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 Files: **No.: LS-21-002** **LS-21-003** **LS-21-004** RESPONDENT CITY OF SEATTLE'S RESPONSE TO APPELLANT NEWWAY FORMING, INC.'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Appellant Newway Forming Inc.'s ("Newway") Motion for Summary Judgment should be denied. Newway fails to establish that it is entitled to summary judgment as a matter of law. Newway ignores the undisputed facts that in several key areas, Newway exercised significant control over the workers paid by Baja ("Workers") and their work, creating a relationship that placed Newway in the role of an employer. The testimony of Newway's own witnesses and employees supports the Office of Labor Standards ("OLS") Director's findings that Newway acted as a joint employer. Several factors outlined in *Becerra v. Expert Janitorial, LLC*[1] demonstrate Newway's role as a joint employer. In addition, the Director did not abuse his discretion by imposing liquidated damages and interest in amounts specifically authorized by the Seattle Municipal Code. The

[1] 181 Wn.2d 186.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

Director's designee exercised her discretion to establish amounts for liquidated damages and penalties, and accordingly, they are not excessive. Newway's Motion for Summary Judgment should be denied.

II. STATEMENT OF FACTS

Newway omits several undisputed material facts in its Motion for Summary Judgment. The City presented facts in its Motion for Summary Judgment which support the finding that Newway acted as a joint employer.

Newway claims that OLS should not have relied on workers' statements in finding Newway was a joint employer, however, infomation workers told investigators was substantiated by other evidence.[2] In its motion, Newway claims OLS relied on "unreliable witness statement that Newway allegedly told Roberto Soto Contreras what time the workday ended for a short period of time."[3] However, this fact is actually undisputed because Newway's own site superintendent, Antonio Machado, testified to the same:

> **Q:** So who tells workers what time to leave on any given day?
>
> **A:** Well, we were based on eight hours day. But then you get the concrete crews. Sometimes – you know, Seattle was a busy industry. We order so many concrete – meters of concrete in an hour.
> And sometimes, because of the traffic or it – any issues, last things steady takes six, seven hours; sometimes will take ten, eleven hours. So the guys, they were involve only – you know, they were involve on – on a concrete, they have to stay there until, you know, they finish.[4]
>
> ……..
>
> **Q:** Right. So who decided whether it would be an eight-hour day or a ten-or 11 hour day? Who made that decision?
>
> **A:** Who made – I – I – I did a lot of times. You know, if you need the guys to stay an hour or two, I always go to foreman, "Oh, today we got to stay a little late. We got to get, you

[2] *See, e.g.*, Findings of Fact, Determination and Final Order, pages 4-5 (Workers indicated Newway told them what hours they would work and Antonio Machado informed OLS that Newway controlled the hours of work.).
[3] Newway's Motion for Summary Judgment, page 4.
[4] Declaration of Lorna S. Sylvester, Exhibit A, Deposition of Antonio Machado, page 45, line 18 to page 46, line 4.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

know, this or that done." You know what I'm saying? So – [5]

Newway admits that they required the workers to sign in and out using a time clock that was located in the Newway office on site.[6] In its motion, Newway minimizes the role of the time clock records. According to Newway's 30(b)(6) witness, Newway's full explanation for the purpose of the time clock records is as follows:

> **Q:** Okay. And was there an approval process for these, all these timecards?
>
> **A:** Yes. Tom Grant wouldn't sign the invoices submitted by Baja until we had backup. And that therefore my Canadian office would not pay bills until this was done.
> So these were – they wanted everybody to come to the office, clock in. And Roberto Soto Contreras would come in once a week and sit down with Tom Grant and they would go through these.
> And then Roberto would make his invoice.
>
> **Q**: So Mr. Soto Contreras and Tom Grant would sit down together and review, I guess, all of the timecards for the week, correct?
>
> **A:** Yes.
>
> **Q:** And they would do this every week during the relevant time period of time?
>
> **A**: Yes.
>
> **Q:** And then if I understood you correctly, Mr. Soto Contreras would then, with that information, he would prepare Baja's invoices, is that correct?
>
> **A:** Yes.[7]

Newway's involvement in the payroll process was more than just a way to track who was on site. Newway used the time clock records to help Baja prepare payroll summaries; in other words, these records were used to track hours.

