedent to set for the construction industry.

For these reasons, the Examiner should deny the City of Seattle's Motion for Summary Judgment, and grant Newway Forming, Inc.'s Motion for Summary Judgment because it is not a joint employer.

DATED this 3rd day of August, 2022.

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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 3rd day of August, 2022, I caused true and correct copies of the foregoing document to be delivered to the following parties and in the manner indicated below:

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SIGNED at Seattle, Washington this 3rd day of August, 2022.

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