Lastly, whether OLS visited the construction site is irrelevant when the statements from

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[5] *Id.* at page 46, lines 13-20.
[6] Newway's Motion for Summary Judgment, p. 4.
[7] Declaration of Lorna S. Sylvester, Exhibit B, 30(b)(6) Deposition of Kwynne Forler-Grant on behalf of Newway Forming, page 18, line 5 to page 19, line 8.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

Workers, the paystubs, the timesheets, other records, and statements from Antonio Machado were consistent. Newway controlled the work site, Newway controlled the hours, and Newway controlled the payments. If Baja did not allow Newway to approve timesheets, Newway would not pay Baja.[8] If Newway failed to pay Baja, the Workers did not get paid.[9] Baja fully relied on Newway since Baja provided its services only to Newway and no one else.[10]

In their motion, Newway also omits certain facts that demonstrate this was more than the "normal contractor-subcontractor" relationship and instead spends much time attempting to discredit the Workers.[11] However, Newway ignores these undisputed facts:

- Baja provided Workers for cement finishing, and Workers were responsible for tasks such as patching and sanding the concrete and building forms for pouring the concrete.[12]
- Newway directed Workers' work and supervised the Workers on the worksites.[13]
- Machado, the Newway superintendent, supervised the Newway foreman who also directed the Workers.[14]
- Newway foremen assigned tasks to Workers throughout the workday.[15]
- Newway controlled Workers' daily schedules.[16] Workers could not work on whatever they wanted.
- Newway told Baja how many workers were needed on the site.[17]
- Newway controlled the meal and rest breaks on the site.[18]
- Newway did not differentiate between its own Workers and Baja Workers in the direction it gave on the job site.[19]
- Newway and Baja agreed on the hourly rate that Newway was to pay Baja for Workers' labor.[20]
- The Workers provided their services for Newway's benefit and played a role in Newway's

[8] Declaration of Lorna S. Sylvester, Exhibit C, 30(b)(6) Deposition of Mercedes De Armas on behalf of Baja Concrete USA, page 26, line 10-21 (referring to Deposition Exhibit 2 [Timesheets and Invoices] which was previously filed in support of City's Motion for Summary Judgment).
[9] 30(b)(6) Deposition of Mercedes De Armas, page 166, lines 4-10.
[10] *Id.* at p. 89, lines 9-18.
[11] Newway's Motion for Summary Judgment, p. 5.
[12] 30(b)(6) Deposition of Forler-Grant at page 92, lines 2-18.
[13] *Id.* at page 79, lines 2-5.
[14] *Id.* at page 80, lines 2-6.
[15] Deposition of Antonio Machado, page 42, lines 4-14, page 49, line 55 to page 53, line 5.
[16] *Id.* at page 46, lines13-19, page 54, lines 13-21.
[17] 30(b)(6) Deposition of Forler-Grant at page 24, lines 4-16, page 53, lines 4-12.
[18] Lorna S. Sylvester, Exhibit D, Interview Statement of Antonio Machado, page 3 a/k/a SEATTLE-OLS-1062, lines 22-25 (stating that the entire site took a timed break at 10 and then 12 but sometimes they would have to work through the breaks if there was a concrete pour).
[19] Deposition of Antonio Machado at page 49, line 25 to page 50, line 11, page 52, lines 16-21, page 59, line 25 to page 60, line 15, page 62, lines 15-22, page 64, lines 2-3, page 66, lines 2-10, page 68, lines 13-19.
[20] *Id.* at page 64, lines 15-17.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

ability to perform its contractual duties to Onni.[21]

- Workers used some of their own tools, but Newway provided the equipment they needed for work.[22]
- Newway required Workers to attend regular meetings regarding safety protocols.[23]
- Machado walked around all day to ensure everyone was working safely.[24]
- Machado spent 90 to 95 percent of his time at the construction site.[25]

Applying the joint employment test to these undisputed facts, Newway jointly employed the Workers.

III. EVIDENCE RELIED UPON

The City relies on the pleadings, stipulations, declarations, and attachments already on file with the Hearing Examiner, including the following: City's Motion for Summary Judgment, City of Seattle's Response to Appellant Newway's Motion for Summary Judgment, and Declaration of Lorna S. Sylvester in Support of City's Response to Newway Forming, Inc.'s Motion for Summary Judgment with Exhibits.

IV. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[26] A material fact is one upon which the outcome of the litigation depends in whole or in part."[27] In determining

[21] 30(b)(6) Deposition of Forler-Grant, page 92, lines 5-25, page 93, lines 3-25, page 117, lines 12-15.
[22] *Id.* at page 95, lines 17-20.
[23] Deposition of Antonio Machado, page 154, line 24 to page 155, line 2, page 155, lines 6-17; *see also* 30(b)6 Deposition of Forler-Grant, page 79, lines 10-23.
[24] Deposition of Antonio Machado, page 23, lines 2-20.
[25] *Id.* at page 24, lines 18-25.
[26] CR 56(c); When questions of practice or procedure arise that are not addressed by these Rules, the Hearing Examiner shall determine the practice or procedure most appropriate and consistent with providing fair treatment and due process. The Hearing Examiner may look to the Superior Court Civil Rules for guidance. Hearing Examiner Rules of Practice and Procedure - 1.03(c).
[27] *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 898-99, (2009) (*citing Atherton Condo. Apartment–Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, (1990)).

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

whether a genuine issue of material fact exists, the court views all facts and draws all reasonable inferences in favor of the nonmoving party.[28] Here, there is no genuine issue as to any material fact.

B. OLS' findings are supported by statements from Newway.

Information provided by the Workers was corroborated by Newway in its 30(b)(6) deposition and by Antonio Machado in his deposition. Workers' statements also were corroborated by documents provided by Newway and Baja. For example, Workers indicated they worked over 40 hours a week without overtime premium pay.[29] Paystubs and timesheets confirmed the same.[30] In its motion, Newway repeatedly refers to the Workers' statements as unreliable yet fails to elaborate on which portions of the Workers' statements would lead to that conclusion since other evidence supports what Workers told OLS. The facts outlined above are facts provided by Newway and Baja representatives. Accordingly, Newway's Motion for Summary Judgment on this basis should be denied.

C. As a matter of law, Newway jointly employed the Workers.

For purposes of Seattle's Minimum Wage, Wage Theft, and PSST Ordinances ("Ordinances"), the term "Employer" refers to "any individual, partnership, association, corporation, business trust, or any entity, person or group of persons, or a successor thereof, that employs another person and includes any such entity or person acting directly or indirectly in the interest of an employer in relation to an employee."[31] Like the Fair Labor Standards Act ("FLSA"), the Ordinances broadly define the term "Employ" as "to suffer or permit to work."[32]

The Ordinances are remedial in nature and subject to liberal construction to effect their

[28] *Id.* at 899 (*citing Owen v. Burlington N. Santa Fe R.R. Co*., 153 Wn.2d 780, 787, (2005)).
[29] Declaration of Lorna S. Sylvester, Exhibit E, 30(b)(6) Deposition of Daron Williams on behalf of OLS, page 66, line 22 to page 67, line 6.
[30] *Id.* at page 65, line 8 to page 66, line 3.
[31] SMC 14.16.010. 14.19.010, 14.20.010.
[32] SMC 14.16.010. 14.19.010, 14.20.010; *see* 29 U.S.C. § 203(g) (FLSA).

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

purpose in protecting workers.[33] Because these enactments use the same, expansive language as the FLSA to define employment, it is appropriate to look to FLSA jurisprudence in interpreting the Ordinances.[34] In the FLSA context, "[a]n entity 'suffers or permits' an individual to work if, as a matter of economic reality, the individual is dependent on the entity."[35] "[T]he 'suffer or permit to work' standard was developed to assign responsibility to businesses that did not directly supervise putative employees."[36] This "definition of 'employ' is far broader than that in common law and encompasses working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category."[37]

In addition to broadly defining employment, the Ordinances explicitly contemplate joint employment. Under the Ordinances, "[m]ore than one entity may be the 'employer' if employment by one employer is not completely disassociated from employment by the other employer."[38] In administering Seattle's minimum wage and minimum compensation rates, OLS holds joint employers jointly and severally liable for violations. "If the facts establish that the employee is jointly employed by two or more employers, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the ordinance with respect to the entire employment for the particular work week and pay period."[39]

To determine whether multiple entities function as joint employers, OLS uses the "economic realities" test the Washington Supreme Court announced in *Becerra v. Expert Janitorial, LLC*, 181

[33] *See Peninsula School District No. 401 v. Public School Employees of Peninsula*, 130 Wn.2d 401, 407, 924 P.2d 12 (1996); *see also U.S. for Benefit and on Behalf of Sherman v. Carter*, 353 U.S. 210, 216, 77 S.Ct. 793, 1L.Ed.2d 776 (1957).
[34] *Cf. Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 195, 332 P.3d 415 (2014) (looking to FLSA's "suffer or permit" standard in considering joint employment under Washington's Minimum Wage Act).
[35] *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996) (citing *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961)).
[36] *Id.* at 933.
[37] *Becerra*, 181 Wn.2d at 195 (internal quotation marks omitted, alteration in original).
[38] SMC 14.16.010. 14.19.010, 14.20.010.
[39] Seattle Human Rights Rule 90-045(6).

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

Wn.2d 186.[40] In *Becerra*, the Washington Supreme Court considered whether employers were jointly liable for violations of Washington's Minimum Wage Act. In making this determination, the court adopted the "economic reality" framework for joint employment announced in *Torres-Lopez v. May*.[41] There, the court set forth thirteen nonexclusive factors to determine whether an entity functioned as a joint employer, including both "formal or regulatory factors" and "common law" or "functional" factors.[42] The factors the *Torres-Lopez* court identified are as follows:

> 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 functional, common-law, or non-regulatory 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 [the alleged employee's] 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,[43]

In *Becerra*, the Washington Supreme Court emphasized that "[t]hese factors are not exclusive and are not to be applied mechanically or in a particular order."[44] Rather, a court considering joint

[40] Seattle's Minimum Wage Ordinance, Questions and Answers. Available at QA_MW_22_0127.pdf (seattle.gov) (last visited June 13, 2022); *see also* SHRR 90-045(3) (indicating that joint employment requires a totality-of-circumstances analysis).
[41] *Becerra v. Expert Janitorial, LLC.*, 181 Wn.2d 186 (2014) (citing *Torres-Lopez*, 111 F.3d 633 (9th Cir. 1997).
[42] *Becerra*, 181 Wn.2d at 196 (citing *Torres-Lopez*, 111 F.3d at 639-40).
[43] *Torres-Lopez*, 111 F.3d at 639-40 (internal quotation marks and citations omitted; alterations in original).
[44] *Becerra*, 181 Wn.2d at 198.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

employment must examine the totality of the circumstances.[45] In addition, the court "is also free to consider any other factors it deems relevant to its assessment of the economic realities."[46] Such 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."[47] Taken as a whole, the undisputed evidence indicates that the Workers were jointly employed by Newway.[48]

1. Newway controlled the conditions of Workers' employment.

Newway does not dispute that it exerted significant control over Workers' day-to-day working conditions but instead attempts to explain it as a normal contractor-subcontractor relationship. However, Newway's management of Workers reinforces the notion that it possessed a great measure of control, especially when viewed in conjunction with other indicia of control.

Although Onni determined the scope of work, Newway had discretion in determining the order in which to accomplish the required tasks, and it imposed those decisions on its subcontractors.[49] Antonio Machado was at the work site almost all of the time and was responsible for supervising each of the foremen.[50] Every day, he would assign tasks to his foremen, who in turn would pass on those instructions to the Workers.[51]

Newway's foremen oversaw workers directly employed by Baja.[52] Newway foremen instructed the Workers, through Soto Contreras, on where they should be stationed throughout the

[45] *Id*. (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)); *see also Becerra*, 181 Wn.2d at 198 ("[T]he 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.") (quoting *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007)).
[46] *Becerra*, 181 Wn.2d at 198 (quoting *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71-72 (2d Cir. 2003))
[47] *Becerra*, 181 Wn.2d at 198 (internal quotations omitted).
[48] *Torres-Lopez*, 111 F.3d at 644.
[49] 30(b)(6) Deposition of Forler-Grant at page 122, lines 1-10.
[50] *Id*. at page 80, lines 2-6; Deposition of Antonio Machado at page 24, lines 18-25.
[51] Deposition of Antonio Machado at page 23, lines 22-24, page 42, lines 17-23.
[52] 30(b)(6) Deposition of Forler-Grant at page 79, lines 2-5; Deposition of Antonio Machado at page 49, line 25 to page 50, line 4, page 51, line 20 to page 52, line 10.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

workday.[53] Workers would approach Newway foreman for instructions, and after a Worker finished a task, the Newway foremen would tell him what to do next.[54] Newway foremen treated the Workers as their own regardless of whether the workers were on Baja's payroll or Newway's payroll.[55] As Machado explained, "So to make sure they get them done. I mean we wouldn't separate… Baja guys in …one side and our employees on the other. No. They were working together."[56]

Newway informed Baja how many workers were needed[57] and Newway implemented a time clock system for Workers.[58] Newway inserted itself into this supervisory function of clocking in and out and performed this function after questions arose regarding Baja's billing, instead of requiring Baja to correct the problem on its own.

The undisputed facts illustrate that Newway controlled the number of Workers and the Workers' daily schedules and tasks. Evidence of joint employment exists where the joint employer "controlled the overall harvest schedule and the number of workers needed for harvesting" as well as "which days were suitable for harvesting."[59] Machado directed his foremen as to when crews needed to begin work and when they needed to stay after hours.[60] Newway foremen would tell Workers when it was time to go home for the day.[61] Workers on Baja's payroll generally took breaks and paused for lunch at the same time as workers on Newway's payroll.[62] Workers worked the same hours as those on Newway's payroll.[63] Newway also decided when to offer additional hours to

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[53] 30(b)(6) Deposition of Forler-Grant at page 80, lines 14-17, *see also* page 13, lines 10-19.
[54] Antonio Machado Interview Statement, page 3 a/k/a SEATTLE-OLS-1062, lines 6-7, 19-20.
[55] Deposition of Antonio Machado at page 52, lines 13-21.
[56] *Id.*, page 60, lines 8-15.
[57] 30(b)(6) Deposition of Forler-Grant at page 24, lines 4-16, page 53, lines 4-12.
[58] *Id.* at page 37, line 25 to page 38, line 5.
[59] *Torres-Lopez*, 111 F.3d at 642
[60] Deposition of Antonio Machado at page 46, lines 13-19, page 54, lines13-21; *see also* Antonio Machado Interview Statement, page 3 a/k/a SEATTLE-OLS-1062, lines 6-7, page 4 a/k/a SEATTLE-OLS-1063, lines13-15.
[61] Antonio Machado Interview Statement at page 7 a/k/a SEATTLE-OLS-1066, lines 11-13.
[62] 30(b)(6) Deposition of Forler-Grant at page 26, lines 1-3, Deposition of Antonio Machado at page 54, line 22 to page 55, line 5; Antonio Machado Interview Statement, page 3 a/k/a SEATTLE-OLS-1062, lines 23-24.
[63] Deposition of Antonio Machado at page 39, line 21 to page 40, line 7.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

Workers.[64]

Various aspects of Newway's management and supervision show Newway exerted control over Workers – through a combination of deciding how many workers were needed, to implementing what was needed to comply with the construction schedule, dictating permissible work hours, and supervising the finishing work. In its motion, Newway claims it did not have control of Workers' schedules but that defies logic given that Workers could not decide on their own when there would be a concrete pour. Workers needed to be available for the cement finishing when finishing needed to be done in accordance with the schedule. There is no evidence to support the idea that Soto Contreras could bring Workers to the sites whenever he wanted. The undisputed facts favor joint employment with regard to Newway's control over hours, tasks, and meal and rest breaks.

2. Newway supervised Workers' job performance directly and indirectly.

The degree to which Newway supervised Workers also favors joint employment. Courts consider "[t]he degree of supervision, direct or indirect, of the work" as a factor bearing on joint employment.[65] Machado was almost always present at the construction site[66] and was continuously monitoring Workers' performance.[67] If Machado discovered a problem, he would address it with the foreman, regardless of whether the offending workers were on Newway's or Baja's payroll.[68] Machado explained, "So, I mean, if there is an issue there, I don't care if they are Baja or Newway. I got to do whatever it takes, you know, to make everybody look good, right?"[69]

A court may find joint employment where a joint employer supervises workers on a daily basis, is in physical proximity, and provides direction and feedback.[70] Joint employment also may

[64] 30(b)(6) Deposition of Forler-Grant at page 68, line 16 to page 69, line 12.
[65] *See Torres-Lopez,* 111 F.3d at 640.
[66] Deposition of Antonio Machado at page 24, lines 18-21.
[67] *Id.* at page 23, lines 2-16, page 25, lines 15-18, page 29, lines 9-11.
[68] *Id.* at page 67, line 12 to page 68, line 19.
[69] *Id.* at page 68, lines 15-19.
[70] *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 146 (2017).

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

be found where a joint employer "exercised a substantial degree of supervision over the work performed" by workers where, as here, one of its officials "had the right to inspect all the work performed" and "[h]is daily presence in the fields helped to ensure that the farmworkers performed satisfactorily."[71]

Newway also required Workers to attend regular safety meetings.[72] A finding of joint employment is supported if a joint employer requires workers to attend frequent meetings and hold themselves out as that employer's employee.[73]

Newway foremen routinely supervised Workers[74] and "[i]t is well settled that supervision is present whether orders are communicated directly to the laborer or indirectly through the contractor."[75] The fact that Newway "effected the supervision by speaking to crew leaders, who in turn spoke to the … workers, rather than speaking directly to the …workers does not negate a degree of apparent on-the-job control over the … workers."[76]

Moreover, Soto Contreras did not have the authority to make decisions on his own with regard to Workers' duties during the workday. The level of control Newway exerted here is similar to the farmer's control in *Torres–Lopez* since Newway dictated the overall work schedule and the hours during which they were permitted to work, maintained a frequent presence at the work site, and retained the right to inspect work. Newway also dictated when and how many Workers were needed.[77] Newway's daily supervision and oversight favors a conclusion that it was a joint employer.

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[71] *Torres-Lopez*, 111 F.3d at 642.
[72] 30(b)(6) Deposition of Forler-Grant at page 79, lines 15-23; Deposition of Antonio Machado at page 154, line 24 to page 155, line 14.
[73] *See Salinas*, 848 F.3d at 146-47.
[74] 30(b)(6) Deposition of Forler-Grant at page 79, lines 2-5; *see also* Deposition of Antonio Machado at page 49, line 25 to page 50, line 4, page 51, line 20 to page 52, line 10.
[75] *Salinas*, 848 F.3d at 148 (2017) (quoting *Aimable v. Long & Scott Farms*, 20 F.3d 434, 441 (11th Cir. 1994)).
[76] *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 238 (5th Cir. 1973).
[77] Deposition of Antonio Machado at page 32, lines 14-15; 30(b)(6) Deposition of Forler-Grant at page 24, lines 4-16.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

3. Newway influenced how Workers were paid.

Newway's influence over Worker pay is demonstrated by Newway requiring Workers to record their start- and end-times using a timeclock located in the Newway office.[78] Newway does not dispute that it required Baja to use Newway's time clock to check the accuracy of the Workers' time.[79] And, Newway does not dispute that it collected and maintained records establishing the number of hours Workers worked.[80] Newway does not dispute that they used these records to assist Soto Contreras with preparing invoices[81] for Newway's approval.[82]

In *Salinas v. Commercial Interiors, Inc.*, a general contractor and subcontractor were considered joint employers when the subcontractor issued the workers' paychecks but the general contractor "recorded Plaintiffs' hours on timesheets, maintained those timesheets, and required Plaintiffs to sign in and out each day."[83] Newway signed off on Baja's invoices, approving the number of hours for which Baja billed Newway.[84] Newway yielded significant economic control over whether Workers were paid. Thus, this factor favors finding a joint employment relationship.[85]

4. Workers used Newway premises and equipment for their work.

The Workers' use of Newway's premises and equipment also favors joint employment because Newway's "investment in equipment and facilities is probative of the [W]orkers' economic dependence on the person who supplies the equipment or facilities."[86] Workers made daily use of

[78] 30(b)(6) Deposition of Forler-Grant at page 37, line 22 to page 38, line 5, page 106, line 11 to page 107, line 15, (referencing Deposition Exhibit 13).
[79] *Id*. at page 60, line 1-5.
[80] *Id*. at page 57, lines 18-20.
[81] *Id*. at page 59, lines 18-24.
[82] *Id*. at page 18, line 16 to page 19, line 4, page 35, line 19 to page 36, line 5, page 61, lines 1-7.
[83] *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 147 (4th Cir. 2017); *see also Chao v. Westside Drywall, Inc*., 709 F.Supp.2d 1037, 1063 (D. Or. 2010) (noting that employer's requirement that laborers track their time on time sheet worksheets and turn them in weighed in favor of joint employment).
[84] 30(b)(6) Deposition of Forler-Grant at page 18, line 16 to page 19, line 4, page 35, line 19 to page 36, line 5 (referencing Deposition Exhibit 7), page 61, lines 1-7.
[85] *Barfield v. N.Y.C. Health and Hosps. Corp.*, 537 F.3d 132, 144-45 (2nd Cir. 2008).
[86] *Torres-Lopez*, 111 F.3d at 640-41 (internal quotations omitted).

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

Newway's physical office at the worksite, where they would use a time clock supplied by Newway to clock in and out.[87] In addition, although Workers supplied their own small tools, the large equipment they used for their day-to-day work belonged to Newway.[88] These undisputed facts also favor a finding of joint employment.

5. Workers were an integral part of Newway's performance of its contractual duties, were required to have no special skill, and were provided with no opportunities for profit or loss.

The nature of Workers' work also favors the conclusion that Newway was a joint employer. Even though in its motion, Newway attempts to diminish the importance of the work performed by the Workers, they were an integral part of Newway's business.[89] Newway was hired to handle the concrete components of several high-rise construction projects.[90] Baja provided cement finishing and Workers were responsible for tasks such as patching and sanding the concrete and building forms for pouring concrete.[91] Baja's tasks "constituted one small step in the sequence of steps" in Newway's broader effort to perform the concrete work for high-rise construction.[92] Workers' responsibilities were like "specialty job[s] on the production line."[93]

Furthermore, the work Workers performed required no "great initiative, judgment, or foresight, or special skill" and provided no "opportunity for profit or loss" depending on the Workers' managerial skills.[94] There is no dispute that the finishing was one of several services used by Newway to complete its projects and even though there was no literal "production line," the Workers fulfilled one necessary step in the linear process of their cement work. The focus is not on

[87] Deposition of Antonio Machado at page 133, lines 15-21.
[88] 30(b)(6) Deposition of Forler-Grant at page 95, lines 17-20.
[89] *See id*. at page 92, line 23 to page 93, line 21.
[90] *Id*. at page 90, line 24 to page 93, line 21.
[91] *Id*. at page 92, lines 2-18.
[92] *Torres-Lopez*, 111 F.3d at 643.
[93] *Id*. (quoting *Rutherford*, 331 U.S. at 730).
[94] *Torres-Lopez*, 111 F.3d at 644 (internal quotations and citation omitted).

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

whether a worker had a unique talent but rather on whether the service that the worker rendered, no matter how mundane, was necessary to the overall business operation. Thus, like the cucumber pickers in *Torres–Lopez* and the beef boners in *Rutherford*,[95] the Workers' work can be considered a specialty job on a production line which constituted an integral part of Newway's business. These facts support the conclusion that Newway is a joint employer.

6. Newway paid Baja at the same rate that it paid a former labor contractor.

The rate Newway agreed to pay Baja for its services is also probative of joint employment because it was the same rate that Newway paid its previous subcontractor and was not subject to negotiation.[96] This undisputed fact suggest that the agreement was "standard for the industry,"[97] and that contractual responsibilities between Newway and its labor contractors "pass[ed] from one labor contractor to another without 'material changes.'"[98] These facts also favor joint employment.

7. Baja worked exclusively for Newway.

The Workers did not have a "business organization" that could shift as a unit from one construction site to another.[99] Instead, they worked *exclusively* for Newway[100] and sometimes a few Workers were dispatched to different Newway locations for a short period of time.[101] The undisputed evidence indicates that Baja Concrete USA was formed for the purpose of providing labor to Newway.[102] Newway and Baja were intimately intertwined.[103] Machado, Newway's site

[95] *Rutherford Food Corp.*, 331 U.S. at 725 (noting that work was a part of the operations which were carried on in a series of interdependent steps).
[96] 30(b)(6) Deposition of Forler-Grant at page 50, line 20 to page 51, line 9; 30(b)(6) Deposition of Mercedes De Armas at page 84, line 24 to page 85, line 18.
[97] *Torres-Lopez*, 111 F.3d at 643.
[98] *Id*. at 640 (quoting *Rutherford*, 331 U.S. at 730).
[99] *Torres-Lopez*, 111 F.3d at 644 (quoting *Rutherford*, 331 U.S. at 730).
[100] 30(b)(6) Deposition of Mercedes De Armas at page 89, lines 16-18.
[101] *Id*. at page 92, lines 4-19.
[102] *Id*. at page 20, lines 20-22, page 89, lines 4-22; *see Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 147 (2017) (finding joint employment where workers "worked almost exclusively on [putative joint employer's] jobsites").
[103] SMC 14.16.010. 14.19.010, 14.20.010

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

superintendent, had a personal relationship with Carlos Ibarra, the brother of Baja's president, Claudia Penunuri.[104] The contract to employ the Workers was a *verbal* agreement between Newway and Ibarra.[105] It was Baja's first and only contract to supply workers in the U.S.[106] Money flowed informally between Baja and Machado, further contradicting the idea of an arms-length, run of the mill, general contractor-subcontractor relationship between the two companies.[107] Baja's overwhelming economic reliance on Newway, and its use of Workers exclusively at Newway's work sites, demonstrates a joint employment relationship.

8. Typical contractor-subcontractor relationships do not negate joint employment.

Newway repeatedly claims that their relationship with Baja was typical one for contractors and subcontractors in the construction industry and therefore, did not constitute joint employment. Courts have rejected this argument under similar circumstances. As discussed above, in *Salinas v. Commercial Interiors, Inc.*, the court noted whether "the general contractor-subcontractor relationship—or any other relationship—has long been 'recognized in the law' and remains prevalent in the relevant industry has no bearing on whether entities codetermine the essential terms and conditions of a worker's employment, and therefore, constitute joint employers for purposes of the FLSA."[108] By inserting itself into Baja's billing process, by collecting information for payroll and tracking hours, and by not signing off on invoices until it reviewed all of the time clock records with Soto Contreras each week, Newway differentiated itself from a typical general contractor.

[104] Deposition of Antonio Machado at page 122, line 25 to page 124, line 6; 30(b)(6) Deposition of Mercedes De Armas at page 144, lines 10-11, page 146, lines 5-15.
[105] 30(b)(6) Deposition of Forler-Grant at page 27, line 17 to page 28, line 10, page 46, lines 15-24.
[106] 30(b)(6) Deposition of Mercedes De Armas at page 88, lines 9-17, page 89, lines 1-15.
[107] Deposition of Antonio Machado at page 108, line 15 to page 110, line 18, page 110, line 25 to page 111, line 24, page 112, line 24 to page 113, line 18, page 115, lines 3-6, page 118, line 10 to page 119, line 20, page 121, lines 3-16; 30(b)(6) Deposition of Mercedes De Armas at page 99, lines 4-7, page 101, lines 13-19 (referencing Deposition Exhibit 7).
[108] *Salinas v. Commercial Interiors, Inc.*, 848 F.3d at 144.

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

Whether Newway intended to be a joint employer and violate the Ordinances is not dispositive as to whether they codetermined the key terms and conditions of the Workers' employment or whether they are joint employers.[109]

According to the court's reasoning in *Becerra*, the Hearing Examiner could find Newway is a joint employer based on the existence of one factor alone since the economic reality factors are not an algorithm. One factor "can serve as the basis for finding that two or more persons or entities are 'not completely disassociated' with respect to a worker's employment if the facts supporting that factor demonstrate that the person or entity has a substantial role in determining the essential terms and conditions of a worker's employment."[110] The undisputed facts demonstrate the extent of Newway's role in this case and favor a finding of joint employment. OLS' determination that they operated as joint employers should be affirmed.

D. Newway failed to allege facts sufficient to find that the penalties and fines assessed by OLS were excessive.

SMC sections 14.19.080.B and 14.20.060.B give the Director of OLS the discretion to impose liquidated damages in an amount of up to twice the unpaid wages for a first violation of the minimum wage or wage compensation ordinances.[111] Because the Director's assessment of liquidated damages is discretionary, the decision is reviewed only for an abuse of discretion.[112]

Newway's claim that the fine in this case is exorbitant, when the Director imposed an amount of liquidated damages *which is authorized by ordinance*, should be rejected.[113] Newway offers no case law to support their claim that the Director abused his discretion when assessing the fine

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[109] *See id*. at 145.
[110] *Id*. at 142.
[111] SMC 14.19.080(B); SMC 14.20.060(B).
[112] *See Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502, 512, 215 P.3d 1043 (2009).
[113] *See Shanlian v. Faulk*, 68 Wn. App. 320, 328 (1992) (finding that orders to pay money within a range set by statute were within the discretion of an agency imposing those penalties and recognizing that courts should not intrude on that discretion) (emphasis added).

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

amount. Although Newway worked with OLS to provide data during the investigation, Newway's actions resulted in underpayments to over 50 workers for over two years with thousands of dollars due in back wages. Considering this and all the other factors outlined in the SMC, the Director exercised his legally authorized discretion to assess amounts for liquidated damages, penalties, and fines. None of the amounts assessed exceed the authority granted to the Director. Accordingly, Newway's claim that the fine amount is exorbitant should be rejected in its entirety.

V. CONCLUSION

For the reasons stated above, the City respectfully requests that the Hearing Examiner deny Newway Forming, Inc.'s Motion for Summary Judgment. Based on the totality of the circumstances and a review of the factors outlined in *Becerra*, Newway is a joint employer and OLS' Findings of Fact, Determination and Final Order should be upheld.

DATED this 3rd day of August, 2022.

ANN DAVISON
Seattle City Attorney

By: /s/ Lorna S. Sylvester
Lorna Staten Sylvester, WSBA #29146
Cindi Williams, WSBA #27654
Assistant City Attorneys
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
Email: lorna.sylvester@seattle.gov
Email: cindi.williams@seattle.gov
Attorneys for Respondents,
The City of Seattle and
The Seattle Office of Labor Standards

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date, I caused to be served a true and correct copy of the foregoing document, **Respondent City of Seattle's Response to Appellant Newway Forming, Inc.'s Motion for Summary Judgment including Declaration of Lorna S. Sylvester with Exhibits A-E**, on the parties listed below and in the manner indicated:

Jason R. Wandler Nicole Wolfe 701 Pike Street, Suite 1700 Seattle, WA 98101 *Attorneys for Appellant, Newway Forming Inc.*	(x) Email: wandler@oles.com (x) Email: wolfe@oles.com (x) Email: stroeder@oles.com (x) Email: smith@oles.com
Mark D. Kimball Alex T. Larkin MDK Law 777 108th Ave NE, Suite 2000 Bellevue, WA 98004 *Attorneys for Appellant Baja Concrete.*	(x) Email: mkimball@mdklaw.com (x) Email: alarkin@mdklaw.com (x) Email: paulo@mdklaw.com
Aaron Rocke Sara Kincaid Rocke Law Group, PLLC 101 Yesler Way, Suite 603 Seattle, WA 98104 *Attorney for Appellant, Antonio Machado*	(x) Email: aaron@rockelaw.com (x) Email: sara@rockelaw.com (x) Email: alex@rockelaw.com (x) Email: tori@rockelaw.com

the foregoing being the last known addresses and email addresses of the above-named party representatives.

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

/s/ Sheala Anderson
SHEALA ANDERSON

Ann Davison
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200